Mandatory Arbitration and Consumer Contracts

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and
Option consommateurs

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Executive Summary

This report examines the use of mandatory arbitration clauses in consumer contracts. A mandatory arbitration clause is a clause in a contract that requires two parties (a service provider and a consumer) to arbitrate any dispute that may arise from the contract instead of taking the dispute to court. Arbitration is a form of dispute resolution, which is viewed as an alternative to traditional court processes. It involves two or more parties agreeing, through an arbitration agreement, to submit their dispute before a neutral decision maker who will make a decision that will be binding upon both parties. Arbitration clauses in consumer contracts usually appear in the form of a mandatory requirement written into a standard form contract, which the consumer is not able to negotiate or change.

In the commercial context, arbitration has been heralded by some as being superior to court processes in terms of reduced cost, speedier and more effective resolution of disputes, fairness to both parties and reduced complexity of proceedings. The authors examine these claims in the context of consumer to business disputes. Research from other jurisdictions where mandatory arbitration clauses are much more predominant, such as the United States suggests that claims about the superiority of arbitration over court processes do not hold up and that may in fact result in increased costs, with no discernable reduction in time taken to resolve the dispute or reduce the complexity of the proceeding. The negative impacts may also include: lack of transparency, lack of protection for class proceedings, limits on damages, risk of inconsistent results, lack of impartiality on the part of the adjudicator, and imbalance between the parties due to businesses being able to take advantage of repeat appearances before arbitrators.

The report assesses the U.S. experience with mandatory arbitration and contrasts it with other jurisdictions. The European Union (where consumer protection is now generally addressed) has taken a stronger stand against mandatory arbitration clauses in consumer contracts. It issued a directive on unfair terms in consumer contracts, which includes mandatory arbitration clauses. The United Kingdom and France have generally prohibited pre-dispute arbitration clauses in consumer contracts. New Zealand has extended its statutory protection against mandatory arbitration clauses to all consumer contracts. Australia has no arbitration legislation. The reason would appear to be a function of its widely privatized utility industry characterized by the prevalence of private ADR, mitigating the need for business to employ mandatory arbitration clauses in consumer contracts.

In Canada the use of mandatory arbitration clauses in consumer contracts is a relatively recent phenomenon. Our research suggests that they are not yet extensively used by Canadian businesses. Recent jurisprudence in Ontario has upheld mandatory arbitration clause in a consumer Internet service provider contract. This caused the Ontario government to adopt provisions in its consumer protection legislation to counter this decision. The legislation states that any term in a consumer agreement that requires disputes arising out of the agreement be submitted to arbitration is invalid

insofar as it prevents a consumer from exercising a right to commence an action in the court. The legislation also specifically protects a consumer's right to commence a class proceeding.

Ontario is the only province with legislation that specifically addresses mandatory arbitration clauses. Other provinces have general provisions about unconscionable trade practices but they may not be strong enough to withstand judicial scrutiny in the face of an arbitration provision. Consumer protection acts that have created statutory rights of action but have not supplemented these with a non-derogation clause will not protect consumers from mandatory arbitration clauses.

Quebec's treatment of mandatory arbitration clauses is examined in the final section of the report. Quebec does not have any legislation that specifically prohibits the use of mandatory arbitration clauses. Arbitration agreements are defined in the Civil Code of Quebec and the courts have upheld their authority. However, the Civil Code also specifically recognizes and defines consumer agreements and contracts of adhesion. Under both contracts, a clause can be declared null or the obligation under it can be limited if a court finds that it is abusive (a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith).

Mandatory arbitration clauses may also be limited by the application of the rules of public order. The rules of public order are rooted in the legislative powers of the province and describes two types of laws: 1) moral laws which protect the institutions that form the basis of social order and 2) the social and economic laws that characterize the desire of the state to regulate economic exchanges. The Quebec Consumer Protection Act and the Civil Code rules governing contracts of adhesion and consumer contracts are examples of this second category of public laws. The courts have held that an arbitration award is not contrary to the public order. An arbitrator may dispose of a question relating to rules of public order since they may be the subject matter of an arbitration agreement. However, under the Code of Civil Procedure, a court may assess an arbitration award to determine whether the decision itself violates principles that are matters of public order. The report describes a case in which a class action was upheld in the face of a mandatory arbitration clause on the basis that it would have frustrated the authority of the Quebec government to adjudicate an action founded on a consumer contract. This decision is being appealed.

The report calls on provinces to introduce legislative changes that will prohibit the use of mandatory arbitration clauses and protect consumers' right to voluntarily choose a range of dispute settlement mechanisms in their dealings with businesses, whether arbitration, small claims court or class actions.

Introduction

PIAC advocates the use of Alternative Dispute Resolution (ADR) mechanisms where their use results in a reduction of barriers to access to justice for consumers, including a reduction in litigation costs and the time it takes to bring a dispute to its conclusion. In addition, it is important that ADR techniques produce fair and just results for all parties concerned, consumer or otherwise. Where these results can be achieved through the use of arbitration agreements and arbitral hearings, we endorse their application.

Arbitration is generally favoured over traditional court processes because of its promise of more efficient dispute resolution, particularly in disputes between parties of equal bargaining power such as businesses.[1] It is also viewed as being cheaper, quicker and more flexible than court litigation and is designed to minimize hostility between the parties.[2]

Our research indicates that the supposed benefits of arbitration are not realized when consumers contract with business. Arbitration is usually imposed on consumers and can be used to further exacerbate the already significant imbalance between businesses and consumers, by increasing the cost of redress to consumers, by prohibiting class actions, by providing for limited judicial review of arbitration awards and by requiring that all proceedings be kept confidential. Mandatory arbitration in consumer contracts has been a problem for consumers in the United States for some time, and has therefore been the subject of consumer group attention south of the border.

Throughout this paper we will be referring to "mandatory arbitration clauses". A mandatory arbitration clause is a clause in a contract that requires two parties (a service provider and a consumer) to arbitrate the disputes that arise from the contract. Of particular concern are mandatory arbitration clauses that are drafted in advance of the conclusion of the contract by the service provider without any opportunity for the consumer to influence the substance of the contract. Examples of such contracts would include automobile rental agreements and standard form loan agreements. The common thread that runs through these contracts is that none of the clauses contained within the agreement has been individually negotiated by the parties.

Mandatory, pre-dispute arbitration clauses are distinct from voluntary, post-dispute agreements to arbitrate. Post-dispute agreements are made after the consumer

[1] Julia A. Scarpino, "Mandatory Arbitration of Consumer Disputes: A proposal to ease the financial burden on low-income consumers" (2002) 10 Am. U.J. Gender Soc. Pol'y & Law 679 at 680.
[2] Jeremy Senderowicz, "Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers' Informed Consent to Arbitration Clauses in Form Contracts" (1998-99) 32 Colum. J.L. & Soc. Probs. 275 at 276.

understands the nature of his claim and can weigh the costs and benefits of both arbitration and court litigation.

Anecdotal evidence suggests that mandatory arbitration clauses are becoming more common in consumer contracts in Canada. Such clauses are inserted into non-negotiated consumer contracts by businesses. By purporting to obtain the consumer's agreement to use arbitration rather than the court system in the event of a dispute, businesses are able to insulate potentially unfair, deceptive or unlawful practices from any meaningful review. Mandatory arbitration makes it difficult for consumer plaintiffs to obtain information through traditional discovery processes, protects the company from adverse publicity, and prevents consumers from engaging in class action lawsuits against the company.

Mandatory arbitration clauses have only just come to light as a potential problem in Canada. Recent jurisprudence in Ontario upheld such a mandatory arbitration clause in *Kanitz v. Rogers Cable Inc.*[3], and as a result blocked a consumer class action lawsuit against an Internet Service Provider. In response, the Ontario government passed new consumer protection legislation in December 2002, which includes a clause protecting the consumer's right to sue by way of class action, regardless of a merchant's attempt to limit such rights in the contract.[4]

The purpose of this paper is to review the appropriateness of using arbitration to adjudicate consumer claims; highlight specific characteristics of the arbitral forum that are less favourable to consumers and could potentially act as a barrier to justice for consumer claims; illustrate how mandatory arbitration agreements can create immunity to consumer claims for businesses; review the law of arbitration as it relates to consumers in other countries and propose legislative options to reduce the negative impact that mandatory arbitration agreements in standard form contracts have on consumers.

What is Arbitration?

Arbitration is one form of dispute resolution, which is viewed as an alternative to traditional court processes. Arbitration involves two or more parties agreeing, through an arbitration agreement, to submit their dispute before a neutral decision maker who will make a decision that will be binding upon both parties. An arbitrator can be anyone, it is up to the parties to choose, but usually they are senior members of the legal community or lawyers who specialize in arbitration.

The arbitration agreement is usually in the form of a mandatory arbitration clause hidden within a standard form consumer contract, which binds the parties to submit certain

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[3] *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299 (S.C.J.) [*Kanitz*].
[4] *Consumer Protection Act, 2002,* S.O. 2002, c. 30, Sch. 30, s. 8. (As of this writing, the Act is not yet in force.)

disputes to arbitration, instead of court. In fact, except in limited circumstances the parties are unable to submit a dispute to court when a valid arbitration exists. Provincial legislation provides that where a person, who is a party to an arbitration agreement, initiates a lawsuit in court that lawsuit must be 'stayed' and the parties are forced to arbitrate the dispute.

Courts are compelled to stay all litigation so that the parties can complete the arbitration process. Section 7(1) of the Ontario *Arbitration Act*[5] requires a court to grant a stay of proceedings if an arbitration agreement exists:

> 7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

If there is a valid arbitration agreement, the court must grant the stay.

The arbitrator's authority to decide the dispute is derived from the arbitration agreement. Implicit in the arbitration agreement is the promise of the parties to be bound to the arbitrator's decision – known as an arbitral award. An arbitral award has the same binding nature as an award of a court. If the party who loses an arbitration does not pay the amount owed under the arbitral award, the award can be registered in court and enforced as if it were an order of the court.

The contractual nature of arbitration allows the parties to create their own court. The parties are free to choose the procedural and substantive rules that will govern their arbitration. They are able to choose the location of the arbitration, the law that governs the proceedings, the procedural rules and a number of other features. For this reason, arbitration can be a powerful tool for sophisticated businesses that want to escape the burdens of the court system.

On the whole, legislatures and the courts are hesitant to interfere with binding arbitration. There is a great respect for 'party autonomy' or the ability for the parties to choose the forum they wish to hear their dispute and how that forum should operate.[6]

Consumer Arbitration – A Uniquely American Experience

Our research suggests that the vast majority of arbitration clauses in consumer contracts originate from U.S. service providers. One reason for this is the favourable legal climate created by U.S. courts. Even though critics have raised serious concerns, and although courts have discarded some of the most egregious clauses, the majority of courts

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[5] *Arbitration Act*, 1991, S.O. 1991, c. 17.
[6] See generally, Wendy J. Earle, *Drafting ADR Clauses for Commercial Contracts* (Toronto: Carswell, 2002).

require consumers to arbitrate under most clauses.[7] As this report will examine, non-American regulators have responded with an almost universal rejection of mandatory arbitration in consumer contracts, creating a distinct division between the U.S. and the rest of the world.

The recent Ontario court decision of *Kanitz*, referred to above, can be seen as Canada's first step towards adopting the U.S. model of upholding arbitration clauses in consumer contracts. For that reason we support those provincial and territorial governments which have developed legislation to prevent this development.

U.S. consumer advocacy groups have been virtually unified in their publicly expressed concern about the growth in the use of mandatory arbitration clauses in consumer contracts in the U.S.[8] The concern arises from the indication that mandatory arbitration clauses are appearing in a myriad of consumer contracts including: credit cards, health insurance agreements, home repair contracts, mortgages and other loan agreements, phone bills, pest-control contracts, and bank depositors' agreements.[9]
Consumer groups raise a number of concerns:

- The cost to a plaintiff of initiating arbitration is almost always higher than the cost of instituting a lawsuit. The comparison of court fees to the fees charged by American arbitration organizations shows that arbitration may cost up to five thousand percent higher than court litigation.[10]
- Because there is virtually no price competition between providers of arbitration services, companies can use arbitration costs as a barrier to prevent consumers and others from asserting their legal rights, by seeking high-cost arbitration services.[11]
- Consumers may end of paying court costs in addition to arbitration costs, because businesses may impose one-way arbitration clauses, allowing the business to retain its right to sue in court, but denying it to the consumer.[12]
- Businesses are vocal proponents of arbitration where they anticipate that they will be defendants in lawsuits initiated by customers or employees, but refrain from imposing it where they anticipate being plaintiffs, as in their own business-to-business contracts.

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[7] Jean Sternlight, "Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World" (2002) 56 U. Miami L. Rev. 831 at 843.

[8] These include: Consumer's Union, Center for Justice and Democracy, Public Citizen, and the National Consumer Law Centre as well as non-consumer organizations such as the American Trial Lawyers Association.

[9] National Consumer Law Centre, News Release/"Consumer and Media Alert: The Small Print That's Devastating Major Consumer Rights" (28 July 2003).

[10] Public Citizen, *The Costs of Arbitration* (April 2002) at 1-2.

[11] *Ibid.* at 2.

[12] *Ibid.* at 3.

[13] "Arbitration Q&A," online: Public Citizen <http://www.citizen.org/print_article.cfm?ID=7490>

The prevalence of mandatory arbitration agreements in the U.S. is significant for Canadian consumers because we may be subject to these clauses. Canadians who purchase goods and services from U.S. companies will be bound by the arbitration clauses governing the sales contract. Furthermore, the trends revealed in the United States might indicate where our own marketplace is headed. If these businesses are concerned with the rising tide of litigation against them, they may draw on the techniques employed by their American counterparts, and impose mandatory arbitration clauses upon Canadian consumers as well.

Why Arbitrate? – "Do it yourself tort reform"

Research and analysis of the use of mandatory arbitration clauses suggests that businesses have different motivations for incorporating mandatory arbitration clauses into consumer contracts, ranging from benign to harmful:

- The belief that arbitration can provide quicker, cheaper and better dispute resolution than the courts can provide;
- The need to insulate businesses from what it considers "frivolous" lawsuits;
- A corporation may take an aggressive attitude of pushing the ethical envelope with its customers, and seek to erect barriers against class actions that would expose unlawful practices;
- A builder, finding that the quality of its construction is suffering due to shortages of qualified workers, might wish to deflect lawsuits from homebuyers that it fully expects in the course of its business;
- An enterprise that knowingly engages in fraudulent activity, such as predatory lending or home improvement scams, may utilize the arbitration cost barrier as an essential element of its modus operandi.

A company's desire to reduce litigation costs seems to drive the move towards arbitration. Business Week reports "companies say they're turning to arbitration to protect themselves from skyrocketing legal costs. With class actions and other suits on the rise, companies' costs are way up, even if they win in the end. Restricting disputes to arbitration reins the costs in considerably."[14]

In response to our inquiries, Robert Finta, Associate General Counsel at Telus Mobility Law Group, a Canadian telecommunications company that includes a mandatory arbitration clause in its consumer contract explained,

> The purpose of the arbitration clause is to provide a more efficient dispute resolution procedure. Court process in the Canadian legal traditions is based on oral testimony, which imposes costs and delays. An arbitrator may use whatever process for taking evidence that appears most appropriate. For instance, in

[14] Charles Haddad and Aixa M. Pascual, "When You Want to Sue--But Can't" *Business Week* 3786 (10 June 2002) at 46.

> traditional court proceedings, a witness must appear simply to produce billing records. An arbitrator may take written evidence. Several law reform commissions across Canada, in examining Small Claims proceedings, have suggested allowing proof by affidavit as a mechanism for accelerating the hearing of claims.
>
> We have also observed that litigation encourages exorbitant claims, with the sole view of extracting a large settlement irregardless of the merits of the case. This tactic is based on the high cost of defending a claim, and is much less effective in the arbitration context.
>
> Finally, the arbitrator is not bound to take evidence in any particular place, and so can accommodate the parties.[15]

As profit-maximizing entities, businesses will likely develop arbitration rules that will reduce both the costs of engaging in dispute resolution and the settlement amounts they are ordered to pay. One author has suggested that the benefits of arbitration translate into increased profits for businesses.

> [A] companies' imposition of mandatory pre-dispute arbitration clauses in both areas (consumer and employment contracts) is clearly linked to their desire to decrease their legal costs and liabilities. While companies typically do not publicly trumpet their desire to decrease legal liabilities, in their more private communications some companies' attorneys acknowledge that mandatory arbitration is obviously intended to help them reduce their payouts not only to their attorneys, but also to claimants.[16]

These are not, however, shared benefits; consumers will shoulder the costs. Arbitration may translate into higher out of pocket expenditures for consumers who arbitrate and a marked decrease in a consumer's ability to vindicate her rights, resulting in lower payouts regardless of the merits of the claim.

Analysts have suggested that the U.S. has seen the largest growth in mandatory arbitration due to specific aspects of its legal environment compared to other regimes. The U.S. legal tradition has a less interventionist culture with respect to commercial transactions, focusing less on protection of the weaker party. The greater availability of jury trials for civil actions in the U.S. compared to Europe is perceived by business as creating the grounds for more sympathy to consumers; arbitration precludes the jury option for consumers. American rules of civil procedure also permit plaintiffs to aggregate claims into class actions. By placing pre-dispute arbitration clauses in consumer contracts businesses reduce their exposure to potential class actions. Finally,

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[15] Interview with Robert Finta, Associate General Counsel at the TELUS Mobility Law Group, July 8th 2003. Notes with author.

[16] Sternlight*, supra,* note 7 at 853-4.

punitive damages are more readily imposed in the U.S. for many tort claims. The perception by American businesses is that they would be less likely to be imposed in arbitration or be of much less scale in arbitration awards.[17]

By incorporating mandatory arbitration clauses into consumer contracts that preclude class actions, businesses are effectively able to obtain much of what they might hope to obtain through legislative reform, but without having to lobby for legislative changes or persuade any judicial body to change court rules. One critic labelled the imposition of mandatory arbitration "do it yourself tort reform".[18] Although it was not intended as a compliment, one advocate of mandatory arbitration proudly accepted the label.[19]

Why Litigate? - The Benefits of Aggregate Litigation for Consumers

As suggested above, one reason that businesses employ mandatory arbitration clauses in consumer contracts is to prevent consumers engaging in class action lawsuits. A class action is a lawsuit involving one or more individuals brought on behalf of a group of persons who are have a common issue against the same defendant or group of defendants.[20]

What is it about the nature of class proceedings that specifically benefit consumers? Analysts have suggested that there are some important substantive effects of class litigation, all of which are a function of the principle purpose of aggregating a number of individual actions: "…to influence who can sue whom for what, and most importantly, how successfully."[21]

Mass-produced wrongs are usually the result of defects in products, processes or decisions that have been made centrally. Under traditional court litigation which might arise over a common issue or alleged wrong, the producer or the business entity (the defendant) is usually favoured over the consumer (the plaintiff) because they can use economies of scale and re-use the same research and overall work involved in defending the common issues for each claim. In contrast, each consumer must individually bear the full costs of asserting their legal claim.[22]

The results of lawsuits for mass wrongs under traditional litigation also favour defendants. One analyst describes why:

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[17] Christopher R. Drahozal & Raymond J. Friel, "Consumer Arbitration in the European Union and the United States" 28 N.C.J. Int'l L. & Com. Reg. 357 at 386-391.

[18] Sternlight, *supra* note 7 at 854 and Jean R. Sternlight, "As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?" (2000) 42 Wm. & Mary L. Rev. 1 at 11.

[19] Roger S. Haydock, "The Supreme Court Creates Real Civil Justice Reform" *Metropolitan Corporate Counsel* (November 2001) at 45.

[20] Craig Jones, *Theory of Class Actions* (Toronto: Irwin Law Inc., 2002) at 9.

[21] *Ibid.* at 15.

[22] *Ibid.* at 22-23.

> It is not difficult to foresee the results of structural asymmetry in the individual litigation of mass tort claims. Mass tort defendants will tend to overspend on litigation in individual suits because their economy of scale permits them to invest in each initial claim on amount far greater than the claim is worth; this strategy makes success more likely in the early suits, compounding the advantage in the aggregate. Faced with such unequal litigative power, suits are discouraged or settled for too little, and confidentiality agreements exacted by defendants at the time of settlement may preclude "free riders" from taking full advantage of the work that has been done before, while the defendant is free to do so.[23]

The chance of prevailing in a lawsuit increases with the amount of investment in the litigation. The ability to invest in experts and to fully prepare for and participate in discovery proceedings expands the amount and accuracy of information available to a tribunal, which increases the probability of a favourable decision.[24]

Thus the reason for aggregating litigation is to level out this imbalance between consumers and business, to allow consumers to approximate the benefits of such economies of scale.

