

# Consumer Arbitration in the Evolving Canadian Landscape

Geneviève Saumier\*

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The prevalence of consumer arbitration as the dispute resolution mechanism of choice for business in North America<sup>1</sup> may be at risk, at least north of the border. In the three most populous Canadian provinces, Quebec, Ontario, and British Columbia, legislators and judges have declared clauses imposing arbitration unenforceable, preserving consumers' access to courts and, perhaps more significantly, access to class actions. In so doing, these jurisdictions stand in stark contrast to the Supreme Court of Canada, which recently extended its pro-arbitration posture from the commercial to the consumer law realm by enforcing an arbitration clause in an online consumer contract, thereby putting an end to the consumer's attempt to file a class action against the vendor. Absent the contrary provincial laws, this judgment would have signaled convergence between the U.S. and Canada on consumer arbitration,

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\* Associate Professor and Member of the Institute of Comparative Law, Faculty of Law, McGill University, Montreal. I would like to thank my colleague Frédéric Bachand for many lively and challenging discussions that we've had concerning consumer arbitration. Of course, the views expressed here are mine alone.

1. In a recent empirical study in the U.S., over 75% of consumer contracts included such clauses. See Theodore Eisenberg, Geoffrey P. Miller, & Emily L. Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, Cornell Law School Legal Studies Research Paper No. 08-017; NYU Law and Economics Research Paper No. 08-28, at 6. I have found no equivalent empirical studies for Canada.

particularly in a transborder context. Indeed, the U.S. Supreme Court has consistently held that arbitration clauses in interstate consumer contracts are subject to the U.S. Federal Arbitration Act, which does not allow for different treatment according to the nature of the contract, thereby pre-empting any State law providing special rules for consumer dispute resolution. In the absence of similar federal arbitration law in Canada, however, the Canadian Supreme Court's endorsement of pre-dispute mandatory arbitration in consumer disputes cannot effect uniformity within the country, let alone on the North American market.

In order to examine the current legal landscape for consumer arbitration in Canada, I will begin by providing an overview of the Supreme Court of Canada's decision in *Dell Computer Corp. v. Union des consommateurs*. I will then move to a consideration of the divergent policies expressed in legislation and judgments from the three provinces mentioned above. In the third section of the paper, I will examine the evolving post-*Dell* case law. This will highlight the extent to which courts are currently struggling to reconcile these conflicting policy positions. The challenge is most evident in those provinces where provincial legislation preserving consumers' access to courts is in place, but does not apply to the particular litigation which arose prior to its coming into force. The resulting ambiguity will be familiar to American jurists conversant with divergent state case law on pre-dispute mandatory arbitration and class-action waivers in consumer contracts.<sup>2</sup> I will close with a brief look at other proposed models for consumer dispute resolution in Europe and in the Americas against whose backdrop our respective supreme courts may appear rather uncivilized indeed!

#### I. *DELL COMPUTERS*; OR THE TRIUMPH OF CONSUMER ARBITRATION IN THE SUPREME COURT OF CANADA

The Supreme Court of Canada recently ruled on the binding effect of a pre-dispute mandatory arbitration clause in a standard form consumer contract in litigation involving Dell Computers.<sup>3</sup> A number of consumers had sought to conclude an online purchase of computer equipment. The equipment was initially advertised at the wrong price, an error that the merchant sought to rectify as soon as it became aware of the mistake on the vendor's main website. Despite the correction, the

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2. See THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 264-95 (Juris Publishing 2007).

3. *Dell Computer Corp. v. Union des consommateurs*, 2 S.C.R. 801, 2007 SCC 34, (S.C.C. 2007). Available free online at [www.canlii.org](http://www.canlii.org) as are all other Canadian cases discussed here. All Supreme Court of Canada judgments are available in English; decisions from other courts are not translated and therefore may be available only in French if drafted in that language.

plaintiffs were able to make their purchases at the erroneous price by skillful internet browsing.<sup>4</sup> When Dell later sought to rescind the online orders, the purchasers launched a class action, claiming that Dell was obligated under applicable consumer protection legislation to sell them the products at the significantly lower advertised price. Dell objected to the action, invoking a mandatory arbitration clause included in its generally applicable terms and conditions of sale.<sup>5</sup>

The case raised four questions that parallel those asked in this type of litigation in the United States: (i) was the arbitration clause part of the online purchase contract; (ii) was the dispute arbitrable; (iii) was the arbitration clause invalid or unenforceable for reasons related to its inclusion in a (standard-form) consumer contract; and (iv) was the arbitration clause unenforceable because the policy favoring class actions supersedes the policy favoring arbitration, at least in the consumer law field?<sup>6</sup>

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4. The consumers used so-called “deep links” to access the products, without going through Dell’s normal home pages or advertising pages; this allowed them to get around the blocks on purchases set up by Dell after it had discovered the pricing errors. *Dell*, 2 S.C.R. 801, at para. 4.

5. The clause in question read as follows:

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

*Dell*, 2 S.C.R. 801, at para. 127.

6. For a general discussion of recent U.S. law on this question, see CARBONNEAU, *supra* note 2. While the arbitration clause does not include an explicit class action waiver, the limitation of claims to those “between customer and Dell” is equivalent and not denied by Dell.

At first instance, the Quebec Superior Court rejected Dell's motion requesting that the court decline jurisdiction and refer the parties to arbitration.<sup>7</sup> The Court ruled that the arbitration clause was not binding on the purchaser because of a jurisdictional rule protecting consumers' access to courts of their home residence (thereby answering yes to the third question).<sup>8</sup>

On appeal, the Quebec Court of Appeal denied Dell's request for arbitration but not on the basis of the jurisdictional rule invoked by the first court.<sup>9</sup> Instead, the Court of Appeal declared that the arbitration clause was "external" to the main contract.<sup>10</sup> Under Quebec contract law, such a clause would be enforceable in a consumer contract only if it had been brought specifically to the attention of the consumer.<sup>11</sup> The Court of Appeal held that the reference to arbitration in the Terms and Conditions of Sale, accessible via a hyperlink on the main website, did not meet the requisite criteria.<sup>12</sup> As a result, the clause was unenforceable under applicable Quebec contract law. The court did not address the issue of arbitrability or resolve the potential conflict between class actions and arbitration policy. The court's response was thus a combination of the first and third questions above, and involved considerations relating to the online context of the purchase and the nature of the contract.

On a further, and final, appeal, the Supreme Court of Canada reversed the outcome in the lower courts, rejecting their legal conclusions and providing revised answers to all four of the questions

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7. *Union des consommateurs and Olivier Dumoulin v. Dell Computer Corp.*, 2004 CanLII 32168 (Que. Super. Ct.). That court went on to certify the class action.

8. *Id.* at para. 33-37. The jurisdiction rule is provided by article 3149 of the Civil Code of Quebec that reads as follows:

A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; *the waiver of such jurisdiction by the consumer or worker may not be set up against him.*

Civil Code of Quebec, 1991 S.Q., ch. 64, art. 3149 (my emphasis).

9. *Dell Computer Corp. c. Union des consommateurs*, [2005] R.J.Q. 1448, QCCA 570 (Que. C.A.).

10. *Id.* at para. 33.

11. Article 1435 of the Civil Code of Quebec provides as follows:

An external clause referred to in a contract is binding on the parties.

