

CONSUMERS AND ACCESS TO JUSTICE: ONE-STOP SHOPPING FOR CONSUMERS

Final Report of the Research Project
Presented to Industry Canada's
Office of Consumer Affairs



June 2011

Report published by:



6226 Saint-Hubert Street
Montreal, Quebec H2S 2M2

Telephone: 514-521-6820
Toll free: 1 888 521-6820
Fax: 514-521-0736

union@consommateur.qc.ca
www.consommateur.qc.ca/union

Union des consommateurs members

Abitibi-Témiscamingue ACEF
Amiante – Beauce – Etchemins ACEF
Montreal East ACEF
Île-Jésus ACEF
Lanaudière ACEF
Estrie ACEF
Grand-Portage ACEF
Montérégie East ACEF
Montreal North ACEF
Québec City South Shore ACEF
ACQC
Individual members

Written by

- Simon Carreau

Editorial management

- Me Marcel Boucher

ISBN 978-2-923405-47-6



Union des consommateurs is a member of the International Consumer Organization (ICO), a federation of 234 members from 113 countries.

The masculine is used generically in this report.

Union des consommateurs received funding under Industry Canada's Contributions Program for Non-profit Consumer and Voluntary Organizations. The views expressed in this report are not necessarily those of Industry Canada or the Government of Canada.

© Union des consommateurs — 2011

Table of Contents

UNION DES CONSOMMATEURS, <i>Strength through Networking</i>	4
ACKNOWLEDGEMENTS	5
INTRODUCTION	6
1. JUSTICE, ACCESS AND CONSUMER LAW	9
1.1 Access to Justice, beyond Ordinary Courts of Law	9
1.2 Problems of Access to Legal Institutions and to Justice	10
1.3 Justice, beyond Dispute Remedies	15
1.4 Conclusion	17
2. MEASURES TO IMPROVE ACCESS TO JUSTICE	18
2.1 Legal Aid	18
2.2 Legal Expenses Insurance	19
2.3 Small Claims Courts	21
2.4 Class Actions	24
2.5 Alternative Dispute Resolution Mechanisms	26
2.6 Community Justice Centres	31
2.7 Conclusion	33
3. EXAMPLES OF CONSUMER COURTS ABROAD	36
3.1 General	36
3.2 Gauteng, South Africa: Consumer Affairs Court	38
3.3 New South Wales, Australia: Consumer, Trader and Tenancy Tribunal	43
3.4 India: District Forums, State Consumer Disputes Redressal Commissions and National Consumer Disputes Redressal Commission	48
3.5 Malaysia: Tribunal for Consumer Claims Malaysia	54
3.6 Lisbon, Portugal: Centro de Arbitragem de Conflitos de Consumo	58
3.7 Punjab (Gujrat), Pakistan: District Consumer Court	61
3.8 Malta: Malta Consumer Claims Tribunal	65
3.9 Turkey: Arbitration Committees and Consumer Courts	67
4. SUMMARY ANALYSIS OF THE INSTITUTIONS STUDIED	71
4.1 General	71
4.2 Summary Table	78
4.3 Comments by Researchers Specializing in Access to Consumer Justice	79
5. CONCLUSION	84
6. RECOMMENDATIONS	92
MEDIAGRAPHY	94

UNION DES CONSOMMATEURS, *Strength through Networking*

Union des consommateurs is a non-profit organization whose membership is comprised of several ACEFs (*Associations coopératives d'économie familiale*), *l'Association des consommateurs pour la qualité dans la construction* (ACQC), as well as individual members.

Union des consommateurs' mission is to represent and defend the rights of consumers, with particular emphasis on the interests of low-income households. Union des consommateurs' activities are based on values cherished by its members: solidarity, equity and social justice, as well as the objective of enhancing consumers' living conditions in economic, social, political and environmental terms.

Union des consommateurs' structure enables it to maintain a broad vision of consumer issues even as it develops in-depth expertise in certain programming sectors, particularly via its research efforts on the emerging issues confronting consumers. Its activities, which are nation-wide in scope, are enriched and legitimated by its field work and the deep roots of its member associations in the community.

Union des consommateurs acts mainly at the national level, by representing the interests of consumers before political, regulatory or legal authorities or in public forums. Its priority issues, in terms of research, action and advocacy, include the following: family budgets and indebtedness, energy, telephone services, radio broadcasting, cable television and the Internet, public health, food and biotechnologies, financial products and services, business practices, and social and fiscal policy.

Finally, in the context of market globalization, Union des consommateurs works in collaboration with several consumer groups in English Canada and abroad. It is a member of *Consumers International* (CI), a United Nations recognized organization.

Acknowledgements

The author extends warm thanks to Lisette Rudge, Fati Manamela, Yasir Azher, Rahazlan Affandi Bin Abdul, Jehangir Gai and Isabel Mendes Cabeçadas. Without their kind collaboration, this study would not have been possible. Thank you!

Thanks also to Marc Lacoursière, Thierry Bourgoignie and Pierre-Claude Lafond for their participation.

Introduction

“[...] The impact of a well-functioning court system extends far beyond the number of cases it resolves. The more timely and predictable a court’s decisions, the better able firms are to predict the outcome of any dispute. As predictability and timeliness improve, the number of disputes filed may decline, because a credible threat of pursuing a remedy in court provides incentives for the parties to honor their obligations. Bargaining takes place in the shadow cast by the courts and the laws they enforce. The stronger the shadow they cast, the lower the risk of transacting, the larger the number of transactions, and the lower their cost [...]”¹.

The ability of citizens, theoretically equal before the law, to assert their supposedly equal rights, is flagrantly unequal. This paradox has long provoked debates and demands. Indeed, the difficulties in gaining access to justice are a constant concern that many think is the Achilles’ heel of our justice system. Whether in civil disputes, family law, or small claims courts, the problems facing litigants seem omnipresent. Economic constraints, long delays, rising costs, high legal fees and complex procedures are among the problems that have been identified in the system on many occasions as factors that discourage complainants from bringing their case before the courts or incite them to give up along the way. Evidently, consumer disputes also face these obstacles. For many reasons, consumers often hesitate to go to court. When they risk the adventure, they encounter discouraging difficulties, as many studies, conferences and documents across Canada indicate when considering problems of consumer access to justice².

In addition, measures proposed in recent decades by governments, consumer associations, researchers and academics to improve access do not appear to have attenuated the problems of access to justice in our legal system. Legal aid programs, legal expenses insurance, small claims courts, new proceedings such as class actions and alternative dispute resolution mechanisms – many measures have been suggested to improve access to justice for the general public and for consumers specifically. The judicial system itself, as seen in the Canadian Supreme Court decision *Dell v. Union des consommateurs*³, seems to want to encourage the use of alternative dispute resolution mechanisms, such as arbitration – which would theoretically offer a path to quick, inexpensive justice – to settle consumer disputes⁴.

¹ Richard E. Messick, “*What Governments Can Do To Facilitate the Enforcement of Contracts*,” written for *Reforming the Business Environment: From Assessing Problems to Measuring Results*, Cairo, Egypt, November 28 – December 1, 2005, p. 10.

² Pierre-Claude Lafond (dir.), *L’accès des consommateurs à la justice*, Cowansville, Canada, Les Éditions Yvon Blais, 2010, 180 pages. David Cuming, *L’accès à la justice : Comment y parvenir?*, Montreal, Canada, July 2004, http://www.consommateur.qc.ca/union-des-consommateurs/docu/protec_conso/acces_justice.pdf. Marc Lacoursière, “Le consommateur et l’accès à la justice,” *Les Cahiers de Droit*, vol. 49, No. 1, March 2008. Kent Roach and L. Sossin, *Access to Justice and Beyond*, Faculty of Law, University of Toronto, 2009.

³ *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 R.C.S. 801, 2007 CSC 34.

⁴ Pierre-Claude Lafond, “L’émergence des solutions de rechange à la résolution judiciaire des différends en droit québécois de la consommation : fondement et inventaire,” in Pierre-Claude Lafond (dir.), *Mélanges Claude Masse – En quête de justice et d’équité*, Les Éditions Yvon Blais, 2003; Stéphanie Raymond-Bougie, *L’arbitrage des différends en droit de la consommation. Une nouvelle approche*, Cowansville, les Éditions Yvon Blais, 2005.

In 2010, Union des consommateurs conducted a study on the effectiveness of arbitration in consumer affairs⁵. In that study, we concluded that although arbitration seems to be highly effective in settling commercial and international disputes, it does not appear suitable for consumer disputes, given the imbalance of power between consumers and merchants, and the relative lack of consumer resources and knowledge. We also observed that Canada has no consumer dispute arbitration system; such disputes end up in forums dedicated to commercial disputes or even in the United States. This contributed to our conclusion that consumer dispute arbitration was proving ineffective. For it to become a suitable alternative to the judicial system, certain benchmarks must be established that would guarantee the parties, but particularly the weaker party, respect for their basic rights and would offer the essential guarantees essential to any fair decision-making system.

In that same study, we focused on consumer dispute arbitration systems in foreign jurisdictions, to determine whether lawmakers there had introduced specific measures to correct the problems we observed in Canada. It turns out that some foreign systems called “arbitration” resemble ordinary courts of law much more than actual arbitration systems, by their operation, the naming of decision-makers, and their benchmarks for providing the essential guarantees of a dispute resolution system.

On that basis, we considered the usefulness of establishing in Canada judicial forums specializing in consumer disputes. Could that be a viable solution to the problems undermining our justice system and restricting consumer access?

The multiple legislative reforms undertaken across Canada to grant consumers more rights have encountered access to justice problems denying consumers effective means to assert their rights. Some foreign jurisdictions have created courts entirely dedicated to consumer disputes, in the manner of one-stop shopping combining legal services, mediation and courts of law.

The recurring issue of access to consumer justice leads us to search for ambitious – if not definitive – solutions to this problem. Accordingly, this study asks the following question: could centralized legal services offered to consumers within a single forum – judicial or quasi-judicial – constitute this type of ambitious solution, likely to improve consumer access to justice significantly? Could establishing a consumer court prove an effective, comprehensive solution to problems of access to consumer justice?

Given the small amount of literature on this type of model, searching for these answers requires an examination of foreign experiences. What are the features of this type of court specializing in consumer disputes abroad? What are the pros and cons? Could such a court provide in Canadian provinces a relevant and applicable solution to problems of consumer access to justice?

It should be noted that the present study will not analyse the effectiveness of means introduced in the past to facilitate access to justice for the general public and for consumers specifically; that exercise has been repeated in many other studies. Although we will make a quick inventory of existing measures, we will focus on the model of a court dedicated to consumer disputes, and will conduct a comparative analysis of the various types of specialized courts established in

⁵ Yanick Labelle, *Consumer Arbitration: A Fair and Effective Process?*, Union des consommateurs, presented to Industry Canada’s Office of Consumer Affairs, June 2009, http://uniondesconsommateurs.ca/docu/protec_conso/arbitrageE.pdf.

various jurisdictions, in an attempt to determine their pros and cons. Despite the importance of economic considerations in analysing the feasibility of establishing a consumer court, our study also does not contain a cost/benefit analysis of the establishment of a consumer court. As mentioned by the Canadian Judicial Council, such an approach to evaluating the justice system does not yet exist and requires the development of new methodological evaluations that would allow a cost/benefit analysis of the justice system⁶.

In the first chapter, we discuss, based on a review of the literature, the very concept of access to justice: when discussing access to justice, what do we really mean by the word *justice*? What should we mean, ideally? And if we want to offer effective solutions, how should we understand the problems of access to justice?

In the second chapter, we review traditional solutions to problems of access to justice, in the light of the justice criteria identified in the preceding chapter. This will give us a better overview of persistent shortcomings regarding access to justice.

Chapter 3, the heart of the report, will present our findings regarding 8 foreign institutions, including 7 with which we had contacts. Each institution is described in some detail, and is followed by a summary of the main aspects where significant differences were observed.

Chapter 4 will present comments by three academics – consumer rights experts – whom we asked, on the basis of a summary document on the seven institutions we studied, to comment on the opportunity to establish consumer courts in Canadian jurisdictions.

The conclusion will summarize the main findings of our study on the desirability of adapting a consumer court model to Canadian realities in order to address problems of access to consumer justice.

⁶ Canadian Judicial Council, *Access to Justice: Report on Selected Reform Initiatives in Canada*, Subcommittee on Access to Justice (Trial Courts) of the Administration of Justice Committee, June 2008, p. 19, http://www.cjc-ccm.gc.ca/cmslib/general/2008_SelectedReformInitiatives_Report_final_EN.pdf.

1. Justice, Access and Consumer Law

Following the 2007 edition of the Henri Capitant Association's International Days, when thirteen reporters described problems of access to consumer justice in their respective countries, Professor Pierre-Claude Lafond concluded that "the problem [of access to justice] persists more than ever and the issue is still a current one⁷." Before focusing, in the next chapter, on solutions already put forward for problems of access to consumer justice, we will review the issues involved.

When insisting on the necessity of improving access to justice, to what are we referring? What is hidden behind the word "justice"? What is the meaning of this "justice" to which access should be made easier? What are the specifics of this problem in consumer affairs?

We will also examine proposals made to analyse barriers to access, in order to lay a path for the next chapter.

1.1 Access to Justice, beyond Ordinary Courts of Law

The first and most obvious way to approach the problem of access to justice consists of studying obstacles that can deter a consumer who wants a legal remedy or court access. So access to justice is understood as access to legal remedies and the courts. As Pierre-Claude Lafond pointed out: "In the classic view, dispute resolution necessarily involves the courts. This purely judicial concept of access to justice aims at improving citizens' access to the institutions in place⁸."

As important as this perspective is, it is insufficient because access to justice is a broader issue than simple access to the courts. *Justice* cannot be considered as an institution, a place, a law, a procedure, a doctrine, etc.

Much of the legitimacy of laws, the justice system and the rule of law depends on the laws applying to everyone equally, and on each individual being treated fairly by the justice system. That fair treatment must notably be ensured by respect for the principles of natural justice, as crystallized, in courts of law, by rules of evidence and procedure. In that sense, justice is a guarantee (or a promise) of means: that an entire case will be treated fairly, under a rigorous process, etc. But justice is not limited to that.

Manitoba's chief justice from 1887 to 1899, Sir Thomas W. Taylor, wrote: "I am not here to dispense justice. I am here to dispose of this case according to the law. Whether this is or is not justice is a question for the legislature to determine⁹." Judges apply the law. Lawmakers (and citizens as political subjects) are responsible for ensuring that the laws are just; without this preoccupation, justice becomes a guarantee of means to apply laws that may be unjust in

⁷ Pierre-Claude Lafond, "Le consommateur et le procès – Rapport général," *Les Cahiers de Droit*, vol. 49, no 1, March 2008, p. 133. Our translation.

⁸ *Ibid.*, p. 134. Our translation.

⁹ Statements of Manitoba's Chief Justice (1887-1899), quoted in Andrew J. Roman, "Barriers to Access: Including the Excluded," reported in Marc Lacoursière, "Le consommateur et l'accès à la justice," *Les Cahiers de Droit*, Vol. 49, No. 1, March 2008, pp. 97 to 130.

themselves. Our societies evolve constantly, in material means as well as mentalities, so the work of lawmakers must be renewed constantly.

Justice is also a question of results¹⁰. Failing those results, laws and judges don't matter much to citizens experiencing a dispute. It is certainly important that a dispute be handled through a process that appears fair and equitable, but what matters most to litigants is to arrive at a satisfactory settlement – as simply as possible, i.e., as quickly as possible and at the lowest possible cost (monetarily, in time, and emotionally).

This need for simplicity and efficiency depends on the development of alternative dispute-settlement procedures. Inversely, if the legal system, by applying laws and rules of procedure, does not succeed in producing results perceived as fair, its credibility is at risk. As stated by Pierre-Claude Lafond, “The courts are instruments of justice, they are not justice itself. They do not have a monopoly on dispute-resolution¹¹.” Thus, when discussing access to justice we should not take legal institutions alone into account; we should also keep in mind the importance of results and include various types of alternative dispute resolution mechanisms.

1.2 Problems of Access to Legal Institutions and to Justice

The most obvious problems of access to justice, in Quebec, Canada and elsewhere in the world, are well known and essentially always the same. To summarize what is mentioned in many texts and articles, including that of Pierre-Claude Lafond, who summarized the observations of the 13 reporters at the Henri Capitant International Days¹²: court costs and legal fees making it very expensive to seek legal remedies (the costs can be prohibitive for less-fortunate population segments whose income bracket slightly exceeds the income ceilings set for legal aid eligibility – we will further discuss this below); slow procedures, largely due to court congestion and their own laborious character; the complexity of the legal system and proceedings; citizens' lack of knowledge, experience and familiarity regarding their rights, the procedures and legal concepts; the formality and solemn aspect of proceedings; the dispersion of responsibilities; the public's lack of trust in the legal system; etc.

To these problems of access that can affect all legal fields are added those specific to consumer law – purchases made abroad or on the Internet, for example, which make it particularly difficult to go to court (a situation that is more and more prevalent, especially in the European common market¹³) – or those exacerbated in the specific field of consumer affairs: the costs seem even more prohibitive if a dispute is over modest amounts from the consumer's viewpoint (whereas for the merchant, modest amounts paid to him by a great many consumers can add up to a very large total).

As others have already mentioned¹⁴, problems of access are not unique to consumer law, but this area makes them more acute. The low amount at stake in many consumer disputes

¹⁰ Lafond, “Le consommateur et le procès,” *loc. cit.*, p. 136.

¹¹ *Ibid.*, p. 134. Our translation.

¹² *Ibid.*, p.135. Marc Lacoursière, *loc. cit.*, p. 99. David Cuming, *op. cit.* Lafond(dir), *op. cit.* Kent Roach and Sossin, *op. cit.*

¹³ Europa, “Consumer access to justice (Commission Green Paper of 16 November 1993 on access of consumers to justice and the settlement of consumer disputes in the single market),” *Summaries of EU legislation*, consulted on May 1, 2011, http://europa.eu/legislation_summaries/other/l32023_en.htm.

¹⁴ Lafond, “Le consommateur et le procès,” *loc. cit.*, p. 135. Claude Brenner, “Le consommateur et le procès (Rapport français),” Journées internationales colombiennes de l'Association Henri Capitant des

increases the relative cost that would be borne (or the difficulties that would be faced) by a consumer wanting to launch legal proceedings to assert his rights. Consumer rights and protections are multiple, spelled out in several laws, and guaranteed by several different authorities, so it is all the more difficult to assert them and have them respected. In addition, the consumer, isolated and burdened by multiple preoccupations, would be engaged in a dispute with a professional¹⁵.

“Designed for individual claims of substantial importance,” the usual legal proceedings are ill suited for consumer law and for the types of disputes involved therein¹⁶.

To analyse these obstacles to court access, various categorizations have been offered. Hakim Boularbah¹⁷ distinguishes *access to justice* obstacles (understood as financial difficulties and other obstacles to launching legal proceedings) and *access to the law* (citizens’ ignorance of their rights and of the law). Lafond points out that this distinction is similar to that between objective (material) obstacles and psychological (subjective) obstacles as drawn by other authors, such as Giard and Proulx¹⁸.

Roderick MacDonald has further developed the metaphor of “barriers” to access, to underline the multiplicity of factors contributing to exclusion: physical and material barriers (geographic access, hours of operation, etc.) objective barriers (costs, waiting times, complex procedures), subjective barriers (the system favours repeat users, organized interests, wealthier sections of society and traditional claims, rather than newcomers, unorganized interests, the less wealthy, and unusual claims), sociocultural barriers (affecting women, immigrants, native people, racial minorities, etc.), and even physical, mental health and psychological barriers¹⁹. The conclusion that MacDonald draws from this categorization deserves mention:

*L'accès à la justice n'est pas distinct des autres exclusions sociales fondées sur l'absence de domicile fixe, le chômage, les carences nutritionnelles, la mauvaise santé. [...] les démunis ne sont pas uniquement comme ceux qui ont de l'argent, à la différence qu'ils n'en ont pas; les problèmes d'inaccessibilité à la justice qu'ils éprouvent se combinent avec d'autres difficultés d'accès à des services sociaux qui sont en étroite corrélation avec leur situation économique*²⁰.

Amis de la Culture Juridique française, Bogota/Cartagena, September 24-28, 2007, <http://www.henricapitant.org/>, pp. 1 and 2.

¹⁵ Being a consumer is only one facet of a person, who necessarily consumes a multitude of goods and services by dealing with many different merchants. The consumer is scattered in his dealings, and his economic interest in a consumer dispute is generally quite modest. To him, consumption is only an act, not an occupation. Inversely, the merchant is a professional; he dedicates most of his time to his business activities. To him, consumers are interchangeable, and the outcome of a dispute with a consumer can have consequences for his entire business.

¹⁶ Lafond, *loc. cit.*, p. 135. Our translation.

¹⁷ Hakim Boularbah, “Réponses pour la Belgique au questionnaire relatif au thème n°4 : le consommateur et le procès,” Journées internationales colombiennes de l'Association Henri Capitant des Amis de la Culture Juridique française, Bogota/Cartagena, September 24-28, 2007, <http://www.henricapitant.org/>, p. 2.

¹⁸ Monique Giard and Marcel Proulx, *Pour comprendre l'appareil judiciaire québécois*, Sillery, Presses de l'Université du Québec, 1985; quoted in Lafond, *op. cit.*, p. 133.

¹⁹ Roderick MacDonald, “L'accès à la justice et le consommateur : une marque maison?,” in P.-C. Lafond (dir.), *L'Accès des consommateurs à la justice*, *op. cit.*, pp. 9 and 10.

²⁰ *Ibid.*, pp. 10 and 11.

Roderick MacDonald, who chaired a Task Force on Access to Justice for Quebec's Justice Minister from 1989 to 1991, proposes in fact to further shift the discussion about access to justice, by moving away from an approach focusing on laws, lawmakers, judges and courts, to first examine the substantial injustices involved. According to him, "social disparities and our refusal to challenge and overcome them – much more than procedural shortcomings in our legal process – are the root cause of inaccessible justice, and of injustice itself²¹." Because this injustice originates not from difficulties encountered during a civil trial, but from social inequalities, "the main objective of a strategy to improve access to justice is to redistribute social power." He therefore invites us to think about access to justice by using the concept of citizens' "empowerment"²², which consists of "granting a diverse population the power to create, choose and apply its own system of justice."