The other important effect of class actions is deterrence, forcing the defendant business to invest in the required changes in a product or service to prevent such harm or breach from happening in future. Traditional litigation has generally ignored or under-emphasized this effect, tending to focus instead on compensation for harm or wrongdoing, after the fact, as the only means of deterrence. Analysts argue that aggregation of claims optimizes deterrence because it offers the most effective way of guaranteeing that the greatest numbers of plaintiffs participate. The impact of an optimum number of plaintiffs and size of the potential claim thus better ensures that defendants internalize the true costs of the harm, giving them the incentive to prevent future harm.[25]

Prevalence of Arbitration Agreements in Consumer Contracts

A broad study of standard form consumer contracts in Canada reveals that mandatory arbitration clauses in consumer contracts are far from the norm. Without empirical data from the 1990s it is impossible for us to confirm that there is a trend towards more mandatory arbitration clauses. What we do know is that some of the companies surveyed had recently added a mandatory arbitration clause to their consumer contracts. If the American experience is any indication, it is likely that such clauses will become more prevalent in Canada.

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[23] *Ibid.* at 23-24.

[24] *Ibid.* at 41-42.

[25] *Ibid.* at 35-37.

Research Methodology

PIAC conducted a survey of 100 businesses from 8 representative industries looking for mandatory arbitration clauses in their consumer contracts during the period of April – July 2003. Specifically, we focused on the telecom, financial services, insurance, energy, on-line shopping, automobile and travel industries. These industries correspond with PIAC's focus areas. Our selections also reflected the American research in this area.

The businesses were randomly selected. However, a preference was demonstrated for companies with website addresses. The selected companies range from Canadian branches of multinationals, to small businesses. An attempt was made to select businesses from all parts of Canada.

We initiated our search for these contracts by searching the Internet sites of the selected companies. We obtained sample agreements through this method. We then contacted the remaining companies by telephone. If these efforts did not yield the sought after information, we subsequently repeated our request via email. Our attempts to achieve sample contracts from 100 companies yielded 86 sample consumer contracts.

Results

Of the 86 sample contracts, 10 of those (or 11.6%) contained mandatory arbitration clauses. These clauses were found in the consumer contracts of Rogers Wireless, Telus Mobility, Rogers Internet, Shaw Internet, Money Mart, Fast Funds online, Amazon online shopping, Rogers Cable, Star Choice Satellite, and Direct Energy natural gas services. 

Arbitration clauses were notably absent from credit card and telephone contracts – a significant departure from the U.S. experience. Possibly the only discernible pattern in Canada relates directly to the *Kanitz* decision. Perhaps encouraged by their Internet Service Provider division's success in the case, Rogers has incorporated mandatory arbitration in their cable television and mobile phone contracts. Shaw's Internet Service division has followed suit (we could not confirm if Shaw uses mandatory arbitration clauses in its cable TV service agreements). Other ISPs restrict the ability of consumers to pursue claims in other ways.[26]

[26] Telus' Internet Services Account Agreement, s.54 states: "CIRCUMSTANCES MAY ARISE IN WHICH YOU OR ANOTHER PARTY IS ENTITLED TO RECOVER DAMAGES FROM ONE OR MORE OF THE TELUS ENTITIES. IN SUCH INSTANCE, THE AGGREGATE LIABILITY OF THE TELUS ENTITIES FOR DAMAGES IS LIMITED TO $100.00." Magma's Internet Service Agreement, s.5 states: "In consideration for the privilege of using Magma's Internet service and in consideration for having access to the information contained on it, the Client hereby releases Magma, from any and all claims of any nature arising from the use, or inability to use, the Internet connection."

While outside the scope of this paper, it should be noted that a number of other businesses employed other clauses to limit consumer's rights. For example, Primus, a telecom service provider has an arbitration clause, which isn't mandatory, but class actions are expressly prohibited. Others limit the geographical location where a legal action may be brought. Ticketmaster requires all disputes involving an event in Canda to be brought in court located in Toronto, Ontario. .

Some companies combine mandatory arbitration clauses with a number of other onerous terms. For instance, amazon.ca™, which sells books and DVDs on line, contains an arbitration clause which requires that any dispute be arbitrated in Seattle, Washington under arbitration rules imposed by the company. Furthermore, the clause imposes a confidentiality requirement on the consumer so that the evidence used and the results of the arbitral proceedings do not enter the public realm. Finally, the clause forbids the consumer from participating in a class action (either in arbitration or court) or joining her claim with that of another consumer.[27]

The prohibition on participating in class action suits is not, in and of itself, noteworthy. We found that most companies who inserted arbitration clauses in their consumer contracts routinely included such terms. Telus, Rogers, Shaw and Money Mart all forbid consumers from participating in class action suits against them. However, Amazon's arbitration clause reveals another disturbing trend in this area, by imposing further conditions such as requiring all consumers to arbitrate a dispute in one location. Such conditions erect barriers to justice that will no doubt discourage many consumers from pursuing an otherwise meritorious claim.

How are Arbitration Agreements Presented to Consumers? – The 'take-it-or-leave-it' method

Anecdotal evidence suggests that consumers have not bargained for, nor given meaningful consent to, agreements to submit future disputes to binding arbitration. As recognized by the Ontario Court of Appeal some 25 years ago "…many standard form printed documents are signed without being read or understood."[28]

Our research reveals that arbitration clauses are often buried in the fine print of standard form contracts, printed on the backsides of agreements, or shipped with products already ordered by mail or by Internet. Most consumers do not read the terms and conditions contained in the contracts at issue.[29] For those who actually read the contract before receiving the good or service, we contend that it is impossible for a layperson to truly understand the ramifications of consenting to an arbitration agreement.

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[27] Amazon.ca: Help / Privacy & Security / Privacy Notice / Conditions of Use

[28] *Tilden Rent-A-Car Co. v. Clendenning,* (1978) 83 D.L.R. (3d) 400 at 408 (Ont. CA.)

[29] Jean R. Sternlight, "Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration" (1996) 74 Wash. U.L.Q. 637 at 688.

> …most consumers' consent, while bargained for, may not be "informed"; many consumers probably cannot distinguish between the arbitration procedure they are agreeing to and any rights they may be signing away.[30]

In the absence of meaningful consent, one cannot endorse the enforcement of clauses that seek to limit the ability of consumers to protect their rights.

However, even an informed consumer who is fully aware of the existence of the arbitration clause may not be able to assert any rights over the consumer agreements containing such clauses. Standard form contracts (also known as contracts of adhesion) may contain provisions that 'strong-arm' acceptance of such conditions. This clause from an Internet service provider agreement illustrates the problem:

> By opening a TELUS Internet Services account under your name or by using the TELUS Internet Services you are agreeing to be legally bound by and abide by the terms of this Agreement. IF YOU DO NOT AGREE TO BE BOUND BY THIS AGREEMENT, YOU MAY NOT SUBSCRIBE FOR, ACCESS OR USE THE TELUS INTERNET SERVICES AND YOU MUST IMMEDIATELY TERMINATE YOUR TELUS INTERNET SERVICES ACCOUNT, IF YOU HAVE ONE.[31]

In this case, there is no way to object to the arbitration clause. This take-it-or-leave-it clause entails the termination of service to any consumer who objects to the terms of the contract. When arbitration clauses become the market norm, or are employed by businesses with virtual monopolies, consumers are left with a Hobson's choice: choosing between forgoing a right to grieve future disputes in court or doing without the product or service at issue.[32]

If a consumer should discover the arbitration clause and object, that individual has identified him or herself as rights-conscious, allowing the enterprise to terminate the relationship immediately and eliminate a potential source of future litigation.

It is also important to note that signing the above agreement is not required for a consumer to become bound by its terms. Many of the contracts we examined automatically trigger the consumers' consent upon the use of the service – in many cases consumers have already agreed to a contract they have not yet seen.

Change in term agreements are also a cause for concern. While many of the contracts we have reviewed to date do not contain an arbitration agreement they do contain a change in term agreement that allows the business to unilaterally change any aspect of the contract, including adding an arbitration clause, without any renegotiation of terms. The next section, which examines the Canadian courts' treatment of mandatory arbitration clauses in consumer contracts, explores this issue.

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[30] Senderowicz, *supra* note 2 at 302.

[31] TELUS Internet Services Account Agreement.

[32] Senderowicz, *supra* note 2 at 303.

As will be highlighted by our evaluation of the numerous ways in which consumers may be disadvantaged by arbitration procedures, this lack of consent should be a matter of considerable concern.

The Courts and Mandatory Arbitration Clauses

The treatment of mandatory arbitration clauses by the courts has been solely defined, until recently, by an Ontario case that upheld a mandatory arbitration clause and denied the attempt by consumers to initiate a class proceeding. *Kanitz v. Rogers Cable Inc.*[33] was the first case in Canada to consider the effect of a mandatory arbitration clause on consumer claims. The result was decidedly in the corporate defendant's favour. Nordheimer J. of the Ontario Superior Court granted a stay to a class action because the agreement between the consumers and the corporation contained an arbitration agreement. The result effectively ended the dispute as consumers were left to arbitrate their claims individually.

However, the landscape has been altered by a recent B.C. decision, which considered whether an arbitration clause in a consumer loan agreement precluded class proceedings arising from the contract. In *Mackinnon v. National Money Mart Co.*[34] the court found that it did not.

In *Kanitz* the Plaintiffs, on behalf of all subscribers to the Defendant Corporation's high-speed Internet access, alleged that Rogers' had failed to provide continuously available Internet access and claimed damages flowing from the allegedly frequent service interruptions. The Plaintiffs filed their claim as a class action and in response Rogers applied to stay the class action and compel the Plaintiffs to arbitrate the dispute. At issue in this case was whether the Plaintiffs could pursue their claims in Superior Court or whether the parties were bound to the mandatory arbitration agreement that appeared in the user agreements, signed by every customer (the "User Agreements").

The first issue addressed by the court was whether there was an arbitration agreement contained in the User Agreements. If there was no arbitration agreement, Section 7(1) would not apply and Rogers' application would fail. Surprisingly Rogers was successful in establishing that an arbitration agreement existed, even though at the time the Plaintiffs signed up for high-speed internet the User Agreements did not contain an arbitration clause. The User Agreements merely included a clause allowing the provider to unilaterally change any aspect of the contract, without any renegotiation of terms.

Pursuant to this clause, Rogers proceeded to amend the User Agreement by adding an arbitration clause, which read:

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[33] *Kanitz, supra* note 3.

[34] *MacKinnon v. National Money Mart Co.*, [2004] B.C.J. No. 175 [*MacKinnon*].

> Arbitration. Any claim, dispute or controversy…arising out of or relating to: (a) this Agreement…will be referred to and determined by arbitration (to the exclusion of the courts). You agree to waive any right you may have to commence or participate in any class action against us related to any Claim and, where applicable, you also agree to opt out of any class proceedings against us. (the "Arbitration Clause")

Rogers posted a notification that the User Agreement had been amended on its Consumer Support website and posted a new version of the User Agreement on the Policy/Agreements page of their website. There was no specific mention made of the addition of the Arbitration Clause. The few consumers who noticed the changes would have to read both the new and old versions of the User Agreement in their entirety to discover the changes.

The Plaintiffs argued that they had not agreed to submit their claims to arbitration, asserting that the Defendant had unilaterally imposed arbitration upon them by purporting to amend the User Agreement to include the Arbitration Clause without reasonable notice.[35] The inadequacy of the court's analysis of Rogers' notification efforts is of significant concern, but outside the scope of this paper. The court held that there was a valid arbitration agreement.

The decision highlights an important problem with mandatory arbitration agreements in consumer contracts – it is possible for a consumer to enter into a binding arbitration agreement without knowing it or without knowing the consequences of doing so.

Having found that there was a valid arbitration agreement, the Plaintiff's only chance for success was to convince the court that the arbitration agreement was unconscionable – thus unenforceable. The test for unconscionability has three parts:

(a) an inequality of bargaining power;
(b) some taking advantage of, or preying upon, the weaker party by the stronger party; and
(c) a resulting improvident agreement.[36]

The court found that the situation of a single consumer and a large corporation met the first branch of the test, based on the Supreme Court's consideration of inequality of bargaining power in the case of *Norberg v. Wynrib.*[37] In that case, Mr. Justice LaForest, writing for the majority of the Court, defined inequality of bargaining power by quoting from another case, *Lloyds Bank Ltd. v. Bundy.*[38] In that case, Lord Denning took a wider approach in relation to imbalance of power and developed the general principle of "inequality of bargaining power":

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[35] *Ibid.* at para. 17.
[36] *Ibid.* at para. 37
[37] *Norberg v. Wynrib,* [1992] 2 S.C.R. 226.
[38] *Lloyds Bank Ltd. v. Bundy*, [1975] Q.B. 326.

> ... I would suggest that through all these instances [i.e. duress of goods, unconscionable transactions, undue influence, undue pressure, salvage agreements] there runs a single thread. They rest on "inequality of bargaining power". By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair… when his bargaining power is grievously impaired by reason of…his own ignorance or infirmity …[39]

Consistent with these decisions, Nordheimer J. acknowledged, "the reality is that there is no bargaining at all. The defendant (Rogers) decides on the terms of the agreement and the consumer's sole choice is either to accept the agreement if he or she wants the service or to reject the agreement,"[40] satisfying the first branch of that test.

Nordheimer J., however, found that there was no "evidentiary basis that would warrant a finding that the Defendant preyed upon or took advantage of the plaintiffs in deciding to impose an arbitration proceeding"[41] thus defeating the Plaintiffs on the second branch of the test. The Plaintiffs argued that the insertion of an arbitration/no class action clause into a consumer contract "demonstrates by its very terms that the defendant took advantage of the plaintiffs,"[42] a suggestion that was swiftly rebuked. Nordheimer J. viewed as the inherent flaw in the Plaintiff's position their contention that an arbitration clause that purported to exclude class actions was equivalent to an exemption clause – a clause in a contract that exempts one party from all liability regardless of how it was caused –based on the 'hidden clause' jurisprudence of consumer contract cases.[43]

Nordheimer J. held:

> The basic flaw inherent in the plaintiffs' position is in their contention that the arbitration/no class action clause is the equivalent of an exemption clause…In my view, an arbitration clause is not at all the same as an exemption clause. The latter serves to remove one contracting party's liability to the other whereas the former simply requires that the parties seek their relief in a different forum. In that regard, the latter clause can be characterized as substantive and the former as merely procedural.[44]

This holding that mandatory arbitration/prohibition of class action clauses are merely procedural instruments is, in fact, a critical flaw in the *Kanitz* decision, as one critic explains:

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[39] *Ibid.* at 339.
[40] *Kanitz, supra* note 3 at para. 38.
[41] *Ibid.* at para. 40.
[42] *Ibid,* at para. 39.
[43] *Tilden Rent-A-Car v. Clendenning* (1978), 18 O.R. (2d) 601 (C.A.), *Toronto Blue Jays Baseball Club v. John Doe* (1992), 9 O.R. (3d) 622 (Gen. Div.) and *Badie v. Bank of America*, 67 Cal.App.4th 779 (1998).
[44] *Kanitz*, *supra* note 3 at para. 39-40.

> Again we confront the characterization of class proceedings as a procedural device, simply an alternative forum to that of arbitration. Its denial, therefore, according to the Court, affected no substantive rights. Yet this procedural description of class actions, as I have stressed here throughout, is inadequate; not only might the class members lack incentives or inclination to proceed individually over such small amounts (as the plaintiffs in *Kanitz* argued), but forcing the plaintiffs into a claim-by-claim resolution process means that the value of their claims *will* be diminished, as will the value of the claim of any other member of the class, even if all are individually viable. While the former effect is arguably a question of procedural choice, the latter effect is substantive. [45]

The Plaintiffs argued that given the small amount of money at issue, there would be no incentive to arbitrate given the costs of arbitration. Nordheimer J. rejected this argument because the Plaintiffs had not offered any evidence on the costs of arbitration or that any customer had tried to arbitrate a claim and was prevented from doing so because of the cost.[46]

The Plaintiffs argued that the inclusion of the prohibition on class actions proved that the Defendant added the Arbitration Clause to the User Agreement "expressly for the purpose of defeating any class action claim."[47] Nordheimer J. was not, however, persuaded by the fact that the Arbitration Clause included a limitation on the Plaintiff's right to participate in a class action. In the absence of evidence on Rogers' motives, Nordheimer J. found it inappropriate to speculate on the purpose of the Arbitration Clause.

Finally, the Plaintiffs argued that the "prohibition against class actions is, by itself, sufficient to constitute the entire clause unconscionable because it has the effect of defeating the public policy inherent in the *Class Proceedings Act, 1992*."[48]

Nordheimer J. dismissed this argument on two grounds. He rejected the characterization of the *Class Proceedings Act, 1992* as anything but a procedural statute. He also concluded that since the legislature, which passed the *Class Proceedings Act, 1992* after the *Arbitration Act, 1991*, did not exempt class actions from the effects of the *Arbitration Act,* there was no reason to adopt the Plaintiff's assertion that the public policy underlying the *Class Proceedings Act, 2001* was paramount to the public policy underlying the *Arbitration Act, 1991*.[49]

As indicated above, it is not at all clear that class proceedings are merely a procedural device with no substantive effect. The fact that class actions have the effect of

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[45] Jones, *supra* note 20 at 136-7.
[46] *Kanitz, supra* note 3 at para. 42.
[47] *Ibid.* at para. 48.
[48] *Ibid.* at para. 50.
[49] *Ibid.*

optimizing deterrence, by internalizing more costs in defendants, is an extremely significant substantive effect:

> Indeed their profound potential to influence the behaviour of defendants across a whole range of previously non-actionable activity is difficult to characterise as simply procedural.[50]

The Supreme Court has also suggested that there are important public policy effects of class actions. In *Hollick v. Toronto (City)*[51] the Court stated:

> …[C] lass actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public…In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that give full effect to the benefits foreseen by the drafters.[52]

In the recent case of *MacKinnon v. National Money Mart Co.* the court emphasized throughout the decision, the public policy objectives of class proceedings legislation.[53]

By granting Rogers a stay of proceedings of the class action and upholding the arbitration provision, *Kanitz* represents a major defeat for consumers. The decision denies consumers the ability to form a national class, even for purposes of arbitration, thus ensuring that defendant businesses will have the greater litigation scale economy and therefore the legal advantage in disputes with consumers:

> As a result of the reasoning in *Kanitz*, a defendant in the position of Rogers, relying on an arbitration clause, can commit many, if not most, breaches of contract or torts with *de facto* legal impunity. This might have been what Rogers' customers agreed to, but then again it might not.[54]

This decision provides almost nothing in the way of support for consumers in their contractual dealings with businesses. Whenever otherwise meritorious consumer claims are defeated by the imposition of a procedural method that favours the stronger party, the clause is improvident and must be struck down. Where any clause of a consumer contract erects artificial barriers to justice that clause too must be improvident.

By barring class actions through the imposition of mandatory arbitration, the economic imbalance between individual consumers and businesses preceding litigation cannot be effectively overcome, which will discourage many consumers from pursuing legitimate grievances. This imbalance is exacerbated by the fact that consumers are usually not

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[50] Jones, *supra* note 20 at 160.
[51] *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.
[52] *Ibid.* at para. 15.
[53] *MacKinnon, supra* note 34 at para. 20, 24-26.
[54] Jones, *supra* note 20 at 137.

aware of this limitation on their rights until they have a dispute with a merchant that cannot be mutually resolved.

As mentioned above, the *MacKinnon* case is an important recent development in the case law, which suggests that the holding in Kanitz may be narrowed. *MacKinnon* involved a certification hearing for a class action commenced in B.C. against a number of payday loan companies (businesses that offer short-term loans to individuals at very high rates of interest).

The defendant businesses argued that the action should be stayed where the contracts contained arbitration clauses. To support their argument they looked at the relevant legislation and noted that the *Class Proceedings Act* was passed after the *Commercial Arbitration Act.* They argued that since the *Class Proceedings Act* does not expressly exclude class proceedings from the purview of the *Commercial Arbitration Act*, the legislature must have intended that the *Commercial Arbitration Act* prevail. This would lead to a stay of all actions, including class proceedings where there is a contract that includes an arbitration provision.[55]

The plaintiffs argued that a stay would defeat the *Class Proceedings Act*, which would be an illogical result. They argued that if their action met the requirements of the *Class Proceedings Act*, it must be certified.[56]

The Court examined both pieces of legislation and concluded that granting a stay would not meet the policy objectives of either Act:

> The claims advanced in this case are exactly those contemplated by the Class Proceedings Act. Individually, they are very small, and could not be litigated economically. Even if there were no legal fees involved, an expert's report would be required to establish a criminal rate of interest. This alone would make the litigation uneconomical. Given the potential recovery, it is unlikely that any individual claimant would litigate.
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> Similarly, it is highly unlikely that any claimant would arbitrate. Arbitration would be as uneconomical as litigation. Even if a claimant were to represent himself or herself, the cost of an expert's report would likely exceed any potential recovery.
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> A stay in these circumstances does not serve the policy objectives of the Commercial Arbitration Act or the Class Proceedings Act. It does not expedite resolution of the dispute or save costs that would be incurred in a court action.