In a consumer contract or a contract of adhesion, however, an external clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer or adhering party, unless the other party proves that the consumer or adhering party otherwise knew of it.

C.c.Q., 1991 S.Q., ch. 64, art. 1435.

12. *Dell Computer*, [2005] R.J.Q. 1448, at para. 43-46.

stated in the previous paragraph.<sup>13</sup> The end result was to send each consumer to face Dell in individual arbitration proceedings.<sup>14</sup>

On the first question involving the inclusion of the arbitration clause within the contract of sale, the Supreme Court held that the reference to the arbitration clause through a hyperlink did not fall afoul of the rule on “external” clauses in consumer contracts provided by the Civil Code of Québec.<sup>15</sup> Its reasoning on this point is not incompatible with comparable U.S. decisions, although its failure to distinguish “browse-wrap” from “clip-wrap” mechanisms is unfortunate.<sup>16</sup> The Court quickly dismissed the second question, concluding that consumer disputes were not inarbitrable *per se*.<sup>17</sup> As for the third question, a majority of the Court held that the plaintiffs could not benefit from the jurisdictional protection accorded to consumers in article 3149 of the Civil Code of Quebec (“C.c.Q.”) because the arbitration involved was not “foreign,” given that it could take place in Québec.<sup>18</sup> On the fourth question, the Court held unanimously that class actions were merely a procedural vehicle that could not act as a public policy bar to the enforcement of the arbitration clause.<sup>19</sup> The overall outcome is therefore strikingly similar to that reached by the U.S. Fifth Circuit Court of Appeals in 2005 involving the same defendant and an only slightly different arbitration clause.<sup>20</sup>

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13. Dell Computer Corp. v. Union des consommateurs, [2007] 2 S.C.R. 801, 2007 SCC 34 (S.C.C.).

14. As is often the case, it is difficult to discover whether or not these arbitration proceedings are forthcoming.

15. *Dell*, 2 S.C.R. 801, at para. 101.

16. A “browse-wrap” contract is one which does not require a specific and separate step in the contracting process expressing consent. A “click-wrap” contract is one where prior to the conclusion of the contract, the consumer is required to agree expressly to the terms and conditions of the contract by way of a mouse click usually placed beside the terms “I agree.” On the relevance of this distinction here, see Philippa Lawson & Cintia Rose de Lima, “Browse-wrap” Contracts and Unfair Terms: What the Supreme Court Missed in *Dell Computer Corporation v. Union des consommateurs et Dumoulin*, 37 REVUE GÉNÉRALE DE DROIT 445 (2007).

17. *Dell*, 2 S.C.R. 801, at para. 62-63 (majority) and 219 (minority).

18. *Id.* at para. 66. The text of the provision is provided above in note 5. In so doing, the court held that the factual matrix of the case put it outside the scope of application of art. 3149 C.c.Q. which is triggered only in the face of a “relevant” foreign element. See C.c.Q., 1991 S.Q., ch. 64, art. 3149. For a critique of this view in law and on the facts, see Geneviève Saumier, *L'affaire Dell: La sphère d'application de l'article 3149 C.c.Q. et le consommateur québécois*, 37 REVUE GÉNÉRALE DE DROIT 6 (2007).

19. *Dell*, 2 S.C.R. 801, at para. 105-10. As will be discussed below, the Quebec legislature had amended its consumer protection legislation to give priority to court actions, including class actions, over arbitration; however, the Supreme Court concluded that the relevant transitional rules made those amendments inapplicable to the case and of no assistance to the plaintiffs. See discussion *infra*.

20. *Hubbert v. Dell Corp.*, 835 N.E.2d 113 (5th Cir. 2005).

While the Supreme Court of Canada dismissed the fourth question rather easily, case law before and since its decision involves that very issue, warranting further consideration of the Supreme Court's reasoning on this point in the *Dell* judgment. For its review of the potential clash between class actions legislation and arbitration law, the Canadian Supreme Court was faced with a number of potentially relevant sources: the Civil Code of Quebec,<sup>21</sup> the Code of Civil Procedure,<sup>22</sup> the Quebec Act Respecting the Class Action<sup>23</sup> and the Commercial Arbitration Act.<sup>24</sup> The Court first noted that no mention of the relation between the two methods of dispute resolution (class action or arbitration) was discernable from the relevant sources.<sup>25</sup> In fact, the Civil Code of Quebec provision on arbitrability (article 2639) does not specifically exclude consumer disputes from its scope.<sup>26</sup> Moreover, the Court refused to include consumer disputes within the residual category of matters of "public order" deemed to be inarbitrable under article 2639.<sup>27</sup> In addition, the Court noted that the Code of Civil Procedure dealt specifically with arbitration, including the role of courts, without any reference to any limitations that might shield other types of judicial recourse from the ambit of arbitration.<sup>28</sup> Its analysis of arbitration as a dispute resolution mechanism focused on doctrine and precedent related to commercial disputes and to interpretations connected to international instruments such as the New York Convention and the UNCITRAL Model Arbitration Law.<sup>29</sup> The Court did not draw any distinctions between arbitration clauses in negotiated commercial contracts and those included in standard-form consumer contracts.

The judicial reasoning underlying the decision in *Dell Computers* reflects a view of arbitration that is largely consistent with the position adopted by the U.S. Supreme Court since its landmark *Mitsubishi*

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21. C.c.Q., 1991 S.Q., ch. 64.

22. R.S.Q., ch. C-25 (articles 940 to 952 deal with arbitration while articles 999-1051 deal with the class action procedure including the certification process).

23. R.S.Q., ch. R-2.1 (this statute regulates access to public funding for class actions; the Supreme Court did not actually refer to this statute in its reasons).

24. R.S.C. 1985, ch. 17 (1985) (2nd Supp.).

25. *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, 2007 SCC 34.

26. Article 2639 C.c.Q. states: "Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration. An arbitration may not be opposed on the ground that the rules applicable to settlement of the dispute are in the nature of rules of public order." See C.c.Q., 1991 S.Q., ch. 64, art. 2639.

27. *Dell*, 2 S.C.R. 801, at para. 109.

28. *Id.* at para. 38-53.

29. *Id.* at para. 38-48. Both instruments are part of Quebec (and Canadian) law and are specifically mentioned in article 940.6 C.C.P. as relevant interpretational sources for *international commercial arbitration*.

judgment in 1985.<sup>30</sup> Canada's highest court's findings could therefore be imagined as leading to a greater harmonization of arbitration law within the Canada/U.S. legal space. That, in turn, could appear to favor transborder commerce by reducing the potential diversity of applicable legal regimes and allowing for a uniform dispute resolution mechanism imposed by the vendor regardless of the location of the purchaser. The utility of such a legal context for internet sales is obvious.

This conclusion can be challenged, however, given that the position of principle put forward by the Supreme Court of Canada in *Dell* is ineffective in two of the three largest provincial economies in the country because of statutory enactments: Ontario and Quebec.<sup>31</sup> Until very recently, appellate courts in British Columbia had also adopted a position of principle contrary to the one taken in *Dell*.<sup>32</sup> Still, as in the U.S., the highest court in Canada can affect statutory interpretation by provincial courts where the issue is within its authority. In fact, since *Dell*, provincial courts in Canada have been grappling with its effect in provinces without explicit legislation on consumer arbitration clauses. Even in Quebec and Ontario, litigation has continued despite the presence of legislation because of ambiguity on the application of the new laws on long-term consumer service contracts. I turn now to a consideration of these issues and the signals they may send concerning the future of consumer arbitration in Canada.

