

UNIFORMITY AND DIVERSITY IN THE ENFORCEMENT OF ARBITRATION CLAUSES IN CANADA

UNIFORMIDAD Y DIVERSIDAD EN LA EJECUCIÓN DE LAS CLÁUSULAS ARBITRALES EN CANADÁ

Geneviève Saumier*
McGill University

El arbitraje se encuentra bien establecido en Canadá. Todas las jurisdicciones han implementado la Convención de Nueva York de 1958, la Ley Modelo de la CNUDMI sobre Arbitraje Comercial y legislación equivalente para el arbitraje doméstico. Este marco legal generalmente favorable al arbitraje se encuentra frecuentemente reñido con el acceso a la justicia para los consumidores. A consecuencia de ello, múltiples jurisdicciones en Canadá han adoptado legislación para asegurar a los consumidores el acceso a las cortes locales, incluso a través de las acciones de clase, a pesar de la inclusión de cláusulas arbitrales en sus contratos. La división constitucional de poderes en Canadá permite a cada provincia adoptar su propia política, lo que genera una diversidad en el cumplimiento que tienen las cláusulas arbitrales de los contratos comerciales a lo largo de todo el país.

En este artículo, la autora examina la tensión entre el apoyo generalizado al arbitraje y el tratamiento diferenciado que recibe el arbitraje de consumo en Canadá. Con dicho fin, la autora examina la legislación pertinente en diversas provincias (incluyendo Quebec y Ontario) así como la reciente jurisprudencia de la Corte Suprema de Canadá (Dell Computer (2007), Telus (2011) y Wellman (2019)). La sentencia de 2020 de la Corte Suprema de Canadá en el caso Uber puede significar una nueva apertura a extender la protección a otras partes contractuales tales como los empleados.

PALABRAS CLAVE: *Cláusula arbitral; protección al consumidor; ejecución; contratos de adhesión; legislación; jurisprudencia.*

Arbitration is well established in Canada. All jurisdictions have implemented the 1958 New York Convention, the UNCITRAL Model Law on Arbitration and equivalent legislation for domestic arbitration. This generally supportive legal landscape for arbitration is often at odds with access to justice for consumers. As a result, several jurisdictions in Canada have adopted legislation to guarantee consumers' access to local courts, including through class actions, notwithstanding the inclusion of arbitration clauses in their contracts. The constitutional division of powers in Canada entitles each province to adopt its own policy, leading to diversity across the country with regard to the enforceability of arbitration clauses in consumer contracts.

In this paper, the author examines the tension between general support for arbitration and differentiated treatment of consumer arbitration in Canada. To that end, the author examines relevant legislation in several provinces (including Quebec and Ontario) as well as recent jurisprudence from the Supreme Court of Canada (Dell Computer (2007), Telus (2011) and Wellman (2019)). The 2020 decision from the Supreme Court of Canada in Uber may signal a new openness toward extending protection to other vulnerable contracting parties such as employees.

KEYWORDS: *Arbitration clause; consumer protection; enforceability; adhesion contracts; legislation; jurisprudence.*

* Professor. B.Com., B.C.L., LL.B., McGill University; Ph.D. (Law), University of Cambridge. Peter M. Laing Q.C. Chair in Law at the Faculty of Law of McGill University (Montreal, Canada). Former Associate Dean at the Faculty of Law of McGill University. Member of the International Academy of Comparative Law and of the American Association of Private International Law. Contact: genevieve.saumier@mcgill.ca.

Editor's note: This paper was received by the Editorial Board of THÉMIS-Revista de Derecho on 9 March, 2020 and accepted by the same on 5 July, 2020.

I. INTRODUCTION

In 1986, Canada ratified the New York Convention on the Enforcement of Foreign Arbitral Awards. This was accompanied by widespread legislative modernization of arbitration along the lines of the UNCITRAL Model Law on International Commercial Arbitration, adopted by United Nations Commission on International Trade Law on 21st June 1985, with effect on both international and domestic arbitration throughout the country. This legislative policy in favour of arbitration forced reluctant Canadian courts to reverse their previous rejection of parties' ability to exclude the jurisdiction of state courts.¹ This ushered in a new approach to arbitration, focussed on supporting party autonomy in the selection of private means of dispute resolution.