[55] *MacKinnon, supra* note 34 at para. 9.
[56] *Ibid.* at para. 10-11.

> Rather, it effectively bars resolution of the dispute by placing an insuperable hurdle before the claimant.[57]

It is important to add that the Court stated that there were important differences between the Ontario *Arbitration Act* and the *Commercial Arbitration Act* of B.C., which accounted for the different conclusion reached by the Ontario court in *Kanitz*. The Court noted that the language of the Ontario *Arbitration Act* "is more restrictive that its B.C. counterpart: s. 7(2) provides that the court may refuse a stay where the arbitration agreement is invalid or the subject-matter of the dispute is not capable of being the subject of arbitration. The broader language of the B.C. *Commercial Arbitration Act* allows the two acts at issue here to operate harmoniously."[58] The B.C. *Commercial Arbitration Act* states that an action is to be stayed unless the arbitration agreement is "void, inoperative or incapable of being performed".[59]

Despite this stipulation, this decision is important for consumers because it demonstrates a court's reliance upon and grasp of the fundamental principles of the benefits of aggregating claims. It grounds its analysis in a practical assessment of the real deterrents to consumers litigating or even arbitrating individual consumer claims and thus finds in favour of the plaintiff's claim to proceed by way of a class action.[60]

The final case of significance to consumers concerning treatment of a mandatory arbitration clause is *Huras v. Primerica Financial Services Ltd*.[61] This case considered the interaction of a mandatory arbitration clause and a class proceeding, but was decided on different grounds. The judgement makes some important comments about the nature of arbitration clauses inserted into non-negotiated contracts, which are very relevant to the issues raised in this report.

In *Huras* the plaintiff commenced a class proceeding for breach of an employment training contract provision. The defendant relied on an arbitration agreement as a term of the contract to request a stay of the class proceeding.[62]

The case was decided on the ground that there were two different contracts formed at two different periods. The court held that the arbitration agreement only applied to a

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[57] *Ibid.* at para. 22-25.

[58] *Ibid.* at para. 35.

[59] *Commercial Arbitration Act, supra* note 69, s. 15(2).

[60] This decision was overturned by the B.C. Court of Appeal, but only to the extent that the court found that the lower court's order refusing to stay the action brought by MacKinnon was premature, as it had been made before the court determined whether MacKinnon's class action would be certified. However, considering the interaction of the two statutes, it upheld the lower court's analysis of the competing policy objectives underlying the acts and her preference for those of the *Class Proceedings Act* on the facts of this case. (*MacKinnon v. National Money Mart Co.*, [2004] B.C.J. No. 1961. (C.A.))

[61] *Huras v. Primerica Financial Services Ltd.*, [2000] O.J. No. 1474 (Sup. Ct.) [*Huras*].

[62] *Ibid.* at para. 2-3.

contractual period of time, which was not the same contractual time period in which the subject matter of the class proceeding had arisen, therefore the class proceeding was not stayed.[63]

This decision is notable because the court made a number of important comments about the nature of standard form contracts made between parties of unequal bargaining power. It is important to state that these comments were obiter (not necessary to decide the case and therefore of no precedential value) and have not been judicially considered. However, obiter comments can become good law, so it is useful to review them here.

The court made strong statement criticizing arbitration terms that were unfair between the parties and that prevented plaintiffs from utilising traditional court processes. It looked at the terms of the arbitration agreement and found that it was non-negotiated and that it contained terms that made it extremely costly and risky for the plaintiff and other potential class members to enter into arbitration:

> Two of the normative purposes of an arbitration provision are to expedite the resolution of a dispute and to save costs that would be seen in a court action. The arbitration provision in the case at hand is to the opposite effect. As I have said, someone in the plaintiff's position is not as a practical reality going to seek an arbitration. At the same time, if the arbitration provision is binding, there is not recourse to a court, including Small Claims Court. Thus, the provision inhibits and effectively frustrates aggrieved individuals from being able to obtain any resolution of disputes through a neutral, independent adjudicator. Primerica submits that the arbitration clause is enforceable even if utilization of the clause might prove inconvenient or more costly to the plaintiff and similarly-situated persons.
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> I disagree. The existence of the arbitration clause in Primerica's contractual documents gives a superficial appearance of fairness to the unsophisticated. In reality, the arbitration clause serves to prevent, any resolution of a dispute other than upon the terms dictated by Primerica. The existence of the arbitration clause is unfair. It would be perverse and in conflict with the normative purposes of an arbitration clause to enforce the one at hand.[64]

Given the limited case law in Canada on the treatment of mandatory arbitration clauses in consumer contracts, it is difficult to draw any conclusions as to how the courts will be inclined to treat these clauses in future. Although the decision in *Kanitz* was disappointing, *MacKinnon* (and the obiter comments in *Huras*) offer some indication that

[63] *Ibid.* at para. 22-26.
[64] *Ibid.* at para. 43-44.

courts are willing to look closely at the nature and impact of mandatory arbitration clauses on consumers.

9 Reasons that Mandatory Arbitration Agreements are Bad for Consumers

As a result of our review of consumer contracts, case law and academic literature we have discovered 9 ways in which arbitration can act as a barrier to access to justice to consumers. These barriers are added costs or burdens that are not features of court procedures. These barriers can negatively impact a consumer claim in two ways. First, a barrier may be an absolute barrier, an added cost or complexity that will cause a consumer to abandon their dispute or grievance. Second, there are barriers, which will ensure that consumers a less favourable outcome than they would through the courts.

Not all of the barriers we have identified will occur in every arbitration and none of these effects, on its own, may be sufficient for a court to conclude that the underlying arbitration agreement is unconscionable. But, in different combination or in the aggregate these barriers will result in fewer consumer claims and reduced judgments.

It is our contention that where arbitration erects barriers to access to justice for consumers – where arbitration does not protect a consumer's interest as well as litigation would – that consumers are put at a substantive disadvantage and are less likely to be fairly compensated for their loss regardless of the merits of their case. While arbitration has been dismissed as being merely a procedural choice, when one party is compelled to litigate in a less advantageous forum they are, in reality, losing the ability to enforce their substantive rights. This result is unconscionable and as a result we believe that arbitration clauses should not be enforceable in Canada.

Most consumer disputes are over relatively small amounts of money. It is with claims of less than $10,000 that the negative effects of arbitration are felt the most. The following discussion will focus primarily on these small disputes, highlighting the differences between arbitration procedures and the small claims procedures offered by provincial courts.

In the following section on costs the provinces of British Columbia and Ontario are used to make some comparisons between court and arbitration costs. While the legislation varies somewhat from province to province, the differences are not critical to the following discussion.

In Ontario Small Claims Court, a branch of the Superior Court of Justice, governs disputes in which the damages claimed are under $10,000. Procedural matters are governed by the Rules of the Small Claims Court.[65] Arbitration of consumer disputes in

[65] R.R.O. 2003, Reg. 440.

Ontario is governed by *Arbitration Act, 1991*.[66] The Act grants arbitrators absolute authority over procedural matters.[67]

In British Columbia the Provincial Court adjudicates Small Claims; procedural matters are governed by the Small Claims Rules.[68] Arbitration of consumer disputes in British Columbia is governed by the *Commercial Arbitration Act*[69] (despite its name). In that Act, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations (the "BCICAC Rules") govern procedural matters.[70]

1. Costs

Increased cost to the consumer is the most often cited criticism of mandatory arbitration. Increased costs will discourage consumer claims regardless of the merits of the consumer's case. There is a threat that since arbitration is more expensive than court, consumers with otherwise meritorious claims will not arbitrate the dispute because the risk of increased costs is greater than the potential reward for proceeding.

Costs of dispute settlement can discourage a prospective plaintiff from filing a claim. The costs of pursuing the claim may be so large that it is not economically viable to pursue the claim. For example, if a plaintiff is seeking $500 from a defendant and it costs $500 to pursue the claim, the plaintiff is not likely to waste her time and effort on the lawsuit.

Secondly, the risk of an adverse result may discourage a plaintiff from pursuing her claim. For example, if the plaintiff was seeking $5000 and it only cost $500 to pursue the claim, the plaintiff would likely proceed. However, it may be that if the plaintiff loses she will be saddled with the defendant's legal costs or an adverse award of damages. If those potential costs are significantly greater than the $5000 sought, a risk-averse (or economically disadvantaged) plaintiff may not pursue her claim. Where a plaintiff, in either situation, pursues her claim and wins, increased costs will reduce the total amount realized from the lawsuit.

Analysts of alternative dispute resolution indicate that most consumer disputes concern low-priced services, goods or credit "...where the costs associated with redress substantially exceed the expected benefits associated with recovery. Moreover, because the benefits will be received, if at all, in some point in the future, the value of that recovery must be discounted to its present value."[71] The above factors, combined

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[66] *Arbitration Act, supra* note 5..

[67] *Ibid.* s. **20.** (1) The arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act.

[68] B.C. Reg. 261/93.

[69] *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55.

[70] *Ibid.* s. 22 unless the parties agree otherwise. All of the arbitration agreements we examined were silent regarding the arbitration rules, so the default BCICAC rules would apply. It is possible for a contract to impose a set of rules on the consumer.

[71] Peter Finkle & David Cohen, "Consumer Redress Through Alternative Dispute Resolution and Small Claims Court" (1993) 13 Windsor Y.B. Access Just. 81at 83.

with the fact that most consumers are risk-averse,[72] may result in a situation where **many consumers are forced to abandon legitimate grievances with businesses.**

Consumers are particularly vulnerable to increased legal costs. Relatively low monetary amounts are characteristic of consumer claims, thus even slight increases in costs have a significant impact on the ability of a consumer to proceed with a legal dispute. In addition, corporate defendants are much better funded than their consumer adversaries. When the consumer is forced to allocate her already limited resources to pay for an unnecessarily expensive dispute resolution mechanism, the advantage to corporate defendants is further exaggerated.

Analysts of the use of arbitration clauses in consumer contracts in the U.S. contend that the cost of initiating arbitration is invariably more expensive than litigating a dispute in court.[73] American courts, in litigating claims concerning the costs of arbitration, have acknowledged that arbitration costs may be prohibitive for low-income consumers.[74]

Arbitration will necessarily increase the transaction costs of litigation. There are a variety of reasons for this chiefly that: in arbitration, a consumer must contribute to the cost of the arbitrator, hearing room, reporter and clerk. In the court system all of these costs are publicly subsidized. [75]

Research conducted in the U.S. cites a number of instances of consumers deterred from participating in arbitration due to arbitration fees well in excess of court costs.[76] Such examples are available in Canada, as one consumer who was contractually bound to use the arbitration services offered by the Alberta New Home Warranty Program (ANHWP) discovered. The President of ANHWP confirmed that they recently informed a consumer that it would cost him approximately $24,000 to pursue his dispute with his homebuilder.[77] This is, admittedly an example of a complex arbitration, but the costs of even the simplest arbitration appear to be much higher relative to the value of most consumer claims.

Comparison of arbitral and court costs in Canada reveals similar cost disparities. In British Columbia the cost to file a claim up to $3000 in provincial Small Claims Court is

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[72] *Ibid*. at 83.
[73] Scarpino, *supra* note 1 at 681; Public Citizen, *supra* note 10; Richard M. Alderman, "Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform" 5 Journal of Texas Consumer Law (Spring 2002) 58 at 60.
[74] In *Rollins* v. *Foster*, 991 F. Supp. 1426, 1436 (M.D. Ala. 1998) the court stated: "When a party who is in such an inferior bargaining position, as was Foster, is compelled to assert her claims in arbitration, thus precluding a remedy in the less expensive public fora, and the costs of the arbitral forum render the party unable to pursue her claim, the clause is oppressive and one-sided and therefore unconscionable." see also *Green Tree Fin. Corp.* v. *Randolph*, 531 U.S. 79, 90 (2000).
[75] *Supra,* note 1 at 690.
[76] Public Citizen, *supra* note 10; National Consumer Law Centre, *supra* note 9; Center for Justice & Democracy, "The HMO's Private Judiciary" *Impact* 2:1 (Winter 2002) at 3.
[77] Interview with Mr. Little, President and CEO of ANHWP on June 19th 2003 (notes with author)

$100.[78] This fee ($50 in Ontario)[79] entitles the consumer to the use of the courthouse registry facilities, a pre-trial settlement conference with a Provincial Court Justice, a trial in front of a Provincial Court Justice, the services of a court reporter and a hearing room; all subsidized by the consumers' taxes.

In contrast the BC arbitration centre, BCICAC demands $500 to file a claim plus $150 as an administration fee.[80] This simply entitles the consumer to file the claim. Arbitrator's fees, hearing rooms and court reporters are all an extra cost. Although arbitrator's fees vary, a few hundred dollars an hour is average. The BCICAC estimates that the simplest arbitration would cost a minimum of $200[illegible]more than ten times the cost of the equivalent small claims litigation and far beyond the reach of all but a few consumers.

As mentioned above, when the costs of arbitration (or litigation) approach the monetary value of the claim there is nothing to gain by pursuing the claim. The potential for costs to act as a barrier does not stop there, arbitral rules on the apportionment of costs make arbitration a far riskier proposition than it would seem.

For the risk averse litigant the threat of an adverse award of costs can be as much of a disincentive as the actual out-of-pocket expenses required to pay for pursuing a claim. However, the rules of small claims courts limit the amount of costs a consumer would be liable for in pursuing an unsuccessful claim. Both the British Columbia and Ontario Small Claims rules of court limit adverse awards of costs to the amount of disbursements, usually a refund of the filing fees and service costs are ordered for the successful party.[81] Ontario allows a maximum of $300 as compensation for legal fees if a lawyer represents the successful party.[82] There is no compensation for legal fees in British Columbia.

In contrast, if a consumer loses in arbitration there is a possibility they may be forced to pay tens of thousands of dollars to cover the legal fees of the company they are suing. Section 54 of Ontario's *Arbitration Act, 1991* gives the arbitrator the authority to award costs in arbitration. Costs are defined as consisting of the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration. A similar provision appears at s. 11 of the British Columbia act.

It is difficult to quantify what a party's legal fees might be before pursuing a claim in arbitration. Legal fees will vary with the complexity of the case, the hourly rate of the lawyer(s) hired and the length of the hearing. [illegible]re is also no way of knowing the regularity with which arbitrators award costs against consumers, but the risk exists. It is also not known how many consumers are discouraged from pursuing an arbitration once they find out that if they lose they could be ordered to pay tens of thousands of dollars of

[78] B.C. Reg. 261/93, Schedule A.
[79] O. Reg. 16/00.
[80] <http://www.bcicac.com/cfm/index.cfm?L=106&P=111>
[81] B.C. Reg. 261/93, s. 20(2); R.R.O. 2003, Reg. 440, s. 19.
[82] R.R.O. 2003, Reg. 440, s.19.

the defendant's legal fees. The court in *Kanitz* held that the risk of prohibitive costs was "too speculative to justify the invalidation of an arbitration ageement."[83] With respect, that view is naïve.

Consider the case of a theoretical unrepresented consumer who has a dispute with a business over a few thousand dollars. The existence of an arbitration agreement would require that this consumer arbitrate her claim, instead of filing in small claims court. Unable to afford a lawyer, the consumer proceeds with the arbitration. Even though the merits of her claim are strong, the consumer's inexperience and lack of a legal education are no match for the highly skilled lawyers retained by the business. Ultimately, the consumer's claim is defeated. Not only is the consumer saddled with the costs of defeat, she is also faced with an adverse award of costs requiring that she pay the bill for the business's lawyers. It is difficult to imagine how such a result, or the potential for such a result would not meet the test of unconscionability to invalidate an arbitration agreement.

The potential for a consumer to pay the business's legal fees if the claim is unsuccessful is exacerbated by the arbitrator's ability to order security for costs. Security for costs rules allow businesses to instruct their lawyers to ask that a large sum of money be deposited by the consumer before the dispute is heard, to cover the business's legal fees of the arbitration, in case the consumer loses. If the consumer can't pay, the arbitration will never take place.

Rule 29(1)(h) of the BCICAC Rules grants arbitrators the authority to order security for costs. This is not an option in Small Claims Court. If the prospect of ultimately paying the business's legal fees were not sufficient to discourage the consumer, being required to pay them up front would be.

Small claims courts exist so that everyone has access to affordable justice. Arbitration agreements allow businesses to opt out of a system that clearly mitigates the imbalance between consumers and businesses when there is a dispute. Given the added expense of arbitration it is hard to imagine why a fully informed consumer would consent to arbitration.

2. Procedural fairness

Because arbitration is a creature of contract, the parties are free to invent whatever rules they wish to govern their arbitration. While the majority of mandatory arbitration agreements we reviewed were silent on procedural rules, there is a potential for mandatory arbitration agreements to be drafted to include specific rules that do not benefit consumers.

[83] *Kanitz, supra* note 33 at para. 42.

Mandatory arbitration clauses are found in standard form contracts. These contracts are imposed on consumers, not negotiated by the parties. As a result, it is questionable that they would contain procedural safeguards that would specifically address the power imbalance between consumers and businesses under arbitration. In contrast, small claims court rules are created to assist unsophisticated litigants and cannot be changed by a stronger party. Plain language drafting, simplified procedure and judicial intervention assist consumers in pursuing their claims.

It has been argued that adjudication procedures affect dispute outcomes.[84] As profit-maximizing entities, businesses are likely drawn to arbitration rules, which will reduce both the costs of engaging in dispute resolution and the settlement amounts they are ordered to pay.[85] Businesses may achieve these goals in a number of different ways. Some examples follow.

Place of arbitration

Some mandatory arbitration contracts provide that any disputes be arbitrated in or at a certain venue. This choice of forum clause can act as a significant disincentive to arbitrate. There is the potential that the cost of travelling to attend the arbitration could be more than the consumer's claim. Amazon.ca requires that "Any dispute relating in any way to your visit to the Amazon.ca site or to products you purchase through Amazon.ca shall be submitted to confidential arbitration in Seattle, Washington, United States."[86]

Limits on discovery

Our civil litigation system sets out a requirement that each party to a lawsuit must disclose to each adverse party, well before trial, all the facts or information it knows about which are relevant to the issues in the lawsuit, whether or not it is helpful or harmful to the party's case. None of the arbitration clauses we reviewed contained a limitation on discovery, but arbitration procedures could include such limitations in an effort to control costs. It can be argued that a "lack of discovery is a drawback to consumers, but not to merchants and creditors, who will already have available to them from their own files all the information they need to proceed directly to the merits of the claim." [87]

Denial of Jury Trials

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[84] Scarpino, s*upra,* note 1 at 680.

[85] Scarpino, s*upra,* note 1 at 682-684.

[86] <http://www.amazon.ca/exec/obidos/tg/browse/-/918816/701-7512724-2940334>

[87] Rosmarin, i*nfra,* note 88 at 1617.

Mandatory arbitration clauses that limit the consumers' right to a jury trial are a more meaningful provision in the U.S. than in Canada, because there are relatively few civil jury trials in Canada.

There are various theories as to why denials of jury trials are incorporated into mandatory arbitration clauses. It has been suggested that businesses avoid civil litigation and juries because they expect less sympathetic treatment by juries: "[B]ecause juries generally sympathize with a consumer who has been taken advantage of, access to a jury may be the difference between winning and losing the case."[88]

It has also been argued that the business preference for mandatory arbitration in consumer contracts is a direct consequence of the wider availability of civil jury trials in the U.S. The complexity of civil litigation in terms of discovery, rules of evidence and the conduct of jury trials in civil cases cause businesses to look for other less complex and less costly options such as arbitration.[89] However, as suggested earlier, the actual application of arbitration by U.S. businesses belies this argument. Many businesses in the U.S. uniformly apply mandatory arbitration in their consumer contracts but not where they expect to be a defendant, such as in business-to-business transactions.[90]

Limits on Damages

Damages are a form of monetary compensation or reimbursement awarded to someone in a legal proceeding where it is determined that they have suffered loss, detriment or injury. Damages may also (albeit much less commonly in Canada) include an amount to reflect punishment for offensive conduct or to deter any future wrongdoing. These damages are known as punitive or exemplary damages. Mandatory arbitration agreements may limit the range of damages which consumers may awarded if the arbitrator rules in their favour. For example, homeowners who are bound to arbitrate their disputes through ANHWP may not receive exemplary or punitive damages.[91]

This kind of limitation is problematic because its absence may have the effect of failing to deter bad business practices. Even though such damages are not commonly awarded in Canada, the threat of such damages provides a fiscal incentive for businesses to reign in disreputable behaviour.