## II. THE DIVERGING JUDICIAL AND LEGISLATIVE VIEWS ON CONSUMER ARBITRATION IN CANADA

In both Ontario and Quebec, the provincial legislatures recently adopted modifications to their respective consumer protection acts in order to limit the effect of pre-dispute mandatory arbitration in consumer contracts. This was done in advance of the Supreme Court's decision in *Dell Computers*.<sup>33</sup>

The Ontario statute provides for the following limitation on arbitration in the consumer context:

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30. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (statutory rights can be the subject of consensual arbitration).

31. Provincial legislatures have exclusive jurisdiction over consumer protection law and civil procedure under Canadian constitutional law. See PETER HOGG, *CANADIAN CONSTITUTIONAL LAW* (2007).

32. Viewed in these terms, the landscape in Canada reflects a diversity of perspectives on consumer arbitration that is actually closer to the American reality than the *Mitsubishi* jurisprudence may suggest. See CARBONNEAU, *supra* note 2.

33. While the Ontario amendments had come into force the summer before the hearing, the Quebec amendments came into force the day after! *Dell*, 2 S.C.R. 801, at para. 8.

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.<sup>34</sup>

In other words, consumer disputes are not inarbitrable since section 7(3) specifically preserves the legality of consumer arbitration as a dispute resolution mechanism. Rather, the section seeks to prohibit pre-dispute mandatory arbitration clauses, typically included in standard form consumer contracts. If a dispute arises after a contract has been entered into, the consumer may then agree to refer the dispute to arbitration.<sup>35</sup> The Quebec legislation is largely similar, though more concise:

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."<sup>36</sup>

Since these provisions are included in provincial consumer protection legislation, their applicability to a transborder consumer dispute will depend on whether the contract is subject to either province's substantive law. Under choice-of-law analysis in Ontario and Quebec, the local statute would normally apply only upon a conclusion that the law of that province was the law applicable to the contract.<sup>37</sup> Alternatively, one

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34. Consumer Protection Act 2002, S.O., ch. 30, sch. A ("Ontario CPA"). (Most Canadian judicial and statutory sources are available free online at [www.canlii.org](http://www.canlii.org).)

35. *Id.* at art. 11.1

36. Consumer Protection Act, R.S.Q., ch. P-40.1 ("Quebec CPA"). The Ontario act also prohibits limitations relating to class actions. *See* 2002 S.O., ch. 30, s.8.

37. In Ontario this would follow from an identification of the "law most closely connected to the contract." *See generally* JEAN-GABRIEL CASTEL & JANET WALKER,



could argue that the CPA provisions are rules of procedural or jurisdictional law, always reserved to the *lex fori*, thereby applicable to any defendant's motion to suspend the judicial procedures in Ontario or Quebec and send the parties to arbitration.<sup>38</sup> A further argument would be available in Quebec through an appeal to the obvious public policy nature of the statutory rule which would give that rule priority over the law applicable to the contract.<sup>39</sup>

Given that these statutory provisions have only recently come into force, courts have had little occasion to consider their impact on consumer dispute resolution. Where plaintiffs have invoked the new provisions to avoid arbitration, courts have had to grapple with the question of their retroactive application. The Supreme Court's decision in *Dell Computers* had declared that the Quebec amendments did not apply retroactively.<sup>40</sup> However that case only dealt with a single executed transaction as opposed to an ongoing contractual relation; moreover it only applied to the Quebec statute. Since *Dell Computers*, Quebec courts have interpreted the non-retroactivity conclusion broadly, refusing to give way to arguments that it might only apply to disputes arising prior to the enactment of the statutory provision, even when the disputes involve long-term ongoing service contracts.<sup>41</sup>

In Ontario, the trial court in *Smith v. National Money Mart Co* dealt with the retroactivity issue at length, concluding that the new rules did apply to an ongoing service contract.<sup>42</sup> Nevertheless, the trial judge went

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CANADIAN CONFLICTS OF LAWS ch. 31 (6th ed. 2005). In Quebec, the choice-of-law rule for consumer contracts is provided in article 3117 C.c.Q. which allows for party autonomy but preserves the protective provisions of Quebec consumer law in particular circumstances.

38. A trial judge in Ontario has just concluded that s. 7 is not merely procedural because it removes a substantive right to contract for arbitration. *Smith v. Nat'l Money Mart Co.*, 2008 CanLII 27479 (Ont. S.C.) at para. 115. In that case, the court held that the provision applied retroactively so as to render invalid an arbitration clause in an executed contract. In Quebec, *see* art. 3130 C.c.Q.

39. This argument would involve an appeal to Art. 3076 C.c.Q. that imported into Quebec private international law the notion of internationally mandatory rules originally codified in art. 7(2) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations.

40. As noted previously, amendments to the Quebec consumer protection legislation would render unenforceable the arbitration clause at issue if included in a newly concluded consumer contract. In *Dell*, the Supreme Court held that those amendments did not have any retroactive effect. *Dell*, 2 S.C.R. 801, at para. 111-19.

41. *See* Fortin c. Rogers Communication sans-fil inc., 2008 QCCS 3855 CanLII (July 15, 2008); 9064-1622 Québec inc. c. Société Telus Commc'n (Telus Mobilité), 2008 QCCS 2975 CanLII (July 4, 2008).

42. *Smith v. Nat'l Money Mart Co.*, 2008 CanLII 27479 (Ont. S.C.J.) at para. 101-26, *aff'd* on other grounds 2008 ONCA 746, leave to appeal to the Supreme Court of Canada dismissed with costs on 5 March 2009, 2009 CanLII 8845 (S.C.C.). As discussed further below, the Ontario Court of Appeal explicitly declined to address the retroactivity

on to consider the effect of *Dell Computers* in Ontario in the event his conclusion on retroactivity was mistaken. In so doing, he relied quite heavily on British Columbia case law discussing the relationship between class actions and arbitration.<sup>43</sup> Since that case law predated the *Dell* decision, it is worth looking at the pre-*Dell* jurisprudence to better understand the post-*Dell* situation in the common law provinces.<sup>44</sup>

The first appellate court to give precedence to class action legislation over arbitration legislation was the British Columbia Court of Appeal in *MacKinnon v. National Money Mart*.<sup>45</sup> American readers familiar with consumer arbitration and class actions will not be surprised to learn that the payday loan industry has faced complaints in Canada of usurious interest rates largely similar to those made against it in the United States.<sup>46</sup> In both countries, defendants objected to certification motions on the grounds that consumers were bound by contractual arbitration clauses, which restricted them to individual arbitration proceedings to advance their claims.

The B.C. court noted the absence, in either the class actions legislation or the arbitration legislation, of specific statutory language that would answer the question of priority between the two.<sup>47</sup> In so doing, the court noted that the class action statute required that certification be granted upon satisfaction of the conditions set therein.<sup>48</sup>

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issue, having been able to dispose of the motion to refer the parties to arbitration on the basis of an issue estoppel argument.

43. *Smith v. Nat'l Money Mart Co.*, 2008 CanLII 27479 (Ont. S.C.J.) at para. 128 and ff.