Finally, one more approach seems to merit explanation. Anthony J. Duggan approaches the issues of court access from a perspective of "law and economics"²³. Viewing legal action as an economic action, he notes that there are benefits as well as costs in taking legal action: accordingly, such action must have a certain cost effectiveness²⁴. Some of those costs are fixed and others will vary according to the magnitude of the case and its implications. In addition to individual benefits, settling disputes through the courts yields major social benefits, in reducing the social costs inherent in an unorganized dispute by channelling a dispute within orderly procedures. Because they will serve as guidelines for interpreting the rights and responsibilities of parties to other conflicts, court decisions also have a deterrent effect likely to avoid future conflicts. The inherent costs of going to court may have a determining effect on demand for such remedies: the higher those costs, the less disputes there will be before the courts. Duggan pursues his application of the economic grid with the idea that, as in any market, the goal is to reach a balance. Excessively low costs would likely clutter the justice system with too many cases, whereas excessively high costs discourage legal action, regardless of their legitimacy, even though unresolved disputes entail social costs that must be borne by the entire public. According to the author, in most countries, the second situation prevails²⁵.

Duggan emphasizes that other than legal costs – notably lawyer's fees, which constitute direct costs – legal action also involves indirect costs of three types: information costs (for example: the cost and time spent on seeking and directing a lawyer, or the cost and time spent on seeking information on possible remedies, relevant laws and authorities, case law, etc.), opportunity costs (the cost of a working day lost in order to appear in court, or the time spent preparing the case), as well as emotional costs (the stress that a dispute puts on the parties). Time, in terms of waiting periods for cases to be handled, contributes to increasing the weight of each of those costs, both direct and indirect.

In applying this grid to consumer law, we quickly see that the low amount at stake in consumer disputes means that, given the substantial fixed costs (direct and indirect) inherent in taking

²¹ *Ibid.* p. 5.

²² *Ibid.*, p. 20.

²³ Anthony J. Duggan, "Consumer access to justice in common law countries : a survey of the issues from a law and economics perspective," in Charles E. F. Rickett and Thomas G. W. Telfer, *International Perspectives on Consumers' Access to Justice*, Cambridge, 2003, pp. 46 to 67.

²⁴ This understanding of legal actions does not suppose that they are all motivated only by a purely quantitative and financial criterion of profitability. A person may want to go to court on matters of principle and refuse very lucrative out-of-court settlement proposals. But the capacity to go to court will still depend on the rarity of means and on the ability to mobilize necessary resources for the adventure, and this requires a minimal cost/benefit calculation.

²⁵ Duggan, *ibid.*, p. 58.

legal action, it is rarely profitable (with the exception of disputes with substantial amounts at stake²⁶) for a consumer to go to court: the process is simply not worth the trouble²⁷. Indeed, the cost structure of justice systems discourages “all but relatively large claims²⁸.”

Another major, socially harmful effect – a “market failure,” to use the jargon of economic analysis – is that the justice system’s current organization gives a structural advantage to actors (companies and merchants) who regularly go to court, as opposed to those (consumers) for whom the legal adventure is an exceptional experience: to use again the terms frequently used in this type of analysis, the former are “repeat players” confronting “one-shot litigants²⁹.” As a party regularly going to court, a repeat player can distribute his indirect costs among many cases. Thus, he does not have to search for a lawyer each time; he may even have lawyers at his service on a permanent basis; he will benefit from the usual advantages of specialization: the research work done by his lawyers – who will improve from one case to the other – in a given case will be useful in other cases; given that the merchant is a professional, the emotional costs become negligible; etc. The “one-shot litigant” benefits from none of those advantages, so this cost asymmetry produces a very unequal balance of power between a company and a consumer, particularly in terms of negotiating power in view of an out-of-court settlement and in terms of case law development³⁰. The company also has every advantage in seeing the case drag on to let the costs increase for the consumer, which makes it more likely that the latter will simply abandon the case.

Accordingly, we find that one of the fundamental causes of the problem of court access is excessive costs, and we can develop strategies to reduce the effect of those costs and thus improve court access, by either reducing or distributing the costs. Small claims courts and alternative dispute resolution mechanisms belong to the first strategy, whereas class actions, legal insurance and legal aid belong to the second (we will further discuss those measures below).

²⁶ It should also be noted that the “importance” depends on the expenses that must be incurred for a recourse and that its value is relative by definition. Thus, of two claims of equal amount, if one claim requires, to establish its evidence, depending on costly technical expertise, it will be much less advantageous to go to court, since a litigating consumer risks seeing his indemnities devoured (or even exceeded) by expert costs.

²⁷ We could add that, given that the stakes are generally easily quantifiable in consumer law – as opposed to family law, for example, where it is often impossible to put a price on the stakes – a simple cost/benefit calculation soon discourages most intentions of going to court; who would persist in going to court for a dispute of a few dollars on a phone bill?

²⁸ Duggan, *ibid.*, p. 48.

²⁹ Duggan refers to Marc Galanter’s classic article (“Why the ‘haves’ come out ahead: Speculations on the limits of Legal Change,” *Law & Society Review*, Vol. 9, No. 1, fall, 1974, pp. 95 to 160), which draws a distinction between “repeat player” and “one-shot litigant,” with regard to the structural disadvantage victimizing occasional and poorer litigants compared to frequent users of the justice system (who typically are richer or have more resources).

³⁰ Repeat users generally have higher stakes in the outcome of decisions than do occasional or one-time users. On a case opposing a repeat user (e.g.: a company) to a one-time user (e.g.: a consumer), the company – which typically has much greater means than the consumer – could more easily “buy” an out-of-court settlement, even if that means offering a premium to the wronged consumer (who can of course continue the legal battle on a question of principle), to avoid the court rendering a decision establishing case law unfavourable to the company. Inversely, it appears highly unlikely that a one-time user would “buy” an out-of-court settlement to avoid a decision establishing case law unfavourable to consumers as a whole. Duggan, *ibid.*, pp. 49 and 50.

We can also make a link with McDonald's categorization of obstacles to access. First, direct costs (legal expenses and lawyer's fees) mean that in any dispute, the lower a person's income, the more costly and difficult it is to go to court.

Moreover, as MacDonald has pointed out, the various forms of exclusion generally tend to combine and add to one another, thus increasing their effects, and the cost of legal action. There is a long list of characteristics that are over-represented among lower-income people compared to other people (particularly higher-income people): being a woman, young, a single parent, living with physical or mental health problems, being less educated, not very literate, being an immigrant, etc.³¹ So the most disadvantaged people – those for whom direct costs are most prohibitive – are also generally those for whom the indirect information and emotional costs will be greatest. The more socially excluded a person is, the more it will be difficult for him to seek necessary information about his rights, available remedies, how to obtain a lawyer, his chances of success, etc. The less educated a person is, the less he is socially integrated, the less he is articulate, the more all the legal procedures and concepts will appear arcane, inaccessible, complicated and intimidating.

Social exclusion factors increase the distance between a person and the information (knowledge, skills, etc.) that would enable him to assert his rights and obtain justice. The greater that distance, the greater the cost of acquiring information, and the greater the emotional costs. In other words, the more powerless a person is, the harder it is for him to acquire any power.

Information, knowledge, skills and membership in networks constitute essential capital for the success of a "legal undertaking"; and, as with other types of capital, it is unequally distributed in society. Do existing measures for improving access to justice take this reality into consideration?

³¹ See for example: Institut de la Statistique du Québec, "Revenu moyen des hommes et des femmes bénéficiaires d'un revenu selon certaines caractéristiques (sexe, âge, type de famille et scolarité)," Québec City, 2008, March 4, 2011, http://www.stat.gouv.qc.ca/donstat/societe/famls_mengs_niv_vie/revenus_depense/revenus/revpart08_tab1.htm. Canadian Council on Learning, *The Social Consequences of Economic Inequality for Canadian Children: A Review of the Canadian Literature*, March 3, 2006, Ottawa/Vancouver, <http://www.ccl-cca.ca/ccl/Reports/SystematicReviews/Review6ConsequenceEconomicInequalityforCdnChildren.html>. Statistics Canada and Organisation for Economic Co-operation and Development, *Learning a Living: First Results of the Adult Literacy and Life Skills Survey*, Ottawa and Paris, Statistics Canada, Organisation for Economic Co-operation and Development, 2005, <http://www.oecd.org/dataoecd/44/6/34867466.pdf>. Louise LEMIRE, "Inégalités socioéconomiques et pauvreté Quelques facteurs déterminants," Déjeuner-causerie, Service de surveillance, recherche et évaluation, Direction de santé publique et d'évaluation, Agence de la santé et des services sociaux de Lanaudière, Terrebonne and Joliette, March 2007, http://www.agencelanaudiere.qc.ca/ASSS/SantePublique/DejeunerCauserie/D%C3%A9jeuner-causerie%2021et%2022%20mars%20finale_MJC_Animation2.pdf.

1.3 Justice, beyond Dispute Remedies

In 1996, in the United Kingdom, a report on the British legal system presented findings very similar to those above about the difficulties of court access:

[...] our present system [...] is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court³².

Based on those findings, that report put forward a set of criteria for the British legal system to correct those problems and become truly accessible:

The system should:

- (a) be just in the results it delivers;*
- (b) be fair in the way it treats litigants;*
- (c) offer appropriate procedures at a reasonable cost;*
- (d) deal with cases with reasonable speed;*
- (e) be understandable to those who use it;*
- (f) be responsive to the needs of those who use it;*
- (g) provide as much certainty as the nature of particular cases allows; and*
- (h) be effective: adequately resourced and organized.*³³

This list of criteria, if applied, would certainly lead to a substantial improvement in the legal system's accessibility. However, we must agree with Roderick MacDonald that the criteria do not pertain to an accessible legal system, but rather to an accessible *dispute resolution system*³⁴. But justice is not merely dispute adjudication and the *post facto* sanctioning of misconduct.

To be effective, a legal system must, by its presence alone, have a deterrent effect; by the threat of sanctions, it must prevent behaviours that contravene standards. Without a credible threat of sanctions against those who do not comply with standards, those standards will remain wishful thinking. Access to consumer justice, with the arsenal of remedies in this field, must have the essential purpose of promoting consumer rights *a priori* and merchants' adoption of lawful behaviours: the certainty of a price to pay in case of an infraction – for example, the near-assurance that consumers will avail themselves of remedies available to them – then serves as a powerful incentive to behave lawfully.

Given the many difficulties facing consumers who would want to assert their rights, and that it is often not cost-effective (in a strictly economic sense) to take legal action, merchants often have little to fear in disrespecting consumer rights (whether through negligence or more deliberately). The legal system must therefore exercise a strong deterrent and preventive function promising

³² Lord (Harry Kenneth) Woolf, *Access to Justice Report: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, July 1996,

<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/overview.htm>.

³³ *Ibid.*

³⁴ Roderick MacDonald, *loc. cit.*, p. 8.

violators that they will face consequences, and thus assuring citizens that they can live their lives normally without constantly having to be wary of merchants they deal with. Accordingly, the importance of deterrent and preventive justice must seriously be taken into consideration in discussions of access to consumer justice, particularly because the main victims of access problems are those most likely to benefit from such consideration.

Strategies – such as small claims courts and the various alternative dispute resolution mechanisms – reduce the direct costs of a dispute resolution undertaking. But the information, opportunity and emotional costs remain very high, because those strategies were not designed to target these barriers specifically. For consumers victimized by social exclusion factors, the information, opportunity and emotional costs remain prohibitive.

Some of those strategies, despite their effectiveness regarding certain objective barriers or direct costs, can even aggravate the effect of other barriers. For example, not requiring, or even prohibiting lawyer representation reduces direct costs (lawyer's fees, but also the duration and procedural complexity of disputes) and tends (with mitigated success) to establish a certain balance between consumers and professionals. However, this rule transfers to the litigant's shoulders the costs (in work and time) of researching and preparing the case. Even simplified procedures would still be stressful and intimidating to anyone who does not have the training, culture, literacy level or mastery of language that are required for defending oneself adequately against a repeat user of dispute resolution procedures.

After studying the problems facing consumers, Lain Ramsay concluded that “complaints as a problem-solving mechanism” are less likely to be effective in low-income markets and disadvantaged clienteles than in a middle-class consumer market³⁵. Ramsay thus stated that this type of mechanism could exacerbate the social power disadvantages of low-income consumers. This conclusion is supported by an empirical investigation conducted by Professor MacDonald and Seana C. McGuire, to the effect that – not surprisingly – the recourse of small claims courts was far from being distributed randomly among the population. Their analysis of over 9,000 cases decided in Montreal's Small Claims Court demonstrated that the typical litigant in small claims courts tends to be white, male, non-immigrant, French or English speaking, professional, educated, between the 40th and 80th earned income percentiles, and 35 to 60 years of age³⁶. In other words, at least at this time, small claims courts are far from a “people's court.”

In addition, “despite the general absence of data, it is clear that a very small proportion of disputes are brought before the courts (and an even smaller proportion by natural persons)³⁷.” A Dutch survey found that only 4.5% of dissatisfied consumers go to court or use another formal dispute resolution mechanism³⁸. Therefore, an initiative to increase access to justice that would only depend on the judicial system is condemned to miss its real target.

³⁵ Charles E. F. Rickett and Thomas G. W. Telfer, “Consumers' access to justice: an introduction,” in Rickett and Telfer, *International perspectives on consumers' access to justice*, *op. cit.*

³⁶ Roderick MacDonald, “Access To Justice And Law Reform #2,” *Windsor Yearbook of Access to Justice* (Vol. 19), 2001, p. 321. Seana C. McGuire and Roderick MacDonald, “Small Claims Courts Cant,” *Osgoode Hall Law Journal*, vol. 34, 1996, p. 546.

³⁷ Lafond, *loc. cit.*, p. 134. Our translation.

³⁸ Mirjam Freudenthal, “Rapport néerlandais,” p. 2, quoted in Lafond, *ibid.*

1.4 Conclusion

Concluding that “ordinary judicial proceedings are not appropriate for settling consumer disputes,” Professor Lafond proposes two main avenues for access to consumer justice³⁹. First, legal procedures must be adapted to the needs of consumer law, by attempting to cross the chasm between consumers and trials. Then, new remedies and proceedings – notably extralegal ones – should be incorporated, that are more capable of meeting the needs of consumer law. Proceedings for representing collective rights also belong to this second avenue, to the extent that individual consumers do not have to be present directly.

We agree with those findings and that program, while proposing a third avenue, modelled on the work of Roderick MacDonald, to complete the development of access to consumer justice. That third avenue consists of thinking about justice beyond dispute resolution remedies and systems, to incorporate an approach that is more preventive and deterrent. As MacDonald stated, “Justice takes many forms, and access to justice requires a multidimensional strategy⁴⁰.” Even less in justice than elsewhere, a “one size fits all” approach cannot function adequately. We must take into account the diversity of situations (social, geographic, economic, cultural, etc.). The most vulnerable consumers are those for whom access to dispute resolution mechanisms remains most difficult, and are therefore those least likely to benefit from improved individual dispute resolution systems. For reactive and individual remedies to help make justice truly accessible, they must be combined with “proactive, preventive and collective strategies that change our society’s balance of power⁴¹.”

This third avenue toward accessible justice implies some focus on two dimensions of access to justice strategies. First, are the latter capable of exercising a preventive and corrective function regarding the behaviour of merchants, so as to ensure that *justice prevails*, from the start – rather than having to be rendered, after the fact, following a process that is difficult on many levels, and that those who need it most can least access? Second, to what extent do strategies of access to justice empower the most vulnerable consumers?

We will keep these questions in mind in the next section, where we examine the main existing strategies of access to justice.

³⁹ *Ibid.*, p. 137. Our translation.

⁴⁰ MacDonald, *loc. cit.*, p. 8. Our translation.

⁴¹ *Ibid.*, p. 14. Our translation.

2. Measures to Improve Access to Justice

We can list five main strategies for resolving problems of access to justice: legal aid programs, legal expenses insurance, small claims courts, class actions, and alternative dispute resolution mechanisms. Those strategies are not equally promising in consumer law.

The goal here is not to make exhaustive descriptions of those different strategies; the literature contains excellent analyses and discussions of them⁴². Rather, we want to identify what aspects of justice are addressed by those strategies, and what problems of access the latter aim to resolve.

2.1 Legal Aid

First introduced in the United Kingdom in 1949, legal aid has spread since 1969 to the Canadian provinces, and was established in Quebec in 1972⁴³. Similar programs exist today, in one form or another, in Columbia, Belgium, Spain, Luxembourg, Brazil, Bulgaria, the Netherlands and Turkey⁴⁴.

The main purpose of legal aid is to provide the less fortunate with adequate legal assistance or representation, as well as legal expenses coverage. Legal aid is an important measure in promoting access to justice; but it is not very useful to consumers because it is not well suited for consumer law.

The main problem is that those programs are generally reserved for litigants who are truly, completely impoverished. The eligibility criteria are so low that the program is of no use to most people; in Quebec, for example, the ceiling has been set to a maximum of \$13,007 for a person living alone, and to \$21,328 for a family with spouses and children⁴⁵. As a comparison, the low-income cut-off was \$13,580 in Quebec in 2007⁴⁶. In Ontario, the ceiling for a person living alone is \$18,000 annually and \$43,000 for a family of at least 5 persons⁴⁷. In British Columbia, legal aid has an income ceiling of \$17,000 annually for a person living alone and \$58,000 for a household of seven or more people⁴⁸. In 2008, the low-income cut-off, based on Market Basket Measure (MBM), was set, for a reference family of two adults and two children, at \$28,091 for

⁴² The reader may refer to the sources quoted in the following pages.

⁴³ Lacoursière, *loc. cit.* p. 100.

⁴⁴ Lafond, *loc. cit.* p. 138. David Cuming, *L'accès à la justice : comment y parvenir?*, *op. cit.*

⁴⁵ Commission des services juridiques, website consulted on May 15, 2011, <http://www.csj.qc.ca/>.

⁴⁶ Marie Bellavance and Alexandre Morin, *Le faible revenu au Québec : un état de situation*, Centre d'étude sur la pauvreté et l'exclusion, Québec City, 2008, p. 23, http://www.cepe.gouv.qc.ca/publications/pdf/CEPE_faible_revenu_au_Quebec_final2.pdf

⁴⁷ Legal Aid Ontario, "Am I eligible for legal aid?," website consulted on May 15, <http://www.legalaid.on.ca/en/getting/eligibility.asp>

⁴⁸ Legal Services Society, "Do I qualify for legal representation?," website consulted on May 15, 2011, http://www.lss.bc.ca/legal_aid/dolQualifyRepresentation.asp

Montreal, \$31,129 for Toronto and \$30,038 for Vancouver⁴⁹. Statistics Canada set at \$22,229 the low-income cut-off (before taxes) for a person living alone in a large urban centre in 2009⁵⁰.

Across the world, legal aid regimes have many variations. In Spain for instance, citizens whose income exceeds the eligibility ceiling can be defended by consumer associations, which benefit from free legal assistance⁵¹. Nevertheless, the general trend is the same almost everywhere: eligible citizens benefit from substantial coverage, but the eligibility criteria restrict it to too few people for it to constitute a significant measure of access to justice⁵². Moreover, in Quebec, legal aid is not available for monetary claims, which are most common in consumer law⁵³.

Although affected by many problems and insufficient⁵⁴, legal aid in itself is an important measure in terms of access to the legal system, by redistributing the direct economic costs of legal services from vulnerable citizens to the population as a whole. However, in terms of protecting consumer rights, the usefulness of legal aid is almost nonexistent, because the regime is not adapted to the needs and issues of consumer law.

2.2 Legal Expenses Insurance

Legal insurance is a more and more popular type of protection. According to Pierre-Claude Lafond, it consists of the following:

*fournir au moyen de la constitution d'un fonds commun, des services juridiques gratuits ou à frais réduits à un groupe désigné de personnes, moyennant une prime ou une cotisation périodique... On parle d'"assurances frais juridiques" dans le cas d'une couverture offerte par un assureur moyennant une prime, alors que l'expression "services juridiques préacquités" est réservée aux programmes de services juridiques payés par l'employeur à titre de bénéfice d'une convention collective.*⁵⁵

As with other types of insurance, the advantage of legal insurance is to distribute risks and costs among a large number of subscribers – notably the risks and costs involved in legal actions. Legal insurance can be sold by insurers as a simple insurance policy, but it is often included in collective agreements⁵⁶. Other than in Canada, legal insurance exists in France, Belgium, Spain, Luxembourg, the Netherlands, Bulgaria and Japan⁵⁷. With regard to consumer law, its

⁴⁹ Statistics Canada, *Low Income Lines, 2008-2009*, Income Research Paper Series, Income Statistics Division, Statistics Canada, No. 75F0002, Ottawa, 2010, <http://www.statcan.gc.ca/pub/75f0002m/75f0002m2010005-eng.htm>

⁵⁰ *Ibid.*

⁵¹ Lafond, *loc. cit.*, p. 139. Manuel Jesús Marín López, "Questionnaire relatif au thème n° 4 le consommateur et le procès : Rapport Espagnol," Journées internationales colombiennes de l'Association Henri Capitant des Amis de la Culture Juridique française, Bogota/Cartagena, September 24-28, 2007, <http://www.henricapitant.org/>.

⁵² Lafond, *ibid.* David Cuming, *op. cit.*

⁵³ Lacoursière, *loc. cit.*, p. 101.

⁵⁴ Cuming, *op. cit.*

⁵⁵ Pierre-Claude LAFOND, *Le recours collectif comme voie d'accès à la justice pour les consommateurs*, les éditions Thémis, 1996, p. 142.

⁵⁶ Lacoursière, *loc. cit.*, p. 102.

⁵⁷ Lafond, "Le consommateur et le procès – Rapport général," *loc. cit.*, p. 140.

advantage – theoretically – is to cover remedial actions (including going to court) as well as preventive actions⁵⁸.

The success of such a measure, which transfers the individual's risk to all insured litigants, remains modest. The measure is not well known or widely offered⁵⁹. The extent of coverage is often too restricted to cover all the expenses likely to be involved in a dispute: compensation is thus often limited to \$5,000 per dispute, whereas “the costs of an average dispute total \$40,000 to \$50,000⁶⁰.”