The more practical concern for Canadian consumers is terms that purport to cap the amount of damages payable by the business. Telus' wireless phone service agreement

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[88] Yvonne Rosmarin, "Consumers-R-Us: A Reality in the U.C.C" (1994) 35 Wm. & Mary L. Rev. 1593 at 1617.

[89] Stephen J. Ware, "Consumer and Employment Arbitration Law in Comparative Perspective: The Importance of the Civil Jury" (2002) 56 U. Miami L. Rev. 865 and see Jean R. Sternlight, "Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial" (2001) 16 Ohio St. J. on Disp. Resol. 669.

[90] Public Citizen, *supra* note 13.

[91] Alberta New Home Warranty Program, Single Family Residence Warranty Certificate, s. 5. (e) <http://www.anhwp.com/warranty.html>

limits its damages to an amount that would not begin to reflect costs much less actual loss incurred in a legal dispute:

> Notwithstanding the limitations of liability in this agreement, in no event shall the aggregate, total liability of TELUS Mobility or its affiliates for damages, injury, losses and causes of action (whether in contract, tort or otherwise) arising from or relating to the provision, use or failure of the service, or any phone used with the service, exceed $20.[92]

3. *Lack of Transparency*

Often the parties to an arbitration agreement are bound to a confidentiality agreement – BCICAC Rule 25 states that "[u]nless otherwise agreed by the parties or required by law, all hearings, meetings, and communications shall be private and confidential as between the parties, the arbitration tribunal and the Centre." In contrast to court proceedings, the evidence presented, the submissions of the parties, the decision or award and even the existence of the dispute itself are kept confidential. This raises critical public policy concerns:

> The public has an interest not only in resolving individual disputes, but also in ensuring that publicly promulgated laws are enforced and publicized. When litigation is brought in court, the public has the opportunity to learn about alleged illegal acts. Even before cases go to trial, reporters or participants may publicize the nature of the claims and defenses. In this way the public may learn about defective tires, workplace discrimination, fraudulent credit practices, excessive check bouncing charges, or ineffective termite extermination services. Knowledge of these problems allows members of the public to protect themselves, bring their own lawsuits, or pressure for legislative reform. In contrast, the public may never learn about these significant issues if such disputes are sent to private binding arbitration.[93]

Confidentiality requirements are employed by Canadian organizations such as the Investment Dealer Association of Canada[94] and the Ontario Motor Vehicle Arbitration program. Analysts have suggested that such requirements work against the interests of the consumer. An analysis of the operation of the Ontario Motor Vehicle Arbitration Plan suggests that the plan's confidentiality requirements work against the interests of consumers. Consumers were prevented from drawing on other individuals' experiences

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[92] Telus Mobility, "Service Terms and Conditions", s. 7 <http://www.telusmobility.com/about/mike_pcs_pt_policy.shtml>

[93] Sternlight, *supra* note 7 at 839.

[94] Interview with Morgan MacGougan, Ont. Regional Director of IDA, June 19th 2003 (notes with author).

before the board while the representatives of car companies were repeat players and could thus call on previous experiences before the Board.[95]

4. Risk of inconsistent results

There is a risk that on a given set of facts different arbitrators will reach different conclusions. Since arbitral awards are only binding on the parties to the arbitration clause, arbitral awards cannot be used as precedents in future disputes – in other words the doctrine of *stare decisis* does not usually operate in arbitration (although labour arbitration awards are published and looked to for guidance in Canada). Confidentiality agreements, as mentioned above, also ensure that arbitral awards are not available for use in future disputes.

Both consumers and business benefit from the doctrine of precedent. If an individual consumer wins an arbitration, that victory will only benefit that individual. In contrast, a victory by a consumer in court assists other consumers because that decision is binding on future trials where the facts in dispute are substantially the same. The precedent operates as an incentive for the company to settle future claims or change its behaviour because they know that it is more likely that they will lose similar disputes in the future.

Relying on precedent also reduces economic uncertainty for business:

> If business firms can rely upon future courts to apply the law in the same way they have in the past—that is in accordance with the doctrine of precedent or *stare decisis*—they will be able to make business decisions with less uncertainty and therefore lower transaction costs. This development can be an enormous "public good" in any economy. Even in a totally honest system, there will always be an uncertainty about how a new issue will be resolved. But, as a body of case law develops and builds, that community which uses that area of law will experience less and less economic uncertainty and thus lower costs. Accordingly, each litigated case with a published opinion—and therefore a settled rule of law—adds to the social capital of the economy.
>
> If, on the other hand, disputes are privately settled with no publication of the results and no way of enforcing the doctrine of precedent, this enormous positive externality will be lost to the economy.[96]

[95] Finkle & Cohen, *supra,* note 71 at 107.
[96] Henry G. Manne, "Law and Economics and the Rule of Law – The Sixteenth Annual National Student Federalist Society Symposium on Law and Public Policy – 1997: Panel I: What is the 'Law' in Law and Economics?" (1997) 21 Harv. J.L. & Pub. Pol'y 11.

5. Limited rights of appeal

The limited rights of appeal allowed by arbitration statutes[97] are a disadvantage to both parties in a consumer dispute. However, commentators have recognized that "the appeal right is most important to the party likely to have been disadvantaged in the original proceeding."[98]

6. Lack of protection for class proceedings

The *Kanitz* decision holds that consumers will not be able to initiate a class action where a valid arbitration agreement exists. Our research indicates that Rogers, Telus, Shaw, Star Choice, Money Mart, and Fast Funds online, include a clause in their arbitration agreement in which the consumer waives her right to commence or to participate in a class action. Amazon.ca has a clause that precludes participating in class arbitration.

As indicated above, class actions are a very valuable legal tool for consumers. They redress the imbalance between consumers and businesses in litigation and they have a major impact on outcomes, the most important one being optimizing deterrence.

The leading judicial view of class actions is that they serve mainly procedural ends. The courts have described the aggregation of claims as serving such procedural purposes as judicial economy and access to justice by making economical the initiating of lawsuits that on their own would be too costly to prosecute. The effect of class actions on deterrence, forcing wrongdoers to modify their behaviour, is also viewed as a form of judicial efficiency.[99]

Some analysts have challenged the dominant view that class actions serve only procedural ends. They challenge the view that deterrence is mainly a procedural rather than a substantive effect and the notion that it is a side-benefit to the more important goal of mass litigation, which is compensation. Deterrence is a critically important substantive effect that serves the primary goal of modern negligence law (and one could argue) general consumer law – to minimise the overall costs attributed to accidents. To ensure that a behaviour or product is altered so that future harm is prevented is arguably more effective than compensation; because compensation alone can never put the victim in the same position they were in before the harm occurred.[100]

Class actions are potentially valuable legal tools for consumers because the benefits of aggregating claims extend beyond the obvious benefit they provide to litigants with

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[97] BC Act at ss. 30 – 31 Ontario at ss. 45-46

[98] Sternlight at 686.

[99] *Hollick*, *supra* note 51 at para. 15.

[100] Jones, *supra* note 20 at 31-37.

individually non-viable[101] claims. As discussed above, the amounts involved in individual consumer transactions where there is a dispute with a business are generally not significant enough to warrant an individual legal action, but may be of sizable value collectively, to warrant a legal action via a class proceeding.

However, It is also true, due to the maximum deterrent effect of aggregating claims, that class actions are valuable to plaintiffs who individually may have a viable claim. There are important reasons why individuals don't pursue litigation beyond the economic calculation of wealth maximization. These factors include: people's general distrust of courts and the whole process of litigation; concerns about the risk entailed and the uncertainty of outcome; the stress involved in litigation; the time factor associated with litigating claims.[102]

Class actions mitigate all of these non-monetary risks because the handling of the claim is passed to a risk neutral manager, the class counsel.

Class actions also respond to information deficits, which is another non-monetary factor contributing to individuals not pursuing valid claims. There are many examples where individual may have suffered harm and not know it, (bank overcharges, securities fraud, identify theft).[103]

For all these reasons, aggregation of individually viable claims as well as non-viable claims has an immediate impact on deterrence "and deterrence increases with the universality of the aggregation. That is, a mandatory class would provide optimal deterrence; voluntary joinder, or "opting in" would tend to provide less, and standard "opt out" classes would be somewhere in between."[104]

Barring class actions generally inhibits transparency and accountability concerning harms that may impact large numbers of consumers. Mandatory arbitration clauses allow businesses to potentially insulate unlawful, unfair or deceptive practices from any meaningful review. By preventing resort to the courts via class action proceedings, it is difficult for consumer plaintiffs to obtain information through traditional discovery processes or challenge negative aspects of consumer products or services that may have an impact upon large numbers of consumers. Mandatory arbitration clauses may also have the effect of protecting businesses from negative publicity

There is a great danger to consumers that arises from systematic, across-the-board business practices that have a relatively small impact on individual consumers but, in the aggregate, amount to large-scale fraud. By requiring the adjudication of all claims through arbitration, and prohibiting participation in class actions, the business may effectively insulate itself from accountability.

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[101] This means that it would cost more for the individual to litigate than could be recovered.

[102] Jones, *supra* note 20 at 39-40.

[103] *Ibid.* at 40.

[104] *Ibid.*

7. Lack of mutuality between the parties

Mandatory arbitration clauses are found in standard form contracts, which are presented to consumers as a *fait accompli*, not the result of negotiation between the parties as to the terms of the contract. Such agreements are problematic for consumers because they are at odds with one of the important premises of arbitration, which is that each party enters it into autonomously. In fact, the arbitrator's authority originates from the parties' consent to the arbitration agreement.

If two parties experienced in arbitration reach their own agreement to arbitrate a dispute, this represents an autonomous decision as much as any market transaction.
If an average consumer, unaware of meaning or purpose of arbitration, happens upon an arbitration agreement by using some product or service, it is highly questionable whether the consumer agreement assented to reflects autonomous consent.[105]

It is difficult, therefore, to understand how an arbitrator can assume jurisdiction over a dispute where one party may not be aware of the existence of the arbitration agreement. It is also questionable that a court may force a party to arbitrate a dispute where there has been no effective consent to arbitrate.

8. Institutional bias – the repeat player effect

Avoiding bias in the decision-maker is one of the important elements in an adjudication process, but it not clear that the arbitration process is any more successful than traditional litigation in avoiding bias.

One of the distinctive differences of alternative dispute resolution over traditional litigation is the apparent control by both parties over the choice of the adjudicator. Although small claims courts are designed to be friendly to the unrepresented litigant through the use of plain language drafting, simplified procedures and facilitative decision makers, judges are imposed on litigants. An individual judge may carry a reputation as being sympathetic or unsympathetic to consumers or unrepresented litigants; either party, however, cannot avoid that judge. Arbitration, in contrast, allows the parties to find and consent to the arbitrator

The reality of consumer to business arbitration is that there is an inequality of information and control between the parties. Some mandatory arbitration agreements provide that the company, not the consumer, selects the arbitrator. Even in those contracts which do not, businesses generally have the ability to control the process. Businesses have the

[105] Clark Freshman, "Tweaking the Market for Autonomy: A Problem-Solving Perspective to Informed Consent in Arbitration" (2002) 56 U. Miami L. Rev. 909.

means to track arbitrators' records and flex their market power accordingly,[106] while the average consumer cannot distinguish arbitrator A from B and doesn't usually have the resources to conduct that kind of research.

The ability to be able to effectively research potential arbitrators also represents a significant added cost for a consumer. Since arbitrator's decisions are not generally a matter of public record, businesses that are involved in frequent arbitration have the advantage of building on their repeated experience of arbitrators' decisions. The average consumer is not able to access or interpret information on the arbitrator's past decisions or reputation in the legal community, which could reveal the potential for bias.[107]

It is not surprising that there is a shared perception among consumer advocates and corporate representatives alike that arbitrators are more likely than judges or juries to bring pro-defendant attitudes to their decision-making. Both the existence and the apprehension of bias undermine the arbitration system.

One potential cause of this perceived bias is known as the "Repeat Player Effect". In arbitration, a consumer typically faces a large corporation that is involved in many cases; the consumer is likely to be involved in just one.[108] There is the potential that an arbitrator develops systematic bias in favour of the large corporation, because the arbitrator depends on the high volume of cases from the large corporation for its livelihood.[109] This may lead to arbitrators favouring institutional parties over individual consumers, as the latter will likely not be using their services again.[110] One critic states: "Even the most scrupulous arbitrators and arbitral organizations may find themselves unconsciously influenced to make findings that favour their valued client."[111]

9. Litigation efficiency and the repeat player effect

The repeat-player effect also has an impact on the preparation required by each of the parties to make their case before the arbitrator. In consumer to business disputes that are subject to arbitration, consumers will typically oppose a larger corporation. While the larger corporation is often involved in multiple arbitration cases regarding its products or services, the consumer or small business is usually involved in just one case. The

[106] Senderowicz, s*upra* note 2 at 276-277.
[107] Public Citizen, *supra* note 10 at 58.
[108] Lisa B. Bingham, "Employment Arbitration: The Repeat Player Effect" (1997) 1 Employee Rts. & Employment Pol'y J. 189.
[109] Alderman, *supra* note 73 at 61-62.
[110] F. Paul Bland, Jr. & Micheal Quirk, "How we can all fight Mandatory Arbitration clauses in contracts" (March 2002) 37 Trial News at 2.
[111] Sternlight, *supra* note 7 at 839.

corporation is able to utilize economies of scale in its preparation for arbitration and save considerable costs.[112]

In direct contrast, the consumer faces much larger costs of preparing a case for arbitration. The absence of class proceedings and the confidential nature of arbitral awards requires that each consumer attempting to arbitrate a dispute will have to maximize all his or her costs in preparing a case, from fact finding, to legal research and ultimately to legal representation before the arbitrator. As indicated above, critics have suggested that this creates a significant imbalance between the parties to an arbitrated dispute to the detriment of consumers. The analysis of the operation of the Ontario Motor Vehicle Arbitration Plan found that its confidentiality requirements prevented consumers from drawing on other individual's experiences before the board. In contrast, the representatives of the car companies were able to amass extensive knowledge and experience in this area as they were continually appearing before the arbitrators.[113]

Repeat players often have more to lose and as a result will spend more to get a favourable result. One author describes this phenomenon:

> For example, in the case of a consumer suing a large corporation over a relatively minor dispute, the amount at risk to the individual is relatively small. The resources he or she devotes to pursing this claim will be commensurate with the amount in dispute. The corporation, on the other hand, has much more at risk. It may possibly face multiple claims based on the same underlying dispute and, consequently, the resources it allocates to defending the dispute will be significantly greater. The repeat-player will play harder because there is substantially more at risk. While the consumer will hire a recent law school graduate with a few years experience, the corporation will retain a major law firm that specializes in defending such suits. The corporation also has the benefit of being able to choose which suits it will defend or settle, thereby choosing the appropriate forum in which to do battle, and when (or if) it will appeal. In the parlance of the old west, the repeat-player "Haves" will simply "out-gun" the "single-shot" consumer.[114]

The status of mandatory arbitration in other countries

Our research indicates that the United States is the only country in which there is widespread enforcement of arbitration agreements in consumer contracts. There are very few instances where consumers have been forced to arbitrate their disputes outside of the U.S. At least one U.S. scholar who has extensive experience in the area concludes that there is no "evidence that the practice of mandatory private arbitration

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[112] Jones, *supra* note 20 at 22-23.

[113] Finkle & Cohen, s*upra* note 71 at 107.

[114] Alderman, *supra* note 73 at 61.

exists outside the United States borders."[115] Most nations, chiefly the European Union member nations, forbid the practice or have established a centralized tribunal system to efficiently dispose of such disputes, as is the case in Australia.

The limited presence of mandatory arbitration outside the U.S. makes it difficult to generalize about the impact or progression of a phenomenon that does not appear to exist in most other countries. However, the fact that mandatory arbitration does not occur in a particular country does not mean it could not occur. Companies may simply have not yet thought to impose arbitration on consumers.[116]

We can, however, say that the prominent arbitration regimes around the world have been considered and that the U.S. is the only country where the widespread use of arbitration agreements in consumer contracts is currently the norm. In the following section we will briefly examine the features of the prominent arbitration regimes worldwide and highlight the different approaches.

The United States

Federal U.S. arbitration legislation provides an important foundation for the prevalence of arbitration agreements by U.S. businesses. A number of U.S. courts have relied on article 9 of the *Federal Arbitration Act* (the "FAA") to enforce arbitration clauses in consumer contracts. The article states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[117]

The FAA was adopted in 1925, in response to the reluctance of the American courts to enforce commercial arbitration agreements.[118] It applied, until recently, only to disputes between businesses, not to transactions between businesses and consumers.[119] In two important decisions in 1953 and 1974, the U.S. Supreme Court held that pre-dispute arbitration agreements could not be enforced between businesses and consumers[120] or businesses and employees.[121]

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[115] Sternlight, s*upra*, note 7 at 831.
[116] *Ibid.* at 844.
[117] 9 U.S.C.A. s. 2 (2001).
[118] Scarpino, *supra* note 1 at 683.
[119] Sternlight, *supra* note 7 at 832.
[120] *Wilko v. Swan* 346 U.S. 427 (1953).
[121] *Alexander v. Gardner-Denver Co*. 415 U.S. 36 (1974).

In the 1980s, however, the Supreme Court reversed its course in a series of decisions upholding arbitration and rejecting public policy claims that certain categories of cases were non-arbitrable.[122] The result was that brokerage houses could require their customers to arbitrate their disputes,[123] and employers were allowed to force arbitration on employees.[124]

In 1995, the Supreme Court enforced a mandatory arbitration clause in a consumer contract in the case of *Allied Bruce Terminix Companies v. Dobson*.[125] In this case, the Court also declared that the FAA pre-empted all state laws that didn't favour arbitration. This effectively limits any state legislation to matters that do not involve interstate commerce.[126]

Given that the FAA does not require that arbitration clauses be signed to be enforceable, the result of this judicial and statutory encouragement has been an unprecedented growth in the use of mandatory arbitration clauses in a wide variety of consumer agreements in U.S. products and services.[127]

There are limited grounds under which pre-dispute mandatory arbitration clauses can be voided or limited. One recognized ground is the existence of a federal statutory claim and the arbitration procedures preclude the litigant from exercising his or her statutory rights in the arbitral forum. Parties may also raise general contract law defenses to the enforceability of a contract, such as unconscionability.[128] This is allowed because Section 2 of the FAA allows for revocation of a contract for reasons of law or equity.[129]

The U.S. Supreme Court has recognized that large arbitration costs, which could prevent a consumer from vindicating his or her rights in an arbitral forum, might render an arbitration agreement unenforceable. In a recent case concerning the enforceability of a mandatory arbitration clause in a consumer contract, the Court considered this issue, but upheld the contract despite the consumer's argument that the arbitration agreement was unenforceable because it was silent with respect to arbitration costs and the consumer was unable to pay the high costs of arbitration. The Court dismissed the consumer's argument because she had failed to demonstrate sufficient evidence of the prohibitive nature of the costs to arbitrate her claim.[130]

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[122] Sternlight, *supra* note 7 at 833.

[123] *Shearson/American Express, Inc. v. McMahon* 482 U.S. 220, 228-34 (1987). and *Rodriguez de Quijas v. Shearson/American Express, Inc*. 490 U.S. 477, 479-80 (1989).

[124] *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991).

[125] *Allied-Bruce Terminix Cos. v. Dobson* 513 U.S. 265 (1995).

[126] *Ibid.* at 840-841.

[127] Sternlight, *supra* note 7 at 834-835.

[128] Christopher R. Drahozal and Raymond J. Friel, "Consumer Arbitration in the European Union and the United States" (2002) 28 N.C.J. Int'l L & Com. Reg. 357 at 376.

[129] 9 U.S.C. §2 (2001).

[130] *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000).