44. Interestingly, one of the earliest decisions on the issue of consumer arbitration came from Ontario and presaged the Supreme Court's decision in *Dell*. In *Kanitz v. Rogers Cable Inc.*, [2002] 58 O.R.3d 299 (Ont. S.C.J.), an Ontario judge had concluded that in the absence of any clear statutory preference for class actions over arbitration, the arbitration clause was enforceable under existing arbitration law. For a detailed discussion of the law pre-*Dell*, see J. Watson Hamilton, *Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?*, 51 MCGILL L.J. 694 (2006); for a brief review, see Geneviève Saumier, *Consumer Dispute Resolution: The Evolving Canadian Landscape*, 1:4 CLASS ACTION DEF. Q. 52 (2007).

45. [2004] 50 B.L.R. (3d) 291 (B.C. C.A.) (claim that contract is invalid as unlawful under state criminal law to be heard by arbitrator, as it does not affect the validity of the severable arbitration clause).

46. See *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006).

47. *Smith v. Nat'l Money Mart Co.*, [2004] 50 B.L.R. (3d) 291, at para. 46.

48. British Columbia's Class Proceedings Act states:

§ 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

. . . (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; . . .

(2) In determining whether a class proceeding would be the *preferable procedure* for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following: . . .

The statutory requirement regarding certification was viewed as incompatible with the defendant's claim that the arbitration clause should be given automatic effect.<sup>49</sup> Indeed, if the arbitration clause were enforced, the opportunity of considering whether certification ought to be granted would be excluded. The court considered instead that the two statutes could be reconciled by assessing the appropriateness of arbitration within the certification process, under the "preferability" aspect of the certification evaluation.<sup>50</sup> In other words, if arbitration was a preferable means of resolving the disputes between the parties, then certification would not be ordered. In contrast, should arbitration not be preferable to the collective action, the arbitration clause would be declared to be "inoperative," an option specifically provided for under the applicable arbitration statute.<sup>51</sup> The court thus found that the referral to arbitration could not be considered prior to the motion for certification; rather, the two had to be considered concurrently:

52 It is only when the court has completed its analysis of the certification application and determines that it must certify the proceeding as a class proceeding that it can legally conclude that the arbitration agreement is "inoperative." It is inoperative because the court, following the direction of the Legislature, has determined that the class proceeding is the "preferable procedure" and the other requirements for certification have been met.

53 Thus, the applications for a stay and for certification of the class proceeding must be dealt with together. The outcomes of the two applications are interdependent: the mandatory terms of the Class Proceedings Act mean that arbitration and class proceedings cannot operate at the same time with respect to the same dispute. On the other hand, if the proceeding is not certified as a class proceeding,

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(d) whether other means of resolving the claims are less practical or less efficient; . . .

Class Proceedings Act, 1996 R.S.B.C., ch. 50 (emphasis added).

49. Smith v. Nat'l Money Mart Co., [2004] 50 B.L.R. (3d) 291, at para. 22-24.

50. *Id.* at para. 46.

51. *Id.* at para. 52-53.

British Columbia's Commercial Arbitration Act states:

§ 15 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings.

(2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, *inoperative* or incapable of being performed.

Commercial Arbitration Act, 1996 R.S.B.C., ch. 55 (emphasis added).

there may be no basis for saying that the arbitration agreement is “inoperative.”<sup>52</sup>

It is easy to predict that where the consumer claims involve small amounts, aggregation is likely to be “preferable” to individual arbitration as a means of resolving the claims, particularly in terms of access to justice. Indeed, a common policy justification for consumer class actions is precisely that individual claims would not otherwise be pursued, given the high costs of litigation compared to the relative low value of the claim. Where the arbitration clause also prohibits consolidation, as was the case in *MacKinnon*, that conclusion is probably inevitable. Indeed, following the holding in *MacKinnon*, certification was effectively granted in the B.C. and Ontario payday loans actions despite arbitration clauses including class action waivers and non-consolidation provisos.<sup>53</sup>

This result is somewhat surprising given that the Ontario court faced different statutory language, specifically the absence of a reference to “inoperability” in its arbitration legislation.<sup>54</sup> The fact that the B.C. view was persuasive outside that province suggests judicial agreement with the underlying policy position regarding resolution of consumer disputes.<sup>55</sup> The overall effect of the evolving jurisprudence pre-*Dell* was to give implicit priority to class actions over arbitration in consumer disputes whenever the facts allowed for such a result, thus suggesting an underlying common policy on the issue.

If the pre-*Dell* Ontario judicial view was inspired by forthcoming legislative changes in that province, the same cannot be said of British Columbia where equivalent amendments were not, and are not currently, anticipated. Still, the B.C. judicial approach is not equivalent to the regime in place under the consumer protection legislation in Ontario and Quebec. Indeed, the former provides for more nuances by subjecting the evaluation of consumer arbitration to the nature of the claims involved as opposed to rendering any pre-dispute mandatory arbitration clause unenforceable where consumer contracts are concerned. Whether the B.C. jurisprudence is compatible with the Supreme Court’s view of such clauses, as expressed in *Dell Computer*, is a question that has been the subject of intense litigation during the past months.

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52. *MacKinnon v. Nat’l Money Market Co.*, [2004] 50 B.L.R. (3d) 291 (B.C.C.A.).

53. In Ontario: *Smith v. Nat’l Money Mart Co.*, 2007 CanLII 186 (S.C.J.), *leave to appeal refused*, [2007] O.J. No. 2160 (Div. Ct.). In B.C.: *MacKinnon v. Nat’l Money Mart Co.*, 2007 BCSC 348 (B.C.S.C.).

54. *Smith v. Nat’l Money Mart Co.*, (2005) 8 B.L.R. (4<sup>th</sup>) 159 (Ont. S.C.J.), *appeal quashed*, (2005) 258 D.L.R. (4<sup>th</sup>) 453 (Ont. C.A.), *leave to appeal to S.C.C. refused*, [2006] S.C.C.A. No. 528.

55. *See also* Saskatchewan Frey v. Bell Mobility Inc., [2006] S.J. No. 456 (Q.B.), *vacated*, [2008] S.J. No. 105 (Q.B.).

### III. *DELL*: THE AFTERMATH

The Supreme Court's decision in the *Dell Computers* case has given rise to a significant amount of commentary from an academic perspective.<sup>56</sup> In terms of legal practice, a Canadian legal affairs magazine has called *Dell Computers* "the most important Canadian case affecting business from 2007."<sup>57</sup> Since its release in July of 2007, the judgment has been referred to in 38 cases (as of 3 April 2009). In the four most directly relevant cases, appellate courts have determined *Dell*'s effect in Ontario and British Columbia.

The four cases involve pre-dispute compulsory arbitration clauses in consumer contracts. In addition to imposing arbitration as the exclusive mode for dispute resolution, these clauses also prohibit any consolidation of claims, whether within a judicial or arbitral procedure. In other words, following American models, the contracts restrict formal dispute resolution to individual arbitration. The first B.C. case, *Mackinnon v. Money Mart*, continues the Money Mart saga discussed above and mirrors the Ontario proceedings, *Smith v. Money Mart*.<sup>58</sup> As noted above, in both provinces, the courts had originally held that the arbitration provisions in the consumer contracts were not an automatic bar to a certification request and eventually did certify the actions.<sup>59</sup> After *Dell* was released, lawyers for Money Mart argued in both jurisdictions that the earlier decisions on the arbitral clauses had been erroneous given the holding in *Dell*.