In the same period, the number of class actions rose throughout the country. This promised greater access to justice along with judicial economy and expected deterrence of wrongful behaviour.² However, fast-forwarding to 2020, the potential tension between these two policies has become evident. The initial wholesale endorsement of arbitration has been challenged by legislatures and courts, largely on the basis of its impediment to access to justice through class actions, particularly in cases involving consumer claims. This article will canvass these areas of friction within Canadian law and jurisprudence.

This paper begins with a brief overview of the legislative context for arbitration in Canada, followed by an examination of the interaction between arbitration and class actions. The particular case of consumer class actions will illustrate the diversity in approaches across the country. Beyond the consumer context, there is less predictability, in the absence of specific legislative rules, as will be examined in the final section. That section will include a brief discussion of the very recent judgment from the Supreme Court of Canada in *Uber Technologies v. Heller*, which may signal a shift in that court's traditionally pro-arbitration view.

II. THE LEGISLATIVE CONTEXT FOR ARBITRATION IN CANADA

Canada is a federal state whose constitutional division of powers between the central and provincial governments puts legislative competence over civil justice, including procedure and dispute resolution, within the purview of the provinces.³ As a result, there is no single uniform arbitration law across the country. Instead, there is separate legislation in each province, constrained only with regard to Canada's international obligations under the New York Convention. Although the New York Convention ensures a uniform approach to the enforcement of arbitration agreements and foreign arbitral awards, it leaves room for distinct implementation, especially as regards the definition of arbitrable disputes and the assessment of the validity of an arbitration clause.

Each province in Canada typically has separate legislation dealing with domestic and international arbitration.⁴ The most relevant aspect of that legislation for the purposes of this article concerns the court's role in enforcing arbitration clauses. With regard to international arbitration, the role of the court is generally stated in terms identical or similar to those provided in Article 8 of the Model Law, according to which a court "shall [...] refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed" (UNCITRAL, 2006).⁵ In relation to domestic arbitration, however, the statutory language is often quite distinct, although the underlying principle is similar. For example, the Ontario legislation states the following:

Section 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.

¹ See Brierley (1988) and, more recently, Bachand and Gélinas (2014).

² See generally Piché and Saumier (2018).

³ Moreover, unlike in the United States, the Canadian judicial system does not include federal courts with general jurisdiction over transborder cases and there is thus no equivalent to the US Federal Arbitration Act that takes precedence over state legislation.

⁴ See generally Casey (2017).

⁵ In all provinces in Canada except Quebec, the legislation on international arbitration incorporates the Model Law by reference. In Quebec, the relevant provisions are included in the Code of Civil Procedure (art. 649 and ff). For Ontario, see the International Commercial Arbitration Act (2017). All of the references to court judgments and legislation in Canada are accessible free online at canlii.org.

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

[...]

(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,

- (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
- (b) it is reasonable to separate the matters dealt with in the agreement from the other matters (Ontario Arbitration Act, 1991).

Whether under international or domestic arbitration legislation, none of the provincial statutes in Canada provides for exceptions with respect to claims brought as class actions. As a result, plaintiffs seeking to avoid arbitration clauses in order to proceed with a class action in court have two options. They can invoke one of the general exceptions to enforcement provided for in the arbitration statute or they can search for an exception to the enforcement of the arbitration clause outside the arbitration legislation framework. Both of these approaches have been attempted in various courts across the country.

III. THE INTERACTION BETWEEN ARBITRATION AND CLASS ACTIONS

Class actions have been available in Canada for several decades but the clash with arbitration only

began in earnest in the early twenty first century.⁶ It was essentially the result of an emerging business practice of including mandatory arbitration clauses in contracts, later followed by the addition of class action waivers.⁷ This trend originated in the United States, fuelled by supportive U.S. Supreme Court jurisprudence.⁸ Even where state legislators attempted to counter this practice through legislation protecting access to courts, the U.S. Supreme Court largely invalidated these attempts based on its interpretation of the federal arbitration legislation as pre-empting inconsistent state legislation.⁹ Although, as explained above, the legislative context in Canada is quite distinct, until the last fifteen years, there were no existing impediments preventing the importation of the U.S. business practice into Canada. As discussed in the upcoming section III.A of this article, the situation changed in the consumer law context. The subsequent section III.B will examine the issue outside the consumer context.