Federal and state courts have also disallowed clauses that mandate arbitration at the expense of class proceedings.[131] Courts have considered that such clauses may be unconscionable on the basis that a clause prohibiting a class action gives a distinct litigation advantage to one party over the other. In the case of *Szetela v. Discover Bank* the court held:

> The clause is not only harsh and unfair to Discover customers who might be owed a relatively small sum of money, but it also serves as a disincentive for Discover to avoid the type of conduct that might lead to class action litigation in the first place. By imposing this clause on its customers, Discover has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect. The potential for millions of customers to be overcharged small amounts without an effective method of redress cannot be ignored. Therefore, the provision violates fundamental notions of fairness.[132]

However, it should be noted that even when clauses contain particularly unfair provisions, courts sometimes sever that portion of the clause rather than void the arbitration provision in its entirety.[133]

Despite the harsh criticism of mandatory consumer arbitration, there is no federal legislation prohibiting the practice, which means that courts monitor the fairness of arbitration clauses in consumer agreements on a case-by-case basis. Legislation has been introduced in Congress that would make unenforceable pre-dispute arbitration agreements in the area of employment and consumer credit; these bills have never proceeded beyond the Committee stage.[134]

Some critics in the U.S. advocate harmonizing its arbitration law with the rest of the world so that mandatory consumer arbitration agreements are no longer enforceable.[135]

The European Union

The European Union's ("EU") position on arbitration provisions in consumer contracts is relevant because consumer protection in general is now addressed at the Union level.

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[131] *Szetela v. Discover Bank* 118 Cal. Rptr. 3d 862, 2002 WL 652397 (Cal. C.A. 2002); *Powertel Inc. v. C. Bexley,* 763 So. 2d 1044 (Fla. S.C.); and *Johnson v. Tele-Cash Inc.* 82 F. Supp. 2d 264 (D. Del. 1999).

[132] *Szetela v. Discover Bank* 118 Cal. Rptr. 3d 862, 2002 WL 652397 (Cal. C.A. 2002)

[133] Sternlight, *supra* note 7 at 836-7.

[134] *Ibid.* at 841.

[135] See Sternlight, *supra* note 7 and Ware, *supra* note 89.

Analysis of European law concerning consumer contracts suggests that, in contrast to the United States, businesses are not able to impose binding arbitration rather than litigation. The EU's 1993 directive on unfair terms in consumer contracts[136] requires member nations to create laws that invalidate any term in a consumer contract it considers to be unfair.[137] Unfair terms are defined as:

> A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.[138]

Specific examples of unfair terms appended to the Directive, include mandatory arbitration.[139] A pre-dispute arbitration clause, which has not been individually negotiated, appears to be void under the Directive.[140]

It appears that the EU has effectively adopted a prohibition on mandatory arbitration, based on various actions following this Directive. In 1998 the European Commission issued a Recommendation, following a series of reports on the implementation of the Directive. The Recommendation declares "out-of-court alternatives may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialised."[141]

In a 2000 workshop on the use of Alternative Dispute Resolution ("ADR") in online commercial transactions, the EU indicated its opposition to mandatory binding arbitration, arguing that access to the courts should not be made conditional on the use of or exhaustion of ADR.[142]

There is very little attention drawn to mandatory arbitration in the EU. Analysts have suggested this is due to the fact that the practice is presumed to be impermissible; therefore, it is rarely discussed.[143]

The United Kingdom and France

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[136] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

[137] Article 6.

[138] Article 3(1)

[139] Annex s.1.(q)

[140] Drahozal, *supra* note 128 at 366.

[141] Commission Recommendation 98/257 of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, 1998 O.J. (L 115) 31, WL OJ 1998 L1 15/13 at 33.

[142] Sternlight, *supra* note 7 at 846-847.

[143] *Ibid.* at 848.

Given the strong direction provided by the EU on mandatory arbitration, specific European countries would be expected to have similarly strong legislation or practices limiting or prohibiting the use of mandatory pre-dispute arbitration clauses. Pre-dispute arbitration clauses are generally prohibited in consumer transactions in Britain and expressly banned in France.[144]

The United Kingdom ("UK") was one of the first states to enact statutory protection for consumers from mandatory arbitration clauses. The 1988 *Consumer Arbitration Agreements Act* ("CAAA") contained a basic prohibition against the enforcement of mandatory arbitration clauses in consumer contracts except where the agreement to arbitrate was entered after the dispute arose.[145]

However, there were significant limitations in the Act. Firstly, the CAAA only applied to proceedings that fell within the jurisdiction of the County Court[146] and the County Court's jurisdiction was limited to tort and contract claims for amounts below 5000 pounds.[147] Furthermore, the County Court had no jurisdiction over actions for slander or libel, and actions surrounding disputes over titles to fares, toll, franchises or markets.[148]

The second limitation was that the CAAA only applied to domestic arbitration agreements.[149] The courts ultimately removed this second limitation.[150] The most significant feature of the CAAA was that courts retained the discretion to ignore the CAAA if they were satisfied that the consumer would not be detrimentally affected by this course of action.[151]

The EU's 1993 Directive on unfair terms in consumer contracts and the accompanying Regulations[152] forced changes in the UK's domestic law. In 1996, the UK Parliament repealed the *Consumer Arbitration Agreements Act* and introduced the *Arbitration Act, 1996.*[153]

The net effect of the change is that pre-dispute consumer arbitration clauses are deemed to be unfair when the amount of potential claim is less than £5,000, thus removing the court's discretion. In all other cases, pre-dispute consumer arbitration clauses are invalid if they are found to be unfair in accordance with the Unfair Terms in Consumer Contracts Regulations, which are an incorporation of the EU Directive into

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[144] *Ibid.*

[145] *Consumer Arbitration Agreement Act* (U.K.), 1988, c. 21, s.1

[146] *Ibid.* s.1(2).

[147] *County Court Jurisdiction Order* S.I. 1981/1123 and *County Courts Act 1984*, c. 28 s. 17.

[148] *Ibid*., *County Court Act*, s. 15(2).

[149] *CAAA*, s. 2(a).

[150] *Philip Alexander Securities and Futures Ltd. v. Bamberger & Or,* [1996] NLOR No 3684 (Court of Appeal – Civil Division).

[151] *Supra* note 1, s. 4.

[152] *Unfair Terms in Consumer Contracts Regulations 1999*, S.I. 1999/2083.

[153] *Arbitration Act 1996* (U.K.), 1996, c. 23.

British law.[154] In the latter circumstance, judges have complete discretion on a case-by-case basis to determine whether it is unfair under the European Union Directive.[155] However, in determining whether the clause is enforceable or not, the courts must draw upon the EU Directive.

In addition to the judicial remedies outlined above, the *Unfair Terms in Consumer Contracts Regulations* have also empowered the Director of the Office of Fair Trading to issue injunctions preventing the continued use of unfair contractual terms such as mandatory arbitration clauses.[156] Where an arbitration clause would be unfair and open to a court challenge, the clause is also open to regulatory action.

The Office of Fair Trading has effected changes in consumer contract terms through implementation of the Act. The Office of Fair Trading consistently has required businesses either to delete pre-dispute binding arbitration clauses altogether or to remove the element of compulsion by making clear that consumers have a choice whether to go to arbitration or not.[157]

It is apparent that the UK's current scheme has eliminated many of the limitations of the *Consumer Arbitration Agreement Act*. Courts no longer have the discretion to enforce the arbitration agreement if they consider that the consumer will not be detrimentally affected by doing so. Furthermore, the scheme covers any "…agreement to submit to arbitration present or future disputes or differences (whether or not contractual)."[158] Finally, the Director of the Office of Fair Trading now has the power to issue injunction orders preventing businesses from inserting arbitration clauses in their consumer contracts. Thus in many respects, the current statutory scheme is more comprehensive than the CAAA. However, as was the case with its predecessor, the current provisions are limited in that they are only applicable to disputes over smaller amounts of money.

The UK ban on mandatory arbitration clauses is a model that should be considered in Canada. The only identifiable flaw with the scheme is the £5,000 limit on the automatic ban. There seems to be little purpose in the Canadian context to replicate such a cap. Apart from being arbitrary, it could act as an incentive for consumers to limit claims to the maximum allowable amount to avoid arbitration. Such a cap could prove to be incompatible with class proceedings legislation as it is unclear whether the cap would apply to the aggregate claim or only to the individual class members. There is currently no class proceedings legislation in the EU so this potential conflict has not surfaced.[159]

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[154] Drahozal, *supra* note 17 at 371-372.

[155] Interview with Martyn Raplely, Consumer and Competition Policy Directorate at the Department of Trade and Industry (UK) (25 June 2003) (notes with author).

[156] *Unfair Terms in Consumer Contracts Regulations 1999, supra* note 152, s. 12.

[157] Drahozal, *supra* note 17 at 372-3.

[158] *Arbitration Act 1996* (U.K.), 1996, c. 23, s*upra* note 153, s. 89.

[159] Drahozal, *supra* note 17 at 390.

Australia and New Zealand

In 1996, New Zealand extended its statutory protection against mandatory arbitration clauses to all consumer contracts. The *1996 Arbitration Act* states:

> 11…(1)Where—
>
> (a) A contract contains an arbitration agreement; and
>
> (b) A person enters into that contract as a consumer…the arbitration agreement is enforceable against the consumer only if…
>
> (c) The consumer, by separate written agreement, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it; and
>
> (d)The separate written agreement referred to in paragraph (c) discloses, if it is the case, the fact that all or any of the provisions of Schedule 2 do not apply to the arbitration agreement.[160]

While this provision is an absolute prohibition on arbitration clauses in consumer contracts, as s. 11(1) (c) indicates above, the Act's protections may be waived prior to the dispute if the consumer has signed and understood a separate agreement to that effect. Although this provision will ensure that the consumer's attention is explicitly drawn to the arbitration clause, it does nothing to ensure that the consumer appreciates the *consequences* of signing such an arbitration agreement. It may be that an unsuspecting consumer has to sign or click twice instead of once. As detailed earlier in this paper, the average consumer is unaware of the nuanced differences between arbitration and adjudication within the court system, and will not appreciate the consequences of agreeing to submit future disputes to binding arbitration.

Australia, in contrast, has not enacted any legislation that specifically prohibits or nullifies mandatory arbitration clauses in general consumer contracts. The Australia *Insurance Contracts Act 1984*, however, does establish that arbitration clauses will be void in insurance benefits contracts.[161] Furthermore, the federal *Trade Practices Act* ("TPA") contains a number of provisions, which may be used to circumvent or nullify the effects of arbitration clauses.[162]

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[160] *Arbitration Act 1996* (N.Z.), 1996/99, s. 11(1) (c).

[161] *Insurance Contracts Act 1984* (Cth.), s. 43.

[162] *Trade Practices Act 1974* (Cth.), ss. 44Y, 51AB, 51AC.

The Australian Commonwealth's Department of the Treasury, which contains a Consumer Affairs Division has endorsed this argument, stating "while the TPA's unconscionability provisions remain largely untested at present in their application to 'standard' contractual terms, there would appear to be considerable scope for using them to address any market failures which result from abuse of pro forma terms in contracts."[163] The Treasury also stated, in reference to the American experience in this area that "[i] n light of such overseas experience, any suggestions that the TPA's unconscionable conduct prohibitions are incapable of providing a remedy against unfair contract terms would appear to be premature."[164]

There is however, little litigation concerning mandatory arbitration in Australia and no statute that deals specifically with arbitration. One critic suggests the reason for this is related to the presence and approach of state organizations dealing with consumer issues: "in part, this may be attributed to the fact that many countries handle consumer complaints administratively. In Australia various state and federal bodies receive and investigate consumer complaints."[165]

This system of state and federal bodies handling consumer complaints administratively rather than through the courts is important to examine, because it has led to the rise in use of ADR. In Australia, government deregulation of essential services has resulted in the privatization of water, electricity, gas and telecommunications. As the government privatized industries they eliminated many traditional public law methods of dispute resolution. In response the government committed itself to encouraging the use of ADR to resolve consumer disputes, including the development of non-litigious consumer redress such as industry ombudsmen, mediation and small claims tribunals.[166]

What has occurred is an exponential growth in private dispute resolution in Australia. The goal of these private schemes is to provide free, independent, just, informal and quick dispute resolution for consumers. Private dispute resolution generally adopts a more inquisitorial style than the adversarial system. Most importantly, the result of private dispute resolution is binding only on business; if the consumer is dissatisfied, court is still an option.[167]

Examples of national private dispute settlement systems include the Telecommunications Industry Ombudsman, the Australia Banking Industry Ombudsman, the General Insurance Enquiries and the Complaints Scheme, the Australian Direct Marketing Association and the Energy and Water Ombudsman.[168]

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[163] Department of the Treasury, Consumer Affairs Division, "Privatisation of Remedies Overview" (Paper presented to the Commonwealth Consumer Affairs Advisory Council, 2002) at 2.

[164] *Ibid.* at 3.

[165] Sternlight, *supra* note 7 at 852.

[166] Anita Stuhmcke, "Resolving Consumer Disputes: Out of the Courts and Into Private Industry," (2003) 31 Austl. Bus. L. Rev. 48 at 49.

[167] *Ibid.* at 48.

[168] *Ibid.* at 49.

By 1997 130,000 consumers relied on private dispute settlement schemes; by 2001 that many consumers were served by the Telecommunications Industry Ombudsman and the Banking Industry Ombudsman alone.[169]

Alternatives to court exist at the state level as well. As of February 25, 2002, the New South Wales Fair Trade Tribunal merged with the Residential Tribunal to create the new Consumer, Trader & Tenancy Tribunal ("CTTT").

The role of the CTTT is to provide an independent, low cost and accessible dispute resolution forum to the people of New South Wales who are parties in consumer or tenancy disputes.[170] All applications are heard for $64[171] and there is no fee for applications regarding changes on the grounds of hardship or postponements of enforcement proceedings.[172] The CTTT also has the prerogative to waive application fees where it "considers that there are special reasons for so doing."[173] In disputes of not more than $10,000, the tribunal will only award costs in exceptional circumstances.[174]

The services of the CTTT are designed to be accessible. Applications can be made at over 100 locations throughout New South Wales, by post, fax or email.

The level of informality in CTTT hearings is intended to benefit consumers. Generally, tribunals are not bound to the rules of evidence and are required to act with as little formality as possible, without regard to technicalities.[175] To further correct the imbalance of power and lower costs, parties to disputes of not more than $10,000 are not entitled to representation by a legal practitioner in the absence of an exceptional circumstance.[176]

Although there is no clear consensus overall as to whether Australian consumers are advantaged or disadvantaged by these schemes, the predominance of ADR in a variety of forms in Australia has mitigated the need for businesses to employ mandatory arbitration clauses in consumer contracts. While there is no prohibition on the practice, it is just not done.

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[169] Stuhmcke, *supra* note 166 at 48
[170] Consumer, Trader & Tenancy Tribunal (CTTT) homepage, online: <http://www.fairtrading.nsw.gov.au/secondarymenus/cttt.html>.
[171] *Consumer, Trader and Tenancy Tribunal Regulation 2002,* (N.S.W.), r.10 (1) (d) (ii) online: <http://www.legislation.nsw.gov.au/maintop/scanact/inforce/NONE/0>.
[172] *Ibid.* r. 10(3)(b).
[173] *Ibid.* r. 11.
[174] *Ibid.* r. 20(2).
[175] *Consumer, Trader and Tenancy Tribunal Act 2001,* (N.S.W.), s 28, online: <http://www.legislation.nsw.gov.au/maintop/scanact/inforce/NONE/0>.
[176] *Ibid.* s. 36(3).

The Regulation of Mandatory Arbitration in Canada

There are a number of possible avenues to legislate protection for consumers regarding mandatory arbitration clauses. Provincial arbitration acts could be amended to grant an exemption from arbitral stays for consumers. Generic consumer legislation such as trade practices statutes could be amended to include arbitration agreements among those trade practices, which are unenforceable. Reform could come through specific consumer protection legislation exempting certain disputes from the Arbitration Act, as is the case with the Ontario *Consumer Protection Act 2002.*[177]

Outside of Ontario, in the absence of a provincial consumer protection statute that directly prohibits the use of mandatory arbitration clauses in consumer contracts, consumers may attempt to rely on other provisions in consumer-related statutes. Some provincial legislation contains provisions that may aid a consumer to avoid being bound by such clauses. For example, section14 of Newfoundland's *Trade Practices Act*[178] guarantees the right of a consumer who has suffered damages as a result of an unfair or unconscionable trade practice to initiate a court action.[179] The *Consumer Protection Act* of Saskatchewan sets out a similar right.[180]

However, a recent Supreme Court decision raises some doubt about the ability of general provisions in consumer statutes to protect consumers from arbitration. *Desputeaux v. Editions Chouette (1987) inc.*[181] considered the concurrent jurisdiction of courts and arbitrators. The plaintiff, Desputeaux, had been involved in a dispute over a contract concerning copyright, which had been submitted to an arbitrator. Desputeaux appealed the arbitrator's decision arguing that the arbitrator did not have jurisdiction over the copyright issues raised by the dispute.[182]

The plaintiff relied on a provision of the federal *Copyright Act*[183] to argue that the nature of the dispute required that it be heard by a court. The provision states: "The Federal Court has concurrent jurisdiction with provincial courts to hear and determine all proceedings, other than the prosecution of offences under section 42 and 43, for the enforcement of a provision of this Act or of the civil remedies provided by this Act."[184]

The Court decided that the arbitrator had jurisdiction over the dispute, holding that to exclude arbitral jurisdiction requires express language in a statute:

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[177] *Consumer Protection Act, 2002*, S.O. 2002, c. 30. (As of April, 2004, this Act had not yet been proclaimed.)
[178] *Trade Practices Act,* R.S.N.L. 1990, c. T- 7.
[179] *Ibid*., s. 14.
[180] *The Consumer Protection Act*, S.S. 1996, c. C-30-1, s. 14(1).
[181] *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178 [*Desputeaux*].
[182] *Ibid.* at para. 12.
[183] *Copyright Act*, R.S.C. 1985, c. C-42.
[184] *Ibid.*, s. 37.

> The purpose of enacting a provision like s. 37 of the *Copyright Act* is to define the jurisdiction *ratione materiae* of the courts over a matter. It is not intended to exclude arbitration. It merely identifies the court, which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. It cannot be assumed to exclude arbitral jurisdiction unless it expressly so states.[185]

This presumption of concurrent jurisdiction has significance for consumers concerned about the interaction of courts and mandatory arbitration clauses. It suggests that consumer protection acts that have created statutory rights of action, but have not supplemented these with a non-derogation clause, will not protect consumers from mandatory arbitration clauses. As the Court held in *Desputeaux*, the fact that a statute has specifically stated that individuals can pursue a given dispute in court is no bar to submitting the matter to arbitration. By extension, the mere presence of a statutorily protected right of action in consumer protection legislation will not provide consumers any relief from mandatory arbitration clauses in consumer contracts.

The Ontario Consumer Protection Act

As indicated earlier in this report, the Ontario *Consumer Protection Act* uniquely contains some very important protections for consumers regarding mandatory arbitration clauses. Section 7 of the Act limits the effect of a term of a consumer contract that requires mandatory 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.[186]

Section 8 of the Act protects a consumer's right to commence a class proceeding:

> (1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.[187]

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[185] *Ibid*. para. 42-43. (page reference??)

[186] *Consumer Protection Act, 2002*, *supra* note 177, s. 7. (2).

[187] *Ibid.*, s. 8.(1).

These sections should operate to nullify mandatory arbitration clauses in all consumer contracts in Ontario. Once in force, this statute should insure the consumers, in Ontario at least, are free to initiate actions and participate in class actions free from the bounds of arbitration.

Industry-specific Legislation

It is important to note that there is legislation already in existence that promotes or mandates arbitration of disputes in a number of specific industries. These programs are briefly described below.

New home warranty

A number of provinces have actively promoted arbitrating disputes between homeowners and new homebuilders. The structures of the programs vary, from privately sponsored voluntary programs to legislated programs. For example, in the Atlantic Provinces and Alberta, builders fund the program. The Alberta program, which was the first in North America, describes its membership as voluntary; however, the program governs 80-85% of new homes built in Alberta.[188]

Ontario's program, in contrast, is a legislated program. Parties are legally required to agree to submit any disputes regarding matters not covered by the warranty to arbitration. The *Ontario New Home Warranty Act* states, "Every agreement between a vendor and prospective owner shall be deemed to contain a written agreement to submit present or future differences to arbitration, subject to appeal to the Divisional Court, and the *Arbitrations Act* applies."[189]

Condominiums

The condominium industry has also been the subject of specific legislative initiatives to promote mandatory arbitration agreements. Although the provincial response to this issue has not been entirely uniform, the majority of provinces who have dealt with the issue have expressly promoted the arbitration of disputes between condominium corporations and developers.