In the B.C. case, Justice Brown held at first instance that the relevant legislative provisions in Quebec and B.C. were sufficiently different to lead to different conclusions on the effect of the arbitration

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56. A recent volume of the *Revue générale de droit* published by the University of Ottawa's Faculty of Civil Law includes seven commentaries on diverse aspects of the case; all but one are in French. See (2007) vol. 37, no. 2, pp.345-514, including my commentary: "La sphère d'application de l'article 3149 C.c.Q. et le consommateur québécois" at 463.

57. J. Melnitzer, "Top 10 Business Cases from 2007," *Lexpert*, Jan. 2008, at 94.

58. In B.C., *MacKinnon v. Nat'l Money Mart Co.*, 2008 BCSC 710 [so-called MacKinnon #5], *reversed*, 2009 BCCA 103 (March 13, 2009) and in Ontario, *Smith v. Nat'l Money Mart Co.*, 2008 CanLII 27479, *aff'd* (2008) 92 O.R. (3d) 641 (C.A.), leave to appeal to the S.C.C. refused 5 March 2009. This entire post-*Dell* fiasco could well have been avoided had the Supreme Court agreed to grant leave to appeal from the 2005 *Smith* decision (see *supra* note 54), which raised exactly the same questions as *Dell* but within the legislative context of Ontario. The fact that the court refused Money Mart's request to be joined to the *Dell* appeal could be argued to give further weight to the argument that *Dell* only applies to Quebec. See discussion *infra* text accompanying note 64.

59. In Ontario: *Smith v. Nat'l Money Mart Co.*, 2007 CanLII 186 (S.C.J.), *leave to appeal refused*, [2007] O.J. No. 2160 (Div. Ct.). In B.C.: *MacKinnon v. Nat'l Money Mart Co.*, 2007 BCSC 348 (B.C. S.C.).

clause on a motion for certification.<sup>60</sup> In the Ontario case, Justice Perell of the Ontario Superior Court of Justice forcefully rejected the claim that the Supreme Court in *Dell* was implicitly speaking to the whole of Canada:

In *Dell Computer*, Justice Deschamps, who writes the majority judgment, focuses her remarks exclusively to the Civil Code of Québec. . . . In their factum and in their material for the motions now before the court, the Defendants make much of the fact that because of the presence of several intervenors from across Canada, the law from across Canada was before the Supreme Court. However, in *Dell Computer*, although the intervenors inundated the Supreme Court with the law from other provinces, the court did not comment and cannot be taken to have ruled on the Ontario legislature's design for the relationship between arbitration agreements and class proceedings, which is, of course, a moving target because the Ontario legislature and the legislatures of the other provinces are free to do something different from Québec.

The Supreme Court did not purport to address the legislative choices of other provinces. Justice Deschamps does not refer to the law in other provinces or to the submissions of the intervenors. The statutory and common law underpinning of the law in other parts of the country is not mentioned, and I do not understand how it can be that Justice Deschamps' judgment can overturn settled case law in those provinces without actually mentioning it.<sup>61</sup>

This opening invited Perell J. to engage in an exercise of legislative interpretation similar to the one originally undertaken by the B.C. courts in its pre-*Dell* jurisprudence and adhered to post-*Dell* in *MacKinnon*,<sup>62</sup> but without the option of relying on the “inoperability” of the arbitration clause since the Ontario arbitration legislation only refers to its invalidity.<sup>63</sup> The competing statute, the Ontario Class Proceedings Act, 1992, provides for essentially the same elements for certification as the B.C. statute, including a preferability criterion at section 5(1)(d). While

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60. *MacKinnon v. Nat'l Money Mart Co.*, 2008 BCSC 710 (B.C. Sup. Ct.), at para. 32-35.

61. *Smith Estate v. Nat'l Money Mart Co.*, 2008 CanLII 27479 (Ont. S.C.J.), at para. 237-38.

62. It is worth noting that he also concluded that the amendments to the Ontario Consumer Protection Act operated retroactively to declare unenforceable the arbitration clauses in the relevant contracts. *Id.* at para. 122.

63. Ontario Arbitration Act, 1991 S.O., ch. 17, s. 7. As in B.C., Ontario has one statute for domestic commercial arbitration and another for the international cases. *See* International Commercial Arbitration Act, 1990 R.S.O., ch. I.9, and Arbitration Act, 1991 S.O., ch. 17.

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the Ontario arbitration legislation does not expressly refer to “inoperability” as grounds for refusing a stay, the court in *Smith* did not see this as an impediment. Indeed, Justice Perell considered previous cases from Ontario and other Canadian common law jurisdiction to conclude that

while [*Dell*] may articulate the law about such things as the scope of an arbitrator to determine his or her own jurisdiction to arbitrate a dispute, the cases do not overrule the law that a court in Ontario or British Columbia may determine whether to stay or not stay an action within the context of the preferable procedure analysis of a certification motion.<sup>64</sup>

It is unfortunate but perhaps not surprising that the Ontario Court of Appeal granted leave in *Smith* but dismissed the appeal on the narrow issue estoppel point. Indeed, given the extensive analysis put forward by Justice Perell, including numerous alternative approaches to resolving the question, the Ontario court chose to maintain the uncertainty plaguing the common law provinces in the post-*Dell* period, affecting business, consumers and arbitrators alike. This decision to resist an evaluation of the statutory question on the merits may be justified by its hypothetical nature in light of the legislative priority given to class proceedings over arbitration in the new version of the Ontario Consumer Protection Act. It may also be related to the fact that the Supreme Court had previously refused to grant leave to Money Mart to allow it to join the *Dell* appeal. Since the Supreme Court does not give reasons on leave applications, but given that the issue in *Dell* was precisely the issue in *Money Mart*, the Ontario Court of Appeal was placed in the unenviable position of having to second guess the Supreme Court, which it deftly avoided by restricting its decision to an unrelated point. Such a posture was not available to the B.C. Court of Appeal, who was very recently forced to grapple with the challenge, as did the two lower courts in that province.

Indeed in the second post-*Dell* B.C. case, *Seidel v. Telus Communications Inc.*,<sup>65</sup> the interpretive argument was raised and at trial, Justice Masuhara decided to consider the question anew, despite Justice Brown’s recent conclusion in *MacKinnon #5*. Justice Masuhara concluded first that despite divergent language on certification criteria, Quebec and B.C. law on certification is largely convergent. It was, rather, the arbitration legislation that was the basis for distinguishing *Dell’s* effect in B.C. Reiterating the point made at the Court of Appeal

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64. *Smith*, 2008 CanLII 27479, at para. 284.

65. 2008 BCSC 933 (CanLII).

by Justice Levine in the pre-*Dell*, 2004 *MacKinnon* decision,<sup>66</sup> Masuhara underlined the use of “inoperable” in section 15 of the Commercial Arbitration Act, a term not to be found in the Quebec legislative sources. The court observed, in particular, the different role played by courts under the Quebec Code of Civil Procedure’s main provision on arbitral clauses:

940.1. Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null. The arbitration proceedings may nevertheless be commenced or pursued and an award made at any time while the case is pending before the court.