Pierre-Claude Lafond makes two other interesting observations. First, where legal insurance is found, covered consumers are still apparently reticent to turn to insurance for their consumer disputes, and reserve its use, for example, to auto-related disputes. Second, “paradoxically, the most prosperous litigants, and thus those who need it least, are those who bother taking out legal insurance⁶¹.”

Unfortunately, this is not surprising. As with any insurance, by making a claim (whatever the amount), a consumer will see his premiums increase. This is a constant for insurers in all fields: an insured person who has already made a claim is deemed more likely to make another one, so the premium increases following a claim. Just as many motorists often hesitate to make a claim for minor damage to their vehicle, we can understand that consumers covered by legal insurance make more claims in cases where the stakes are higher (economically or emotionally).

As for the fact prosperous people are generally the most insured, this is a problem of social inequality that is found elsewhere: in all studies on the level of home insurance, for example, we find much lower levels of insurance among low-income households⁶². Although the most disadvantaged are those who, theoretically, would most benefit from such protection, the reality is that its costs frequently put it out of reach for low-income households.

Costs that do not seem exorbitant in absolute terms can be unaffordable for households whose budgets leave no margin of manoeuvre. Moreover, many of the non-monetary costs and the difficulties involved in legal action – stress and opportunity costs – cannot be mitigated by insurance and remain as obstacles.

One of the approaches that have been considered in view of improving access to this type of insurance is the automatic inclusion, in standard insurance contracts, of such coverage (with the right of withdrawal). In Canada, it appears that only the Barreau du Québec has fully embraced legal insurance and is favourable to a measure such as including it by default in general insurance contracts⁶³. In Ontario, it appears that the development of legal insurance sales has been limited by provincial insurance regulations that, if it is determined that the service sold constitutes a type of insurance, require sellers of that product to register as insurers and obtain

⁵⁸ Lacoursière, *loc. cit.*, p. 102.

⁵⁹ *Ibid.* Lafond, *loc. cit.*, p. 140.

⁶⁰ David Cuming, *op. cit.*, p. 41. Our translation.

⁶¹ Lafond, *loc. cit.*, p. 140. Our translation.

⁶² Union des consommateurs, *Access to Home and Auto Insurance: An Issue?*, Final Report of the Research Project Presented to Industry Canada's Office of Consumer Affairs, June 2009, available on <http://www.consommateur.qc.ca/union-des-consommateurs/>.

⁶³ Barreau du Québec, *L'assurance "protection juridique" : pour un meilleur accès à la justice*, Montreal, Barreau du Québec, 1999, pp. 17 to 19, quoted in Lacoursière, *loc. cit.* p. 104.

a permit for that purpose⁶⁴. In British Columbia, initiatives promoting legal insurance have reportedly not succeeded.

An interesting initiative we think is not discussed often enough with regard to legal insurance would be a telephone service offering legal information and assistance that could pertain to all legal fields. That initiative would reduce information costs to consumers wanting to assert their rights themselves, which can be particularly useful in consumer law.

As for a generalized adoption of legal insurance (for example, through systematic inclusion in general insurance policies), it appears unlikely to resolve generally identified problems of access, and could even have perverse effects. As we have seen, access to justice should not be restricted to access to legal proceedings and lawyers. While generalizing the offer of legal assistance by means of the telephone may promote dispute resolution by consumers themselves (which remains to be demonstrated), generalizing the offer of prepaid legal services risks, on the contrary, multiplying legal proceedings and thus further clogging the legal system and likely inflating legal costs. If distributing legal costs through insurance increases the inherent costs and the necessary time for legal proceedings, consumers will not be better off.

Accordingly, legal insurance appears, to a certain extent, as a welcome measure within a range of solutions to problems of access. However, its usefulness depends on access to lawyers and legal remedies, it protects only a minority of consumers, and its usefulness is also limited by the exclusions inherent in this type of insurance and by the typically modest amounts at stake in consumer disputes.

2.3 Small Claims Courts

By lightening court procedures and formalities and thus reducing legal expenses and waiting times, small claims divisions aim to make legal proceedings more accessible to citizens who make more-modest monetary claims.

The characteristics obviously vary according to the jurisdictions, but generally, the various small claims court systems feature oral procedures, simplified rules of evidence, no obligation to be represented by a lawyer, and a certain geographic proximity⁶⁵. One of the main differences between Quebec's Small Claims Court and those of Ontario and British Columbia is that Quebec prohibits lawyer representation⁶⁶. A judge presiding in the small claims divisions generally plays a more inquisitory role than one presiding in a general law procedure, and his judgment is final and without appeal⁶⁷. The jurisdiction of small claims divisions is limited to monetary claims below a certain amount. In Quebec, for example, the maximum amount of claims heard by the small claims division went from \$3,000 to \$7,000 in 2002⁶⁸. In Ontario, the

⁶⁴ Sheldon Gordon, "Meet the legal service delivery vehicle of the 21st century: Judicare," *National*, no date (consulted on June 1, 2011),

http://www.cba.org/CBA/practicelink/National_articles/PrintHtml.aspx?DocId=1924

⁶⁵ Lafond, *loc. cit.*, p. 141.

⁶⁶ Cuming, *op. cit.* pp. 44 et 45

⁶⁷ *Ibid.*, p. 43. Lacoursière, *loc. cit.*, p. 107. As with any generalization, there are exceptions: a ruling by the Small Claims Court of Ontario on a claim of over \$2,500 may be appealed. Ministry of the Attorney General of Ontario, "Small Claims Court Pamphlets," Government of Ontario, January 2011, <http://www.attorneygeneral.jus.gov.on.ca/english/courts/scc/default.asp>.

⁶⁸ Cuming, *ibid.*, 43.

ceiling is \$25,000, as is the case in British Columbia (where it is announced that it will rise to \$50,000)⁶⁹.

We find, in one form or another, small claims courts in Colombia, Brazil, Japan, France, Belgium, Italy, Malaysia, Malta, Australia, South Africa, Portugal, Pakistan and India⁷⁰.

Duggan distinguishes two types of mechanisms for processing small claims⁷¹. On one hand are “court-based” mechanisms, which correspond to what we have just described, i.e., an ordinary court with lightened procedures, restricted use of legal representation in many cases, reduced costs, and less possibility of appealing a judge’s decision. On the other hand are “tribunal-based” mechanisms. The latter are more-radical reforms, found notably in Australia (as we will see, many consumer courts resemble this model). This type of tribunal differs from ordinary courts by sometimes limiting admissible actions to certain categories of litigants, by allowing consumers to launch an action simply by filling out a form, by prohibiting legal representation, by having waiting times counted in weeks rather than months, and by including tribunal members who do not necessarily have to be legal experts⁷².

Pierre-Claude Lafond states, about the simplified procedures of small claims processing – irrespective of the two types we have just identified – that “the actual effectiveness and use of these simplified proceedings by consumers seem recognized in the majority of systems, but with important nuances⁷³.”

A caveat: lack of resources leads to clutter in such proceedings. In Quebec, for example, in several districts, such as Montreal, it can take twenty months for a case to be heard⁷⁴.

In addition, simplifying procedures does not always meet the intended objective: “legal proceedings remain complex for the layman⁷⁵.” As mentioned above, the burden on consumers is only heavier if the absence of a lawyer leaves them to their own devices and forces them to prepare and present a case. Worse, in systems where representation is allowed without being required, a consumer alone and lost in the legal jungle often faces a merchant represented by a lawyer. Such imbalances are added to the repeat-player effect whereby repeat users distribute legal costs over many cases and thus further increase their own expertise.

⁶⁹ Ministry of the Attorney General of Ontario, *loc. cit.*

Ministry of the Attorney General, “What is Small Claims Court?,” Government of British Columbia, revised version of March 3, 2011, http://www.ag.gov.bc.ca/courts/small_claims/info/what_is.htm. Small Claims BC, “An introduction to Smallclaimsbc.ca,” [video], consulted on June 10, <http://www.smallclaimsbc.ca/>.

⁷⁰ Lafond, *loc. cit.* Duggan, *loc. cit.*

⁷¹ Duggan, *ibid.*, pp. 58 and 59.

⁷² Obviously, these are broad categories. In reality, the courts may be found in any of the categories according to the aspects considered. For example, in formal Court of Justice branches in Quebec, Ontario and British Columbia, motions may be made simply by submitting a form rather than by procedures requiring legal fees. Moreover, as we have already pointed out, representation by attorney is prohibited in Quebec.

⁷³ Lafond, *loc. cit.*, p. 142. Our translation.

⁷⁴ Communication with the Court of Québec Registry, April 26, 2011.

⁷⁵ Lafond, *loc. cit.*, p. 142. Our translation.

M. J. Trebilcock points out that prohibiting legal representation sometimes has the disadvantage of leading to poor preparation, and thus to lost time, ineffective use of court resources, and even bad decisions⁷⁶.

To reprise the terms of Duggan's economic and legal analysis, direct costs (legal expenses) are reduced in part by raising opportunity costs, information costs (the time spent preparing the case is not available for doing something else) and emotional costs (the stress of representing oneself alone). It should also be mentioned that small claims courts are not free – consumers still have to bear certain expenses, such as legal stamp fees, and in Quebec, at least since 1995, judgment enforcement fees⁷⁷. This is also the case in British Columbia⁷⁸. In Ontario, to the cost of filing a petition (\$75) is added a \$100 fee for requesting a hearing date and \$100 more if a writ of seizure is necessary⁷⁹.

There is no lack of original proposals to try to reduce some of the difficulties that persist despite the existence of small claims divisions. To improve accessibility, M. J. Trebilcock has suggested extending the working hours of small claims courts by having legal experts with at least five years of practice sit on Saturdays, as part-time judges, on a *pro bono* basis or for nominal fees⁸⁰. Such a measure would certainly lower the opportunity costs.

In British Columbia, there is a pilot project modelled after this type of approach. In the small claims offices of Robson Square and Richmonds, a pilot project is testing differentiated procedures: simplified trials for claims of up to \$5,000; summary trials for lending companies' claims of debts related to credit of up to \$25,000; mediation and a trial conference for cases of \$5,000 to \$25,000⁸¹. Simplified trials normally last less than an hour and are presided by an experienced lawyer. Summary trials for financial debts are presided by a judge and decided, if possible, in a summary proceeding of 30 minutes (in reality, the judge will attempt to establish a reasonable instalment agreement acceptable to both parties – failing which, they will be directed to mediation or a court trial). Mediation is conducted by a professional mediator, at no charge to the parties, and must normally last about two hours. The 30-minute trial conference is presided by a judge and aims to prepare the "real" trial and determine its duration. Finally, simplified trials take place in the daytime in one of the two offices of the court, and in the evening in the other.

From a consumer point of view, small claims divisions are certainly useful, but consumers remain reticent to turn to them. In Quebec, for example, the small claims division is mainly used by non-incorporated businesspeople representing a minority of the court's cases⁸². This is

⁷⁶ Michael J. Trebilcock, "Rethinking Consumer Protection Policy," p. 88., in C. E. F. Rickett and T. G. W. Telfer, *International Perspectives on Consumers' Access to Justice*, *op. cit.*

⁷⁷ Cuming, *op. cit.*, p. 46.

⁷⁸ Glenn Gallins, "Fact sheets 18: Seizing Assets," The Law Centre (University of Victoria Faculty of Law), April 2008, http://thelawcentre.ca/self_help/small_claims_factsheets/fact_18.

⁷⁹ Law Help Ontario, "A Guide to Fees in Small Claims Court," 2008, http://www.lawhelpontario.org/small_claims/item.2264-PlainLanguage_Guides.

⁸⁰ Trebilcock, *loc. cit.* p. 88.

⁸¹ Small Claims BC, consulted on June 10, <http://www.smallclaimsbcc.ca/>.

⁸² MacDonald and McGuire have concluded, based on their vast empirical study, that merchants populated the small claims court by a proportion of 85%, as opposed to only 15% by individuals. The authors arrived to these percentages by analysing some 2,600 cases brought before the Small claims Court. S.C. McGuire and R.A. MacDonald, *loc. cit.* Pierre-Claude Lafond cites other numbers presented by MacDonald and McGuire to the effect that "59 % of the lawsuits concern debt collection, and almost half of those lawsuits (26%) concern professional fees." (Our translation.) Pierre-Claude Lafond,

because the problem of consumers' opportunity to access the courts and bring a case in a dispute of low value remains. Can it be stated that the small claims division meets its objectives of better consumer access to justice when those courts have become additional instruments for the collection of unpaid accounts?

Another aspect to be taken into account with regard to consumer law is those courts' lack of specialization and expertise in the subject. Consumer law is complex and diffuse; its rights and obligations are found in many laws that often may appear contradictory. This lack of specialization is likely to make cases last longer and to increase the number of erroneous or contradictory decisions⁸³.

Despite efforts to simplify procedures and lower costs, small claims costs remain considerable. When all the costs are added – legal stamp fees, judgment enforcement fees, the necessary time for filing a claim, preparing a case, the intimidating aspect of courts despite the good intentions to simplify proceedings, the stress of such an adventure for the average citizen, and the substantial delays multiplying most of those costs – we must conclude that the burden remains considerable for a consumer wanting to obtain justice.

2.4 Class Actions

The emergence of class action procedures is, according to Duggan, “one of the most important developments in judicial law in recent years⁸⁴.” Lafond defines class actions as follows:

moyen procédural par lequel une personne ou une association de consommateurs est autorisée à représenter en justice, généralement sans mandat, un groupe non organisé de personnes possédant des réclamations similaires à l'encontre du même défendeur, le jugement final du tribunal liant chacun des membres du groupe⁸⁵.

The “similar claims” are still individual claims, but they are treated collectively in a single case. Class action is a fiction of law that links a plurality of individuals, thus allowing them to be represented in an action against another litigant who reportedly has similarly harmed those individual interests, without members of the group with those individual interests having to go to court individually, entrust a third party to do so for them or even consider the possibility of launching an action. This is one of the most useful legal actions in defence of consumer rights: in Quebec, for example, the field of consumerism represents at least 40% of all class actions undertaken, and 50% if we include those originating from the public services sector (cable television, mass transportation)⁸⁶.

Class actions are very useful and advantageous for consumers since members of the group (defined in the claim on the basis of a collective interest) have no obligation regarding the process, but the latter requires extraordinary commitment by whoever has volunteered to

“L'exemple québécois de la Cour des petites créances : "Cour du peuple" ou tribunal de recouvrement ?,” *Les Cahiers de droit*, vol. 37, No. 1, 1996, p. 83.

⁸³ Duggan, *loc. cit.* p. 62.

⁸⁴ Lafond, *loc. cit.*, p. 145.

⁸⁵ *Ibid.*, p. 145.

⁸⁶ Pierre-Claude Lafond, “Le recours collectif québécois des années 2000 et les consommateurs : deux poids, quatre mesures,” Service de la formation permanente, Barreau du Québec, 2001, pp. 39 to 43, quoted in Lacoursière, *loc. cit.*, p. 109.

represent the others' interests. Indirect costs (opportunity, information and emotional costs) inherent in organizing a class action are very high in terms of time, organizational work and networking. In that work to organize the case, supervise lawyers and represent interests, consumer associations – which have the resources, legitimacy and competence to carry out such undertakings – play a fundamental role.

The class action is a mechanism for distributing the direct economic costs of legal action: the action's costs are deducted, as the case may be, from the compensation obtained for the members (generally in the same way as though the prosecutors in the case had received from each member a mandate whereby they would retain as a fee a percentage of the amounts that would be awarded by a judgment or agreed to by transaction). Law firms that accept such cases have to bring the case to term at their own risk – the fees, if they win the case, may be substantial, but remote⁸⁷. In Quebec, the Fonds d'aide au recours collectif offers additional funding and cost distribution for class actions. Ontario also has a fund, the "Ontario Class Proceedings Fund," but lack of funding has prevented it from yielding results equivalent to those in Quebec. British Columbia still does not have such a fund.

In addition to proceedings – class actions – for the collective representation of individual interests, some jurisdictions have proceedings for the representation of collective interests or the public interest. According to P.-C. Lafond, those proceedings are legal actions aimed at "compensating for harm done to the general and diffuse interest of consumers as a whole." They usually lead to "sanctions to stop a violation of collective rights: to stop illegal activity/advertising, declare an act illegal, prohibit a contract or a clause, award general damages⁸⁸." Some of those proceedings are highly successful, such as, in France, actions for an injunction against unfair clauses; in those actions, certified consumer associations can declare a clause unfair and can prohibit it. We find one form or another of actions for discontinuance of illicit acts; those actions can be launched, as the case may be, by consumer associations or corresponding entities in Belgium, Luxembourg, Bulgaria, Spain, Italy, Turkey and Japan⁸⁹. As opposed to class actions, they cannot be used to claim damages, so individual consumers are left with the responsibility of bringing their claims... which limits considerably the deterrent effect of such a measure.

In terms of access to consumer justice, the main advantages of class actions are the deterrent and preventive functions that are added to the purely curative ones; the possibility of such an action to be launched is likely to exercise substantial pressure on delinquent or illegal commercial behaviours⁹⁰. By aggregating all individual claims against a company in default, a class action attenuates the asymmetry in the balance of power between merchant and consumer. A large company can accumulate great profits by illegally overbilling each customer by a few (or a few dozen) dollars. It would be absurd for each of those customers to take legal action and be reimbursed a few dollars. The aggregation of individual claims and thus of damages claimed overcomes this paradox by making it a perilous adventure for a company that would be found guilty. The penalty is not to compensate a few brave souls who would go to court for a few dollars; a company found guilty may have to compensate hundreds or even thousands of consumers, so the amount can often be in the millions of dollars, by the simple addition of individual compensations. Thus, class actions are one of the rare mechanisms in consumer law that, by the serious threat of a significant sanction against merchants, can have

⁸⁷ Cuming, *op. cit.*, p. 72.

⁸⁸ Lafond, "Le consommateur et le procès – Rapport général," *loc. cit.*, p. 143. Our translation.

⁸⁹ *Ibid*, pp. 144 to 145.

⁹⁰ Cuming, *op. cit.*, p. 79.

such a deterrent function. Moreover, those sanctions can have a broader “curative” function than merely compensating members. For example, there was a time when the field of travel accounted for a large part of class actions (26% of class actions launched 1980 to 2001)⁹¹. Nowadays, class actions in the field of travel “are extremely rare” – the delinquent players have been removed from the market⁹².

The class action is therefore an important measure of access to justice, in being one of the few measures capable of promising that large delinquent companies will be levied deterrent, significant sanctions proportional to the gravity of the misconduct.

2.5 Alternative Dispute Resolution Mechanisms

Offers and incentives regarding the use of alternative dispute resolution mechanisms (ADRM) – mediation, conciliation and arbitration – are more and more prevalent today. The essential purpose of ADRMs is also their main advantage: to offer an alternative to trials before a judge by promising the parties a satisfactory solution following a less formal, less costly, quicker and less stressing process. ADRMs thus directly meet this result requirement that citizens and consumers expect from justice. The legitimacy of ADRMs and of their decisions is due to the fact that the parties freely consent to them. Of course, one may doubt the free and informed character of consumers’ decision to use an alternative dispute resolution mechanism if the pre-dispute arbitration clause of a subscription contract obliges them, in the event of a dispute, to use ADRMs exclusively and to waive their right to go to court individually or collectively, or even to be a member of a class action. This practice certainly contradicts the purpose and legitimacy of ADRMs.

Although there have been several attempts to distinguish them, there appear to be no substantial or convincing distinctions between *mediation* and *conciliation*⁹³, or at any rate no firm consensus about the meaning of those terms and about the realities they cover respectively. A real distinction appears more clearly between mediation/conciliation and arbitration. It should first be noted that mediation and conciliation are distinguished from simple negotiation by the presence of a third party – a conciliator/mediator – responsible for assisting the parties in examining the facts, pretensions and claims of both parties to the dispute in order to help them reach a freely accepted agreement or settlement. Like conciliation/mediation, arbitration also features the presence of a third party – an arbitrator – to assist the parties in examining the facts and the claims of each party to the dispute. The essential distinction is that the parties to the dispute, by agreeing to participate in an arbitration procedure, thereby agree to be bound by the outcome, which will be determined by the arbitrator’s decision. In a mediation/conciliation process, the parties to the dispute remain free to accept the proposed settlement or not, if there is one, or to have the dispute continue in the absence of an agreement.

Anthony Duggan considers ADRMs as strategies to reduce and avoid the cost of legal action – strategies that resemble small claims courts in this regard and on certain points. But he points out a major difference between the two, which constitutes an advantage in favour of arbitration tribunals, ombudsmen and other dispute resolution mechanisms that are specific to an industry: specialization tends to reduce the trial’s duration, because the arbitrator (mediator or conciliator) is already familiar with the sector’s issues; so the parties are not obliged to explain the context

⁹¹ *Ibid.*, p. 62.

⁹² *Ibid.*, p. 62.

⁹³ Labelle, *op. cit.*, p.10-13. Lafond, *loc. cit.* Lacoursière, *loc. cit.*, p. 118.

of the dispute. Shorter trials cost less for everyone. Specialization is also likely to reduce the number of errors in decisions⁹⁴.

More and more countries incorporate forms of conciliation or mediation in court proceedings. In Spain, any ordinary court proceedings must follow a trial whose avowed goal is to foster an agreement between the two parties⁹⁵. In Canada, conciliation or mediation is mandatory in certain areas (e.g.: labour law, in the federal government, the *Canadian Human Rights Act*, in family law⁹⁶). Quebec's Small Claims Court offers mediation to help the parties settle their dispute prior to a trial before the judge and induces the parties to accept mediation⁹⁷. We mentioned above the ongoing pilot project in British Columbia, to integrate mediation and pre-trial conferences in available formal proceedings; the Small Claims Court also encourages out-of-court settlements and requires the parties to participate in a "settlement conference" before the trial⁹⁸.

Lafond uses the expression "pluralisme juridique" (legal pluralism) to designate all dispute settlement mechanisms and procedures that are found outside the legal system. He uses the expression "pluralisme judiciaire" (judicial pluralism) for alternative procedures implemented within the legal system itself, which then seeks to "adapt to the new realities without necessarily renouncing legal authority or recognizing the value of other normative categories"⁹⁹.

In terms of access to justice, alternative legal proceedings (those offered once a dispute has entered the legal system) are mainly useful to citizens who have already used the legal system, i.e., as explained above, to a minority and not necessarily to those who would need it most. Certainly, by lightening the legal system, ADRMs are likely to free up resources and thus enable quicker processing of other proceedings, which is significant.