Of the six provinces that have enacted provisions regarding such disputes, only one specifically preserves a consumer's right to litigate a dispute in court. Specifically, Ontario's *Condominium Act* promotes non-binding mediation and arbitration, but does

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[188] Kernaghan Webb, "Presentation of Market-Driven Consumer Redress Project Case Study: Alberta New Home Warranty Program" (January 25-26, 2001), online: Industry Canada <http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca01658e.html#Presentation8> (date accessed: April 23, 2004).

[189] *Ontario New Home Warranty Act*, R.S.O. 1990, c. O.31, s. 17 (4).

not affect consumers' right to go to court.[190] However, that right may be limited where an arbitration agreement exists.[191]

Auto insurance

A final industry that has been subject to provincial regulation regarding mandatory arbitration is the auto insurance industry. In many provinces, the approach to resolving auto insurance disputes involves both arbitration and civil litigation. This is consistent with the legislative scheme in a number of provinces, including Ontario, which preserves the right to litigate under certain circumstances.

In Ontario, the right to sue has been retained in matters dealing with property damage and claims for pain and suffering, but arbitration remains an option for disputes regarding accident benefits and is provided through a government body. The Financial Services Commission of Ontario is an arm's-length agency of the Ministry of Finance, which regulates the insurance industry. It also provides arbitration services for consumers and insurance companies who are involved in insurance benefits disputes. However, the use of arbitration is entirely optional for the consumer, once they and their insurance company have completed mediation through the Commission.[192]

Voluntary measures – Online Dispute Resolution

Another area that in which some are advocating for the use of mandatory arbitration is with respect to contracts made over the Internet. Since geographical boundaries have little relevance in contracts made online, when disputes arise there are difficulties in establishing which legal jurisdiction should prevail as well as determining where disputes should be arbitrated, where the plaintiff or the defendant resides. As a result, online dispute arbitration has been employed in business to business contracting and has also been touted as transferable to business to consumer disputes.

The potential legal difficulties created for consumers in the online contracting world are significant. Businesses will often dictate where disputes will be arbitrated in the contract. In addition, the uncertainty about which legal jurisdiction should prevail means that consumers may enter into online contracts without any assurance that local consumer protection laws will be applicable to their dispute.

As indicated previously in this report, some contracts impose the place of arbitration on consumers, which can have unequivocal consequences for consumers. Amazon.ca™

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[190] *Condominium Act*, R.S.O. 1998, c.19, s. 136.

[191] *Strauss v. Hazelton Lanes Ltd*. (1984) 39 C.P.C.B. (Ont. HC)

[192] Online: Financial Services Commission of Ontario <http://www.ontarioinsurance.com/FSCO_UW_MainEngine.nsf/cd0bbbe7b8237e1e85256482005b6998/94becbac6c9fb9fa85256aca006abc48?OpenDocument> (date accessed: April 23, 2004).

requires that any dispute be arbitrated in Seattle, Washington.[193] Such provisions effectively ensure that consumer disputes will never be pursued to arbitration.

The current legal environment is also very uncertain with respect to which legal jurisdiction should prevail in an online contract dispute. A very recent case illustrates the problem. Yahoo! ®, the well-known web portal and Internet service provider allowed end users to post Nazi memorabilia on its online auction site. A French court asserted jurisdiction and found Yahoo! ® in violation of its law forbidding the posting of neo-Nazi propaganda and memorabilia, ordering it to block access to that content by French visitors to the web site. Yahoo! ® successfully challenged the decision in U.S. courts. The District Court of California declared that the French order was not enforceable under U.S. law because it would infringe upon the company's free speech right under the First Amendment to the U.S. Constitution.[194] This case is currently under appeal.

As a result of this legal climate of uncertainty, some analysts have suggested that an Internet based arbitration forum be set up that would encompass business to business as well as business to consumer online disputes. By imposing mandatory arbitration in online disputes over consumer contracts, parties would then avoid the uncertainty created by the resort to the courts and competing legal jurisdictions.[195]

However, imposing mandatory arbitration in online consumer contract disputes may have the same negative consequences for consumers as its imposition poses in off-line consumer contracts. An existing system for resolving commercial disputes over domain names, which utilizes online dispute resolution, does not provide a positive model of potential benefits for consumer online disputes.

The Internet Corporation for Assigned Names and Numbers (ICANN) a U.S. based, non-profit company, was set up in 1998 to govern how domain names would be assigned over the Internet. It operates under a memorandum of understanding with the U.S. Department of Commerce.[196]

It's purpose was to provide a model of self-regulation of the Internet, but it has come under increasing criticism for lack of transparency in its decision-making, for its domination by powerful appointed stakeholder groups over elected members and for its

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[193] See Amazon.ca online contract, *supra* note 86.
[194] Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, 145 F. Supp. 2d 1168 (N.D. Ca. 2001; Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, 169 F Supp. 2d 1181 (N.D. Ca. 2001).
[195] Karen Stewart & Joseph Matthews, "Online Arbitration of Cross-Border, Business to Consumer Disputes" 56 U. Miami L. Rev. 1111.
[196] ICANN Fact Sheet online: <http://www.icann.org/general/fact-sheet.html>.

lack of public accountability to Internet users.[197] Some U.S. politicians have even suggested that the government take a more active role in managing ICANN.[198]

The European Union (EU) has also indicated its opposition to mandatory arbitration for consumers in the online environment. In a workshop convened by the U.S. Federal Trade Commission in 2000 to specifically assess the potential of ADR to resolve disputes online, the EU emphatically stated its opposition to mandatory binding arbitration in online transactions involving EU citizens.[199]

Without any strong evidence that online dispute arbitration as applied to consumer contracts will be accessible, fair, transparent and effective, it is difficult to endorse this model for consumers.

Proposals for Legislative Reform

As this analysis has indicated, there is a need for legislative reform concerning mandatory arbitration clauses in consumer contracts. Canadian companies are increasingly inserting such clauses in their consumer contracts. As the *Kanitz* case outcome demonstrates, these clauses have already begun to limit consumers' access to justice in Canada.

There is no current legislation at the federal or provincial level, with the exception of Ontario, (as soon as the Act is proclaimed) that provides consumers with specific protection regarding mandatory arbitration clauses. Ontario's *Consumer Protection Act, 2002* has some limitations. It only invalidates arbitration agreements that have limited a consumer's ability to exercise their procedural rights under the Act. As a number of consumer actions are not based upon, and do not pertain to, such statutory rights of action, Ontario's new consumer protection act will not provide consumers with complete protection in this area. Thus, although Ontario's provisions concerning mandatory arbitration clauses in consumer contracts are quite strong, these should not be the definitive models for legislative reform in this area.

It is our view that consumer protection acts should be amended to remove judicial discretion as to whether a given arbitration clause is enforceable or not. This could be accomplished through provisions stating that such clauses are unenforceable, or are only enforceable if they have been entered into after the dispute has arisen.

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[197] Michael Geist, "Public's role in Net governance threatened" *The Globe and Mail* (13 June 2002), online: globeandmail.com <http://www.theglobeandmail.com/servlet/ArticlesNews/printarticle/gam/20020613/TWGEIS>.

[198] Susan Stellin, "Senate Hearing on Domain Names" *The New York Times* (13 June 2002) C6.

[199] Sternlight, *supra* note 7 at 846.

One analyst provided an example of proposed legislative changes to the U.S. *Federal Arbitration Act*[200] which attempt to address the unfairness for consumers of pre-dispute mandatory arbitration clauses (as well as being applicable in the employment context):

> § 1. For purposes of this Act:
>
> (a) commerce includes all transactions or employments arising out of interstate or international commerce;
>
> (b) a consumer is any individual purchasing goods, property or services in interstate commerce, including a franchisee, if the seller or supplier knows or has reason to know that the purchaser will consume the goods, property or services in the United States;
>
> (c) an employee is a worker or other provider of services who is not subject to a collective bargaining agreement and is not an executive officer of a corporation;
>
> (d) an adhesion contract is a contract or transaction between a consumer and its supplier or between an employee and its employer in a form proposed by the supplier or employer and not resulting from a process of bargaining between the parties advised by counsel of their choice; and
>
> (e) statutory rights are rights and remedies created by federal and state legislation for the benefit of consumers and employees.
>
> § 2. A written term in an adhesion contract between a consumer and a supplier or an employee and employer agreeing to arbitrate a controversy thereafter arising out of the contract or agreeing to arbitrate an existing controversy arising out of the contract is not enforceable unless the written term conspicuously:
>
> (a) discloses the agreement to arbitrate, explains the nature and effect of arbitration, and states that statutory rights maybe included in the agreement to arbitrate; and
>
> (b) offers the consumer or employee a choice to accept or to reject the arbitration term without losing the opportunity to purchase the goods, property, or services offered or to enter into the employment relationship.
>
> § 3. Even though the requirements of §2 have been satisfied, terms in an adhesion contract to arbitrate shall be enforced only if they are just and reasonable. In particular:

[200] *Federal Arbitration Act, supra* note 117.

> (a) a term purporting to preclude the application of statutory rights is invalid unless the jurisdiction whose law is made applicable by the contract has a materially greater interest in regulating the contract than does the United States or the state whose law would otherwise apply; and
>
> (b) a term having the effect of precluding the assertion in a convenient forum of statutory rights is invalid, provided, however, that a contract may require a consumer or employee to assert claims in a jurisdiction other than that in which the consumer or employee resides if the jurisdiction selected has a materially greater interest in regulating the contract than does the state of residence.[201]

This sample legislation is a good beginning for a legislative model, but it has some significant omissions. The legislation does not prohibit the use of mandatory arbitration clauses in consumer and individual employment contracts. Although section 2 does provide consumers and employees with some protection in this area, it does not go far enough. It would be far preferable to prohibit the use of such clauses outright, or establish that such clauses are only enforceable if the consumer or employee has signed them after the dispute has arisen.

Rendering a mandatory arbitration clause enforceable only when the consumer consents to it *after* a dispute has arisen creates a critical difference because it promotes arbitration agreements that are the product of meaningful mutual consent. It is also a better reflection of real and rational economic behaviour. It has been argued that the expectation that a consumer will have read and fully understood a standard form contract before entering into the contract, does not conform to rational economic behaviour:

> Given the high cost of obtaining and understanding information in a complex economy, the consumer's behavior may reflect rational economic behavior. Specifically, the marginal cost of obtaining information about a particular contractual clause may exceed the marginal benefit of such information. To obtain such information the consumer would not only have to read the fine print, but would also likely have to obtain legal advice to assist her in understanding its significance. [202]

The marginal benefit of information regarding the meaning and consequences of consenting to an arbitration clause is much higher after the dispute has arisen. At that point, it would be reasonable to expect consumers to seek clarification regarding the arbitration agreement, which they are being asked to sign. Having received such clarification, the consumer's consent to the arbitration agreement may be said to be informed and meaningful.

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[201] Richard E. Speidel, "Consumer Arbitration of Statutory Claims: Has Pre-Dispute Mandatory Arbitration Outlived Its Welcome?" (1998) 40 Ariz. L. Rev. 1069 at 1093-1094.

[202] Sternlight, s*upra* note 29 at 689.

The other weakness of the proposed legislation is that it does not adequately ensure that consumers are not precluded from arbitration by allowing businesses to dictate the forum for arbitration. Section 3 attempts to address jurisdiction clauses which are onerous for consumers, but it is open-ended in allowing for the jurisdiction to be other than the consumer's place of residence in cases where the jurisdiction selected has a "materially greater interest in regulating the contract than does the place of residence." Such open-ended language could potentially allow a business to routinely and successfully argue that its jurisdiction has a materially greater interest in the contract, given the size and economic influence of businesses. Given the strong disincentive for consumers to engage in arbitration created by allowing the jurisdiction to be determined by business, a provision is needed, which would state that disputes must be heard and arbitrator's decisions enforced in the location where the consumer resides.

Conclusion

This report has outlined a number of reasons why mandatory arbitration clauses in consumer contracts may be dangerous for consumers, because of the inequities they both create and exacerbate between consumers and businesses. The availability of alternative dispute resolution should never deprive consumers of their right to access the publicly funded justice system. The decision by a consumer to engage in arbitration should always be fully informed, voluntary and made only after the dispute has arisen.

Perhaps the most persuasive argument against mandatory arbitration is that making arbitration compulsory undermines businesses' own case for arbitration as the preferable system in dealing with business to consumer disputes. As one critic states:

> Explaining the rationale for its position [that access to legal redress should not be conditional on the use of ADR], the European Union argued that companies would undermine the perceived fairness of their own system by mandating the use of binding arbitration. Again making the same point as many United States critics of mandatory arbitration, the European Commission further stated that compulsion should not be needed as long as the process is fair. "An effective, fair and rigourous ADR scheme that gives consumers confidence will be used without the need for compulsion."[203]

[203] Sternlight, *supra* note 7 at 847.

Appendix 1 – Examples of Use of Mandatory Arbitration Clauses

TELECOM
Telephone

Company	Uses mandatory arbitration clause?	Our record – Hard Copy or Electronic version (from internet)
Aliant	No	Electronic
Northwestel Inc.	No	Hard copy
Bell	No	Hard copy
Sask Tel	No	Hard copy
MTS Communications	No	Electronic
Telus Communications	No	Electronic

Independent Telecom Service Providers

Company	Uses mandatory arbitration clause?	Our record – Hard Copy or Electronic version (from internet)
Lansdowne Rural Telephone Company	Did not provide information concerning terms	Oral Communication
Amtelecom Inc.	No	Hard copy
Cochrane Public Utilities Commission	No	Hard copy
Corporation of the City of Thunder Bay	No	Electronic
Gosfield North Communications	No	Hard copy

Cell Phones

Company	**Uses mandatory arbitration clause?**	**Our record – Hard Copy or Electronic version (from internet)**
Bell Mobility	No	Electronic
Rogers Wireless Inc.	Yes & no class action	Electronic
Global Star Canada Co.	No	Electronic
Sasktel Mobility	No	Electronic
Aliant	No	Electronic
Superior Wireless Inc.	No	Hard copy
MTS Mobility Inc.	No	Electronic
Microcell Telecommunications Inc.	No	Hard copy
Telus	Yes & no class action	Electronic

Alternative Providers of Telecom Services

Company	**Uses mandatory arbitration clause?**	**Our record – Hard Copy or Electronic version (from Internet)**
Eastlink	No	Hard copy
Navigata Communication Inc.	No	Electronic
Sprint	No	Electronic
Primus	No*	Electronic
Futureway (new name: fci Broadband)	No	Hard copy

***** Has arbitration clause, but it's not mandatory. However, class actions are prohibited and customer is required to contact Primus and give company an opportunity to resolve dispute, before exercising legal right to small claims court or arbitration.

Internet

Company	Uses mandatory arbitration clause?	Our record – Hard Copy or Electronic version (from internet)
Rogers Cable Inc.	Yes & no class action	Electronic
Bell Sympatico	No	Electronic
Shaw	Yes & no class action	Electronic
Sprint	No	Electronic
Telus	No – but have limited their aggregate liability to $100	http://www.telus.net/policies/TISAA.html
Aliant	No	Electronic
AOL Canada	No	Electronic
Videotron	No	Electronic
Eagle	No	Electronic
Cyberus	No	Electronic
Sasktel Internet	No	Electronic
Magma	No – but require consumers to agree to waive, and not assert, any claims based upon their use of the Internet connection and anti-spam software	Electronic

Cable TV/Satellite

Company	Uses mandatory arbitration clause?	Our record – Hard Copy or Electronic version (from internet)
Bell Express Vu	No	Electronic
Shaw	N/A	
Rogers	Yes & no class action	Hard copy
Videotron	No	Electronic
Star Choice	Yes & no class action	Electronic

FINANCIAL SERVICES

Credit cards

Company	Uses mandatory arbitration clause?	Our record – Hard Copy or Electronic version (from internet)
National Bank – Mastercard	No	Hardcopy
Bank of Montreal - Mastercard	No	Hardcopy
Canadian Tire – Mastercard	No	Hard copy
Citibank – Mastercard	No	Hard copy
Cuets – Mastercard	No	Hard copy
Desjardins – Visa	N/A	
Royal Bank – Visa	No	Electronic
TD Bank – Visa	No	Electronic
Laurentian Bank of Canada – Visa	N/A	

Investment brokers

Company	Uses mandatory arbitration clause?	Our record – Hard Copy or Electronic version (from internet)
TD Waterhouse	No	Electronic
Action Direct (RB)	No	Electronic
CIBC Investors Edge	No	Electronic
Etrade Canada	No	Electronic
Enorthern Investor Line	No	Electronic
ScotiaMcLeod Direct Investing	No	Electronic
InvesNet (National Bank)	No	Electronic

Online Banking

Company	**Uses mandatory arbitration clause?**	**Our record – Hard Copy or Electronic version (from internet)**
Royal	N/A*	
TD	No, but dispute handling process with bank is described in agreement	Electronic
Scotiabank	No, but dispute settlement process with bank is described in agreement	Electronic
Bank of Montreal	N/A**	
CIBC	No	Electronic
National Bank of Canada	No, but dispute settlement process with bank reps. Described in agreement	Electronic
HSBC	No	Electronic
CitiBank	N/A***	
ING Direct	No	Electronic

*****Royal Bank representative indicated that agreement is only made available for cardholders during enrolment process
**Bank of Montreal representative indicated that agreement is only made available during the registration process
***Citibank representative indicated that agreement is only made available when account is opened

Alternative Banking Services

Company	**Uses mandatory arbitration clause?**	**Our record – Hard Copy or Electronic version (from internet)**
Money Mart	Yes & no class action	Electronic
Cash Money	N/A*	Hard copy
Stop ‘n’ Cash	N/A**	
eCash Canada	N/A***	
Fast Funds online	Yes & no class action	Electronic
Quick Payday	N/A****	

*****Directed to branch location where customer service representative asserted that there was no written agreement containing terms and conditions
**No response to phone request for information
***Representative indicated by email that loan agreement only made available upon filling out an application online
********Representative indicated by email that loan agreement only made available upon approval of membership application, which must be made prior to applying for a loan

ON-LINE SHOPPING SERVICES

Company	**Uses mandatory arbitration clause?**	**Our record – Hard Copy or Electronic version (from internet)**
Ebay	No	Electronic
Amazon.ca	Yes & no class arbitration	Electronic
TicketMaster	No, but if dispute involves an event in Canada all actions must be brought in courts located in Toronto, Ontario	Electronic
Future Shop.ca	No, any legal action must be brought in courts located in Vancouver, B.C.	

ENERGY SERVICES

Company	**Uses mandatory arbitration clause?**	**Our record – Hard Copy or Electronic version (from internet)**
Enbridge	No	Hard copy
Enmax Energy Corporation	No	Electronic
EPCOR Energy Services	No, but agreement requires that parties use reasonable efforts to resolve disputes before turning to the courts	Electronic
Nova Scotia Power Inc.	N/A*	
Manitoba Hydro	No	Hard copy
SaskPower	No	Electronic
BC Hydro	No	Hard Copy
Irving Oil	No	Hard copy
Direct Energy	Yes**	Electronic

*No response to request for terms and conditions
**Applies to natural gas plan for Ontario residential customers
https://www1.directenergy.com/(12pl1qig5tyisn55jtquxy2h)/de/onCA/gas/web/webonsignup1.aspx?PC=gqaFKrUSEJtR1b2yqe3JxQ%3d%3d

Automobile Rental

Company	Uses mandatory arbitration clause?	Our record – Hard Copy or Electronic version (from internet)
Enterprise	No	Hard copy
National	No	Hard copy
Thrifty	N/A*	
Budget	No	Hard Copy
Alamo	No	Hard copy
Avis	No	Hard copy
Hertz	No	Hard copy
Dollar	N/A*	

*In-house staff indicated that a request would have to be made to the service manager.

TRAVEL

Company	Uses mandatory arbitration clause?	Our record – Hard Copy or Electronic version (from internet)
Air Canada Vacations	No, but any claims must be received no later than 14 days after return from a trip	Electronic
Air Canada	No	Hard Copy
Via Rail	No	Hard Copy
Westjet	No, but legal actions arising from the reservations agreement are required to be adjudicated in Calgary, Alberta courts	Electronic
Sears Travel	No, but legal actions are required to be adjudicated in Calgary, Alberta courts	Electronic
Aeroplan	No, but legal actions are required to be adjudicated in Ontario courts	Electronic

Clauses d’arbitrage en droit québécois

Introduction

Ce rapport traite des clauses d'arbitrage obligatoires que nous retrouvons dans certains contrats de services et de biens au Québec. Quel est le cadre législatif des dispositions qui traitent des clauses d'arbitrage? Y-a-t-il des limites juridiques qui restreignent ces clauses d'arbitrage? Nous tenterons de répondre à ces questions. Nous verrons ensuite des exemples de différentes clauses d'arbitrage contenues dans des domaines spécifiques au Québec et nous terminerons avec nos réflexions relativement au clauses d'arbitrage en regard de l'accès à la justice.