According to Masuhara, this provision provides that the only ground for refusing to send parties to arbitration is the nullity of the arbitration clause. No other bases—notably that the clause is “void,” “inoperable,” or “otherwise incapable of being applied”—are available in Quebec, although these alternatives are mentioned in the B.C. legislation.<sup>67</sup> Moreover, that more complete enumeration parallels the language used in both the New York Convention on Foreign Arbitral Awards and the UNCITRAL Model Law on Arbitration, international instruments that are part of Canadian law.<sup>68</sup>

In *Telus*, the court attempted to distinguish *Dell* by relying on the Supreme Court’s reference to international sources, sources which were irrelevant to the domestic arbitration situation faced by the parties in *Telus*. The domestic nature of the case in B.C. was reinforced by the fact that the applicable statute was the Commercial Arbitration Act (CAA), as opposed to the International Commercial Arbitration Act (ICAA). Of course the flaw in this distinction lies with the fact that the arbitration in *Dell* was treated as a domestic arbitration. That was a critical point initially made by the Supreme Court, one that allowed it to exclude the special jurisdictional rule invoked by the plaintiff to avoid the arbitration clause.<sup>69</sup> Still, Masuhara did highlight the weakness in the Supreme

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66. [2004] 50 B.L.R. (3d) 291 (B.C.C.A.) (case discussed *supra*).

67. This is the case for both the International Commercial Arbitration Act and the Commercial Arbitration Act.

68. In *Dell*, the Supreme Court had noted that article 940.1 C.C.P. did not mirror the language in either international instrument. Still, the Supreme Court did note that under article 940.6, the provisions on arbitration in the C.C.P. are to be interpreted in light of the Model Law on Arbitration, whenever interprovincial or international commercial arbitration is an issue.

69. See discussion of article 3149 C.c.Q. *supra*. By concluding, as it did, that article 3149 C.C.Q. did not apply to the *Dell* case because no foreign elements were present, the Supreme Court was implicitly declaring article 940.6 C.C.P. inapplicable to the case!



Court's analysis in *Dell* where references to international instruments and prevailing international trends were invoked for the purpose of interpreting article 940.1 C.C.P. despite that court's own conclusion that it was dealing with a purely domestic arbitration case.<sup>70</sup>

The strongest argument advanced in *Telus* turns on the scope of authority granted to the arbitral tribunal to determine its own jurisdiction. Here the ICAA and CAA diverge, with the former following the Model Law that enshrines the principle of kompetenz-kompetenz for international arbitration, and the latter remaining silent on the matter, thereby preserving the court's full authority to deal with the issue. The Supreme Court in *Dell* had held that the arbitral tribunal's power to decide on its own jurisdiction was very broad under article 943 C.P.C., restricting judicial intervention to situations involving questions of law where the facts were either irrelevant or merely incidental.<sup>71</sup> The lower court in *Telus* found that this interpretation of the Quebec legislation did not apply to the CAA in B.C. since no similar provision was to be found in the B.C. statute. While this may appear to be a minor point in support of the holding in *Telus*, it is noteworthy because it was not available to the Ontario Court in the *Smith* decision discussed previously.

The apparent incompatibility between the Supreme Court's holding in *Dell* and the British Columbia courts' jurisprudence explains why the appeals in *MacKinnon* and *Telus* were joined and heard on an expedited basis, with the judgment rendered less than two months following audition of the appeals.<sup>72</sup> In both cases, the B.C. Court of Appeal concluded that the *Dell* decision *did* apply in the province, thus overruling the original conclusions in both cases that certification of a class action could render an arbitration clause "inoperative."<sup>73</sup>

In the *MacKinnon* judgment, the B.C. Court of Appeal considered the statutory interpretation arguments developed by Justice Brown in the

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70. To say nothing, of course, about the fact that arbitration in a consumer case is not equivalent to arbitration in a commercial case. Oddly this argument does not seem to have been pressed by counsel for consumers in any of these cases.

71. For a discussion of this aspect of the case, see Frédéric Bachand & Pierre Bienvenu, *L'arrêt Dell et le contrôle de la compétence arbitrale au stade du renvoi à l'arbitrage*, 37 REVUE GENERALE DE DROIT 477 (2007).

72. *MacKinnon v. Nat'l Money Mart Co.*, 2009 BCCA 103; *Seidel v. Telus Commc'ns*, 2009 BCCA 104.

73. *MacKinnon*, 2009 BCCA 103, at para. 2; *Telus*, 2009 BCCA 104, at para. 14. I note that in *Frey v. Bell Mobility Inc.*, [2008] SKQB 79 (Q.B.) (discussed *supra*), a Saskatchewan court had also concluded that *Dell* had changed the law regarding the interplay between class actions and arbitration and reversed its previous decision to refer the arbitration issue to the certification judge. The judgment did not provide any reasoning for its conclusions regarding *Dell*. Oddly, it was not mentioned by the B.C. Court of Appeal in either *MacKinnon* or *Telus*.

lower court but rejected them all.<sup>74</sup> The summary of those findings is succinctly captured in the companion *Telus* judgment:

As explained by Madam Justice Newbury in *MacKinnon* (2009), it was held by the Supreme Court of Canada in *Dell* . . . that a class action is a procedural vehicle that does not modify or create substantive rights. While an arbitration clause in a contract deals with a procedure for resolving disputes between the parties to the contract, it nevertheless creates substantive rights and cannot [sic] be modified by the procedural provisions applicable to class actions. There are broad similarities between the arbitration and class action legislation of Quebec and British Columbia, and the technical differences between the laws of the two provinces are not material to the analysis of whether the reasoning in *Dell* . . . extends to British Columbia.<sup>75</sup>

It is worth noting that in making this determination, Justice Newbury focused on the common genesis of arbitration legislation in both provinces, being the New York Convention and Model Arbitration Law, without mentioning the fact that these are addressed to commercial, not consumer arbitration.<sup>76</sup>

The focus on the “purely procedural” nature of consolidation and the “substantive right” created by a contractual arbitration clause stands in contrast to the nuanced approach adopted by the same court, though differently constituted, that rendered the original *MacKinnon* judgment in 2004. In that case, the British Columbia Court of Appeal had accepted that the economics of consumer claims could make consolidation the only viable option for redress.<sup>77</sup> This underpinned the whole notion of dealing with arbitration within the preferability criterion of certification which characterized the pre-*Dell* jurisprudence in that province, as well as in Ontario. Having lost that option, consumers in B.C. may have one last argument remaining.

Indeed, in the original *MacKinnon* judgment, the B.C. Court of Appeal had set aside arguments of unconscionability that had been successfully raised to defeat consumer arbitration clauses in some American courts.<sup>78</sup> In so doing, the court stated: “It is not necessary that the court conclude that the arbitration agreement is unenforceable because it is ‘unconscionable’; the test is whether the arbitration agreement is ‘inoperative’ in the face of a procedure that the court finds

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74. *MacKinnon*, 2009 BCCA 103, at para. 66, 68 and 72.

75. *Telus*, 2009 BCCA 104, at para. 14.

76. *MacKinnon*, 2009 BCCA 103, at para. 62.

77. *MacKinnon v. Nat'l Money Mart Co.*, (2004) 50 B.L.R. (3d) 291, at para. 47.

78. *Id.* at para. 46.

‘preferable.’”<sup>79</sup> Now that the statutory argument of “inoperability” has been rejected in light of *Dell*, it remains to be seen whether the contractual argument of “unconscionability” may be reintroduced. The authority of *Dell* may be such that the B.C. courts will prefer to leave the regulation of consumer arbitration to the provincial legislature, given the precedent established by Ontario and Quebec.