A. The Particular Context of Consumer Claims

One of the early landmark decisions arose in 2002 in Ontario. The case dealt with proceedings to bring a class action instituted by consumers against Rogers Cable, a telecom company, who objected based on the dispute resolution clause in the contract. The clause read as follows:

Arbitration. Any claim, dispute or controversy (whether in contract or tort, pursuant to statute or regulation, or otherwise, and whether pre-existing, present or future) arising out of or relating to: (a) this Agreement; (b) Rogers@Home; (c) oral or written statements, advertisements or promotions relating to this Agreement or to Rogers@Home or (d) the relationships which result from this Agreement (including relationships with third parties who are not signatories to this Agreement) (collectively the "Claim"), 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 (*Kanitz v. Rogers Cable Inc.*, 2002, pp. 302-303).

⁶ See generally Piché and Saumier (2018). As with arbitration, each province has its own legislation regarding class actions. Although there is significant uniformity, there are divergences between the statutes, none of which are essential to the discussion here.

⁷ See generally Saumier (2009). See also Pavlovic (2016) and McGill (2014).

⁸ See Eisenberg *et al.* (2008).

⁹ For a comprehensive review of the jurisprudence see Stone (2017).

In the action, the plaintiff had sought to avoid the arbitration clause using the two types of arguments mentioned in the previous section. First, the plaintiff argued that the arbitration clause was invalid because it was unconscionable. Although admitting that there was inequality of bargaining power between the parties and that the contract was one of adhesion, the Court rejected this argument.¹⁰ In its reasons, the Court stated that there was no evidence that the inclusion of the arbitration clause and class action waiver in the contract was “improvident” for the consumers or that it had been included to take advantage of them. Second, the plaintiff argued that the policy behind the class actions legislation supported non-enforcement of the arbitration clause. This too was rejected by the Court, holding that nothing in the class actions statute gave it precedence over arbitration and that while the legislature was free to make that determination, it had not done so (*Kanitz v. Rogers Cable Inc.*, 2002, para. 52). In the end, the Court held that the clause was enforceable, pursuant to article 7 of the Ontario arbitration legislation cited above (para. 33). This had the effect of denying access to any court process, whether on an individual or a collective basis.

During the same year, the Ontario Government was in the process of amending its consumer protection legislation in order to deal with arbitration and class action waivers in consumer contracts. In this document, two separate provisions were adopted, as follows:¹¹

Section 7:

(1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.

(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.

(3) Despite subsections (1) and (2), after a dispute over which a consumer may commence

an action in the Superior Court of Justice arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law.

[...]

(5) Subsection 7 (1) of the Arbitration Act, 1991 does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.

Section 8:

(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.

[...]

(4) Subsection 7 (1) of the Arbitration Act, 1991 does not apply in respect of any proceeding to which subsection (1) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration (Ontario Consumer Protection Act, 2002).

These amendments sought to secure access to courts for consumers bringing claims under the Ontario consumer protection legislation, whether individually or collectively. It achieves this result in two ways. First, Section 7 provides that a pre-dispute mandatory arbitration clause in a consumer contract will not be enforceable in court. Second, Section 8 specifies that the same result accrues when the action is brought as a class action. It is arguable that the result in Section 8 is implicit in Section 7 since if the arbitration clause is not enforceable, this will be effective regardless of the way the claim is brought to court. However, given that consumer contracts had begun to include not only arbitration clauses but also class action

¹⁰ The Court defined the test for unconscionability as follows, at paragraph 37:

Three elements can be discerned as being required for a finding of unconscionability. First, there must be an inequality of bargaining power. Second, there must be some taking advantage of, or preying upon, the weaker party by the stronger party. Third, there must be a resulting improvident agreement. It is not sufficient to simply show that one party extracted a better deal than the other (*Kanitz v. Rogers Cable Inc.*, 2002).

¹¹ These amendments came into force in 2005.

waivers,¹² the legislature chose to address both explicitly. The specific exemption from the application of Subsection 7(1) of the Arbitration Act spells out a clear legislative policy in favour of class actions over arbitration.

As a result of this legislative intervention, defendants will not succeed in avoiding statutory consumer claims brought before Ontario courts, whether individually or collectively, notwithstanding the inclusion of arbitration clauses or class action waivers in the relevant contracts. However, by choosing to modify only the consumer protection legislation, the Ontario legislature has left intact the jurisprudential priority given to arbitration absent any specific protection for class actions in other fields.