1.Cadre législatif en droit québécois

1.1 Code civil du Québec

Les articles 2638 et suivants du chapitre dix-huitième du *Code civil du Québec* (ci-après C.c.Q.) concernent les règles applicables à la convention d'arbitrage. Cette convention est définit comme étant : «le contrat par lequel les parties s'engagent à soumettre un différend né ou éventuel à la décision d'un ou de plusieurs arbitres, à l'exclusion des tribunaux.»

Quelle forme doit prendre cette convention? L'article 2640 C.c.Q édicte que « la convention d'arbitrage doit être constatée par écrit; elle est réputée l'être si elle est consignée dans un échange de communications qui en atteste l'existence ou dans un échange d'actes de procédure où son existence est alléguée par une partie et non contestée par l'autre».

Le Code civil du Québec parle également des contrats d'adhésion et des contrats de consommation. On retrouve régulièrement dans ces types de contrat des clauses d'arbitrage qui édictent qu'en cas de conflit entre les parties, le différend découlant ou résultant du contrat sera obligatoirement soumis à un arbitre qui rendra une décision qui liera les parties et sera sans appel. Des exemples de contrat d'adhésion et de consommation ? Notamment les contrats de téléphonie cellulaire, d'internet, de câblodistribution.

Il nous semble important de reproduire les définitions d'un contrat d'adhésion et de consommation tel qu'on les retrouve dans le *Code civil du Québec*.

Le Code civil définit à l'article 1379 ce qu'est un contrat d'adhésion en ces termes :

> «Le contrat est d'adhésion lorsque les stipulations essentielles qu'il comporte ont été imposées par l'une des parties ou rédigées par elle, pour son compte ou suivant ses instructions, et qu'elles ne pouvaient être librement discutées.
>
> Tout contrat qui n'est pas d'adhésion est de gré à gré. »

Le code civil définit également le contrat de consommation à l'article 1384 C.c.Q. :

> « Le contrat de consommation est le contrat dont le champ d'application est délimité par les lois relatives à la protection du consommateur, par lequel l'une des parties, étant une personne physique, le consommateur, acquiert, loue, emprunte ou se procure de toute autre manière, à des fins personnelles, familiales ou domestiques, des biens ou des services auprès de l'autre partie, laquelle offre de tels biens ou services dans le cadre d'une entreprise qu'elle exploite. »

Une clause dans un contrat d'adhésion ou de consommation peut être déclarée nulle ou l'obligation qui en découle peut être réduite si les tribunaux en vienne à la conclusion que la clause est abusive (article 1437 C.c.Q). Conséquemment, un juge, après analyse d'une clause d'arbitrage dans un contrat d'adhésion et de consommation pourrait la déclarer abusive, donc l'annuler.

1.2. Ordre public de protection

Pourquoi invoquer l'ordre public de protection dans le cadre de ce document? Tout simplement parce qu'une clause arbitrale ne doit pas contrevenir à une disposition législative dite d'ordre public. Donc en cas de violation à cette règle, les tribunaux seront appelés à intervenir pour faire invalider la clause d'arbitrage.

À quoi fait-on référence lorsque l'on parle d'ordre public? L'auteur et juge Jean-Louis Baudoin classifie l'ordre public selon deux types. Le premier, l'ordre public et moral. C'est celui qui «vise à protéger l'ensemble des institutions qui constituent la base des règles du jeu de la société». Le deuxième : l'ordre public social et économique est celui «caractérise la volonté de l'État de réglementer les échanges économiques.»[204] Sous ce deuxième type, on distingue, d'après le but poursuivi, un ordre public de direction et un ordre public de protection. L'ordre public de protection est défini soit par des textes, soit par des arrêts qui ont comme but premier de protéger l'individu. On veut ainsi «rétablir une certaine équité contractuelle». Le meilleur exemple de ce principe? La protection

[204] J.-L. BAUDOIN, P.-G. JOBIN, Les obligations, 5e édition, 1998, pp. 157ss

que le consommateur est en droit d'avoir dans ses rapports avec les commerçants. La *Loi sur la protection du Consommateur du Québec* est une loi d'ordre public social et économique. On retrouve également dans le Code civil du Québec certains articles d'ordre public social et économique, notamment, les règles sur les contrats d'adhésion et les contrats de consommation.

Dans l'affaire Garcia Transport, la juge L'Heureux-Dubé [205] aborde la question d'ordre public en profondeur. Nous reprendrons quelques extraits de ses propos.

«Dans la doctrine et la jurisprudence classiques, la sanction qui s'impose à la violation de l'ordre public dans un acte juridique est la nullité absolue. Toutefois, le droit sur ce plan a évolué. Lorsque la règle touche l'ordre public de protection, il est logique, pour précisément assurer la réussite du but poursuivi, que seul celui que la règle a pour but de protéger puisse invoquer la nullité. »

Peut-on renoncer au bénéfice d'une loi d'ordre public? Nous répondons à cette question par l'affirmative en citant une fois de plus la juge L'Heureux-Dubé :

> «Pour conclure sur ce point, disons qu'il est possible de renoncer à une disposition d'ordre public économique de protection puisque sa violation n'est sanctionnée que par une nullité relative. En raison de la nature même de la protection accordée, toutefois, cette renonciation n'est valide que si elle est consentie après l'acquisition du droit et non avant. À mon avis, le juge Jacques de la Cour d'appel a correctement exposé l'état du droit lorsqu'il a écrit à la p.929 :
>
> > «Il est maintenant acquis que la partie qui bénéficie de la protection d'une loi d'ordre publique économique de protection peut y renoncer. Cependant, cette renonciation ne peut être anticipée. Elle ne peut avoir lieu que lorsque le droit que cette loi accorde est né et peut être exercé en toute connaissance de cause, tout comme, par analogie, un acte de ratification d'une obligation annulable doit exprimer, entre autres, l'intention de couvrir la cause de l'annulation. »

Il est généralement reconnu que les tribunaux n'aiment pas intervenir pour invalider des clauses d'un contrat quand les parties les ont négociées et acceptées. Toutefois, plusieurs contrats de consommation sont des contrats d'adhésion donc nullement négociés entre les parties. Dès lors, le tribunal pourrait réviser un contrat afin de rétablir l'équilibre entre les parties en cas d'une inégalité entre les forces en présences.

L'article 2639 du *Code civil du Québec* édicte que :

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[205] Garcia Transport Ltée c. Cie Royal Trust, (1992) 2 R.C.S. 499

> « Ne peut être soumis à l'arbitrage, le différend portant sur l'état et la capacité des personnes, sur les matières familiales ou sur les autres questions qui intéresse l'ordre public.
> Toutefois, il ne peut être fait obstacle à la convention d'arbitrage au motif que les règles applicables pour trancher le différend présentent un caractère d'ordre public. »

La Cour Suprême dans l'arrêt Desputeaux c. Éditions Chouette (1987) inc[206] énonce clairement et sans équivoque que la sentence arbitrale n'est pas contraire à l'ordre public. Le juge LeBel qui écrit pour la Cour, indique que l'interprétation et l'application de la notion d'ordre public dans le domaine de l'arbitrage conventionnel au Québec se doit de tenir compte de la politique législative qui a fait une place à cette forme de règlement des différends et qui va même plus loin en l'encourageant à la développer. Dans les limites de 2639 C.c.Q., l'arbitre peut rendre une décision basée sur des règles d'ordre public puisque ses dernières peuvent faire l'objet de la convention d'arbitrage proprement dite. En fait, l'ordre public intervient principalement lorsque vient le temps d'apprécier la validité de la sentence arbitrale. Le tribunal, en vertu de l'article 946.5 C.p.c. examine la sentence arbitrale dans son ensemble afin d'en apprécier la validité. La décision ne doit pas contrevenir à des dispositions législatives ou à des principes qui iraient à l'encontre de l'ordre public. On ne pourrait pas annuler une sentence arbitrale suite à une erreur d'interprétation d'une disposition législative à caractère impératif à moins que la sentence arbitrale démontre clairement que cette décision est «inconciliable avec les principes fondamentaux pertinents de l'ordre public. »

2. Jurisprudence québécoise en matière d'ordre publique de protection

L'Union des consommateurs, le 6 mai 2003, a déposé une requête pour permission d'exercer un recours collectif contre la compagnie Dell Computer[207]. Pendant quelques jours d'avril 2003, plusieurs consommateurs ont acheté sur internet des ordinateurs à un prix affiché variant entre 89 $ et 118 $ selon le modèle. Or, Dell a annulé les transactions en prétextant une erreur de prix. Les appareils auraient dû normalement coûter entre 379$ et 549$.

Ce recours a pour but d'exiger que Dell respecte le prix de vente annoncé. En vertu de l'article 224 c) de la *Loi sur la protection du consommateur*, qui est d'ordre public, le commerçant ne peut exiger pour un bien un prix supérieur à celui annoncé.

Le membre désigné, Olivier Dumoulin, représente « Tous les consommateurs qui, au Québec, entre le 4 avril 2003 et le 7 avril 2003, se sont prévalus ou ont tenté de se

[206] Desputeaux v. Éditions Chouette (1987) inc., (2003) 1 S.C.R. 178
[207] Union des consommateurs c. Dell Computer Corp., JE-2004-457

prévaloir de l'offre faite sur le site Internet de Dell de l'intimée pour l'achat d'un appareil Axim X5, 300 mhz ou 400 mhz respectivement au prix de 89.00$ et de 118.00$.»

Le 9 septembre 2003, Dell dépose une requête pour référer le litige à l'arbitrage conformément à la clause d'arbitrage prévue au contrat de vente qui régit les transactions entre Dell et les consommateurs. En vertu de cette clause d'arbitrage, tout litige découlant du contrat de vente doit obligatoirement être résolu par un arbitrage dont la décision lie les parties. Cette clause se lie ainsi :

> **Arbitrage :** Une réclamation, un conflit ou une controverse (par suite d'un contrat, d'un délit civil ou autrement dans le passé, qui survient à l'heure actuelle ou qui surviendra dans le futur, y compris ceux qui sont prévus par la loi, ceux qui surviennent en Common law, les délits intentionnels et les réclamations équitables qui peuvent, en vertu de la loi, être soumis à l'arbitrage obligatoire) contre Dell, ses représentants, ses employés, les membres de sa direction, ses administrateurs, ses successeurs, ses ayants cause ou les membres de son groupe (collectivement aux fins du présent paragraphe, «Dell ») découlant de la présente convention ou de son interprétation ou relié à celle-ci, ou découlant de la violation, de la résiliation ou de la validité de la présente convention, des relations entre les parties antérieures, actuelles ou futures (y compris, dans la mesure autorisée par le droit applicable, les relations avec des tiers qui ne sont pas des signataires de la présente convention), de la publicité affichée par Dell ou d'un achat connexe devra être réglé de façon exclusive et définitive par voie d'arbitrage obligatoire organisé par le National Arbitration Forum (NAF) conformément à son code de procédure et aux procédures particulières concernant le règlement de petites réclamations et (ou) de conflits entre consommateurs alors en vigueur (qui peuvent être consultés sur internet à l'adresse http://www.arb-forum.com ou par téléphone au 1-800-474-2371). L'arbitrage se limitera uniquement aux conflits ou aux controverses entre le client et Dell. La décision du ou des arbitres sera définitive et obligatoire pour chacune des parties et elle peut être accueillie devant un tribunal compétent. On peut obtenir des renseignements sur le NAF et déposer des réclamations auprès de cet organisme en écrivant au P.O. Box 50191, Minneapolis, MN 55405, en envoyant un courriel à l'adresse file@arb-forum.com ou en remplissant une demande en ligne à l'adresse http://www.arb-forum.com. »

Le 16 janvier 2004, la Cour supérieure, sous la plume de la juge Hélène Langlois, a rejeté la requête de Dell et autorisé le recours collectif. S'appuyant sur l'article 3149 du *Code civil du Québec*, qui se lit comme suit :

> « Les autorités québécoises sont, en outre, compétentes pour connaître d'une action fondée sur un contrat de consommation ou sur un contrat de travail si le consommateur ou le travailleur a son domicile ou sa résidence au Québec; la renonciation du consommateur ou du travailleur à cette compétence ne peut lui être opposée. »

La juge a conclu que l'application de la clause d'arbitrage aurait pour effet de soustraire de la compétence des autorités québécoises un litige relié à un contrat de consommation (le NAF étant situé aux États-Unis). Cette décision a été portée en appel par Dell.

Au mois de mai 2004, la Cour d'appel a entendu les parties et l'Office de la protection du consommateur est intervenu dans cette affaire. Au moment d'écrire ses lignes, la décision de la Cour d'appel n'a toujours pas été rendue.

3. Exemples de différentes clauses d'arbitrage

3.1 Le Programme d'arbitrage pour les véhicules automobiles du Canada

Depuis 1994, il existe au Canada, le Programme d'arbitrage pour les véhicules automobiles du Canada, aussi appelé le PAVAC. Ce service est offert aux consommateurs du Québec depuis le mois de janvier 2001.

La mission première du PAVAC est d'aider les consommateurs à résoudre certains conflits avec les constructeurs d'automobile et les distributeurs sans avoir recours aux des tribunaux civils. Il est important de noter que le PAVAC ne règle pas les conflits avec les concessionnaires d'automobile, seulement avec les fabricants.

Le conseil d'administration du PAVAC est composé de personnes représentants les intérêts des consommateurs, ceux des gouvernements ainsi que ceux de l'industrie, qu'il s'agisse des fabricants, des distributeurs ou des concessionnaires. Actuellement, au Québec, L'Office de la protection du consommateur représente le gouvernement provincial du conseil d'administration. Cette adhésion de l'office au sein du PAVAC permet désormais aux consommateurs québécois de bénéficier d'une alternative aux tribunaux dans le cas de litiges avec des fabricants d'automobiles.

Quels sont les critères d'admissibilité pour pouvoir bénéficié du PAVAC ? Il y en a plusieurs :

- Le différend doit concerner un prétendu défaut de fabrication ou l'application de la garantie attachée à un véhicule neuf
- Le consommateur doit être résident canadien et le véhicule doit avoir été acheté, à l'origine, d'un concessionnaire autorisé du fabricant au Canada.
- Seul les véhicules qui sont des modèles de l'année courante et les véhicules de l'une ou l'autre des quatre années précédentes et qui ont parcouru moins de 160 000 kilomètres sont éligibles.

- Il peut s'agir également de véhicule acheté ou loué, neuf ou d'occasion.
- Le véhicule doit servir principalement à des fins personnelles ou familiales et non commerciales.
- Le consommateur doit avoir suivi le processus de règlement des différents du fabricant et avoir donné au concessionnaire et au fabricant suffisamment de possibilités pour régler les problèmes qui sont allégués dans sa requête.

Si, les tentatives pour régler le problème avec le concessionnaire ou le fabricant ne satisfait pas le consommateur, un arbitre neutre et impartial peut entendre la cause.

L'arbitre devra rendre sa décision dans les 14 jours suivant l'audition de la cause. Si la décision est en faveur du consommateur, le fabricant devra se conformer à la décision rendue dans les délais prévus à la convention d'arbitrage, soit 21 jours pour un rachat et 30 jours ouvrables pour des réparations. En principe, le traitement complet du dossier auprès du PAVAC, de la réception du formulaire dûment rempli jusqu'à la décision de l'arbitre, prendra environ 70 jours. Une prolongation de ces délais est possible dans les cas d'inspections techniques plus approfondies ou lorsqu'il y a des tentatives de règlement provisoire.

L'arbitre peut rendre les décisions suivantes; il peut ordonner que des réparations soient effectuées sur le véhicule, ordonner le rachat du véhicule, ordonner le remboursement du coût des réparations que le consommateur a déjà effectuées; ordonner le paiement de menues dépenses et finalement, exonérer le fabricant de toute responsabilité.

Il est également à noter, que le programme est entièrement gratuit pour le consommateur. En effet, les coûts de l'arbitrage sont entièrement assumés par les fabricants d'automobiles. L'audition de la cause se tiendra normalement dans la ville du consommateur ou dans un endroit avoisinant.

Il est très important de mentionner que ce programme est facultatif et non obligatoire. En effet, le consommateur qui le désire, a toujours le droit de soumettre son litige devant les tribunaux civils compétents mais du moment où le consommateur décide de recourir au PAVAC pour régler son différend, il renonce à ses recours civils. La décision de l'arbitre est finale et sans appel. Nous sommes favorables à ce type de clause d'arbitrage qui laisse le libre choix au consommateur.

Par contre, nous déplorons certaines lacunes à ce programme. La pratique et les expériences passées ont démontré que les délais de résolution des conflits excédaient facilement les 70 jours et que le consommateur voyait son dossier prendre facilement plusieurs mois avant d'en connaître son dénouement. Les audiences se passent à huis-clos et les décisions ne sont pas publiques, elles ne peuvent donc pas servir de précédents en la matière. Le PAVAC permet ainsi aux commerçants d'éviter d'avoir à divulguer à l'ensemble de la population une problématique générale qui pourrait toucher un grand nombre de consommateur et ainsi donner ouverture à un recours collectif. Nous croyions que tous processus d'arbitrage qui restreint l'accès aux tribunaux civils,

en amont ou en aval du processus décisionnel, est considéré défavorable pour le consommateur.

3.2 Le programme de garantie des bâtiments résidentiels neufs

3.2.1 Législation et doctrine applicable au programme de garantie des bâtiments résidentiels neufs

Au Québec, lorsque nous invoquons les règles sur la construction d'un bâtiment, nous nous référons le plus souvent à la *Loi sur le Bâtiment*[208] ainsi qu'au *Code civil du Québec*.[209] Ces règles encadrent le contrat de construction de la bâtisse. Un contrat de construction est également à la base de l'érection de la majorité des immeubles résidentiels du Québec. En effet, à moins que le particulier effectue la totalité des travaux lui-même, il retiendra les services d'un entrepreneur en construction qui lui fera appel à l'expertise de sous-contractants et de fournisseurs en matériaux de construction. La *Loi sur le bâtiment* oblige les entrepreneurs en construction à détenir une licence valide et à adhérer à un plan qui garantit l'exécution de leurs obligations légales et contractuelles pour la vente ou la construction d'un bâtiment résidentiel. C'est pourquoi le gouvernement québécois a adopté en 1998 le *Règlement sur le plan de garantie des bâtiments résidentiels neufs* [210] . Ce règlement est très important, il assure au consommateur la qualité des travaux de construction du bâtiment qu'il fait construire. Il impose des normes minimales à tout entrepreneur en construction. Il vient dans les fait rajouter aux règles plus générales du Code civil du Québec en la matière.

Il est important de souligner que «seuls sont couverts par la garantie les bâtiments dont les travaux de construction n'ont pas débuté avant le 30 août 2001 et pour lesquels aucun contrat préliminaire ou d'entreprise n'a été signée avant cette date. (D. 920-2001, a.5.)»

Comme tout règlement ou loi, il est primordial d'en connaître sa portée. L'article 2 du *Règlement sur le plan de garantie des bâtiments résidentiels neufs* définit le champ d'application du règlement. On retrouve au chapitre II le contenu de la garantie, la couverture, les exclusions de la garantie, les limites de la garantie, le mécanisme de mise en œuvre de la garantie et finalement les recours.

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[208] Loi sur le bâtiment, L.R.Q., c. B-1.1

[209] Code civil du Québec

[210] Règlement sur le plan de garantie des bâtiments résidentiels neufs, c. B-1.1, r. 0. 2

L’article 5 du règlement n’est pas sans intérêt. Il édicte que toute disposition d’un plan de garantie qui est inconciliable avec le présent règlement est nulle. Cette disposition a des répercussions directes pour le consommateur et l’entrepreneur général ; aucune clause contractuelle, même négociée entre les parties sera déclaré nulle et non avenue si elle n’est pas conforme au présent règlement. Cette disposition couvre les clauses illisibles ou incompréhensibles (article 1436 C.c.Q.), les clauses que les consommateurs ne connaissaient pas et qui n’ont jamais été porté à son attention (1435 C.c.Q.) ainsi que les clauses jugées abusives (1437 C.c.Q.)

Comme pour tout contrat, plusieurs parties (au moins deux) sont signataires de l’entente. Cette entente a été parfois négociée ou, lors d’un contrat d’adhésion, a été soumise à l’autre pour signature. Évidemment, si le contrat se déroule entièrement à la satisfaction des parties, tout va pour le mieux mais qu’en est-il lorsqu’un conflit survient en pleine exécution du contrat ? Quel est le mécanisme de mise en œuvre de la garantie?