Some ADRMs are entirely private and others benefit from some support from public authorities. Some are specific to a sector of activity and others are more general.

In the financial sector, for example, a Canadian consumer can first approach the Financial Services Ombudsnetwork (FSON), whose assistance and orientation services may refer him to members of that network, i.e., to the Ombudsman for Banking Services and Investments (OBSI), to the General Insurance OmbudService (GIO), to the Canadian Life and Health Insurance OmbudService (CLHIO), or, if applicable, to the Financial Consumer Agency of Canada (FCAC) or the relevant provincial authority for institutions under provincial jurisdiction, such as the Autorité des marchés financiers du Québec (AMF). Marc Lacoursière describes the processes established by those institutions in an attempt to settle disputes¹⁰⁰; we conclude that

⁹⁴ Duggan, *loc. cit.* p. 62.

⁹⁵ Lafond, *loc. cit.*, p. 151.

⁹⁶ Labelle, *loc. cit.* p. 13.

⁹⁷ Ministère de la Justice du Québec, "Les petites créances," September 24, 2010, <http://www.justice.gouv.qc.ca/francais/publications/generale/creance.htm>

⁹⁸ Ministry of the Attorney General of Ontario, "Small Claims Court Pamphlets," Government of Ontario, http://www.attorneygeneral.jus.gov.on.ca/english/courts/scc/small_claims_court_brochures_EN_Jan_11.pdf

⁹⁹ Lafond, *loc. cit.*, p. 150. Our translation.

¹⁰⁰ For example: "L'OSBI exige d'abord du consommateur lésé qu'il communique avec son institution financière. En cas de résultat négatif, il devra porter plainte devant l'OSBI dans un délai de six mois, à la condition de respecter le mandat de cet organisme. Précisons que l'OSBI ne possède qu'un pouvoir de recommandation envers une entreprise fautive. Les sanctions sont habituellement de l'ordre des dommages compensatoires, mais il peut occasionnellement y avoir une recommandation de

the entry points are many, the jurisdictions vague, the steps to be taken multiple, and that those organizations essentially have no powers other than that of making recommendations, while consumers have practically no guarantee that companies will comply with decisions rendered by the organizations. Apart from the FCAC, those dispute resolution mechanisms have no decision-making or enforcement power. As for the FCAC, it can investigate a consumer complaint if an institution under its jurisdiction does not meet its legal obligations. It can then take steps to compel the company to comply with the law, but it can offer the wronged consumer no compensation.

To find mechanisms that are enforceable on merchants, it is necessary to look at arbitration, which leads to a binding decision – subject to court approval. It should be noted that such approval entails costs as well as additional proceedings (and thus indirect costs). Finally, as a general rule, only when both parties agree to arbitration can the latter be used to settle disputes.

On one hand are initiatives such as the Canadian Motor Vehicle Arbitration Plan (CMVAP), a joint initiative by the governments of several provinces and territories and by the Canadian Consumer Association, the Canadian Vehicle Manufacturers' Association, and the Canadian Automobile Dealers Association¹⁰¹.

On the other hand, there are entirely private arbitration tribunals where the parties can agree to submit their dispute. Quebec and Ontario have recently prohibited pre-dispute arbitration clauses in consumer contracts; under those clauses, consumers waived their right to go to court in the event of a dispute with their co-contracting party, while agreeing to refer any eventual dispute exclusively to private arbitration¹⁰². The lawmakers are not thereby attempting to prohibit consumer disputes from being submitted to arbitration – a consumer can still, if he wishes, submit to arbitration his dispute with a merchant, but that choice can be made only once the dispute is acknowledged, thus preserving the consumer's right to have his complaint heard in the forum of his choice (including before a judge)¹⁰³.

One of the problems most often reported about certain private arbitration tribunals is the lack of a guarantee of independence. Public Citizen revealed in 2007 that the National Arbitration Forum (NAF), one of the largest American arbitration firms, had rendered decisions unfavourable to consumers in 94% of cases. Minnesota's Attorney General initiated legal action against NAF and alleged that the company was linked economically to collections companies providing it with a major part of its business, and that NAF had stopped referring its cases to arbitrators who did not sufficiently decide in favour of those companies, but rather had recruited "arbitrators" more likely to decide against consumers and in favour of the companies¹⁰⁴. The fundamental bias results from private arbitration firms having to sell their services and from the most important clients being large companies that often include mandatory arbitration clauses by default in their contracts. So private arbitration firms have a direct interest in rendering

dédommager une perte financière indirecte. Les recommandations ne sont pas contraignantes, mais, en cas de refus ou d'omission, l'OSBI publie les recommandations sur la vitrine Internet ou les rend publiques autrement." Lacoursière, *loc. cit.*, p. 124.

¹⁰¹ *Ibid.*, pp. 117 à 118.

¹⁰² Ogilvy Renault LLP, "Class Actions, Arbitration and Alternative Dispute Resolution," August 27, 2007, <http://www.nortonrose.com/>.

¹⁰³ Including such clauses in consumer contracts is still possible in the other provinces, as in the United States, where consumer rights organizations attempt to have them prohibited. Public Citizen, *Forced Arbitration: Unfair and Everywhere*, September 14, 2009, <http://www.citizen.org/publications/publicationredirect.cfm?ID=7705>.

¹⁰⁴ *Ibid.*, p. 2.

decisions in favour of companies: what better selling point than a 90% rate of cases won by companies?

The above example is a reminder of how important it is that ADRMs comply with natural law principles and that consumers have a real choice to submit their dispute to them or not, in full knowledge of the facts. But the problems with private arbitration courts are not limited to such spectacular cases.

After studying several arbitration tribunals, Union des consommateurs has concluded that none of the arbitration systems available in Canada offers, in consumer affairs, a sufficient guarantee of cost-effectiveness¹⁰⁵, notably because decisions must be ratified in order to become enforceable, which adds time and money to the process.

In addition, as opposed to civil cases brought before the courts, the procedures and decisions of arbitration tribunals remain private and confidential. This worsens the problem, which we discussed above, of asymmetry between repeat players and one-shot litigants in arbitration. Large companies, which are repeat users of (legal or arbitration) tribunals, can distribute the expenses of their legal actions over many cases and benefit from specialization. Inversely, a consumer has to invest a lot of time and money to prepare his case, hire a professional, appear at the proceedings, etc. Proportionately and in absolute terms, the (direct and indirect) costs are greater for the consumer. But the private and confidential character of arbitration decisions considerably aggravates this problem. A repeat user, having taken part in many proceedings, knows how the decisions tend to be taken, or at least the arguments that did or did not make a difference in past cases. For his part, an infrequent user cannot have access to such knowledge since the decision-making process is opaque and decisions are not made public. And yet, it would be essential, in a fair process, that knowledge of past decisions and related information be shared among the parties, if only to enable them to anticipate reasonably, and fairly, the chances of success or failure – an essential calculation when the time comes to consider a settlement proposal, or for enabling the parties to prepare their case and arguments, in a motion or in defence. Ironically, a company whose practices are deficient and problematic on a regular basis, and that is thus often called to appear before arbitration tribunals, will likely, rather than be penalized, improve each time its ability to win cases. Thus, the cost of acquiring information (about past decisions, the chances of success, the arguments that work best) decreases for the company each time it appears before the arbitration tribunal, whereas the consumer has no access to that information at all. Finally, the proceedings' confidentiality also makes it impossible for a consumer seeking a supplier of goods or services to know that a given merchant is constantly embroiled in disputes with his customers – although that information is essential for the consumer to make an informed choice.

Those considerations led Union des consommateurs to conclude, in its report on arbitration, that it was not impossible to establish adequate arbitration systems, but that several criteria had to be met to that end.

First, the funding of such a tribunal should guarantee its independence: no other funding than public funding offers such a guarantee. Second, a consumer arbitration system should, "to play its role adequately, assist consumers by providing them with useful and complete information about arbitration, as well as relevant legal assistance," in order to accompany consumers in the process, reduce the stress of such an adventure, and facilitate access to relevant information to

¹⁰⁵ Labelle, *op. cit.*, p. 62.

prepare their case (and reduce the effects of repeat users' structural advantage)¹⁰⁶. Third, recourse to arbitration should always remain a fully conscious and voluntary decision for consumers. Four, to fully meet its promises, an arbitration tribunal should truly be as inexpensive as possible, or even free of charge to the consumer (including for the decision's ratification and enforcement). And five, it should be accessible in a material sense; our report on arbitration pointed out that many arbitration tribunals only hold hearings in large urban centres or charge additional fees to hold them elsewhere.

As a cost-reduction strategy, ADRMs are certainly interesting as part of an arsenal of policies to improve access to justice. But it should be kept in mind that they constitute a mechanism for resolving individual disputes and that recourse to such mechanisms – if they are to be a means to provide more justice, not less – must always remain a fully conscious and voluntary choice by consumers. But, as described above, individual dispute resolution mechanisms do not serve the sections of the population that are most vulnerable. Whether through conciliation, an ombudsman or arbitration, the direct and indirect costs of using such mechanisms are still very high, particularly for sections of the population that are victims of various forms of social exclusion: by a cruel paradox, those who have the least financial means to hire a lawyer are those who least know the language of legal proceedings and dispute resolution mechanisms. For the same reasons that the most disadvantaged people are not the typical clientele of small claims courts, they are least likely to be that of ADRMs.

Another aspect that can make ADRMs problematic is that they have no actual deterrent function. In fact, before the recent legislative amendments in Quebec and Ontario, a forced recourse to arbitration constituted a primary strategy used by large companies to avoid having to go to court.

For example, to benefit from ADRMs in the field of financial institutions, a consumer has to take several steps that can take months, with no guarantee that the process will be fair and without knowing whether the institution will abide by the decision in the end. Thus, after several months of undertakings (of invested time and effort), a consumer may still have to go to court to have his rights respected. The costs incurred in such an adventure discourage all small disputes from the start, so a company has every interest in dragging the process while waiting for the consumer to give up rather than try to have the problem corrected or seek a settlement. For an ADRM to have a fair outcome, both parties must participate in good faith in trying to settle the case. The best way to ensure that a company is in good faith is to assure it that if it acts in bad faith, the customer can avail himself of a process that will not depend on its good faith.

Accordingly, in a true strategy of access to justice – and not only of “dispute resolution” –, if ADRMs are to be a means of access to justice and not a denial of justice, they must be accompanied by strong enforcement mechanisms that an uncooperative company could not escape. The only true enforcement mechanisms are still legal proceedings. If we want the latter to seriously exercise their deterrent function on companies and merchants, they must be credible and truly accessible.

¹⁰⁶ *Ibid.*, p. 61. Our translation.

2.6 Community Justice Centres

The Quebec government inaugurated in 2010 two community justice centres, in Québec City and Rimouski, with the collaboration of the Barreau du Québec, the Chambre des notaires and the Société québécoise d'information juridique. A third centre, which originally was to open in Sherbrooke, will in the end be established in Montreal; its opening is planned for May 2011¹⁰⁷. Those three-year pilot projects are modelled after several similar initiatives in the rest of Canada, in the United States and in France¹⁰⁸. The centres, which have two employees, are autonomous non-profit organizations led by a board of directors comprised of local stakeholders. Funding is shared among the partners, i.e., the ministère de la Justice, the Barreau du Québec, the Chambre des notaires du Québec and the Société québécoise d'information juridique du Québec¹⁰⁹, which have defined, by consensus, the mission of community justice centres. Although each centre can reflect its regional differences, it is committed to fulfil the mission, values, vision and goals determined as part of the pilot project.

The essential mission of those centres consists of improving access to justice “by promoting citizen participation,” by offering “information, support and orientation services, offered as a complement to existing resources¹¹⁰.” So a citizen of Rimouski or Québec City can approach those centres to obtain information on his rights, the laws and the remedies available to him. The personnel will help him find the information and will direct him to specialized resources. As information complementary to the press release of April 21, 2009, the website of the ministère de la Justice also mentioned that legal advice services as well as “mediation services and other alternative dispute resolution mechanisms, on site or not¹¹¹” could be offered by the centres. That has not been the case, because each centre’s service basket has been determined by its board of directors, in accordance with a centre’s “capacity to pay” and the common instruction not to offer legal opinions¹¹².

¹⁰⁷ Personal communication with André Couture, Direction des orientations et politiques, ministère de la Justice, Thursday, May 12, 2011.

¹⁰⁸ Notably cited are “Point d'accès au droit” (France), “Law Information Centres” (Alberta), “Law Help Centre” (Ontario), “BC Supreme Court Self-Help Information Centre” (British Columbia). Ministère de la Justice du Québec, “Community Justice Centres,” in information complementing the press release issued on April 21, 2009 by Justice Minister Kathleen Weil.
<http://www.justice.gouv.qc.ca/english/commun/centres-a.htm>.

¹⁰⁹ The ministère de la Justice contributes \$200,000, the Barreau du Québec \$100,000, the Chambre des notaires du Québec \$100,000 and the Société québécoise d'information juridique du Québec \$100,000, for a total of \$500,000.

¹¹⁰ Community Justice Centres, “Bonne Nouvelle : Le premier centre de justice de proximité devrait ouvrir ses portes très prochainement,” August 24, 2010, <http://justicedeproximite.qc.ca/2010/08/bonne-nouvelle-le-premier-centre-de-justice-de-proximite-devrait-ouvrir-ses-portes-tres-prochainement/>. Our translation.

¹¹¹ Ministère de la Justice du Québec, *loc. cit.* <http://www.justice.gouv.qc.ca/francais/commun/centres.htm>. Our translation.

¹¹² Communication with André Couture, direction des orientations et politiques, ministère de la Justice, May 17, 2011.

The initial project was presented as follows:

Selon la formule envisagée actuellement, cinq types de services pourraient être offerts dans les centres de justice de proximité :

Information juridique

Permettra au centre de jouer un rôle préventif, de procurer aux citoyens un sentiment de contrôle accru et de leur offrir une meilleure préparation avant un procès, le cas échéant.

Avis juridique

Permettra aux citoyens d'être en contact rapidement avec un juriste, au centre ou non, et d'obtenir un avis sur l'opportunité d'engager une procédure.

Services de soutien (séances d'information, explication du déroulement d'un procès, service bénévole d'accompagnement, etc.)

Permettra aux citoyens de "démystifier" le système de justice et renforcera leur sentiment de confiance dans le processus judiciaire.

Aide concernant les formulaires liés à des démarches judiciaires (pour identifier le formulaire approprié ou le remplir)

Permettra de simplifier la vie du citoyen, d'accélérer le déroulement des procédures et, accessoirement, d'alléger la charge d'autres intervenants du milieu.

Médiation et autres modes alternatifs de règlement des conflits, sur place ou non
Permettra de porter à l'attention des citoyens les bénéfices des modes alternatifs et de les inciter à y avoir recours, lorsque jugé opportun¹¹³.

The services promoted today on the websites of community justice centres are the following:

Les Centres de justice de proximité offrent notamment les services suivants :

information juridique permettant au citoyen de comprendre les diverses réalités juridiques auxquelles il peut faire face dans sa vie quotidienne et d'y réagir de façon avisée;

orientation du citoyen vers les différentes ressources juridiques disponibles, communautaires ou autres, afin qu'il puisse choisir le service correspondant à ses besoins;

*service de soutien au citoyen et d'accompagnement dans l'établissement de ses besoins d'ordre juridique et dans les options possibles pour y répondre;
aide au citoyen pour choisir et remplir adéquatement les formulaires de nature juridique¹¹⁴.*

¹¹³ *Ibid.*

¹¹⁴ Community Justice Centres, "À propos," consulted on June 1, 2011, <http://justicedeproximite.qc.ca/a-propos/>

Those projects are manifestly at an early stage. We find little information on the Internet (only coordinates, a mission statement and a description of services offered, as well as links to online resources)¹¹⁵. The main consultation method seems to be on site, during regular office hours.

The offer of such information, assistance and orientation services will likely help improve access to justice, for consumers and litigants in all other fields. Those services are likely to reduce the cost incurred by consumers searching for information to understand the laws, their rights and remedies, along with the various procedures available to them. The orientation and assistance can not only save time, but also consumers' frequent stress and feeling of alienation regarding legal and dispute resolution mechanisms. The hope is that such initiatives will be successful and can be reproduced elsewhere in Quebec. Certainly, the addition of legal advice and mediation/conciliation services, as apparently intended when this initiative was designed, could help make justice more accessible.

This pilot project is to be assessed for the period of September 1, 2011 to September 1, 2012.

2.7 Conclusion

In the panoply of measures offered to consumers, there are no fully satisfactory solutions to guarantee consumer access to justice. Legal aid is accessible to a too-restricted part of the public and generally does not cover consumer disputes. Unless it adopts the Spanish model, which funds consumer associations, legal aid is thus of little use in consumer law.

Legal insurance is not yet very popular or well known. The possibility of broadening its use by including it by default in insurance contracts does not appear necessarily desirable. Moreover, legal insurance is of little use in consumer disputes, where the low value of a claim obviates the cost-effectiveness of this remedy. Just as motorists often do not make claims unless the damage is substantial, it is unlikely that legal insurance would be widely used in consumer law. Still, the offer of telephone legal assistance to the insured has an interesting preventive character.

Class actions are a fundamental component of the legal arsenal in consumer law. By aggregating individual claims, this mechanism can impose substantial penalties to companies that act abusively or negligently toward a large clientele. In the process, this type of recourse can have deterrent and even curative functions. This measure avoids problems related to the asymmetric relations between consumer and company.

Small claims courts are certainly a step in the right direction to making legal proceedings accessible, but that step is insufficient. Those courts are still much too costly (in money, time, opportunity cost, and stress) to constitute an interesting recourse for most consumer claims. In addition, this measure misses the target. It is essentially a dispute resolution mechanism for professionals and litigants belonging to higher income brackets. In other words, small claims courts, despite their clear advantages for certain litigants, fail to actually reduce inequalities of

¹¹⁵ *Ibid.* The online resources retained are: 1) Organizations: Éducaloi; Commission des normes du travail; Office de la protection du consommateur; Pro Bono Québec; the Quebec courts of law; Commission des services juridiques; Institut de médiation et d'arbitrage du Québec; and 2) Laws, regulations and decisions of courts or organizations: laws and regulations of Quebec; laws and regulations of Canada; Société québécoise d'information juridique; annotated Civil Code of Québec; and Canadian Legal Information Institute (CANLII).

access and to fight substantial injustices. And small claims courts are limited to debt claims, so they are of limited usefulness in defending consumer rights.

Alternative dispute resolution mechanisms (ADRM) – quicker, more flexible and less intimidating than a court of law – meet consumers' need for dispute resolution results. Their specialization produces shorter waiting times for processing and trials. One of the disadvantages of ADRMs is due to the privatization of disputes, which are then settled behind closed doors, thus eliminating any possibility of a deterrent effect. It should also be noted that the asymmetry between repeat players and one-shot litigants is greater than ever in this type of recourse.

Community justice centres are an interesting initiative that can enable a consumer to reduce several of the informal costs of a legal action to assert his rights. They can reduce the distances between some consumers and the knowledge and understanding of concepts and texts necessary to the defence of consumer rights. But at this time, they are fragmentary initiatives with resources and services that appear too limited to have a substantial impact.

What conclusions can be drawn from this overview of measures of access to justice? First, with the exception of a class action – in situations where a dispute affects a sufficiently large number of consumers to justify this particularly demanding procedure – none of those measures is fully adapted to the realities of consumer law. Measures such as small claims courts (and, to a certain extent, legal cost insurance, and even ADRMs) can be somewhat useful to consumers, but that potential usefulness is strongly limited if the disputes are of little value, as is often the case in consumer disputes. Those measures are generally too costly to really be accessible and worthwhile for a consumer to initiate an action. When to the various direct costs (legal stamp fees, judgment enforcement fees) are added indirect costs (opportunity costs related to a lost workday for plaintiffs, time spent preparing the case, stress), a lot of claims lose their interest simply in terms of cost-effectiveness. This is all the more true for litigants victimized by various forms of social exclusion, for whom acquiring the necessary information to prepare the case, and going to court, will be more costly, difficult and stressful due to lack of education, literacy problems, lack of fluency in French or English, etc. All the barriers to access, normally qualified as psychological obstacles, are greater for vulnerable consumers. Clearly, the measures in place are insufficient for overcoming those barriers.

That leads us to the following point: most of the measures we have examined constitute or lead to individual dispute resolution mechanisms. Improving access to legal proceedings and ADRMs is essential, but such mechanisms do little to fight the substantial injustices at the source of the real problems of access to justice and are unable to benefit the most vulnerable consumers.

Without proposing a vast program to reduce social inequalities, a program of access to consumer justice should first give much more weight to prevention and deterrence. Competitive markets, and companies that fear the consequences of not respecting consumer rights, will also benefit vulnerable consumers. It should be noted that class actions constitute one of the rare mechanisms likely to have real deterrent power over large companies.

In addition, more effort is necessary to make legal remedies truly accessible. That implies initiatives to reduce all forms of distance between consumers and access to legal proceedings, by paying attention to the diversity of obstacles and social inequalities: material, psychological, cultural, social, geographic, etc. More effort would also be necessary to remove inequalities in access to justice, before or apart from going to court.

Finally, measures likely to have a deterrent effect should be broadened, increased and diversified. Indeed, facilitating consumers' ability to launch useful legal actions can reinforce their deterrent function. In this regard, it is problematic that small claims courts are reserved for financial claims.

Roderick MacDonald recalls that the task force on access to justice he had chaired in the early nineties had "made several recommendations regarding legal readability and popular legal education, and regarding community justice centres and popular organizations dedicated to promoting preventive law¹¹⁶." Those recommendations, which were intended to "empower citizens as citizens, and not as clients of the legal profession," were not followed up, except for some intended, for example, to facilitate recourse to ADRMs within the legal system, and thus to add auxiliary proceedings to the legal system, rather than provide preventive justice. MacDonald points out that his task force's report was not written according to a specific mandate to promote consumer justice, but he emphasizes that "its orientation in favour of specific and differentiated justice" would have led him to recommend the creation of a consumer court¹¹⁷.

In fact, several foreign jurisdictions have adopted a consumer court in one form or another. In the next section, we will examine whether those initiatives suggest solutions to the problems we have just described regarding access to justice.

¹¹⁶ MacDonald, *loc. cit.*, p. 17. Our translation.

¹¹⁷ *Ibid.*, p. 18. Our translation.