Despite the B.C. Court of Appeal’s judgment on the substantive point, Money Mart will still be forced to defend the class action in that province. Indeed, as in Ontario, the plaintiff succeeded on the issue estoppel argument, having shown that the original decision not to send the parties to arbitration had been conclusively determined between the parties and that no special circumstances existed to justify an exception to the finality of that conclusion.<sup>80</sup> As no issue estoppel argument was available in *Telus*, the B.C. Court of Appeal’s decision in that case means that the consumers will be forced to pursue their claims through arbitration. Unlike the Money Mart clause, the Telus arbitration clause does not specifically exclude consolidation within arbitral proceedings, a point left untouched in the judgment.<sup>81</sup>

The last case worth mentioning here was released after the Ontario Court of Appeal’s judgment in *Smith v. Money Mart* but before the B.C. Court of Appeal’s judgment in *MacKinnon v. Money Mart*. I refer here to *Griffin v. Dell Canada*,<sup>82</sup> where a trial judge in Ontario adopted Justice Perell’s reasoning in *Smith v. Money Mart* to certify a class action in the face of an arbitration clause. In doing so, Justice Lax noted that the Ontario Court of Appeal in *Smith v. Money Mart* had dismissed the appeal on estoppel grounds without addressing the question of *Dell Computers’* effect on the law of Ontario.<sup>83</sup> Because Perell’s reasons were so closely tied to B.C. caselaw that was just overturned by the B.C. Court of Appeal in *MacKinnon v. Money Mart*, as discussed above, the current trial court jurisprudence in Ontario rests on a fragile foundation.

This leads to the conclusion that the present legal landscape for consumer arbitration across Canada can be fairly described as chaotic. There appears to be a significant divergence of judicial opinion on the question of policy regarding pre-dispute mandatory arbitration clauses in consumer contracts, particularly as these clauses interact with procedures for collective judicial action. The fracture does not appear to be horizontal, i.e. between judges from the different provinces, but rather vertical, i.e. between trial and appellate court judges in the three most

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79. *Id.*

80. *Id.* at para 81.

81. Seidel v. Telus Commc’ns, 2009 BCCA 104, at para. 4.

82. 2009 CanLII 3557 (Ont. S.C.J.)

83. *Id.* at para. 32.

populous and economically significant provinces and the nine judges sitting at the Supreme Court of Canada.<sup>84</sup> The pro-arbitration stance espoused by the latter court in all matters, from commercial to consumer disputes and including copyright cases,<sup>85</sup> seems to have met serious resistance from inferior courts. The British Columbia Court of Appeal has only recently bowed to the Supreme Court's decision in *Dell* while the Ontario Court of Appeal has declined at its first opportunity to take a stand. Beyond the courts, the Supreme Court's policy position on consumer arbitration is directly contrary to the most recent legislative pronouncement in two key provinces, thereby seriously undermining any suggestion that its judicial view is derived from common principles of law in Canada or that it should be persuasive beyond the confines of the *Dell* case. It is also difficult to ignore the irony of the Supreme Court putting forward what it presents as arguments of principle drawn from Quebec law that have been explicitly rejected by the Quebec legislature whose views are paramount!

The litigation that has followed *Dell* leading to the very recent decisions from the Ontario and B.C. courts of appeal demonstrates that the issue facing consumer arbitration in Canada cannot, and should not, be resolved by way of technical arguments based on statutory interpretation shielding positions drawn from policy. To this end, it is incumbent on jurists arguing or commenting on ongoing litigation to frame the issues in terms of policy and to offer arguments drawn from policy. But unless Canadian courts are willing to go beyond the largely outdated clichés regarding the "merely procedural" aspects of class actions as they apply to consumer disputes, it may well be that legislators will be invited to intervene and to modify the post-*Dell* effect outside Ontario and Quebec. Regardless of the forum for discussion, arguments for and against (individual) consumer arbitration will have to be more original and sophisticated than what has recently been offered. Fertile ground for new ideas is often found just outside one's own window. To this I turn in the final section of this paper, for a brief glance at developments in Europe and elsewhere in the Americas.

#### IV. COMPETING VISIONS OF CONSUMER DISPUTE RESOLUTION?

While the debate about the advisability of pre-dispute mandatory arbitration clauses in consumer contracts continues unabated in the

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84. While there was a dissenting opinion in *Dell*, the court was unanimous in its conclusion that arbitration policy could trump class actions policy in the absence of specific legislative language providing for a different hierarchy.

85. See *Desputeaux v. Editions Chouette (1987) Inc.*, [2003] SCC 17.

United States,<sup>86</sup> the question seems to have excited less passionate, or virulent, commentary elsewhere. Two factors may explain the situation in Canada: first, recourse to such clauses is a relatively new phenomenon; and second, until the *Dell Computer* case, courts tended to give priority to collective judicial action in consumer cases even in the face of an arbitration clause. In Europe, the issue has attracted little negative attention given the apparent assumption that this type of clause is likely to be unenforceable under the *Directive on Unfair Terms in Consumer Contracts*.<sup>87</sup> Indeed, that piece of European law includes pre-dispute mandatory arbitration clauses in a list of presumed unfair terms and a recent decision from the European Court of Justice in the *Claro* case supports that view.<sup>88</sup>

In *Claro*, a consumer defaulted on a cell phone contract and the service operator made its claim through the arbitral institution named in the contract.<sup>89</sup> The tribunal rendered an award against the consumer who had appeared and defended on the merits.<sup>90</sup> The consumer challenged the award in judicial proceedings on the basis that the arbitration clause was unfair and therefore unenforceable under the *Directive*.<sup>91</sup> Using the referral mechanism, the Spanish court asked the following question to the European Court of Justice:

May the protection of consumers under Council Directive 93/13/EEC . . . [of 5 April 1993 on unfair terms in consumer contracts] require the court hearing an action for annulment of an arbitration award to determine whether the arbitration agreement is void and to annul the award if it finds that that arbitration agreement contains an unfair term to the consumer's detriment, when that issue is raised in the action for annulment but was not raised by the consumer in the arbitration proceedings?<sup>92</sup>

The ECJ answered in the affirmative and declared that the consumer protection objectives at the heart of the Directive mandated that the

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86. See the extensive references cited in Eisenberg, *supra* note 1.

87. Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (O.J. 1993, L 95/29). An annex to the Directive lists a series of supposed unfair terms that include, as 1(q), terms "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract."

88. Case C-168/05, *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*, 2006 ECR I-10421.

89. *Id.* at para. 17.

90. *Id.*

91. *Id.* at para. 18.

92. *Id.* at para. 20.

validity of the arbitral clause be considered by the national court, even at that late stage, to ensure that the inequality of bargaining power between the parties be kept in check on the issues covered by the Directive.<sup>93</sup> According to one commentator, the ECJ's recent jurisprudence is incompatible with the Canadian Supreme Court's views on arbitral authority where consumer transactions are involved; instead, judges are seen as the guardians of the consumer interest and therefore required to intervene to verify the fairness of arbitration clauses that limit consumers' access to courts.<sup>94</sup>

More recently, the European Commission has indicated, in a policy paper, that it intends to maintain, and reinforce, consumer choice of dispute resolution mechanisms, thereby restricting business' option to impose arbitration or any other single method of resolving contractual disputes between the parties.<sup>95</sup> The future of consumer arbitration in Europe lies, therefore, in convincing consumers that this dispute resolution model is effective, efficient, and fair, such that consumers will choose it once a dispute has reached the stage where third-party adjudication is required. This is not inconsistent with the approach put forward in a recent OECD policy paper on consumer dispute resolution<sup>96</sup> where the emphasis is placed on providing a diverse of set of mechanisms from which the consumer can choose.