That jurisprudential priority was affirmed in 2007 by the Supreme Court of Canada.¹³ In the *Dell Computer Corp. v. Union des consommateurs* case, the Supreme Court confirmed that pre-dispute mandatory arbitration clauses in consumer contracts are valid and enforceable, even against a class action, unless specific legislation provides otherwise. Moreover, the Supreme Court held that the validity of the clause is a question for the arbitrator and not the court to determine unless it involves a pure question of law (*Dell Computer Corp. v. Union des consommateurs*, 2007, para. 84).¹⁴

The appeal was from a case brought before a Quebec court. At the time the initial claim in the *Dell Computer Corp. v. Union des consommateurs* case was filed in 2003, Quebec legislation did not specifically deal with the interaction between arbitration and class actions. Quebec private international law does, however, grant Quebec consumers (and employees) access to domestic courts in trans-border cases, specifically declaring that any waiver of that jurisdiction is not binding on consumers (or employees) (Civil Code of Quebec, 1991, art. 3149). This is understood to apply to both choice of court clauses and arbitration clauses. However,

it only applies to cases involving a relevant foreign element, which the Supreme Court found not to be applicable in the *Dell Computer* case since the arbitration clause allowed for arbitration in Quebec.¹⁵

While the *Dell Computer* case made its way up to the Supreme Court of Canada, the Quebec legislature introduced an amendment to its consumer protection legislation in 2006. This included the following single provision to cover both arbitration and class actions in relation to consumer claims:

11.1. Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.

If a dispute arises after a contract has been entered into, the consumer may then agree to refer the dispute to arbitration (Quebec Consumer Protection Act, 1971).

The Supreme Court found that this new protection did not apply retroactively to the *Dell Computer* litigation (2007, paras. 111-120).¹⁶ As a result, it referred the parties to arbitration, pursuant to the rules of the Quebec law governing arbitration.¹⁷ For all later cases, however, the situation in Quebec is identical to that in Ontario: consumers are entitled to bring claims in court, whether individually or in a class action, notwithstanding the inclusion of an arbitration clause or class action waiver in their contract.

Although the *Dell Computer Corp. v. Union des consommateurs* case arose from Quebec, the Supreme Court's decision expressed general principles governing the interaction between arbitration and class actions. As a result, courts in other Canadian provinces felt compelled to follow it when interpreting their own legislation on arbitration and class actions. The result was that arbitration

¹² It is unusual for a contract to include only a class action waiver without an arbitration clause. There is only one reported case involving such a clause: *Pearce v. 4 Pillars Consulting Group Inc.* (Supreme Court of British Columbia, 2019). The Court refused to enforce the class action waiver.

¹³ The Supreme Court of Canada is a court of general jurisdiction and is the highest appellate court in the country.

¹⁴ Because the issue had been addressed in full by the parties, however, the Court decided the issue, finding that the arbitration clause was neither abusive nor against public order.

¹⁵ The clause provided for arbitration governed by the rules of the U.S. National Arbitration Forum (NAF). The Supreme Court held that this was insufficient as a foreign element to trigger the application of art. 3149 of the Civil Code of Quebec because the NAF rules allowed for arbitration to take place in Quebec. The Court omitted to consider the fact that the defendant was a foreign corporation, which would normally constitute a sufficient foreign element. For a full discussion of this aspect of the case we recommend to see Saumier (2007).

¹⁶ In essence, the Court held that the arbitration clause was a substantive right that could not be affected retroactively unless the amendment was expressly declared to apply retroactively, which it did not.

¹⁷ The relevant provision is in the Quebec Code of Civil Procedure which provides for obligatory referral to arbitration unless the arbitral clause is found to be null (2014, art. 622).

clauses were held to be effective to defeat consumer class actions in Canadian provinces other than Ontario and Quebec.¹⁸

The *Dell Computer Corp. v. Union des consommateurs* decision did not give absolute precedence to arbitration clauses in consumer class actions given the exceptions included in the arbitration legislation. In particular, it was still open to a plaintiff to argue that the clause was inoperative because the subject-matter of the claim was not arbitrable. Two decisions reflect this possibility. First, in 2011, the Supreme Court of Canada heard an appeal concerning a consumer class action against a telecom provider in British Columbia (*Seidel v. Telus Communications Inc.*, 2011). The defendant had sought to avoid the action by invoking the arbitration clause contained in the service contract. The applicable British Columbia consumer protection legislation did not contain any rule prohibiting such a clause or reserving the right to bring a class action. The legislation did include, however, a provision allowing any person, whether or not they had a personal interest, to bring an action seeking a declaration that a supplier was acting in contravention of the statute and an injunction against such contravention in the future (Business Practices and Consumer Protection Act, 2004, section 172).