3. Examples of Consumer Courts Abroad

3.1 General

Given that not much literature is available about the concept of a court entirely dedicated to consumer recourses, the present study has favoured a more exploratory method, to seek almost first-hand information. So the idea was not to conduct an in-depth comparative analysis of consumer dispute resolution mechanisms and legal recourses in different countries, but rather to examine an option that appears to have been explored too little in itself. First, we conducted research to draw up an inventory of jurisdictions that have chosen that option. The survey we conducted does not pretend to be exhaustive (we will describe those limits below).

Then we conducted research based on available information, to draw a first portrait of those tribunals, and we attempted to contact stakeholders of those jurisdictions who were familiar with those institutions. At times it proved necessary to multiply the number of attempts and means of communication, but we succeeded in establishing communication with a large majority of those institutions. Some of our contacts work for – and even manage – those institutions, while others were more involved with them to defend consumers there (more details will follow on the stakeholders).

Once contact was established, we sent our contacts a questionnaire regarding the institution in question. That detailed questionnaire was personalized, written specifically for each consumer court on the basis of our prior research, and aimed to obtain complementary information and clarifications. In some cases, more than one follow-up was done after first making contact.

In this section we present a detailed portrait of each of those institutions, on the basis of our research and those discussions. A summary analysis will follow.

Because our research was intended to do the groundwork, the selection of proceedings to be studied is not scientific or very systematic. It was instead a form of reasoned selection of cases. Our research led us on several paths to identify foreign institutions corresponding to the idea we had of a consumer court, i.e., a specialized legal or quasi-legal forum in charge of receiving all or most consumer claims and recourses. Among the criteria considered: is the process similar to that of an ordinary court of law? Are the institution's decisions directly enforceable on companies and merchants? Does non-compliance with a decision entail legal consequences?

After a first examination, some institutions were not retained for further study. This is the case with Denmark's Consumer Complaints Board (*Forbrugerklagenævnet*)¹¹⁸, where the greatest risk run by a company that does not comply with sentences is to have its name published on the Internet; and with the Dutch Consumer Dispute Arbitration Board (*De Geschillencommissie*), where participating trade associations guarantee the implementation of those decisions¹¹⁹. We also set aside Norway's Consumer Disputes Commission (*Forbrukertvistutvalget*), which does not hold oral hearings and renders decisions only on the basis of written evidence¹²⁰.

¹¹⁸ Danish Competition and Consumer Authority, "The Consumer Complaints Board," consulted on June 1, 2011, <http://www.consumeragency.dk/Regulatory-framework/The-Consumer-Complaints-Board>.

¹¹⁹ *De Geschillencommissie*, consulted on June 1, 2011, <http://www.degeschillencommissie.nl/>

¹²⁰ *Forbrukertvistutvalget*, consulted on June 1, 2011, <http://www.forbrukertvistutvalget.no>

Several institutions on the Oceania Continent might have been included in our analysis: New Zealand's Disputes Tribunal, the Victorian Civil and Administrative Tribunal (VCAT), the Queensland Civil and Administrative Tribunal (QCAT), and the Australian Capital Territory Civil and Administrative Tribunal (ACAT)¹²¹, all of which are Australian subnational jurisdictions. Those organizations correspond to what could be qualified as an Oceanian model for administrative justice, i.e., centralizing to a one-stop service most of the courts and administrative tribunals that exist in those jurisdictions (small claims, housing, discrimination, land ownership, health, professional orders, etc.¹²²). Generally, we did not think the mandate of those organizations was sufficiently specific to consumer affairs to correspond with what we intended to study, i.e., the concept of a court specializing in consumer law. On the other hand, because it is a model that can be of interest as part of our research topic, we included in our analysis the Consumer, Trader and Tenancy Tribunal (CTTT) of the Australian province of New South Wales, because that court seemed most dedicated to consumer recourses (the CTTT having grouped together only the fields of housing and consumerism).

Among the institutions retained, the presence of the *Centro de Arbitragem de Conflitos de Consumo de Lisbonne* may seem surprising since, in accordance with the model of an arbitration tribunal, only companies that have agreed a priori to appear before it can be compelled to do so and are bound by its decisions, which are enforceable. Nevertheless we chose to include this institution in our analysis, because this original type of consumer dispute resolution mechanism – which was the model that initially guided the present study¹²³ – has features much more typical of an actual tribunal than an arbitration organization. We included it so that a certain diversity of models could allow for comparison, and because the *Centro* clearly contains aspects that should, in our view, be part of any consumer court.

The other institutions we retained correspond to the concept of a consumer court clearly enough for their inclusion to be obvious. They are:

- Consumer Affairs Court, Gauteng, South Africa;
- Consumer, Trader and Tenancy Tribunal, New South Wales, Australia;
- District Forums, State Consumer Disputes Redressal Commissions, National Consumer Disputes Redressal Commission, India;
- Tribunal for consumer claims, Malaysia;
- *Centro de arbitragem de conflitos de consumo*, Lisbon, Portugal;
- District Consumer Court, Punjab, Pakistan;
- Consumer Claims Tribunal, Malta.
- Arbitration boards and consumer courts, Turkey.

¹²¹ *Disputes Tribunal*, consulted on June 1, 2011, <http://www.justice.govt.nz/tribunals/disputes-tribunal>. *Victorian Civil and Administrative Tribunal*, consulted on June 1, 2011, <http://www.vcat.vic.gov.au>. *Queensland Administrative and Civil Tribunal*, consulted on June 1, 2011, <http://www.qcat.qld.gov.au/>. *Australian Capital Territory Administrative and Civil Tribunal*, consulted on June 1, 2011, <http://www.acat.act.gov.au/>.

¹²² For example, here is the list of courts amalgamated in the *Queensland Civil and Administrative Tribunal: Anti-Discrimination Tribunal; Appeal tribunals formed under the Local Government Act; Children Services Tribunal; Commercial and Consumer Tribunal; Fire Panel of Referees Fisheries Tribunal; Guardianship and Administrative Tribunal; Health Practitioners Tribunal; Independent Assessor under the Prostitution Act 1999; Legal Practice Tribunal; Misconduct Tribunal; Nursing Tribunal; Racing Appeal Tribunal; Retail Shop Leases Tribunal; Small Claims Tribunal; Surveyors Disciplinary Committee; Teachers Disciplinary Committee; Valuers Registration Committee; Veterinary Tribunal*. *Queensland Administrative and Civil Tribunal*, consulted on June 1, 2011, <http://www.qcat.qld.gov.au/>

¹²³ Yanick Labelle, *op. cit.*

3.2 Gauteng, South Africa: Consumer Affairs Court

Main features

- Intended to establish means to monitor and prohibit “unfair business practices” in the interest of consumer protection;
- A “Consumer Protector” represents and supports consumers before the court;
- It is not necessary that damage be sustained for a complaint to be heard;
- The court has extensive powers, particularly in prohibiting certain business practices deemed “unfair,” and in naming a trustee;
- No limit to the value of admissible disputes;
- Quick processing of cases.

Introduction

The province de Gauteng, where the cities of Johannesburg and Pretoria are located, is the most populous and richest in South Africa. This was also the first province in the country to have a Consumer Affairs Court. The adoption of the *Consumer Affairs (Unfair Business) Act of 1996*¹²⁴ led in 1999 to the commencement of Gauteng’s consumer court. The provinces of Free State and Limpopo have since followed.

In 2010, the South African Parliament adopted a reform to harmonize and enhance consumer protection across the country¹²⁵. Under the *Consumer Protection Act* of 2010, the provinces that have not yet done so are now obliged to acquire consumer courts. The new law notably transforms the *National Consumer Tribunal*, created under the *National Credit Act* of 2005, and hitherto only responsible for credit agreements and services, into a higher administrative tribunal for consumer recourses. Generally, the new law allocates powers between the provinces and the South African State, but also between private and public dispute resolution mechanisms, thus creating – in theory – recourses for all South African consumers.

However, implementation may pose quite a challenge. By March 2010, all the provinces had indeed adopted a law for creating a consumer court, but only the three provinces mentioned above had succeeded in making their institution functional. Problems of institutional capacity, political will and ability to gather necessary political support are reportedly at the source of the difficulties¹²⁶. Moreover, the launch of the National Consumer Tribunal, scheduled for fall 2010, has been postponed by at least 6 months¹²⁷.

Since those institutions, resulting from initiatives by South Africa’s central government, are only at their beginnings (and since the complexity of South African federalism is beyond us), we chose not to study the new arrangements instituted by the South African parliament, but rather

¹²⁴ *Consumer Affairs (Unfair Business Practices Act of 1996)*, Provincial Legislature of Gauteng, <http://www.ledet.gov.za/docs/new%20acts/consumer%20affairs%20unfair%20business%20practice%20act.pdf>. Hereinafter *Consumer Affairs Act*.

¹²⁵ Neesa Moodley-Isaacs, “How the consumer law will be enforced,” *Personal Finance Magazine*, No. 4, 2010, <http://www.iol.co.za/business/personal-finance/how-the-consumer-law-will-be-enforced-1.1016167>. Kevin Iles, “The Consumer Protection Bill – Changing the Face of Litigation and Dispute Resolution,” *Bowman Gilfillan*, Friday, April 17, 2009, <http://www.bowman.co.za/LawArt.s/Law-Art.-id~2132417394.asp>.

¹²⁶ Fati Manamela, “Institutional Arrangements: the Consumer Protection Court Perspective,” Consumer Protection Law Conference, March 4-5, 2010, Johannesburg, www.dti.gov.za/ccrd/Consumer/Manamela.pdf.

¹²⁷ Nathan Adams., “New body ready to tackle consumer complaints” *Eyewitness News*, January 25, 2011, www.eyewitnessnews.co.za/articleprog.aspx?id=57907.

to focus on the Consumer Affairs Court of the province of Gauteng, which has served as a model and example for the rest of the country.

We contacted Fati Manamela, current “Consumer Affairs and Business Compliance” Executive Director at Gauteng’s Economic Development Department, who has held and holds many positions and has contributed to establishing the court¹²⁸.

Consumer Affairs Act: context and objectives

In 1996, the province of Gauteng adopted the *Consumer Affairs (Unfair Business Practices) Act*¹²⁹. During all the apartheid years, South African consumers were exploited and benefited from practically no protection¹³⁰. There had been “consumer councils” previously, but their usefulness was limited by having no power to impose anything on a recalcitrant or delinquent merchant. There only remained the courts of justice, but most South African consumers could not bear the expenses related to hiring a lawyer. Gauteng’s law recognizes this situation and seeks to rectify it.

The *Consumer Affairs (Unfair Business Practices) Act* adopts a more prohibitive than proactive approach: i.e., it does not really formulate consumer “rights” that would then be protected and implemented (except, notably, in the law’s preamble, “the right not to be exploited as consumers”). Rather, the law is aimed at “unfair practices,” which it prohibits and which are defined quite broadly: “any business practice which, directly or indirectly, has or is likely to have the effect of unfairly affecting any consumer¹³¹.” Moreover, the Charter of Rights in the country’s Constitution apparently protects consumer rights¹³².

The law’s objective is thus to establish means for investigating, monitoring and prohibiting unfair business practices, in the interest of consumers¹³³. The Consumer Court, as well as an Office for the Investigation of Unfair Business Practices, directed by the Consumer Protector, has notably been established to that end.

¹²⁸ A former lawyer before the Superior Court of South Africa, Mr. Manamela was the first “Consumer Protector” named under the Consumer Affairs Act. Named in 1998, he succeeded in activating the Consumer Affairs Court, which had been moribund since 1996. Afterward he helped consumers defend themselves before the Court for the following 7 years. He is also a member of the National Consumer Tribunal.

¹²⁹ *Consumer Affairs Act*.

¹³⁰ Barring other indications, references or clarifications, the information presented in this part of our study, as well as the information on other examples of consumer courts, is based on the answers that the officials or representatives of those institutions sent us.

¹³¹ *Consumer Affairs Act*, art. 1.

¹³² This is what our interlocutor stated and what can be read on the website of the Trade and Industry Department (<http://www.dti.gov.za/protectingconsumers/consumerrights.htm>, consulted on February 20, 2011); but we could not identify the specific articles of the Charter that pertain to these issues.

Constitution of the Republic of South Africa, 1996.

<http://www.info.gov.za/documents/constitution/1996/index.htm> .

¹³³ “To provide for the investigation, prohibition and control of unfair business practices in the interest of the protection of consumers, and for that purpose to establish an Office for the Investigation of Unfair Business Practices and a Consumer Affairs Court; to amend the Local Government Ordinance, 1939, so as to authorise local authorities to establish consumer advice offices; and to provide for matters connected therewith.” *Consumer Affairs Act*.

Consumer Protector

The Consumer Protector manages the “Office for the Investigation of Unfair Business Practices” but is itself a distinct institution. The Office supports the Protector’s work and constitutes the first contact for a consumer who wants to file a complaint. If the Office does not succeed in settling the dispute, the file is transferred to the Consumer Protector, who is charged first with searching for a negotiated solution, and then, if necessary, to bring the case before the Consumer Affairs Court, where he will also be responsible for defending the consumer.

Filing a complaint

Consumers who are involved in a dispute with a merchant must first file a complaint to the “Office for the Investigation of Unfair Business Practices,” where an advisor will study the file and contact the merchant in an attempt to settle the complaint. Failing such a settlement, the file will be transferred to the Consumer Protector, who will attempt mediation. If the parties reach a negotiated settlement, it can be received by the Consumer Court, which will lend it its power of enforcement. Should mediation fail, the dispute is transferred to the Consumer Court and legal action is initiated.

No fees are imposed on the consumer for filing complaints to the Office or the Consumer Court.

Simplified procedure

The Consumer Court is not bound by the rules of evidence prevailing in courts of law; it uses a simplified procedure, more inquisitory than contradictory, whereby the parties are encouraged to represent themselves¹³⁴. But consumers have the possibility of being represented by the Consumer Protector. The Consumer Court “deals with complaints on the principle of fairness” by adapting its procedure to the dispute before it, so as to render decisions efficiently, quickly and at low cost to the parties.

Maximum complaint-handling periods

The Office for the Investigation of Unfair Business Practices has the objective of handling complaints within 60 days following their filing. From the moment when the case is transferred to the Consumer Protector, who is responsible for taking it before the Consumer Affairs Court, the complaint must be settled within 21 days, including the trial and, if applicable, the deliberations. However, the Consumer Affairs Court may adjourn a case in order to investigate certain elements further. The Court and the Consumer Protector will then have 21 additional days to settle the case. These quick complaint-handling objectives have been set jointly by the Office, the Protector and the Court.

Composition of the Consumer Affairs Court

The Court is comprised of one presiding member, 4 regular members and 4 alternate members. The presiding member must be a retired judge or an experienced legal expert. The members must have knowledge of consumer rights issues, the law, economics, trade or industry. The quorum is 3 members, but the bench may also be comprised of 5 members.

The Court sits in Johannesburg but may hear cases everywhere in the province. Four Consumer Office access points are distributed among the province’s main regional centres.

Powers

The Consumer Affairs Court has all the usual powers of a court of law in hearing witnesses or ordering the production of evidence.

¹³⁴ Legal representation is allowed but not encouraged. *Consumer Affairs Act*, art. 18 (6).

If it considers a business practice to be “unfair,” the Court declares it illegal at once¹³⁵ and issues a binding order. The Court’s determinations are added to case law¹³⁶. Gauteng’s Consumer Affairs Court can hear a complaint even if the complainant has suffered no direct damage.

The Court has the power to issue emergency orders in the nature of an injunction; pending a final decision, they will prohibit the defendant from engaging in the disputed business practice. Following a conviction, the Court may even name a trustee to take over the management of a business in order to redistribute its profits to wronged consumers¹³⁷. However, the Court does not have the power to cancel a contract, in whole or in part.

The Court can charge fees only in the event of clearly unreasonable or fraudulent conduct.

A party who refuses to comply with a court order may be found guilty of contempt of court and be levied a fine of 200,000 rands (almost \$28,000) or sentenced to up to 5 years in jail.

Any agreement or contractual term aiming to limit or exclude the application of any part of the law is null and void¹³⁸.

Jurisdiction

The Court can hear any consumer dispute, whatever its value. The Court’s jurisdiction applies to all goods purchased and services contracted in the province and to all unfair business practices, including all agreements, all marketing methods, negotiations, distributions, advertisements and business solicitations¹³⁹. But credit-related aspects are now the responsibility of the National Credit Regulator and the National Consumer Tribunal, which have jurisdiction across the country.

Status of the Consumer Affairs Court (CAC)

The Consumer Affairs Court is an administrative tribunal. It reports to the Economic Development Department.

A special tribunal presided by a retired judge can receive appeals and requests for review¹⁴⁰. The decision of that special tribunal, established under article 13 of the *Harmful Business Practices Act, 71 of 1988*, is final.

Difference with the Small Claims Court

We also find in South Africa a Small Claims Court that is a branch of the national government’s legal system, as opposed to the CAC, which is an administrative tribunal under the jurisdiction

¹³⁵ This power is established in two articles: “Order by court prohibiting unfair business practice” (art. 22) and “Declaration of certain business practices to be unlawful” (art. 24). *Consumer Affairs Act*.

¹³⁶ See *Moses Mashigoana, Tebogo Tanjane, Temba Rikhotso, Sizwe Shongwe, Gift Moloi, Masixole Dlomo v. Vaal Technology Institute*, CASE NO. GCC11/27/10. *Naresh Kandhai v. It’ Africa Woodcraft & Timbers cc*, CASE NO. GCC/14/15/1210. *Praisah Setimela Matlou v. Unlimited Furniture*, CASE NO. GCC/15/02/02/11.

¹³⁷ *Consumer Affairs Act*, art. 23.

¹³⁸ *Consumer Affairs Act*, art. 33.

¹³⁹ *Consumer Affairs Act*, art. 1.

¹⁴⁰ *Consumer Affairs Act*, art. 25.

of Gauteng province¹⁴¹. A main difference between the two institutions: the Small Claims Court can receive claims of only up to 12,000 rands, whereas the CAC has no ceiling.

Moreover, South Africa's Small Claims Court can receive claims only for debts; it will hear claims from any natural person (and not from artificial persons: companies, corporations or associations).

In contrast, the CAC has extensive powers not only to hear claims filed by consumers, but also to sanction infractions of the *Consumer Affairs Act*. The CAC's mandate is to apply that Act, so consumers are not likely to be compelled to appear before the CAC as defendants against a merchant's claim, as they may be before the Small Claims Court.

The Small Claims Court prohibits lawyer representation and seems to offer or favour no alternative dispute resolution mechanism. For its part, the CAC allows, but discourages, consumers from being represented by anyone other than the Consumer Protector. Consumers are accompanied and assisted (notably in attempts at an out-of-court settlement) throughout their adventure before the Office for the Investigation of Unfair Business Practices and the CAC.

Main benefits and challenges

The benefits are reportedly "enormous" and the public is said to have welcomed the CAC very favourably due to its free, accessible, quick¹⁴², informal character, which requires no legal representation and even makes a Consumer Protector available to consumers. The new case law favourable to consumers has reportedly helped clean up business practices.

Groups that were hostile to the CAC threatened, when it was established, to challenge its constitutionality. Those threats never materialized. Today, the Court's main difficulty resides in its ability to enforce its orders.

A sanction can be imposed only when a defendant refuses to comply with an order; but the case must be submitted to a criminal court. Fati Manamela estimates that this is an unsatisfactory situation – consumers need financial compensation; if an order is contravened, the National Consumer Tribunal should be able, like the superior courts, to issue writs to seize and sell the defendant's goods in order to compensate the wronged consumer. According to Mr. Manamela, the new *Consumer Protection Act* (which we addressed above) should correct this situation: "The *Consumer Protection Act* states that the decisions of the National Consumer Tribunal have the effect and force of a high court. This is what we want¹⁴³."

¹⁴¹ Department of Justice and Constitutional Development, "Small Claims Courts," 2006, website consulted on June 1, 2011, <http://www.justice.gov.za/scc/scc.htm>.

¹⁴² Fati Manamela mentions "We do not have backlog of cases; cases are attended to promptly and fairly." We were not able to obtain the annual reports that the Court tabled in the provincial legislature and in which processing periods are recorded.

¹⁴³ Fati Manamela's quote in answer to our questions.

3.3 New South Wales, Australia: Consumer, Trader and Tenancy Tribunal

Main features

- Administrative tribunal for facilitating access to an efficient, quick and low-cost dispute resolution mechanism in several fields, such as consumer affairs.
- Broad definition of the word “consumer.”
- Favours conciliation.
- Lightened and simplified procedure.
- Powers similar to those of a court of first instance.
- Jurisdiction (recently) over unfair terms.
- Many parameters and modalities vary according to the divisions and are defined in the laws governing the various fields under CTTT jurisdiction.

Introduction

As indicated by its name, the *Consumer, Trader and Tenancy Tribunal* (CTTT) is responsible for settling consumer and housing disputes, among others, and for granting permits. It contains 9 Divisions:

- General (goods and services – disputes of up to \$30,000);
- Residential construction (disputes of up to \$500,000);
- Motorized vehicles (new and used – \$30,000 or no limit for buying a new vehicle for private use);
- Residential renting (orders of up to \$15,000 or \$30,000 for cases involving “rental bonds,” i.e., a bond paid by a tenant to the lessor);
- Social housing (same as for residential renting);
- “Strata and community schemes”;
- Residential parks (mobile home parks);
- “Retirement villages”;
- Business (credit, real estate brokerage, travel agents).

Our contact was Lisette Rudge, “Senior Policy Officer” at the CTTT.

The CTTT originated from the 2002 merger of the Fair Trading Tribunal and the Residential Tribunal of New South Wales, which had been criticized for being “unresponsive and slow¹⁴⁴.” It has retained the same structures and procedures as the tribunals it replaced, but with a few modifications to improve decision-making quality and consistency. The members of the Tribunal must now subscribe to “performance agreements” and comply with a code of conduct and with the CTTT Chairperson’s procedural instructions.

Functions and objectives of the CTTT

- Adjudicate disputes under its jurisdiction;
- Ensure that the Tribunal is accessible, effective and efficient, and that its decisions are fair;
- Enable an informal, expedited and inexpensive process;
- Ensure the quality and consistency of decisions¹⁴⁵.