This divergent landscape in Europe is no doubt connected to the fact that American-style damages class actions are not generally available in Europe (yet).<sup>97</sup> Given the prevalence of class action waivers alongside

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93. *Id.* at para. 36.

94. Elise Poillot, *Regards européens sur la décision de la Cour suprême du Canada Dell Computer*, 37 REVUE GENERALE DE DROIT 491, 511 (2007). For English-language commentary on the *Claro* case, see Christoph Liebscher, 'Case C-168/05, *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*', 45 COMMON MARKET L.R. 545-557 (2008) and Arthur E. Appleton, Bernd Ulrich Graf, '*Elisa María Mostaza Claro v Centro Móvil Milenium: EU Consumer Law as a Defence against Arbitral Awards*, ECJ Case C-168/05', 25 ASA BULLETIN 48, 48-64 (2007). This expansive view of consumer protection when interpreting uniform community law can be contrasted with the ECJ's negative view of national consumer protection legislation that can be seen as undermining the common market. For a full discussion, see Angus Johnston & Hannes Unberath, '*The double-headed approach of the ECJ concerning consumer protection*', 44 COMMON MARKET L.R. 1237-1284 (2007).

95. Directive on Consumer Rights (COM(2008) 614). This proposal follows the overall review of consumer protection policy in the *Green Paper on the Review of the Consumer Acquis* (Feb. 2007), both available at: <http://ec.europa.eu/consumers/rights/consacquisen.htm>

96. OECD, *OECD Recommendation on Consumer Dispute Resolution and Redress*, (July, 12 2007), available at: <http://www.oecd.org/dataoecd/43/50/38960101.pdf>.

97. This landscape is rapidly changing. See NEW FRONTIERS OF CONSUMER PROTECTION: COMBINING PRIVATE AND PUBLIC ENFORCEMENT (F. Cafaggi & H.-W. Micklitz eds., Kluwer Intersentia, forthcoming 2009).

arbitral clauses in consumer contracts in North America,<sup>98</sup> it may be that business has less to gain from consumer arbitration since there is no current need in Europe to avoid class actions. In other words, there is likely less business pressure on EU institutions to change the law regarding consumer arbitration in the absence of the threat of collective action; instead energies are being spent opposing the never-ending proposals for collective consumer action that have now become the focus of a formal European Commission proposal.<sup>99</sup>

Closer to home, the Organization for American States (OAS) for several years has been exploring the opportunity of harmonizing the legal landscape for transborder consumer transactions. The Brazilian delegation to the OAS has brought forward a proposal for uniform choice-of-law rules. The U.S. delegation has favored legislative guidelines on dispute resolution mechanisms. The Canadian side has suggested rules to identify the applicable law and the appropriate judicial forum for adjudicating transborder consumer disputes, which are put forward as a model law.<sup>100</sup> The three proposals not only suggest different types of instruments (treaty, model law, legislative guide) but also focus on divergent means of seeking harmonization (choice-of-law rules, judicial jurisdiction, dispute resolution models). The three proposals seem to be pursuing a common objective of facilitating transborder consumer transactions, notably internet purchasing. In focusing on rules to identify the applicable law, the Brazilian document underscores that such transactions can be treated differently from domestic contracts, all the while respecting relevant consumer protection policies in place in the various jurisdictions involved. This may well be indicative of a view of the judicial role in consumer protection that is incompatible with a system where arbitration is the default rule for resolution of consumer disputes. The U.S. focus on dispute resolution suggests either a lack of serious concern about substantive law issues, perhaps showing greater confidence in arbitration or assuming greater harmony of consumer law policies in the Americas.

Still, the view that consumer disputes should not be systematically excluded from the courts is also reflected in several domestic U.S. initiatives, at the state and federal levels. Most recently, an "Arbitration Fairness Act" to prohibit pre-dispute mandatory arbitration clauses in consumer, and other, contracts was put forward in both houses but died

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98. Eisenberg, *supra* note 1, at 16.

99. See Comm'n of the Eur. Cmty., *Greenpaper on Consumer Redress* (Nov. 27, 2008), available at <http://ec.europa.eu/consumers/redresscons/collectiveredressen.htm>.

100. On file with the author. The OAS website is not particularly fruitful as a source for these proposals, some of which are out-of-date: see [http://www.oas.org/cji/dil-cji-cd-may2005/dil/CIDIP-VII\\_home.htm](http://www.oas.org/cji/dil-cji-cd-may2005/dil/CIDIP-VII_home.htm).

on the books at the close of the current session.<sup>101</sup> Prior to that, several state legislatures sought to restrict the impact of such clauses through legislation but with little effect whenever the issue was pre-empted by the Federal Arbitration Act, which leaves no room for exceptions to arbitration based on the nature of the contract.<sup>102</sup>

Despite the U.S. and Canadian supreme courts' statements to the contrary, one might be tempted to conclude that there is evidence of convergence in most western legal systems *against* the enforcement of pre-dispute mandatory arbitration clauses in consumer contracts and in favor of the maintenance of consumers' access to state courts for the resolution of their disputes. To do so might involve concluding that the current situation in the U.S., which has migrated north to Canada, is an anomaly flowing from a specific statutory instrument particular to American federal law. Viewed in this light, it may be surprising that the Canadian Supreme Court would have followed its U.S. counterpart's path in the absence of an equivalent statutory imperative in Canada. What is less surprising, however, is that provincial legislatures in Canada have intervened to maintain consumers' access to courts and that appellate judges had until recently arrived at the same conclusion even in the absence of explicit statutory language to that effect. In other words, the diversity in Canada mirrors the diversity in the U.S. but in a manner that is both visible and effective for domestic and transborder commerce. The view from Canada compromises the legal certainty regarding consumer arbitration that currently prevails for U.S. companies doing business across state lines. While *Dell* may have given them the impression that crossing the Canadian border would not affect the enforceability of arbitration clauses in consumer contracts, the reality is otherwise in Ontario and Quebec, and has only just been addressed through judicial pronouncements in two other provinces. On this issue, then, we may be inclined to reach for the lesser known warning *caveat venditor*.<sup>103</sup> Should that give rise to some rebalancing of interests in consumer dispute resolution, it may well be envisaged as a civilization of (consumer) arbitration.

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101. A Bill to Amend Chapter 1 of title 9 of United States Code with Respect to Arbitration (Arbitration Fairness Act of 2007), H.R. 3010 and S. 1782, 110th Cong. (2007).

102. The literature on this issue is monumental; see references in Eisenberg, *supra* note 1. For a discussion of various federal proposals and state legislation, see E. BRUNET ET AL., *ARBITRATION LAW IN AMERICA* 157-71 (Cambridge Univ. Press 2006).

103. Meaning, of course, "seller beware," as opposed to the more commonly heard *caveat emptor*, "buyer beware."