The plaintiff had sought such a declaration and injunction, in addition to damages in relation to her own contract with the defendant. At the British Columbia Court of Appeal, it was held that all of the claims were to proceed to arbitration (*Seidel v. Telus Communications Inc.*, 2009). Indeed, that court considered that the *Dell Computer* decision was dispositive given the absence of any express language in the British Columbia consumer protection legislation giving precedence to court actions over arbitration. The Supreme Court of Canada granted leave to appeal and allowed the appeal in part. The Court held, first, that the damages action could not proceed in court because the arbitration clause was valid and enforceable, following its ruling in *Dell Computer* (*Seidel v. Telus Communications Inc.*, 2011, para. 7). Secondly, it refused to do the same regarding the declaratory and injunctive portion of the action, holding instead that it could proceed in the British Columbia court. Even though the statute did not expressly state that the arbi-

tration clause was inoperative in relation to that remedy, the Supreme Court engaged in statutory interpretation to determine the legislative policy regarding arbitration in relation to that particular remedy. In so doing, it concluded that the statutory remedy in question engaged a public interest rather than a private interest and that public interests could not and should not be subject to private and confidential arbitration (paras. 31-40). Furthermore, because this determination involved a pure question of law, it was appropriate for a court to decide it rather than refer it to the arbitrator (paras. 28-30). It is worth noting that the Court opened its consideration of the case with the following statement: “the Court’s job is neither to promote nor detract from private and confidential arbitration. The Court’s job is to give effect to the intent of the legislature as manifested in the provisions of its statutes” (para. 3).

The decision in *Seidel v. Telus Communications Inc.* was very limited in scope given the peculiarity of the provision of the British Columbia consumer protection legislation that was involved. However, the willingness of the Supreme Court to engage in statutory interpretation in the absence of express statutory language about arbitration suggested a more nuanced approach was possible than what *Dell Computer Corp. v. Union des consommateurs* may have suggested. This approach was endorsed by the Manitoba Court of Appeal, in a 2014 decision, where it refused to enforce an arbitration clause in a consumer class action against a payday loan company (*Briones v. National Money Mart Co.*, 2014).¹⁹ Even though the relevant Manitoba legislation was silent with regard to arbitration and class actions, the Court interpreted the statute as providing for exclusive judicial jurisdiction; the Court considered that this rendered the claim inarbitrable and refused to enforce the arbitration clause.

Since then, however, only two other provinces have amended their consumer protection legislation to declare “void and unenforceable” arbitration clauses in consumer contracts (Saskatchewan Consumer Protection and Businesses Practices Act, 2013, section 101; Alberta Consumer Protection Act, 2017, section 16).²⁰ It is worth noting that none of these provinces declare that consumer claims are inarbitrable. On the contrary, the legis-

¹⁸ For example, in British Columbia, courts had initially sought to reconcile arbitration and class action statutes through statutory interpretation. This had led to refusals to enforce arbitration clauses when these did not permit consolidation of claims when the alternative was a class action in court. After the *Dell Computer* case, the courts reversed their position and sent consumers to individual arbitration since there was no express language preserving the right to proceed in court in the provincial legislation. See *MacKinnon v. National Money Mart Company* (British Columbia Court of Appeal, 2009).

¹⁹ Leave to appeal to the Supreme Court was refused.

²⁰ There is no specific protection accorded to class actions in the Alberta legislation although this is an expected consequence of the unenforceability of arbitration clauses.

lation in all cases expressly preserves the right of consumers to choose arbitration, but this can only be done after the dispute has arisen.²¹

These four provincial statutory interventions express a clear legislative policy in favour of protecting consumers' access to courts. The explicit reference to class actions in three of these statutes reflects the importance of this procedural mechanism in consumer cases. While the four statutes maintain a consumer's option to choose arbitration, the emphasis is on bilateral consent at the time of the dispute as opposed to unilateral imposition in an adhesion contract at the time of contracting.²² In balancing the policies supporting arbitration on the one hand and access to courts, in particular by class actions, on the other, these legislatures have given clear precedence to the latter in the consumer context.