¹⁴⁴ Wikipedia, “Consumer, tenancy and trader Tribunal of New South Wales,” September 12, 2010, http://en.wikipedia.org/wiki/Consumer_Tenancy_and_Trader_Tribunal_of_New_South_Wales.

¹⁴⁵ Rowena Johns, “The Consumer, Trader and Tenancy Tribunal,” Briefing Paper No. 11/2003, <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/B135D7C99E9FF0F5CA256ECF00084FE5>.

Filing a complaint

In several of the divisions, such as the “General” Division¹⁴⁶, it is possible to initiate a proceeding by filling out an online form on the CTTT website (the form can also be downloaded, and print copies are available at Tribunal registries, where they will have to be handed or sent). Online application fees may be paid by credit card. For the other divisions, the form cannot be filled out online.

Dispute resolution and hearing

The parties may attend the hearing by telephone. When the Tribunal thinks it appropriate and with the parties’ consent, it can render a decision without holding an oral hearing, on the sole basis of documentary evidence.

Hearings are presided by a single member and are generally public. Decisions are usually rendered immediately after the hearing, but may also be rendered after deliberations.

The Tribunal has the same powers as a court of law (calling witnesses, evidence, etc.), including the power to question witnesses under oath.

Informal procedures

The Tribunal is not bound by the rules of evidence that prevail in courts of law. Subject to procedural fairness, it may investigate any element it deems relevant. The CTTT “is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms¹⁴⁷.”

However, CTTT members must render their decisions similarly to courts of law, i.e., “on the basis of information properly presented and available for testing and upon which submissions can be made by a person affected,” and according to the information’s quality and relevance.

In short:

- The Tribunal may determine its own procedures;
- It is not bound by rules of evidence;
- It must conduct its hearings with as little formality and technicality as possible;
- It is obliged to ensure, to the extent possible, that all the evidence relevant to the case is presented before it, so that it can render its decision on the basis of all the relevant facts.

Legal representation and costs

To maintain the procedures’ accessible, informal and quick character, the rule is that the parties must represent themselves and bear their own costs. However, under the law, the Tribunal may allow representation by another person or by a lawyer under certain circumstances¹⁴⁸, and allow costs under certain conditions and depending on the value of the dispute:

¹⁴⁶ The other divisions are: *Tenancy, Social housing, Motor vehicles, Home building, Residential parks.*
http://www.cttt.nsw.gov.au/Applications/Lodge_an_application.html

¹⁴⁷ *Consumer, Trader and Tenancy Tribunal Act 2001 No 82*, Province of New South Wales, Art. 28 (3).
(hereinafter: *CTTT Act*)

¹⁴⁸ *CTTT Act*, art. 36.

- Less than \$10,000¹⁴⁹: the Tribunal must be convinced that the circumstances are exceptional;
- \$10,000 to \$30,000: the Tribunal must be convinced that the circumstances are exceptional, or that either party was adversely affecting the procedure;
- Over \$30,000: the Tribunal may award costs at its discretion.

Moreover, the CTTT may order a party to bear the costs of any procedure it deems frivolous, vexatious, without foundation, or not completed.

Conciliation

Although the process remains voluntary, the CTTT strongly encourages the parties to attempt conciliation before the hearing. To that end, the Tribunal makes available to the parties, in its main registries, rooms and conciliators, who are members of the Tribunal or employees assigned for that purpose. In areas where those services are not available, during a first hearing the Tribunal member acts as a conciliator or as a “hearing member,” depending on the case before him. An agreement reached in conciliation may be approved, ratified and made legally binding by a member of the Tribunal¹⁵⁰.

Appeal and new hearing

The District Court and the Supreme Court of New South Wales (NSW) share powers of judicial review and appeal¹⁵¹.

A party that thinks it has suffered a substantial injustice (unfair Tribunal decision, contrary to the evidence) or that has new evidence may request a new hearing. The decision to grant a new hearing or not is final and not subject to appeal.

CTTT composition

The CTTT is comprised of a Chairperson, two Deputy Chairpersons (“Register and Administration” and “Determination”), 8 senior members, 10 full-time members and 62 part-time members. They are named by the Executive Council¹⁵².

Only the Chairperson and the Deputy Chairperson “Determination” must absolutely be lawyers. Members are named according to their ability to render a fair and equitable verdict, their ability to command the respect of the parties, their relevant expertise in the Tribunal’s fields of jurisdiction, and their experience in alternative dispute resolution mechanisms.

Case management period

The rule is that plaintiffs must generally be prepared to participate in a hearing within 28 days after their complaint is filed (filing may be done on the Tribunal’s website). But the CTTT’s various divisions have different case management periods. In 2009-2010, about 75% of cases

¹⁴⁹ The values are in Australian dollars. An Australian dollar is worth about the same as a Canadian dollar.

¹⁵⁰ CTTT, “Fact sheet: conciliation,” no date (consulted on June 1, 2011), http://www.cttt.nsw.gov.au/pdfs/Resources/Publications/Fact_sheets/Conciliation.pdf
CTTT, “Fact sheet: What happens at the Tribunal?,” CTTT-INFO-10/2008, http://www.cttt.nsw.gov.au/pdfs/Resources/Publications/Fact_sheets/What_happens_at_the_Tribunal.pdf

¹⁵¹ CTTT, “Fact sheet: Rehearing and appeals,” September 2010, http://www.cttt.nsw.gov.au/pdfs/Resources/Publications/Fact_sheets/Rehearing_and_appeals.pdf

¹⁵² There is in fact an exception: the “Registry and Administration” Vice-Chairperson is named by the “Deputy Commissioner Fair Trading Operations.” CTTT, website consulted on March 18, 2011, http://www.cttt.nsw.gov.au/About_us/Tribunal_members.html.

were settled before or during the first hearing, i.e., within 42 days, whereas 64% were settled within 35 days.

Powers and decisions

The CTTT can render the usual type of decisions for this type of institution: orders to refund, repair, replace, pay, etc.¹⁵³ It has no declaratory power and its decisions can apply only to the parties involved in the case.

The specialized divisions also have specific powers related to their specialization: for instance, the Residential Rental Division pertains notably to rent control; the Commercial Division issues permits to travel agents and oversees compliance with their rules of conduct; the Strata and Community Schemes and Retirement Villages Divisions oversee the legality and application of those residences' bylaws; etc.

Adopted in 2010, the *National Unfair Contract Terms Law* constitutes a major reform of Australia's consumer law, which applies uniformly to all Australian States and territories; its provisions provide the courts with tools for intervening against unfair clauses.

The Courts of Law or the CTTT can now declare that a contract clause is "unfair" if it:

- creates a disproportion between the respective rights and obligations of the two parties;
- is not reasonably essential to protecting the legitimate interests of the party it benefits;
- is likely, if applied or used, to cause harm (financial or otherwise) to the other party.

A contract clause declared "unfair" will be declared null and void, between the parties to the dispute only.

The law provides that the "Director General" of the Fair Trading agency can also address the NSW Supreme Court to have a contract clause declared "unfair"; the decision rendered on that motion will apply to all merchants whose contract contains a similar clause.

Publication of decisions

The parties will obtain on request a written copy of the reasons for the decision rendered¹⁵⁴. If the hearings are public, the decisions are generally communicated only to the interested parties. But there are two exceptions¹⁵⁵: all decisions rendered under the *Home Building Act 1989* must be communicated to the "Commissioner for Fair Trading" to be included in the public registry; and written reasoned decisions are published on the website of the Australasian Legal Information Institute¹⁵⁶.

CTTT jurisdiction

The CTTT's jurisdiction covers the provision to any consumers of any good or service within the State of NSW. The definition of "consumer" is rather broad there, and includes persons as well as firms, companies and many types of associations, whether for-profit or not. Goods are defined as any tangible thing that can be the object of trade or exchange, but land interest is excluded.

¹⁵³ *Consumer Claims Act 1998*, art. 6.

¹⁵⁴ *CTTT Act*, art. 49.

¹⁵⁵ CTTT, "Decisions and order," consulted on June 1, 2011, http://www.cttt.nsw.gov.au/Orders/Decisions_and_orders.html

¹⁵⁶ www.austlii.edu.au.

Excluded from the CTTT's jurisdiction are work contracts, life insurance contracts and lawyer fees. The CTTT was responsible until recently for regulating credit and financial brokerage; that jurisdiction was transferred in July 2010 to the Australian Securities and Investment Commission, in the context of a broader reform.

Value of admissible disputes, limitation periods, application fees

The CTTT's jurisdiction is of course also defined by the value of the amounts in dispute. Admissible amounts vary from one division to another: \$30,000¹⁵⁷ or less in the general division and the motorized vehicles division; up to \$500,000 in housing matters.

Specific laws govern all the various fields over which the CTTT has a specialized jurisdiction. The amounts limiting the CTTT's jurisdiction are established in each of those laws.

In addition, limitation periods are established by those laws, and thus vary from one division to another. In the "General" division, the limitation period is three years.

Administrative fees to file a motion also vary by division, but also according to the value of the amounts in dispute. The fees can be \$35 (for most cases) to \$623¹⁵⁸. A reduced rate of \$5 is set for students and retirees.

Difference between the CTTT and the Small Claims Court

There is also a small claims division in New South Wales. The ceiling of admissible claims is \$10,000, vs. \$30,000 to \$500,000 at the CTTT depending on the division¹⁵⁹. Admissible fees for filing a motion are \$35 for most CTTT recourses, and at least \$83 at small claims courts¹⁶⁰.

The willingness to make the CTTT accessible and effective is manifested on a well known, user-friendly website that offers clear educational material explaining its mission and procedures in several languages. In NSW, small claims courts are local court divisions¹⁶¹. Not being an institution in its own right, a small claims court does not offer a specific means of access. Small claims information can be found only on a page dedicated to local courts on the Justice Ministry's website¹⁶².

The CTTT's "General," "Motorized Vehicles" and "Residential Construction" divisions receive claims only from consumers. By contrast, small claims seem able to receive claims regarding any type of debt and from any type of claimants¹⁶³.

¹⁵⁷ In the "residential rental" division, the limit is \$15,000 for business other than that concerning "rental bonds" paid by tenants. This is the only exception to the threshold of \$30,000.

¹⁵⁸ CTTT, "Fees and charges," consulted on June 1, 2011,

http://www.cttt.nsw.gov.au/Applications/Fees_and_charges.html.

¹⁵⁹ *LawAssist*, "Claims and debts of \$10 000 or less," consulted on June 1, 2011,

http://www.lawlink.nsw.gov.au/lawlink/lawaccess/ll_lawassist.nsf/pages/lawassist_debt_small_claims_home

¹⁶⁰ *LawLink*, "Local Courts Civil Claims Fees," September 1, 2010,

http://www.onlineregistry.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_newwebsitefes05.

¹⁶¹ *LawLink*, "About Courts," January 18, 2011,

http://www.onlineregistry.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_aboutus .

¹⁶² *LawLink*, "Welcome to the NSW Local Courts website," consulted on June 1, 2011,

http://www.onlineregistry.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_index.

¹⁶³ *Local Court Act 2007*, New South Wales Consolidated Acts, updated at January 7, 2011, available at http://www.austlii.edu.au/au/legis/nsw/consol_act/lca2007131/ .

Challenges

The CTTT representatives we questioned on this subject identify as follows the Tribunal's main challenges: to keep listening to the community's various needs, ensure equitable service across the State within allocated budgets, and ensure that the court members stay apprised of legislative changes.

Those representatives also state that they have a culture of continuous improvement, which leads them to regularly organize meetings with interested parties so they can participate in modification processes. The CTTT also relies on the new information and communications technologies and on educational tools in order to improve access to its services and make file processing more efficient.

2009-2010 data¹⁶⁴

59,403 motions to initiate proceedings were filed:

- Increase of 1.2% compared to 2008-2009;
- 45% of all motions were made online.

73,822 hearings were held:

- Average period of 24 days between filing a motion and the first hearing;
- Hearings were held at 70 different locations.

62,068 cases were settled:

- 75% of cases were settled before or during a hearing;
- 64% of cases were settled in 35 days or less.

85,835 court orders were issued

- 85% of final orders were issued within 4 days following a hearing.

3.4 India: District Forums, State Consumer Disputes Redressal Commissions and National Consumer Disputes Redressal Commission

Main features

- Mechanism to apply the new consumer rights;
- Three-level system of administrative tribunals:
 - Consumer Disputes Redressal Forum (district);
 - State Consumer Disputes Redressal Commission;
 - National Consumer Disputes Redressal Commission;
- Very broad jurisdiction, including services in health care, banking, credit, etc.;
- Can receive claims from consumer associations and governments;
- Unfair business practices, excessive prices, and unsafe goods and services are justiciable;
- Substantial delays in the processing of claims (apparently due to the presence of lawyers) and problems with the tribunals' composition.

Introduction: the *Consumer Protection Act* and its objectives

The *Consumer Protection Act* adopted by the Indian Parliament in 1986 proclaimed consumer rights and established means for protecting and promoting them.

¹⁶⁴ CTTT, "Facts and statistics," February 21, 2011, http://www.cttt.nsw.gov.au/About_us/Facts_and_statistics.html.

To provide an inexpensive, fast and effective consumer dispute resolution mechanism, the law has established a three-level system of quasi-legal consumer courts. That system is comprised essentially of 604 District Forums, 34 State Commissions and one National Commission at the upper level.

Despite repeated requests to the National Commission, we found no interlocutor there. But we did succeed in communicating with Jehangir Gai, a consumer rights protector and a journalist who has been involved in the Forums and Commissions since their creation¹⁶⁵.

Jurisdiction

The law applies to all goods and services offered to Indian consumers, including many services that, in other jurisdictions, are administered by very different legislative regimes - medical care services, banking services, credit, public services, insurance and housing¹⁶⁶.

The law excludes business purchases except those made by the self-employed. Services provided free of charge are not covered; but the Supreme Court has deemed the following with regard to hospital care: in the case of care provided by hospitals that have two categories of clients (paying and non-paying), free medical care is considered to be defrayed by paying clients, and is therefore covered by the *Consumer Protection Act*.

Finally, services provided under a *personal service* contract are excluded, but those provided under a contract *for* a personal service are included. The first category covers the master-servant relationship whereby the payer retains control over the relationship. The second category covers services provided by an independent professional with the necessary expertise and skill sets. Thus, a physician's services are covered by the law and submitted to the consumer courts' authority.

Jurisdictional structure according to the value of disputes

The District Forums are responsible for disputes valued at less than 2M rupees (\$45,000 CAD); the State Commissions for those valued at 2M to 10M rupees (\$45,000 to \$225,000); the National Commission for those valued at more than 10M rupees.

Courts of the first instance, at the Forum level, handle most disputes. Insurance claims – including those made by for-profit organizations¹⁶⁷ – are most often filed at the level of the State Commissions or the National Commission.

Composition of courts

A person who has been, is, or is eligible to be a district judge chairs each Forum. A State Commission is chaired by a judge or ex-judge or by an eligible person who is a High Court judge. The National Commission is chaired by a judge or ex-judge or by an eligible person who is an Indian Supreme Court judge.

¹⁶⁵ Jehangir Gai has been involved in the consumer rights movement since 1984. He appeared before the Consumer Dispute Resolution Forums from their creation in 1986. Today, while continuing this work at the district, State and national levels, he is a columnist at the Times of India and at Mid-Day Gujarati. He notably received the Government of India's National Youth Award for Consumer Protection.

¹⁶⁶ National Consumer Disputes Redressal Commission, website consulted on February 20, 2011, <http://ncdr.nic.in/>.

¹⁶⁷ Given that an insurance contract is not a way to generate income, but to compensate for losses, it has been interpreted that claims against insurance companies, including claims made by for-profit companies, were a subject of concern for the *Consumer Protection Act*.

In addition to its chairperson, a Forum is comprised of two additional members, while the State Commissions and the National Commission have four additional members¹⁶⁸.

A quorum requires the presence of the chairperson and at least one other member.

Each court must have at least one woman among its members¹⁶⁹.

Among other requirements are holding a degree from a recognized university and having adequate knowledge of fields related to consumer issues (economics, law, etc.)¹⁷⁰

Proceedings may be initiated by:

- Any person (natural or artificial) who has paid for a good or service (or for whom the good was purchased, or their heirs);
- A recognized consumer protection association;
- Collective interests (class actions);
- State governments or the central government.

Consumer associations may file a claim on behalf of a wronged consumer. But a person with direct knowledge of the dispute must present evidence. In the case of claims regarding an “unfair business practice,” a consumer association may pursue his recourse even if the wronged consumer and the defendant reach a settlement of their dispute.

“Simplified” procedures

Consumer court procedures are simplified; those courts are not bound by the burden of evidence found in ordinary courts of law. Disputes must be settled as quickly as possible.

Lawyer representation is allowed (more about that below). If a consumer cannot hire the services of a lawyer and the tribunal deems that he needs such assistance, an *amicus curiae* may be named, whose fees will be paid from a legal aid fund.

No alternative dispute resolution mechanism is provided in the law for speeding up the settlement of a dispute.

To initiate proceedings before a court under the *Consumer Protection Act*, only “nominal fees” of 100 to 5,000 rupees (\$2 to \$100), set according to the value of the dispute, are charged. Consumers whose income falls below the poverty line are exempt from paying those fees.

Court decisions are public.

¹⁶⁸ David Anoussamy, “Le consommateur et le procès dans l’Inde,” Journées internationales colombiennes de l’Association Henri Capitant des Amis de la Culture Juridique française, Bogota/Cartagena, September 24-28, 2007, <http://www.henricapitant.org/>.

¹⁶⁹ *The Consumer Protection Act*, 1986 (CPA), sec. 10, 16 and 20. Available at http://ncdrc.nic.in/1_1.html.

¹⁷⁰ *Ibid.*

Types of admissible claims and consumer court powers

Proceedings may be initiated before the three levels of consumer courts for the following reasons:

- Defective goods or services;
- Unfair or restrictive business practice, i.e., a practice that tends to manipulate the market, prices, the service terms or offer in a manner that imposes on consumers unjustified costs or restrictions¹⁷¹;
- Excessive price, i.e., a higher price than that set by the law, or displayed, or understood between the parties;
- Offering the public dangerous goods or services, i.e.: a) that contravene any legal safety requirement, or b) that the seller should have known to be unsafe¹⁷².

The three court levels may order a party:

- To repair or replace the good, offer the service again, refund the price, or pay damages for any loss or harm sustained by the consumer;
- To cease any unfair or restrictive business practice, or not to repeat it;
- To no longer offer, to withdraw from its offer, or to cease the production or offer of a dangerous good or service;
- To issue advertisements to correct or neutralize the effect of misleading advertisements;
- To defray the expenses of another party;
- To pay punitive damages¹⁷³.

Fees

The court may order that the party against whom the verdict is rendered pay adequate fees; the court has wide latitude for determining those adequate fees¹⁷⁴.

Power to cancel a contract

The Indian consumer courts do not formally have the power to cancel a contract in whole or in part – that prerogative is reserved for the civil courts. However, in a 2009 decision, the National Commission reportedly deemed that an agreement's clause created such an imbalance in favour of a homebuilder and against the purchaser that the clause constituted an unfair practice that could not have legal value¹⁷⁵.

Effect on third parties

An order cannot apply to a third party. However, in clauses pertaining to unfair business practices, at times the Forums have “suggested” that the regulatory authorities take corrective measures¹⁷⁶.

Appeal

A decision may be appealed only once to the higher level. In other words, a Forum order may be appealed before a State Commission, a State Commission order before the National Commission, and a National Commission order before the Supreme Court. The appeal, which

¹⁷¹ CPA, sec. 2 (r).

¹⁷² CPA, sec. 2 (c).

¹⁷³ CPA, sec. 14.

¹⁷⁴ Jehangir Gai wrote on this subject: “However, in reality, the costs awarded are arbitrary and depend upon the whims and fancies of the Presiding Officer.”

¹⁷⁵ *Prasad Homes Pvt. Ltd. v. E. Mahender Reddy & Ors.* [I (2009) CPJ 136 (NC)].

¹⁷⁶ The exact formulation used by Jehangir Gai is: “the consumer fora have directed the Regulatory Authority [...], to take corrective action.”

proceeds on the record, entails a new examination of the facts and the evidence in order to determine whether the appeal is justified.

Execution of decisions and sanctions

A party that does not comply with a consumer court's decision is subject to a jail sentence of 1 month to 3 years, or to a fine of 2,000 to 10,000 rupees (\$45 to \$216).

The rate of voluntary compliance with decisions is reportedly almost 80%. In the remaining cases, receipt of a summons generally suffices to prompt compliance. Only "exceptional cases" have required a sanction for contempt of court.

Difference between consumer courts and small claims courts

Small claims courts are under the States' jurisdiction, so the rules vary between the 35 units comprising the Republic of India. Those courts are at times distinct from a State's High Courts and in some cases constitute divisions of the latter. The ceilings of admissible claims are from 20,000 (\$432) to 45,000 (\$872) rupees, depending on the State¹⁷⁷.

The difference with the Forums is stark, since the latter can receive claims of up to 2 million rupees – 50 to 100 times more than the amounts to which Indian small claims courts are limited. Moreover, as we have mentioned, the Indian system of consumer courts was established as a mechanism for applying the consumer protection law. So the Forums and Commissions exercise certain penal functions, and can receive claims from consumers, consumer associations, and governments, but not merchants.

Challenges and difficulties

Established in 1986, the Indian consumer courts constitute the oldest consumer dispute resolution mechanism we studied. Initially very proactive and sympathetic to consumers, it has faced many challenges and difficulties over the years, with the main impact being felt in dispute processing times.

According to Jehangir Gai, it takes 6 to 12 months for cases to be settled in rural areas, whereas it takes on average 3 to 4 years in the Forums and 7 to 10 years in the State and National Commissions. The Forums often "harass" consumers with repeated adjournments and other technicalities, and discourage consumers from attending hearings. Some Forums hear cases, let them drag on for several months without rendering a decision, and then start over again with another hearing.

The most recent available data indicate that the Forums, the State Commissions and the National Commission have dispute resolution rates of 87%, 80% and 91%, respectively; but those statistics represent the percentage of cases settled in relation to all the cases initiated since the creation of those proceedings in 1986 (and not an annual percentage)¹⁷⁸. In addition, those numbers include, among the cases "settled," complaints rejected by default (after being abandoned, for example) and those that started over after such a rejection. The resolution rates

¹⁷⁷ Information on the subject is not easy to find. Benjamin Arie, "How Small Claims Court works in India - Justice is blind but can also be pricey and taking a long time," e-Court.in Legal Services LLP., 2010 (consulted on June 1, 2011), http://e-court.in/how_it_works/smallclaims.php.