En vertu de l’article 17 du règlement, chaque bâtiment visé par le plan de garantie a fait l’objet d’une inspection avant la réception de la bâtisse par le bénéficiaire.

Dépendamment si le litige concerne des bâtiments détenus en copropriété divise ou si le litige concerne des bâtiments non détenus en copropriété divise, certaines sections du Règlement vont s’appliquer relativement à la procédure d’arbitrage.

La procédure suivante s’applique à toute réclamation faite en vertu du plan de garantie.[211]

> 1° dans le délai de garantie d'un, 3 ou 5 ans selon le cas, le bénéficiaire dénonce par écrit à l'entrepreneur le défaut de construction constaté et transmet une copie de cette dénonciation à l'administrateur en vue d'interrompre la prescription;
>
> 2° au moins 15 jours après l'expédition de la dénonciation, le bénéficiaire avise par écrit l'administrateur s'il est insatisfait de l'intervention de l'entrepreneur ou si celui-ci n'est pas intervenu; il doit verser à l'administrateur des frais de 100 $ pour l'ouverture du dossier et ces frais ne lui sont remboursés que si la décision rendue lui est

[211] Règlement sur le plan de garantie des bâtiments résidentiels neufs, c. B-1.1, r. 0. 2, article 18 pour la garantie relative aux bâtiments non détenus en copropriété divise et article 34 pour la garantie relative aux bâtiments détenus en copropriété divise.

favorable, en tout ou en partie, ou que si une entente intervient entre les parties impliquées;

3° dans les 15 jours de la réception de l'avis prévu au paragraphe 2º, l'administrateur demande à l'entrepreneur d'intervenir dans le dossier et de l'informer, dans les 15 jours qui suivent, des mesures qu'il entend prendre pour remédier à la situation dénoncée par le bénéficiaire;

4° dans les 15 jours qui suivent l'expiration du délai accordé à l'entrepreneur en vertu du paragraphe 3º, l'administrateur doit procéder sur place à une inspection;

5° dans les 20 jours qui suivent l'inspection, l'administrateur doit produire un rapport écrit et détaillé constatant le règlement du dossier ou l'absence de règlement et il en transmet copie, par poste recommandée aux parties impliquées;

6° en l'absence de règlement, l'administrateur statue sur la demande de réclamation et, le cas échéant, il ordonne à l'entrepreneur de rembourser le bénéficiaire pour les réparations conservatoires nécessaires et urgentes, de parachever ou de corriger les travaux dans le délai qu'il indique et qui est convenu avec le bénéficiaire;

7° à défaut par l'entrepreneur de rembourser le bénéficiaire, de parachever ou de corriger les travaux et en l'absence de recours à la médiation ou de contestation en arbitrage de la décision de l'administrateur par l'une des parties, l'administrateur fait le remboursement ou prend en charge le parachèvement ou les corrections dans le délai convenu avec le bénéficiaire et procède notamment, le cas échéant, à la préparation d'un devis correctif, à un appel d'offres, au choix des entrepreneurs et à la surveillance des travaux.

Si le bénéficiaire ou l’entrepreneur est insatisfait de la décision rendue par l’administrateur, ils peuvent soumettrent leur différend à un arbitre dans les 15 jours de la réception par poste recommandée de la décision de l’administrateur à moins que les deux parties ne conviennent d’aller en médiation. Si la médiation échoue, les parties peuvent encore soumettre le différend en arbitrage. Cette fois, le délai est de 15 jours à

compter de la réception par la poste recommandée de l'avis du médiateur constatant l'échec total ou partiel de la médiation.[212]

L'entrepreneur en construction, le bénéficiaire de la garantie ainsi que l'administrateur qui a rendu sa décision sont liés par la décision de l'arbitre. Cette décision est finale et sans appel.[213]

Nous croyions que le mécanisme d'arbitrage obligatoire dans ce programme de garantie des bâtiments neufs est fort contestable. Compte tenu du fait que le plan de garantie ne couvre pas l'ensemble des obligations auxquelles l'entrepreneur est tenu, le consommateur pourrait donc se retrouver dans une situation où il devra tout de même exercer un recours contre l'entrepreneur devant un tribunal de droit commun pour faire valoir l'entièreté de ses droits, ce qui implique deux instances décisionnelles. Sans ce processus obligatoire, le consommateur pourrait s'adresser uniquement aux tribunaux civils pour régler le litige. La compétence des arbitres est également souvent mis en doute, tant du point de vue technique que légal. Un contrôle continue des arbitres devrait être assuré, les audiences devant les arbitres devraient être publiques par souci de transparence de tout le processus.

3.2.3 Jurisprudence applicable au programme de garantie des bâtiments résidentiels neufs

Dans l'arrêt Marie-Claude Poulin et Normand St-Hilaire c. Maisons Modules Beauport Inc. et La Garantie Habitation du Québec Inc[214] les demandeurs ont conclu avec la Garantie habitation du Québec un contrat d'entreprise et de garantie. Ce contrat, conforme au plan de garantie des bâtiments neufs, comportait une clause compromissoire parfaite qui prévoyait que «*le bénéficiaire ou l'entrepreneur, insatisfait d'une décision de l'administrateur, doit, pour que la garantie s'applique, soumettre le différend à l'arbitrage…».* Les défenderesses Maisons Modules Beauport Inc. et La Garantie Habitation du Québec Inc conteste l'action Madame Poulin et de M. St-Hilaire devant les tribunaux civils aux motifs que ces derniers tentent d'obtenir sans droit une indemnité de la part des tribunaux civils contre eux alors que des mécanismes spécifiques et exclusifs sont prévus au contrat que les parties ont signées soit:

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[212] Règlement sur le plan de garantie des bâtiments résidentiels neufs, c. B-1.1, r. 0. 2, article 19 pour la garantie relative aux bâtiments non détenus en copropriété divise et article 35 pour la garantie relative aux bâtiments détenus en copropriété divise.

[213] Règlement sur le plan de garantie des bâtiments résidentiels neufs, c. B-1.1, r. 0. 2, article 20 pour la garantie relative aux bâtiments non détenus en copropriété divise et article 36 pour la garantie relative aux bâtiments détenus en copropriété divise.

[214] Poulin c. Maisons Modules Beauport Inc. J.E. 2003-735 (C.Q.)

l'arbitrage. Plus précisément, c'est l'existence et la validité de la clause compromissoire parfaite du *Code civil du Québec* (article 2638) qui est étudié en l'espèce.

Le juge Michel Simard se penchant sur la validité d'une telle clause cite l'affaire Zodiak de la Cour Suprême.[215]

«La clause compromissoire parfaite, qualifiée tour à tour de réelle, formelle, complète, véritable est celle par laquelle les parties s'obligent à l'avance à soumettre à l'arbitrage les litiges qui pourraient naître relativement à leur contrat et qui comporte que la sentence rendue sera finale et liera les parties.

Elle se distingue notamment d'une clause qui serait purement facultative. Elle se distingue aussi dite préjudicielle ou d'arbitrage préalable qui oblige les parties à soumettre leur dispute à l'arbitrage, mais qui n'exclut pas le recours aux tribunaux de droit commun une fois que l'arbitrage a eu lieu.»

Quant à la forme et à la nature d'une telle clause, la Cour poursuit en disant:[216]

« Le Code de procédure ne renferme aucune disposition quant à la forme de la clause compromissoire. Il suffit qu'elle réunisse les éléments essentiels, à savoir que les parties se soient obligées à passer compromis et que la sentence arbitrale soit finale et lie les parties.»

Le juge Simard après étude des faits, de la jurisprudence et de la doctrine en vient donc à la conclusion qu'il est en présence d'une clause compromissoire parfaite, reconnue en droit québécois et que, part le fait même la clause d'arbitrage du contrat de garantie entre Mme Poulin, M. St-Hilaire et La Garantie du Québec inc. est tout à fait valide et légale. Il retourne les parties devant l'arbitre compétent.

Cette cause a été citée quelques mois plus tard dans l'arrêt Milzi c. Construction André Taillon Inc.[217] Le juge Pierre E. Audet de la Cour du Québec, chambre civile ne remet pas en cause lui non plus la validité de la clause compromissoire en droit québécois.

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[215] Zodiak International Productions Inc. c. Polish People's Republic, (1983) 1 R.C.S. 529

[216] idem p.21

[217] Roberto Milzi et Carole Dorion c. Construction André Taillon inc. Cour du Québec, 540-22-007757-031

3.3 Les clauses d'arbitrage en matière d'assurance automobile

Au Québec, l'assurance automobile est obligatoire. En effet, la *Loi sur l'assurance automobile*[218] oblige tout propriétaire d'un véhicule à souscrire auprès d'un assureur privé, une assurance en responsabilité civile d'au moins 50 000 $. Il couvre tout dommage que vous pourriez causer aux biens d'autrui lors d'un accident survenu au Québec. De même, cette protection couvre les dommages matériels et corporels causés à des tiers lors d'accidents qui surviennent ailleurs au Canada ou aux États-Unis.

Ce contrat d'assurance se retrouve sous la forme d'un contrat standard. Ce contrat est autorisé par l'Inspecteur général des institutions financières qui est maintenant sous l'égide de l'Autorité des marchés financiers depuis le début de l'année 2004.

Le contrat prévoit une procédure d'arbitrage obligatoire en cas de contestation portant sur la nature, l'étendue ou le montant des dommages ou sur la suffisance du remplacement ou de la réparation, et indépendamment, de tout litige mettant en cause la validité du contrat.

La procédure d'arbitrage est bien établie et doit respecter les formalités et les délais prescrits à l'article 13 de la section «Dispositions générales» de la Formule standard des propriétaires F.P.Q.:[219]

«Chaque partie nomme un expert et les deux experts ainsi nommés s'adjoignent un arbitre désintéressé. Dès lors, les deux experts opèrent en commun pour l'estimation des dommages - établissant séparément la valeur vénale et les dommages – ou l'appréciation de la suffisance des réparations ou du remplacement; le cas échéant, ils soumettent leurs différends à l'arbitre.

Faute par l'une des parties de nommer son expert dans les sept jours francs du moment où l'avis écrit de la partie adverse lui est parvenu ou par les experts de s'entendre sur le choix de l'arbitre dans les quinze jours de leur nomination, ou en cas de refus ou d'indisponibilité d'un expert ou de l'arbitre, la vacance ainsi créée doit être comblée, sur requête d'une des parties, par un tribunal ayant compétence à l'endroit de l'arbitrage.

La sentence arbitrale doit être rédigée à la majorité des voix. Quant au reste, la procédure prévue aux articles 940 à 951.2 du *Code de procédure civile du Québec* s'applique compte tenu des adaptations nécessaires. Chaque partie supporte les frais et honoraires de son expert et la moitié des frais et honoraires de l'arbitrage.» On remarque que les coûts pour la procédure d'arbitrage sont plus élevés que les coûts que le consommateur doit débourser pour faire une demande à la Cour du Québec, division

[218] LRQ. A-25

[219] Nous pouvons retrouver le contrat standard à l'adresse suivante : http://www.trousseassurance.ca/docpdf/FPQno1.pdf

des Petites Créances. De plus, si le consommateur gagne son recours devant les tribunaux civils, il récupérera les frais extra judiciaires, notamment les frais d'ouverture de dossier.

Cette procédure peut sembler à prime abord claire et sans possibilité d'interprétation, il en est autrement de la réalité. Selon l'association Contre-Expertise en Sinistre Automobile du Québec Inc., la réalité est tout autre. Cette association dénonce le fait que les procédures entourant l'arbitrage se déroulent de façon tout à fait différente et qu'elles varient d'un dossier à un autre. Il n'y a pas d'uniformité dans le traitement des demandes. L'association souligne l'exemple d'un assuré qui a vu son dossier prendre 9 mois avant d'être entendu par l'arbitre. Le véhicule de l'assuré a passé au feu (le 14 août 1996) et l'audition devant l'arbitre a été reportée au 25 avril 1997…et on ne dit le moment la décision a été rendue.

Il serait primordial, compte tenu du processus obligatoire de la procédure arbitrale dans les cas ci-haut mentionnés, que les règles régissant cette démarche soit rigoureusement suivie.

Nous avons remarqué dans les bases électroniques de jurisprudence que plusieurs consommateurs portent leur différend qu'ils ont avec leur assureur automobile devant la Cour du Québec, divisions des petites créances malgré la procédure d'arbitrage obligatoire. Cette procédure ne semble même pas être soulevée en plaidoirie ni par les parties, ni par le juge. Est-ce par ignorance ou parce que toutes les parties préfèrent une audition devant les tribunaux civils au lieu de la procédure d'arbitrage qui ne semble pas être efficace?

4. Les clauses d'arbitrage et l'accès à la justice

4.1 Les clauses d'arbitrage et le recours collectif

La procédure du recours collectif existe au Québec depuis 1979, en Ontario depuis 1992, en Colombie-Britannique depuis 1995, en Saskatchewan depuis 2001 et depuis 2002 au Manitoba et à Terre-Neuve. Des règles sur le recours collectif existent aussi en Cour fédérale du Canada.

Le recours collectif est une procédure qui permet d'accroître l'accès à la justice pour le simple citoyen. On note ces dernières années une progression du nombre de recours collectifs exercés dans le domaine de la consommation. Entre 1993 et 2000, 49 % des

demandes d'autorisation entrent dans le champ de la consommation.[220] Il s'agit sans contredit d'une procédure de plus en plus utilisée et qui a fait ses preuves.

Le recours collectif joue un rôle préventif. Le simple fait que les citoyens aient à leur disposition cet outil efficace et puissant pour faire valoir leur droit encourage certainement des entreprises à agir avec équité dans le cadre de leur relation avec leur clientèle. Par exemple, dans le domaine des voyages, les recours collectif ont amélioré la qualité des services. Auparavant, les clients insatisfaits des services des agents de voyage devaient s'adresser à la cour des petites créances. Les recours collectifs ont permis d'élaborer une jurisprudence pour clarifier les règles de responsabilité. Les entreprises sont donc plus prudentes lorsqu'elles établissent de nouveaux contrats avec les consommateurs ou lorsqu'elles élaborent des politiques. Certaines entreprises demandent aussi l'avis des avocats spécialisés en recours collectif avant de modifier leur contrat ou avant d'élaborer de nouvelles pratiques commerciales. Les recours collectifs ont donc un effet dissuasif.

Dans un contexte de mondialisation des marchés, il est fréquent de rencontrer de rencontrer ce qu'on appelle des préjudices collectifs. En guise d'exemple, prenons la mise en marché d'un produit qui s'avère dangereux pour la santé, la production massive de biens qui donnent lieu à des défauts de fabrication, le non-respect de certaines dispositions de la *Loi sur la protection du consommateur*, etc. C'est essentiellement par la voie d'un recours collectif qu'on peut espérer réparer les préjudices causés aux consommateurs dans ce genre de situation.

Le recours collectif est donc une procédure efficace qui joue un rôle curatif très important. Une seule décision favorable permet d'indemniser des milliers de personnes qui autrement n'auraient pas obtenu justice.

Le recours collectif joue aussi un rôle social important et peut pallier jusque dans certaines mesure, au désengagement de l'état dans la défense des droits des consommateurs. Le recours collectif permet donc de rééquilibrer les forces en présence sur le marché.

4.2 Le libre choix des recours

L'arbitrage, la cour des petites créances et les recours collectifs sont des procédures qui existent pour régler des différends entre les consommateurs et les commerçants. Le consommateur devrait toujours avoir le choix du véhicule procédurale qu'il utilise pour

[220] Pierre-Claude Lafond, *Le recours collectif québécois des années 2000 et les consommateurs :deux poids, quatre mesures*, Développements récents sur le recours collectif, Barreau du Québec, Éd. Yvon Blais, Cowansville, 2001. p.41

tenter de solutionner son problème. Ces différentes procédures doivent co-existées et être considérées comme des alternatives et non être imposée par le commerçant.

Le fait d'imposer l'arbitrage aux consommateurs et d'interdire ainsi le recours collectif diminue l'accès à la justice dans les causes où il y a une multitude de demandeurs. Les consommateurs ne doivent donc pas être privé d'un recours efficace.

Une clause d'arbitrage obligerait un traitement individuel des plaintes. « Il est peu rentable et inefficace, non seulement pour les personnes en cause mais aussi pour le système de justice civile, d'exiger que des personnes intentent des actions individuelles pour obtenir réparation de comportement ou de faits qui ont eu une incidence sur bon nombre de victimes de la même manière ou de manière semblable[221] ». Le même raisonnement peut s'appliquer au recours obligatoire à l'arbitrage.

4.3. Les contraintes économiques

Les entreprises, tels les institutions financières, les compagnies d'assurance ou de télécommunications peuvent facilement absorber les coûts des procédures judiciaires mais le consommateur qui a une réclamation, doit réfléchir longtemps avant d'entreprendre des procédures vus la complexité et les coûts s'y rattachent. Les contraintes économiques constituent souvent une des principales barrières à l'accès à la justice.

De plus, il est fréquent dans le domaine de la consommation que les litiges portent sur une somme modeste. Dans ces circonstances, seul le recours collectif peut donner la chance aux consommateurs de récupérer leur dû puisqu'ils n'y ont pas de frais à débourser pour faire valoir leurs droits. Un recours individuel via l'arbitrage ou la cour des petites créances s'avère beaucoup trop onéreux pour obtenir finalement le remboursement d'une petite somme d'argent.

À titre d'exemple, en 1997 Option consommateurs a déposé une requête en autorisation d'exercer un recours collectif contre GE Capital. Cette requête concernait les frais de retard imposés sur les cartes de crédits de certains détaillants tels, Future Shop et Esso. Les clients de GE Capital qui n'acquittaient pas le paiement mensuel demandé sur leur carte de crédit n'auraient pas dû payer de tel frais de retard autres que l'intérêt prévu au contrat. Une entente est intervenue entre Option consommateurs et GE Capital pour rembourser les consommateurs ayant payé des frais de retard. En tout, plus de 1,1 millions de dollars à été versé à 23 000 consommateurs. Chacun a reçu une somme variant entre 15 $ et 57 $.

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[221] Margaret A. SHONE, *Accéder plus facilement aux tribunaux grâce aux recours collectifs : l'évolution canadienne*, Forum canadien sur la justice civile, Bulletins no.4, printemps 2002, http://www.cfcj-fcjc.org/fr/issue_4/n4-fac_access-f.htm

Un autre exemple, en 1999, Option consommateurs a conclu une entente avec Vidéotron pour régler un recours collectif. Cette entreprise de télécommunications avait modifié unilatéralement les contrats d'abonnement au câble. Pour conserver les services pour lesquels les consommateurs avaient déjà payé, ceux-ci devaient alors débourser un supplément. Vidéotron a accepté de verser un somme de 450 000 $ ce qui a permis à 73 000 consommateurs de recevoir un dédommagement d'environ 4 $.

De tels règlements, n'auraient pu être obtenus si les contrats avaient prévus une clause d'arbitrage obligatoire excluant expressément le recours collectif. De plus, dans les dossiers mentionnés ci-dessus, l'arbitrage s'avère inefficace pour des montants modestes. Sans l'existence de ces recours collectifs, les consommateurs n'auraient donc pu recevoir quelconque dédommagement. En imposant l'arbitrage, le déséquilibre entre les consommateurs et les commerçants ne fait qu'augmenter.

Conclusion

Le recours à l'arbitrage ne doit pas brimer les droits des consommateurs. Une clause contractuelle qui exclue expressément le recours collectif et oblige les consommateurs à avoir recours à l'arbitrage plutôt que les tribunaux civils devrait être invalidée.

Pour éviter qu'on retrouve dans les contrats de consommation des clauses d'arbitrage obligatoire, une interdiction législative devrait exister. Ces dispositions législatives pourraient en premier lieu être adoptées dans le cadre de la *Loi sur la Protection du consommateur* qui a une portée législative plus restreintes et ensuite dans un champ d'application plus large comme dans le *Code de procédure civile.*

Nous avons aucun problème à ce qu'un consommateur ait recours à l'arbitrage pour régler son litige mais celui-ci doit avoir le choix des recours qui s'offre à lui pour éviter qu'il subisse un préjudice. Si l'arbitrage est obligatoire, l'accès à la justice diminue pour les consommateurs.

Nous sommes en faveur des différents modes alternatifs de règlement des litiges à condition que ceux-ci ne soient pas onéreux, complexes, éloignés ou que le droit applicable ne soit pas celui du lieu de résidence du consommateur. De plus, les modes alternatifs de règlement des litiges tel que l'arbitrage possède certains avantages mais ils doivent constituer une alternative et non une obligation imposée aux consommateurs.