This diversity in the consumer context reveals the absence of uniformity on the underlying policy question: how the tension between arbitration and access to courts should be managed. Neither the Supreme Court of Canada nor the federal legislator has the power to impose a uniform response given provincial legislative competence over the relevant matters. In practice, this situation means that merchants operating across Canada cannot impose arbitration as a uniform dispute resolution mechanism throughout the market. This also means that consumers have different procedural rights across the country, depending on the province of Canada where they live.

Despite largely, and the limited provincial legislation noted above, the tension between class actions and arbitration continues to give rise to litigation. Plaintiffs raise the access to justice obstacle presented by individual arbitration for low-value claims and some courts are receptive to this argument, even outside the consumer context. This phenomenon will be explored in the next section of this article.

B. Beyond the Consumer Context

In 2010, the Ontario Court of Appeal allowed a class action to proceed in the case *Griffin v. Dell Canada Inc.*, notwithstanding that the contract contained an arbitration clause. While the claims from consumers were protected by the specific exception in the Ontario consumer protection legislation mentioned in the previous section of this article, the action also included claims by purchasers who were not consumers. The Court of Appeal relied on Subsection 7(5) of Ontario's arbitration legislation to refuse to separate the two groups of purchasers, even though it recognized that the arbitration clause was valid and enforceable against the second group who were not consumers. It argued that to refer the non-consumer claims to individual arbitration would be inefficient, involve multiplication of proceedings, occasioning additional cost and delay. Most striking, however, was the following statement by the Court of Appeal:

[I]t is clear beyond any serious doubt on this record that staying any claims advanced in the action will not result in any of the stayed claims being arbitrated. [...] [T]here is a lack of reality to Dell's argument that the claim should proceed by way of arbitration. There will be no arbitration. The choice is not between arbitration and class proceeding; the real choice is between clothing Dell with immunity from liability for defective goods sold to non-consumers and giving those purchasers the same day in court afforded to consumers by way of the class proceeding (*Griffin v. Dell Canada Inc.*, 2010, para. 57).

The Court held further that it might have accepted to separate the two groups had Dell agreed to arbitrate the non-consumer claims collectively in a single arbitral procedure.²³ But Dell insisted on individual arbitration as provided for in the arbitration clause. This led the Court to conclude as follows:

²¹ See s. 7(3) and s. 8(4) of the Ontario statute, art. 11.1(2) of the Quebec legislation, s. 101(3) of the Saskatchewan statute and s. 16(3) of the Alberta legislation.

²² This is largely similar to the situation under the law of the European Union which requires that non-judicial dispute resolution options be provided for consumers (see Consumer ADR Directive 2013/11/EU) but presumes that mandatory arbitration clauses are unfair (as per the Annex to the Unfair Contract Terms Directive (93/13/EEC)). Neither of these conclusions are modified by the more recent Consumer Directive (EU) 2019/2161.

²³ This point refers to the mechanism of "class arbitration", that is, the possibility that an arbitration may proceed on a collective basis, aggregating the claims of all parties asserting a common cause of action against the same defendant. There is no evidence of such mechanisms being deployed in Canada (See Saumier (2014)). The concept of class arbitration originated in the U.S. as a response to the enforcement of arbitration clauses to defeat class actions. Where the arbitration clause did not include a class action waiver, some courts were willing to interpret it as not excluding the possibility of collective arbitration. However, once class action waivers were declared enforceable by the U.S. Supreme Court and interpreted to extend to the arbitration context (see for e.g. *AT&T Mobility v. Concepcion* (2011)), these became routinely included within arbitration clauses, thereby closing the loophole that had allowed class arbitration to emerge. Even where the clause is silent about class arbitration, the U.S. Supreme Court has recently interpreted it to exclude that option: *Lamps Plus, Inc. v. Varela* (2019).

[T]his provides further evidence, if further evidence is required, that Dell does not genuinely seek to have the claims advanced against it determined by way of arbitration. Dell is simply seeking to exploit the inefficiency of arbitrating individual claims. As that inefficiency can be avoided if all the claims proceed by way of the class proceeding, I conclude that granting a partial stay would not be reasonable (2010, para. 60).

Dell Canada sought to appeal this judgment to the Supreme Court of Canada, but leave was denied. It took close to ten years before the Supreme Court of Canada took the opportunity to consider the Ontario Court of Appeal's judgment in the case *Griffin v. Dell Canada Inc.* When it did, in 2019, it rejected it.