¹⁷⁸ 2011 numbers provided by Jehangir Gai. For those of 2008, see Anurag Singh, Brajesh Kumar, "Consumer Empowerment: an Indian Experience (analysis of consumer forums initiatives)," *Journal of Marketing and Communication*, September-October 2008, vol. 4. No. 2., pp. 56 to 66.

of State Commissions vary by as little as 50% in some States and by a remarkable 98% in others¹⁷⁹.

Other, more detailed data taken from a text by R. Moog on the basis of a report from the Central Consumer Protection Council paint a similar picture¹⁸⁰. In November 2000, the Forums had a settlement rate of 82% (again, since their creation). Of those settled cases, 28.8% were settled within 90 days, 20.8% within 90 to 150 days, and over half (50.4%) in over 150 days. The State of Gujarat reported at the time that only 44,000 cases had been settled there, and not one in less than 150 days. In the State Commissions, the rate of cases settled in over 150 days was over 56%. Those data lead Moog to conclude that “concerns over delays are well founded¹⁸¹.”

Jehangir Gai, who has been involved in consumer protection for many years, identifies some of the causes of the problems affecting those courts.

The presence of lawyers and the efficiency of proceedings

Jehangir Gai states that the presence of lawyers conflicts with the objective of brief, simplified and accessible processes. He is not the only one to reach this conclusion: a *Consumer Protection Act* amendment to limit legal representation was considered in order to correct the situation. The lawyers’ lobby defeated this project. Today many Forums are not in favour of the parties representing themselves or of consumer rights groups participating. This trend encourages lawyer participation in hearings – the necessity of being represented makes the quest for justice expensive, all the more so because some lawyers demand remuneration on a daily basis, thus contravening the stated objective of the *Consumer Protection Act* to make justice more accessible.

Problematic composition of the Forums and Commissions

The tribunal chairpersons do not come from the legal profession. The short duration of mandates (a maximum of 2 five-year mandates) does not suffice to interest more-competent lawyers. The leaves of absence – for health and other reasons – taken by the many retired judges assigned to those proceedings make them non-functional. As for the members, they are only hired part-time, with fees that are too low, so recruitment is a problem. Some members are reportedly named for political reasons, with no consideration given to competence.

Corrections to be made

In his text, Robert Moog identified essentially the same causes for delay problems: the large number and duration of vacancies in tribunal member positions, the excessive formality of proceedings (“judges [...] run the proceedings much as they would a courtroom”), the contradictory nature of the proceedings, encumbered by lawyers, red tape and too many adjournments¹⁸².

As Jehangir Gai reports, merchants and manufacturers originally feared Forum decisions, because those decisions could be rendered in 3 to 6 months. Today, with the delays we have seen, that fear is virtually nonexistent.

¹⁷⁹ Anurag Singh, Brajesh Kumar, *ibid.*

¹⁸⁰ Robert Moog, “Democratization of justice : the Indian Experiment with Consumer Forums,” p. 147, in Erik Gilbert Jensen and Thomas C. Eller, *Beyond common knowledge: empirical approaches to the rule of law*, Stanford: Stanford University Press, 2003.

¹⁸¹ *Ibid.*, p. 148.

¹⁸² *Ibid.*, p. 148.

According to Jehangir Gai, a change of attitude would be required of court chairpersons and other members. Parties requesting repeated adjournments without valid reason should face severe consequences. Adequate fees should be provided. Recruiting processes should be overhauled. Chairpersons should come from the legal profession. The other members should be named without political interference and be remunerated more adequately.

3.5 Malaysia: Tribunal for Consumer Claims Malaysia

Main features

- Establishment of a Malaysian consumer protection policy for the first time;
- Intended as a mechanism for protecting the new consumer rights stated in the same law;
- Alternative dispute resolution mechanisms; simpler processes, quicker than civil courts, and more efficient because of specialization in consumer affairs;
- Its object: compensating consumers for damages and losses suffered;
- Very high level of efficiency and dispute resolution.

Introduction

The Tribunal for Consumer Claims Malaysia (TCCM)¹⁸³ was set up in 1999 with the adoption of the *Consumer Protection Act*. That law was the first formulation of a complete consumer protection policy in Malaysia. In addition to establishing a National Consumer Advisory Council, it has asserted consumer rights as well as the obligations of suppliers and merchants, safety standards, has prohibited certain business practices and has prescribed others. To have those new consumer rights respected and applied, the law has established the TCCM and granted new powers of investigation and legal action to representatives of the Ministry responsible.

We contacted Rahazlan Affandi Bin Abdul Rahim, TCCM “Deputy Chairperson.”

The TCCM’s primary objective is to offer, to consumers seeking redress for damages sustained (in relation to goods or services contracts), a less cumbersome and less expensive solution than ordinary courts of law. While Malaysia also has a Small Claims Court that can settle disputes valued at 5,000 Malaysian ringgits (RM 5,000 is equivalent to a little more than \$1,600 CAD) or less, the TCCM’s creation was intended to offer a Tribunal specializing in disputes between consumers and merchants.

Three TCCM objectives

- Apply and implement consumer rights and protections formulated in the *Consumer Protection Act*;
- Offer a quicker, less costly and less cumbersome alternative to courts of law;
- Offer a forum specializing in disputes between consumers and merchants.

Composition of the TCCM

The TCCM is comprised of 10 members, including a chairperson and a vice-chairperson, who must come from the Judicial and Legal Service, which groups legal experts who report to the Attorney General and the courts¹⁸⁴. The other members must at least hold a Bachelor of Law degree.

¹⁸³ See the website of the Tribunal for Consumer Claims Malaysia (TCCM), <http://tspm.kpdnkk.gov.my>.

¹⁸⁴ Answer provided by our TCCM correspondents: “It comprises of legally qualified government servants from the Attorney General Chambers and Courts. It falls under the purview of the Judicial and Legal

The TCCM has registries in each of Malaysia's 13 States and 3 federal territories, and it can operate in at least 30 locations.

Procedure

The parties must represent themselves in proceedings. Companies may be represented by only one employee.

The Tribunal member who chairs a hearing has the necessary powers to require production of evidence and witnesses under oath¹⁸⁵. The parties also have the right to present evidence and witnesses in support of their case.

The law confers to Tribunal members the responsibility and the necessary margin of manoeuvre to conduct the hearing as efficiently as possible and render a decision as quickly as possible, notably by helping the parties present their case¹⁸⁶.

During the hearing, and when appropriate, a tribunal member may also assist the parties in seeking a negotiated settlement. A negotiated agreement may be ratified and registered by the Tribunal.

No additional resource (conciliators or local) is specifically dedicated to alternative dispute resolution mechanisms.

Hearings are open to the public.

Types of possible claims before the TCCM

A consumer may file a complaint before the tribunal against a merchant for any loss or damage suffered as a result of:

- An unfair practice, false representation, misleading statement or behaviour, etc.;
- Safety problems with products or services;
- Non-compliance with the contract, commitments, warranty problems, product quality, or non-correspondence with the good or service advertised¹⁸⁷;
- Etc.

Only a consumer who has suffered loss or damage may file a claim before the Tribunal. Indeed, "The cardinal basis of the TCCM proceedings and its award is loss suffered by the consumer¹⁸⁸." Without damage suffered by a consumer, the TCCM cannot do anything.

Service Commission of Malaysia, which was established according to Art. 138(1) of the Federal Constitution."

¹⁸⁵ *Consumer Protection Act of 199 (Malaysia), (CPAM)*, art. 110.

¹⁸⁶ "The Tribunal may generally direct and do all such things as may be necessary or expedient for the expeditious determination of the claim." *CPAM*, art. 110. (1) g)

"[The] member of the Tribunal may at any time assist the parties in conducting their cases." TCCM, "Hearing procedure," July 23, 2008,

http://tprm.kpdnkk.gov.my/portal/index.php?option=com_content&task=view&id=47&Itemid=33 .

¹⁸⁷ TCCM, "Type of Claims That May Be Brought Before The Tribunal," Friday, July 25, 2008,

http://tprm.kpdnkk.gov.my/portal/index.php?option=com_content&task=view&id=50&Itemid=36.

¹⁸⁸ Answer given by our TCCM correspondents to a question about whether there could be a complaint without any damage having been sustained.

However, an infraction of the *Consumer Protection Act* that would not result in a victim likely to seek redress before the TCCM may be the object of legal action initiated against the merchant by the “Enforcement” Division of the Domestic Trade, Cooperative and Consumerism Ministry.

A fee of RM 5 (slightly more than \$1.60) is required for a claim to be filed with the TCCM.

Tribunal decisions

The TCCM renders decisions based on an examination of the law and the facts, particularly of consumer case law founded on the concept of “workable justice.”

The Tribunal is empowered to order, for example, a refund or a product’s replacement or repair, or that the service be offered again, or that the supplier comply with the warranty, etc.¹⁸⁹ It may order financial compensation for losses or damage sustained – non-monetary damages are excluded. Or it may suspend a contract’s execution in whole or in part. It may also order any party to pay fees (up to RM 200, about \$65). Finally, it may order payment of interest, at a maximum annual rate of 8%. Tribunal decisions apply only to the parties directly involved.

Judicial review

A party dissatisfied with the Tribunal’s decision may apply for judicial review before the High Court so that the latter may reconsider the TCCM’s order¹⁹⁰.

Publication of decisions

Orders are given only to the parties involved in the case, and decisions are not published. But newspapers regularly report on TCCM hearings in their pages. The TCCM also plans to launch the Malaysian Consumer Law Journal in 2011.

Processing times

The law states that the Tribunal must render its decisions within 60 days following the first date of hearings, whenever possible¹⁹¹. The TCCM has given itself a “Client Service Charter” featuring various performance commitments – for instance, to resolve cases within 45 days after the statement of defence form is filed, and to render all final decisions on the same day as a hearing.

Most cases are now settled on the same day as the hearing. By January 31, 2011, 86% (i.e., 5,074 cases) of the cases registered with the TCCM were settled within 45 days.

The TCCM’s jurisdiction and the scope of the law

The TCCM may hear a case valued at up to RM 25,000 (\$8,000 CAD), or a case of greater value if the parties agree in writing to submit their dispute to that Tribunal.

Excluded from its jurisdiction are any claims related to land or real estate interests, to a will or settlement of a succession, to a business secret or intellectual property, or resulting from injury or death¹⁹².

The *Consumer Protection Act* applies to all goods or services offered to consumers, including (only since 2008) exchanges and transactions made electronically.

¹⁸⁹ CPAM, sec. 112.

¹⁹⁰ CPAM, sec. 116 (1)

¹⁹¹ CPAM, sec. 112 (1).

¹⁹² CPAM, sec. 99.

Excluded are transactions involving securities, futures contracts, land estates (with some exceptions), services offered by professionals subject to a specific law, as well as health care services¹⁹³.

Difference between the TCCM and the Small Claims Court

As mentioned above, one objective in establishing the TCCM was to create a Tribunal specializing in consumer affairs. Another peculiarity is that the value of admissible claims is five times greater at the TCCM (RM 25,000, or about \$5,000) than at the small claims court¹⁹⁴. Only consumers may initiate proceedings before the TCCM, whereas any individual, including merchants and professionals, may do so before the small claims court.

Advantages and challenges

TCCM representatives told us that one of its main advantages is that consumers are now more aware of their rights.

Access to consumer justice is reportedly also improved. From 2000 to 2010, about 55,000 claims were filed at the TCCM. All cases filed until 2009 have been settled, and by January 18, almost 94% of those filed in 2010 were settled.

Again according to its representatives, the TCCM's main challenges are – in addition to raising public awareness of the institution and making consumers and merchants more aware of their rights and responsibilities – to encourage consumers to initiate proceedings before the tribunal, even when the amount claimed is low; and to find a balance between the interests of consumers and merchants, in accordance with the concept of “sustainable consumption.”

Among institutional design elements that are particularly useful and welcome is the easy and inexpensive process (a single, easily accessible form, very low fees), along with the swift processing of cases.

The *Consumer Protection Act* was recently amended to better protect consumers against unfair clauses. According to Rahazlan Affandi Bin Abdul Rahim, “among the proposed provisions are provision which deal with procedural and substantive unfairness, provision on the effect of unfair terms, provision on burden of proof and provision on executed contracts [sic].”

Finally, the *Ministry of Domestic Trade, Co-operative and Consumerism* is also about to establish a Consumer Claims Tribunal intended for tourists and to allow cross-border remedies.

¹⁹³ CPAM, sec. 2(2).

¹⁹⁴ Malaysian Bar, “Malaysian Court System,” September 29, 2008, http://www.malaysianbar.org.my/malaysian_court_system.html.

3.6 Lisbon, Portugal: *Centro de Arbitragem de Conflitos de Consumo*

Main features

- Consumer dispute arbitration NGO;
- Voluntary membership of companies;
- Combines a legal information service, mediation and an arbitration tribunal presided by a judge;
- Arbitration tribunal decisions have the same legally binding value as those of a court of law of first instance.

Introduction

The *Centro de Arbitragem de Conflitos de Consumo de Lisboa* (the Centre) presents itself as a consumer dispute arbitration centre, and informally as a consumer court. Inaugurated in 1989 as a pilot project thanks to the collaboration of civil society organizations and the municipality, the project began in earnest in 1993 with the creation of a private non-profit association, and then with the government's recognition of the Centre as a non-governmental organization operating in the public interest. Since then, the model has been replicated in 5 other metropolitan areas, and an arbitration centre specializing in the automotive field was added, as well as a national centre for receiving and processing consumer claims not covered by the other centres.

We have included the Centre here because that original form of consumer dispute resolution prompted the present study. In the course of researching consumer arbitration¹⁹⁵, Union des consommateurs had noticed that Lisbon appeared to have set up an accessible, efficient and quick solution, precisely by avoiding the usual forms of arbitration and by borrowing several aspects of a consumer court: respect for principles of natural justice, quickness, the Centre's autonomy, independent arbitrators, and arbitration decisions with the same value as a decision by a court of first instance. It is neither an administrative tribunal nor a court of law, but rather a type of paralegal institution.

Companies enrolled in the Arbitration Centre agree to be subject to its authority in any dispute that consumers bring before it and that falls under its jurisdiction. A consumer will always have the choice, despite the merchant's membership, to initiate proceedings before a court of law. However, the Arbitration Centre's legal services may constitute a serious incentive for consumers to choose the Arbitration Centre.

Our interlocutor was Ms. Isabel Mendes Cabeçadas, director of the *Centro De Arbitragem de Conflitos de Consumo De Lisboa*.

Objectives

- Simplify access to justice, to resolve consumer disputes in the Lisbon Metropolitan Area;
- Promote the resolution of small consumer disputes and handle claims by means of information, mediation, conciliation and arbitration.

Legal service: information and assistance as a gateway

The Centre's mission involves two services: the Legal Service and the Arbitration Tribunal. The Legal Service constitutes consumers' gateway to the Centre: it informs them and prepares their

¹⁹⁵ Yanick Labelle, *Consumer Arbitration: A Fair and Effective Process?*, Union des consommateurs, presented to Industry Canada's Office of Consumer Affairs, June 2009, http://uniondesconsommateurs.ca/docu/protoc_conso/arbitrageE.pdf.

claim in view of successive phases of mediation, conciliation and arbitration – this is similar to the Quebec initiative of community justice centres¹⁹⁶. If it is impossible to reach a settlement during the information and mediation phases (which the Legal Service attempts with the company), the parties are convened to the Centre in a conciliation attempt led by the Centre's legal experts. If conciliation succeeds, the agreement is ratified by the judge/arbitrator and is as binding as a legal decision. If conciliation fails, the parties are directed to the Arbitration Tribunal, which will be responsible for settling the dispute¹⁹⁷.

Arbitration Tribunal

The Arbitration Tribunal is comprised of a single arbitrator, who is an Appeal Court judge named by the High Council of the Judiciary. This indication of independence helps to secure the parties' trust. The main distinction between the Centre's decisions and those rendered under usual forms of arbitration is that the Centre's decisions have the same value as those of a court of law of first instance and are enforceable.

The Arbitration Tribunal's procedure aims at avoiding the formality associated with legal proceedings and strict rules of evidence. It is intended as a simplified, efficient and quick procedure that still guarantees respect for the fundamental principles of natural justice: "equality of the parties, adversarial and oral proceedings, representation, independence and impartiality, transparency, efficiency, legality, freedom¹⁹⁸."

The parties benefit from substantial, not simply formal, equality. The arbitrator can play a proactive role and lend some assistance, particularly by questioning witnesses and requiring the presentation of evidence he deems appropriate.

While taking into account the voluntary character of the system, the judge has the same powers as a judge in a court of law: to require the production of evidence he deems necessary and to determine which party must pay for expert testimony.

The parties may represent themselves or name a representative (a lawyer or other) before the Tribunal.

Decisions based on the law or equity

The arbitrator normally rules according to the law, but he may also render a decision based on equity if the disputing parties so agree. In that event, they waive their right to appeal the verdict. Most of the decisions are based on the law, but occasionally there are cases where a lack of evidence requires decisions based on equity. The majority of merchants to whom the judge recommends that the decision be based on equity reportedly accept that recommendation.

¹⁹⁶ However, the Quebec initiative is limited, as we saw at the end of chapter 2 herein, to information, orientation, support and assistance services.

¹⁹⁷ Bob SCHMITZ, "Un exemple original : Les Centres d'Arbitrage au Portugal," as part of the Conference *Les Règlements Alternatifs de Litiges de consommation*, University of Luxembourg, April 28, 2006, www.eco.public.lu/salle_de_presse/.../2006/.../Expose_Bob_Schmitz.pdf.

¹⁹⁸ Our translation. The application of these principles in the Centre's rules and practices is detailed in Isabel Mendes Cabeçadas, "Centre d'arbitrage de Litiges de Consommation de Lisbonne," as part of the public hearing on the European Commission's financial services, September 19, 2007, http://ec.europa.eu/internal_market/finances-retail/docs/policy/hearing-cabecadas_fr.pdf.

Transparency

The Centre regularly disseminates information in the press, in addition to publishing annual reports on its activities. The principles on which decisions (of law or equity) are based are made public, as is the case law (while preserving the parties' anonymity).

Jurisdiction of the Arbitration Centre

The Centre is responsible for receiving claims that do not exceed €5,000 and that involve consumer disputes pertaining to the acquisition of a good or service from a business that is a member of the Centre, and is thus located in the Lisbon metropolitan area.

There can be no claim without a transaction or without sustained damage or loss.

Company membership in the Centre

The Centre has jurisdiction only over member companies. The latter can display the Centre's logo and they appear on a "widely disseminated" list.

Non-member companies may also, on a case-by-case basis, agree to submit a dispute to the Centre.

Companies' motivations for subscribing to the Centre are the same as with other types of arbitration. The objective is to avoid, in the event of a dispute, the long and costly proceedings of a court of law, and to offer consumers a type of guarantee likely to raise their trust.

According to Isabel Mendes Cabeçadas, "most merchants" in the Lisbon metropolitan area have subscribed to the Centre, including companies providing the main public services (water, electricity, gas, mail, Internet, telephony and cable television). The sectors where companies are less likely to submit their dispute to arbitration are construction and "aggressive sales."

Given the Arbitration Centre's voluntary character, a decision can apply only to the parties involved; but the fact that decisions are published (which is exceptional in arbitration) establishes case law that can serve as a guideline for rendering a decision in similar cases. Moreover, under a European Directive on producers' responsibility¹⁹⁹, a decision on the warranty of a product could also apply to the latter's producer.

Appeal

Arbitration decisions (except those that, on the parties' consent, are rendered in equity) may be appealed on the same bases as a decision by a court of law.

Funding and absence of cost

To guarantee its independence, the government and Lisbon's City Hall fund the Centre. Its operation is independent from consumer organizations as well as merchants.

The financial contribution of various public bodies has made it possible to remove any costs that consumers would pay for any proceedings, including those that must be initiated to implement a decision. But relying on experts may entail costs to the party hiring them.

¹⁹⁹ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. See to that effect Europa, "Summaries of EU legislation: Defective products: liability," March 5, 2007, http://europa.eu/legislation_summaries/consumers/consumer_safety/l32012_en.htm.

Ms. Mendes Cabeçadas mentioned that the support of public authorities had become a delicate question. However, funding is reportedly more and more difficult to obtain, thus affecting the Centre's capacity to carry out certain training and advertising initiatives.

Efficient and quick claims processing

The time between the Centre's admission of a case and its resolution is 30 to 40 days.

The Arbitration Tribunal's decisions are generally rendered on the same day as the hearing.

In 2010, the Centre answered 1,843 requests for information and received 1,087 claims, of which 949 were settled: 690 by mediation and 259 by an arbitration decision.

Differences with small claims courts

Portugal also has legal proceedings for small claims courts²⁰⁰. The differences between the two institutions are explained by the willingness, manifested in establishing the Centre, to facilitate consumers' access to justice, promote the resolution of small consumer disputes, and process claims by means of information, mediation, conciliation and arbitration. The ceiling for admissible claims is €3,740 at small claims courts, which is lower than the €5,000 euros at Lisbon's Arbitration Centre. Small claims court proceedings take "less than two months," whereas 30 to 40 days suffice for the Centre to settle a case. As with the other institutions we have studied, only consumers may initiate proceedings at the Centre.

Main advantages

According to Ms. Mendes Cabeçadas, the fact that consumers can voluntarily submit their claim to a dispute resolution mechanism that "provides all the guarantees of impartiality" and offers competent service specializing in consumer law is particularly welcome and appreciated. Moreover, with proceedings that are free of charge, quick and completed by a legally binding decision, the Centre is a very attractive solution for anyone who wants to settle a consumer dispute efficiently.

Finally, one of the Centre's major and positive aspects is that it has changed the behaviour of companies, which have reportedly adapted their practices to the Tribunal's decisions and thus to consumer protection laws.

3.7 Punjab (Gujrat), Pakistan: District Consumer Court

Main features

- First step in consumer protection in the Pakistani Punjab;
- Court of law at the district level, as a mechanism for implementing the consumer rights recognized in the new consumer protection law;
- Intended to compensate consumers for losses and damages, but also to punish violators of the law;
- The Court may receive lawsuits and motions from the district administration. The latter may initiate proceedings if the law is violated even if no consumer was wronged;
- Very short limitation period: 30 days.