The *Wellman v. Telus Communications Inc.* case involved yet another class action against a telecom company in which proceedings were instituted in Ontario with respect to a group including both consumers and non-consumers whose contracts with Telus included an arbitration clause and a class action waiver (Supreme Court of Canada, 2019). Following the *Griffin v. Dell Canada Inc.* case, the Ontario courts, both at first instance and on appeal, invoked Subsection 7(5) of the arbitration legislation to refuse to refer the non-consumer claims to arbitration since the action by the consumers, against whom the arbitration clause and class action waiver were unenforceable, would proceed in court. The Supreme Court of Canada allowed the appeal and declared that the non-consumers could not remain within the class action with the consumers and had to bring their claims in individual arbitration.²⁴

Referring to its earlier jurisprudence, the Court recalled that "The central theme emerging from Seidel, consistent with its predecessors Dell and Rogers, is that arbitration clauses, even those contained in adhesion contracts will generally be enforced absent legislative language to the contrary" (*Wellman v. Telus Communication Inc.*, 2019, para. 46). According to the Court, Subsection 7(5) of Ontario's arbitration legislation could not be used to refuse to refer parties to arbitration with respect to claims that fell within a valid arbitration agreement. The exception to a stay provided by Subsection 7(5) was limited to cases where

claims were commenced concerning different "matters", some of which were not covered by the arbitration agreement (paras. 67-76). In the *Wellman* litigation, the claims from the consumers and non-consumers concerned a single and identical billing matter (para. 2) —e.g. the way partial minutes used were rounded-up— and thus, the main condition for the application of Subsection 7(5) was missing. While the Court noted the policy arguments relating to access to justice and efficiency, it found that these could not be used to modify the clear meaning of Subsection 7(5) (paras. 77 and ff). A different outcome could only result from legislative intervention, which had so far only occurred with respect to consumer claims (paras. 79-80).

The decision in the case *Wellman v. Telus Communications Inc.* reiterates a point of significant importance for parties whose contract contains an arbitration clause or a class action waiver: the fact that such a clause is included in a standard-form contract (i.e. a contract of adhesion) does not, on its own, affect the enforceability of the clause. In other words, such a clause is presumed to be valid unless the party seeking to avoid it can raise some other contractual defense to impugn its validity. A generic lack of specific consent argument will not be sufficient, even in the online context. For example, in *Dell Computer*, the plaintiff failed in its argument that the arbitration clause was not enforceable because it had to be accessed by way of a hyperlink such that its content had not been brought to the attention of the buyer when transacting online with the defendant (2019, *supra* note 15 at para. 101).

This conclusion may be open to reconsideration with the most recent decision from the Supreme Court, handed down on 26th June 2020. In the *Uber Technologies Inc. v. Heller*²⁵ case, the plaintiff instituted an action seeking a declaration that Uber drivers are employees entitled to certain benefits under Ontario employment legislation²⁶. Uber contended instead that drivers are independent contractors and not employees and sought to have that issue determined by ICC arbitration in Amsterdam according to Dutch law, as per the arbitration clause in the user agreement between the drivers and Uber. In an effort to avoid the arbitration clause, the plaintiff raised the two expected arguments mentioned at the outset of this

²⁴ The Court split 5-4, with the dissent finding that s. 7(5) allowed for the non-consumer claims to remain within the class action where access to justice and efficiency justified such a result.

²⁵ The Supreme Court affirmed the decision of the Ontario Court of Appeal (2019 ONCA 1).

²⁶ Uber has been the subject of similar actions in the U.S. and in other countries, some successful, such as in France where the Court of cassation confirmed the employment status in the Case 374 on 4th March 2020 (19-13.316).

paper: one, that the arbitral clause is invalid and two, that the employment legislation renders the arbitration clause unenforceable. Regarding the first argument, the plaintiff submitted evidence showing that the costs required to institute arbitral proceedings were prohibitive, thus rendering the clause unconscionable.²⁷ The Supreme Court agreed and thus declared the clause invalid under Subsection 7(2) of the Ontario arbitration statute (*Uber Technologies Inc. v. Heller*, 2020, para. 65)²⁸. In so doing, it held that a finding of unconscionability rested on two requirements: “inequality of bargaining power and a resulting improvident bargain” (para. 65). On the first criterion, the Court insisted on the fact that the contract was silent as to the costs of the dispute resolution mechanism and that a person in Mr. Heller’s situation could not expect that the costs would be so high. On the second criterion, the Court essentially agreed with Heller that, given the prohibitive cost of making a claim, no arbitrator would ever have the opportunity of deciding whether he was an employee or not: “Effectively, the arbitration clause makes the substantive rights given by the contract unenforceable by a driver against Uber” (para. 95).

Having found the arbitration agreement to be invalid on the basis of unconscionability, the Court did not consider whether it might also have been invalid in relation to the employment legislation (para. 99). Nor did its decision deal with whether Uber drivers are employees or not – it merely determined that this question is to be decided by the court seized of the action and not by an arbitrator (para. 48). Moreover, nothing in the decision deals with the class action dimension of the case, as was typically the case in consumer actions discussed previously. As a result, the decision leaves unresolved the situation where an employment class action is brought, and the defendant raises an arbitration agreement that is not invalid for unconscionability. Thus, while *Uber* might suggest a shift away from the Supreme Court of Canada’s previous support for arbitration, it is difficult to foresee how this will affect future cases, given the highly fact-specific aspects of the decision.

Interestingly, if the action had been brought in Quebec instead of in Ontario, the arbitration

clause would likely have been declared unenforceable by direct reference to legislation without any need to show that the clause was unconscionable (or rather “abusive” to use the language of the Civil Code of Quebec). This result would occur because the co-contracting party in the *Uber* case is a Dutch company and the arbitration clause provides for arbitration in the Netherlands under Dutch law. These facts should put the case firmly within the rules on international jurisdiction which, as noted earlier, include a provision guaranteeing Quebec employees access to their local courts, notwithstanding any waiver to the contrary (Civil Code of Quebec, 1991, art. 3149). Even though the result is the same with the Supreme Court’s decision, the road to that conclusion is more direct and predictable where legislators make a clear policy decision rather than leaving it to courts to decide on a case-by-case basis.

IV. CONCLUSION

Arbitration is well-regarded in Canada and has the support of legislatures and courts. Although there is no single uniform arbitration legislation in the country, all jurisdictions follow the UNCITRAL Model Law for international arbitration and with minor variations for domestic arbitration. Parties with arbitration clauses in their contracts or with arbitration awards to their benefit can expect these to be enforced by courts in Canada. Any limitation to this pro-arbitration environment must find its source in statutory language, preferably express language. This has been done in four provinces who have chosen to protect consumers against arbitration clauses and have done so expressly in their consumer protection legislation (and only one province has expressly protected employees in the same way). In the remaining provinces, consumers (and employees) are left to contest the validity of the arbitration clause in order to avoid it. Arguments going solely to the general preferability of class actions from an access to justice perspective will not suffice, at least under the current jurisprudence of the Supreme Court of Canada. This follows from that court’s view that arbitration clauses are *prima facie* valid even in adhesion contracts and that class action policy does not necessarily supersede arbitration policy. It is no doubt too soon to declare whether the *Uber*

²⁷ According to evidence presented by the plaintiff, the “mediation and arbitration process requires up-front administrative and filing fees of US\$14,500, plus legal fees and other costs of participation.” (*Uber Technologies Inc. v. Heller*, 2020, para. 2).

²⁸ Somewhat surprisingly, the Supreme Court held that the domestic arbitration statute applied as opposed to the international **commercial** arbitration statute. Indeed, although the arbitration was “international”, it was **not** “commercial”, given that the claim was framed under employment legislation (*Uber Technologies Inc. v. Heller*, 2020, paras. 25-26). The choice of applicable legislation was of no consequence on the facts of the case, but it may in other situations.

decision signals a shift away from this view of arbitration clauses in adhesion clauses, although future claimants will certainly make that argument in seeking to preserve their access to courts.

This combination of uniformity and diversity in the enforcement of arbitration agreements is a product of Canada's constitutional arrangements and also of the influence of U.S. business practices. Unlike in the U.S. or in the European Union, in Canada there is no higher authority that can impose a uniform policy regarding the balance between arbitration and access to courts. While the New York Convention opened Canada to arbitration, it did not close the door to limits validly imposed under domestic law. That those limits will vary from State to State is not surprising, but it is likely unusual that they vary within a State, as they do in Canada. 🗳️

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