²⁰⁰ Europa, "CONSUMER REDRESS – Portugal," no date (consulted on June 1, 2011), http://ec.europa.eu/consumers/redress_cons/docs/MS_fiches_Portugal.pdf.

Introduction

In Pakistan, the establishment of consumer protection mechanisms has preceded campaigns to raise public awareness of the importance of consumer rights. Initiatives in this regard were encouraged by the “Access to Justice” program funded by the Asian Development Bank²⁰¹. The administration of justice and consumer protection fall under provincial jurisdiction, so there is no central government legal institution across the country.

The province of Punjab – the richest and most populous – was not the first to adopt a consumer protection law; it was preceded by Khyber Pakhtunkhwa in 1997 and Balochistan in 2003. But it was the first to include provisions for establishing “Consumer Courts.” The latter are set up at the district level; currently, 11 of the Pakistani Punjab’s 35 districts have a Consumer Court.

It was difficult to find a resource person, but we finally succeeded in communicating with Yasir Azher, Assistant Registrar at the Gujrat District’s Consumer Court, who agreed to answer our questions.

Objectives of the *Consumer Protection Act* and the Consumer Courts

- Protect and promote consumer rights and interests; offer wronged consumers means to have their rights respected and be compensated quickly for wrongs suffered²⁰².

In addition to establishing consumer courts as a mechanism for applying and implementing consumer rights and interests, the *Consumer Protection Act* has set up the Punjab Consumer Protection Council, and has granted the “District Coordination Officer” (DCO) investigative and prosecutorial powers²⁰³.

The law makes merchants liable for goods and services that are defective or do not comply with standards, legitimate expectations or what was advertised²⁰⁴. It also imposes on merchants various transparency obligations for: displaying prices, issuing receipts, return policies²⁰⁵, product or service components and features²⁰⁶.

Filing a complaint before the Court

To induce the parties to settle their dispute out of court, the process provides that a consumer must first communicate his grievance in writing to the merchant and request compensation from him directly; the latter has 15 days to respond. A dispute cannot be heard without evidence that the notice has duly been sent to the merchant.

²⁰¹ Shahzada Irfan Ahmed, “Act now,” *The News on Sunday*, September 2007, No. 2, <http://www.jang.com.pk/thenews/sep2007-weekly/nos-02-09-2007/spr.htm#2>.

²⁰² Preamble of the *Punjab Consumer Protection Act 2005 (PCPA)*, available at <http://punjablaws.gov.pk/laws/477.html>.

²⁰³ Or any other official named for that purpose by the government. The “District Coordination Office” (DCO) is the director of the district’s administration. As opposed to the *Zila Nazim*, who is the district’s elected chief executive, the DCO is named by the province’s government.

See National Reconstruction Bureau, “District Government: Powers and Functions of District Coordination Officer,” Government of Pakistan, consulted on February 15, 2011, http://www.nrb.gov.pk/local_government/district_government_05.htm.

²⁰⁴ *PCPA*, Parts II and III, and V.

²⁰⁵ *PCPA*, sec. 18, 19, 20.

²⁰⁶ *PCPA*, sec. 11 and 16.

The complaint must be filed within thirty (30) days following the event prompting legal action or, as the case may be, within sixty (60) days following the warranty's expiry – but the Court may authorize recourse up to one year later²⁰⁷.

Out-of-court settlement and legal fees

An out-of-court settlement between the parties may be presented on the proper form to the Court, which will ratify it to make it binding.

In Pakistan, the judge has total discretion to grant fees or not. If a party makes a firm offer to settle the case before a hearing, and that offer is refused, the party that has refused the agreement may have to bear court costs, including lawyer's fees, if the decision is unfavourable to it²⁰⁸.

Hearing

The Consumer Court is legally obliged to hold a summary proceeding and settle the case at the latest six months after the accused has received a summons²⁰⁹. The usual rules of evidence are lightened.

However, the proceeding's "summary" character requires a few clarifications. It provides the possibility of leaving the parties a few days to reach an out-of-court settlement (if they so wish). But more importantly, the various steps in this simplified proceeding (presenting each party's evidence, cross-examination, plea, decision) do not take place on the same day, but over several days, "even weeks." Thus, according to Yasir Azher, despite the maximum legal period of 6 days, the court may take an average of 10 months to settle a case.

The parties are authorized to be represented by a lawyer.

Court order

The Court has all the powers of a civil court²¹⁰. Its decision may order the defendants to do what it takes to compensate the plaintiff for losses and damages suffered: replace the good, repair it, give a refund, offer the service again, offer financial compensation, pay damages, and pay the wronged consumer's legal fees. The Court may also issue orders that will have effects on other consumers: for example, confiscation or destruction of defective goods, ordering the merchant to stop offering such goods or services until they meet standards, recalling a product, etc. It should be noted that the law makes null and void any contract provision that would limit or exclude a merchant's liability regarding a product or service sold²¹¹.

A party that neglects to comply with a Court order may face a prison sentence of one month to three years, and/or a fine of 5,000 to 20,000 rupees²¹².

²⁰⁷ PCPA, sec. 28 (4).

²⁰⁸ PCPA, sec. 29.

²⁰⁹ PCPA, sec. 30 (5).

²¹⁰ PCPA, sec. 30 (3).

²¹¹ PCPA, sec. 12 and 17.

²¹² Which represents about CA\$57 to 227. This ceiling may seem very low; but it should be noted that this maximum amount represents slightly more than one-third of Pakistan's annual per capita income, which is US\$770. Canadian International Development Agency (CIDA), "Pakistan," January 10, 2010, <http://www.CIDA-cida.gc.ca/CIDA-cida/CIDA-CIDA.nsf/fra/JUD-12916929-STL>.

The court may hear lawsuits and motions from the district administration (the DCO – see below), which may initiate proceedings for infractions to the law even if no consumer was wronged.

Dissemination of decisions

District Court decisions are public²¹³, but no mechanism is provided to make them accessible. The media occasionally report them. In Gujrat, some decisions are published on the District Consumer Court's Facebook page, maintained by the registrar's assistant and used as an official presence on the Internet²¹⁴.

Lawsuit powers of the District Coordination Officer (DCO)

In addition to consumers, the District Coordination Officer – or his representative – may initiate legal proceedings before the consumer court. He does so under articles on defective goods or services, even if no consumer has been wronged, as long as he can demonstrate that consumers might be wronged. He may also launch investigations to that effect, notably following a reference or complaint from the Consumer Protection Council.

The DCO may also receive complaints from anyone about defaults to obligations in displaying prices, ingredients or components and issuing receipts²¹⁵.

Status of the Court and appeal

The Consumer Courts are courts of law under the supervision and control of the Lahore Higher Court. The latter hears all appeals, which may be filed in their own right, against a decision by a District Consumer Court.

Consumer Court judges are District judges named by the Punjabi government in consultation with the Lahore Higher Court.

Differences with small claims courts

A 2002 order established Small Claims And Minor Offences Courts in Pakistan²¹⁶. This central government initiative was intended to improve access to justice; the DCCs were established by the Punjabi government specifically to facilitate consumers' access to justice and offer a mechanism for applying the *Consumer Protection Act*. The DCCs were established to hear claims under that law and exercise penal functions related to its application; this limits admissible recourses to those initiated by consumers and district administration representatives.

The value of recourses admissible at the DCCs is unlimited, whereas it is limited to 100,000 rupees (\$1,130) in small claims courts. The latter are empowered to receive all lawsuits and claims based on a certain number of extremely varied rights and laws²¹⁷. Administrative fees of

²¹³ *PCPA*, sec. 26.

²¹⁴ District Consumer Court Gujrat, Facebook page, consulted on February 16, 2011, <http://www.facebook.com/group.php?gid=116129648424260#!/group.php?gid=116129648424260&v>.

²¹⁵ *PCPA*, sec. 23.

²¹⁶ *Small Claims And Minor Offences Courts Ordinance, 2002*, available on Pakistanlaw.net at <http://www.pakistanlaw.net/pakistan-law/civil-law/small-claims-and-minor-offences-courts-ordinance-2002/>.

²¹⁷ *Small Claims and Minor Offences Courts Ordinance, 2002*, "Schedule 1."

1. Suit for recovery of money due on contract in writing, receipt or any other documents.
2. Claim for damages on account of contract in writing.
3. Suit for the specific performance or rescission of a contract in writing.
4. Suit for recovery of movable property or value thereof.
5. Suit for separate possession of joint immovable property through partition or otherwise.

25 rupees (\$0.28) are charged when a complaint is filed at the small claims courts. No administrative fees are charged at the DCCs.

Main advantages and challenges

Among the main features, our correspondent pointed out: the possibility of recourses regarding services, a maximum of six months for the court to render its decision (but it should be recalled that in practice, it would take an average of 10 months to settle a case), the user-friendly process of filing actions, the absence of legal fees, and the possibility of claiming an unlimited amount in damages.

With regard to challenges, our correspondent deplores that the Pakistani law is only “a copy, but a poor copy” of India’s consumer protection law. In his view, amendments are necessary to broaden the Court’s jurisdiction. For the rest, since the law is relatively recent, the main challenges are to inform Pakistanis of their consumer rights and merchants of their obligations and responsibilities, and to clarify grey areas in the law’s application.

3.8 Malta: Malta Consumer Claims Tribunal

Main features

- Aims to offer a dispute resolution mechanism that is quick, inexpensive and specializing in consumer affairs;
- Complaints must first be filed with the Consumer Affairs Council or a recognized consumer association, which will make a first attempt at dispute resolution;
- Relatively low value of admissible disputes;
- Power to grant damages and fees and to levy small fines.

Introduction

The smallest Member State of the European Union, with a population of less than 500,000, Malta has a Consumer Claims Tribunal in addition to a small claims court²¹⁸. In fact there are two consumer courts, one for the Island of Malta and the other for the Island of Gozo. Their operation is identical and will be discussed together here.

We succeeded in making a first contact with Malta’s Consumer Claims Tribunal, which had agreed to collaborate with our study. But despite calling back a few times, we never received an

-
6. Suit for compensation.
 7. Suit for redemption of mortgage property.
 8. Suit for enforcement of easement rights.
 9. Suit for rendition of accounts of joint property.
 10. Suit to restrain waste and remove nuisance.
 11. Disputes under the Canal and Drainage Laws.
 12. Mesne profits of property.
 13. Suit for compensation for wrongful taking or damaging movable or immovable property.
 14. Suit for damages by cattle trespass.
 15. Suit for damages and compensation arising out of traffic accidents.
 16. Any other relief not falling under the Schedule but agreed to by the parties to be settled under this Ordinance. Small Claims and Minor Offences Courts Ordinance, 2002.

Part II

All offences in the Pakistan Penal Code (Act XLV of 1860), punishable with imprisonment not exceeding three years or with fine or with both.”

²¹⁸ *Malta Consumer Affairs Act (CAA)*, 1996, Ch. 378.

answer to the questionnaire sent. The information presented here was found on the websites of the Consumer and Competition Department²¹⁹ and the Consumer Affairs Council²²⁰.

Objective

The main objectives for establishing the Tribunal were to offer a quick and inexpensive consumer redress mechanism and an alternative, more specialized in consumer law, to the Small Claims Court²²¹.

Alternative dispute resolution proceedings

The most usual recourse – the first step for Maltese consumers who seek redress without going to civil courts – consists of filing a complaint with the Consumer Affairs Council or a recognized consumer defence association; they can obtain information from it about the rights and responsibilities of each party, and those organizations will attempt mediation. After 15 working days, if mediation fails, the consumer may choose to transfer his complaint to the Consumer Claims Tribunal²²².

Consumer Claims Tribunal

The Consumer Claims Tribunal can hear claims of up to €3,494 (almost \$5,000 CAD). The complaint must be related directly or indirectly to the consumer's purchase of a good or service from a merchant²²³.

The Tribunal is presided by a decision-maker (“arbitrator”) who sits alone. Arbitrators are named by the Prime Minister and must be lawyers with at least five years of experience. Nominal fees (up to €25 – about \$35) related to the amounts in dispute are charged for filing a claim.

Simplified proceedings

The arbitrator is considered to have the same power as a judge in a court of law; he may notably summon witnesses to appear and have them testify under oath. As in all other proceedings of this type, he is not bound by the usual rules of evidence. He is free to conduct the proceedings in the manner that he deems most appropriate for applying the law while respecting the principles of natural justice. The arbitrator must do everything reasonably possible to render his decision on the same day as the hearing and to limit recourse to experts (“technical referees”) to the extent possible. Finally, he is not obliged to give detailed reasons for his decision.

Lawyer representation is allowed, but discouraged (“the whole scope of the Consumer Claims Tribunal is to enable the consumer to state his case without the need of having a lawyer²²⁴”). No lawyer's fees may be reimbursed even to the party that wins a case.

²¹⁹ Consumer and Competition Department, “Consumer Claims Tribunal,” Government of Malta, consulted on February 12, 2011, <https://secure2.gov.mt/consumer/consumer-claims-tribunal?l=1>.

²²⁰ Consumer Affairs Council, “Consumer Claims Tribunal,” Government of Malta, consulted on February 12, 2011, http://finance.gov.mt/page.aspx?site=CAC&page=consumer_claims.

²²¹ Consumer and Competition Department, *op. cit.*
Wikipedia, “Office for Fair Trading (Malta),” January 7, 2010, [http://en.wikipedia.org/wiki/Office_for_Fair_Trading_\(Malta\)](http://en.wikipedia.org/wiki/Office_for_Fair_Trading_(Malta))

²²² Consumer Affairs Council, “Submitting a Complaint,” Government of Malta, consulted on February 22, 2011, http://finance.gov.mt/page.aspx?site=CAC&page=submit_compliant.

²²³ We could not obtain a clarification of the word “indirectly.”

²²⁴ Consumer and Competition Department, *op. cit.*

The Consumer Claims Tribunal's powers: damages, fees and fines

The Consumer Claims Tribunal may award damages as well as fees, but only in very limited amounts. Thus, it may award up to €232.94 in damages for non-material losses to a consumer who has suffered pain, anxiety or other annoyances. If it deems that a claim or a defence to be vexatious or frivolous, the Consumer Claims Tribunal may order a party to pay a penalty of up to €116.47.

Anyone who fails to comply with a Consumer Claims Tribunal order may be found guilty of contravening the *Consumer Affairs Act* and is subject to a fine of €500²²⁵.

The Court of Appeal hears only appeals concerning the arbitrator's non-compliance with the principles of natural justice or if he has seriously infringed on the consumer's rights.

Difference with the Small Claims Court

One of the objectives in establishing the Consumer Claims Tribunal was to create an alternative to the Small Claims Court. Like the other forums examined in this study, the Maltese Consumer Claims Tribunal can receive only claims filed by consumers against merchants (it can also hear counterclaims filed by merchants).

By contrast, the Small Claims Tribunal, which belongs to the legal system, may hear claims from any entity, artificial person or natural person²²⁶. Both institutions hear claims of up to €3,494.

3.9 Turkey: Arbitration Committees and Consumer Courts

Main features

- Two-level system: Consumer Arbitration Committees – local forums for disputes of under \$500 – and Consumer Courts;
- The “Arbitration Committees” founded in 1995 as arbitration tribunals have been transformed into administrative tribunals (quasi-judicial institutions) and made mandatory;
- Entirely free of charge;
- Consumer associations and the government may go before Consumer Courts;
- Broad jurisdiction including credit and real estate sales.

Introduction

We add the case of Turkey even though we did not have an opportunity to study it thoroughly, given the language constraints. It was impossible for us to contact a respondent familiar with this institution. We will nevertheless make a short presentation based on the only substantial source we could find on the subject: the text of Turkey reporters at the Journées Henri-Capitant²²⁷.

²²⁵ *Ibid.*

²²⁶ Malta Communications Authority, “Legal Framework: Obligations towards Consumers,” consulted on May 15, 2011, <http://www.mca.org.mt/infocentre/openarticle.asp?Id=1327&pref=50&pagepos=1#Link6>.

²²⁷ Hakan Pekcanitez and Nur Bolayır, “Le Consommateur et le Procès (Rapport Turquie),” Journées internationales colombiennes de l'Association Henri Capitant des Amis de la Culture Juridique française, Bogota/Cartagena, September 24-28, 2007, <http://www.henricapitant.org/>.

Context and presentation

The Turkish legal system does not have proceedings for the collective representation of individual interests (class actions), or alternative legal proceedings for settling consumer disputes. But it allows governments and duly registered consumer associations to take legal action for the protection of consumer interests if the law is violated.

Turkey has a two-level consumer court system. The latter is comprised of Consumer Arbitration Committees and Consumer Courts.

It should first be noted that the Arbitration Committees are not arbitration tribunals in the usual sense: the Arbitration Committees' jurisdiction is clearly formulated in law and, as opposed to arbitration's consensual nature by definition, the defendant does not have the choice of accepting or refusing an action against him that is brought by a consumer. Founded by the *Law No. 4077* (of consumer protection) of 1995, recourse to Arbitration Committees has become mandatory (for disputes of less than 792.12 new Turkish liras – about \$500 CAD) following amendments made to the law in 2003²²⁸.

The main distinctions between the two levels, i.e., the Arbitration Committee and the Consumer Court, concern the amounts at stake in disputes, the types of admissible recourses, and the powers granted to those forums. The Ministry of Industry and Consumer Affairs is to establish a Consumer Arbitration Committee in each county seat and district.

Composition of Arbitration Committees and Consumer Courts

An Arbitration Committee is comprised of 5 members, one of whom must be a legal expert, named by the Bar from among its members. The four other members are named, respectively, by the mayor (from among city hall personnel specializing in such matters), the chamber of commerce and industry, the craftspeople guild, and consumer associations.

Consumer Courts are comprised of a single judge.

Jurisdiction of the Arbitration Committees

The Arbitration Committees' jurisdiction covers disputes involving a maximum amount that is indexed annually, and set at 792.12 Turkish liras (about \$500 CAD) for 2007. Below that amount, recourse to an Arbitration Committee is mandatory; decisions are final and may be executed directly and enforced under legal provisions on enforcement and bankruptcy. The parties have 15 days to appeal the sentence before the Consumer Court, if they wish to do so.

Admissible claims are those resulting from a dispute between consumers and sellers or suppliers that pertains to a claim for material or moral redress, to credit, or to the "real estate sale of vacation or permanent residences." Criminal lawsuits, precautionary measures and administrative disputes are excluded²²⁹.

Disputes involving over 792.12 Turkish liras may still, if the parties so agree, be submitted to Arbitration Committees, but then the decisions will not be final; arbitration verdicts may be admitted as evidence before the Consumer Court, without being conclusive.

²²⁸ *Ibid.*, p. 3.

²²⁹ *Ibid.*, p.11.

Free recourse

Recourse to Arbitration Committees and any claim before Consumer Courts are free of charge. All costs are borne by the Ministry of Industry and Trade²³⁰.

Jurisdiction of Consumer Courts

Consumer Courts are empowered to settle all disputes valued at over 792.12 liras – so there is no ceiling on the value of admissible claims. Consumer Courts are also mandated to “settle all types of disputes related to the application” of the consumer protection law (number 4077).

Accordingly, not only consumers, but also consumer associations and the Ministry of Industry and Trade are authorized to bring actions before a Consumer Court. They may notably request that the Court prohibit the sale or production of defective products and have them withdrawn from the market. The losing litigant may have to pay for the publication of public notices in newspapers.

However, actions seeking material and moral redress for harm suffered are reserved for consumers.

Summary proceedings

These Courts apply summary proceedings, i.e., “quicker and easier legal proceedings than the written proceedings applied in higher courts²³¹.”

Legal representation

Lawyer representation is not mandatory in the Turkish legal system, but not prohibited before Arbitration Committees or Consumer Courts. “In practice,” legal representation is reportedly not necessary for consumers, because consumer associations help and guide them. Legal aid – although apparently very insufficient – is available to the poorest consumers who must appear before Consumer Arbitration Committees or Consumer Courts.

Problems and challenges

The main problem with the Turkish system appears to be its great popularity and the insufficient resources to deal with that. The Consumer Arbitration Committees are confronted with a great many disputes, particularly in large cities, and the Consumer Courts’ workload is also too heavy. “For bureaucratic reasons, it has not been possible to increase the number of Consumer Courts and judges²³².”

Other difficulties, according to the authors of the text, are: the Arbitration Committees number only one legal expert, whereas the quorum is three members; the Committees may therefore sit without the presence of at least one legal expert. This situation prompts critiques regarding the “equitable” nature of verdicts.

Finally, the compensation of experts that is provided by the Ministry is reportedly “quite low,” thus making it more difficult to hire experts.

Advantages

According to the authors, thanks to those forums sparing consumers the bureaucratic and difficult proceedings of courts of law, consumers have “the assurance of quickly and

²³⁰ *Ibid.*, p. 4.

²³¹ *Ibid.*, p. 5.

²³² *Ibid.*, p. 5.

inexpensively settling disputes.” “The negative situation encountered in Canada [to the effect that small claims forums mainly serve the interests of merchants and professionals who present their own claims there] does not exist in our legal system²³³.”

Performance

In 2005, 32,500 new actions were brought before Consumer Courts; in 2002, 2003 and 2004, the number of actions brought was 5,400, 6,358 and 20,187, respectively²³⁴. The number of cases ending with a verdict after a certain period exploded, from 6,119 in 2004 to 30,153 in 2005. In 2005, 58.9% of cases ending with a verdict were initiated in the same year and 37.6% the year before.

Small claims court

We found no information confirming the existence of a small claims court in Turkey.

²³³ *Ibid.*, p. 11.

²³⁴ *Ibid.* p. 6-12. These numbers do not include recourse to arbitration committees.

4. Summary Analysis of the Institutions Studied

4.1 General

We will attempt here to identify the main differences between those tribunals, as well as the major trends shaping them.

Mandate and objectives of the tribunals studied

We observe substantial variations in the mandate and objectives of the consumer courts studied herein. Of course, the common denominator of those initiatives is that they are all intended to improve consumer access to justice by offering an alternative to ordinary courts of law.

In Pakistan, India, South Africa and Malaysia, all the tribunals appear to have been instituted following a first consumer protection policy. Those jurisdictions adopted a consumer rights law, and the tribunals' establishment aimed mainly at establishing a mechanism for implementing and applying those rights. In fact it is not surprising that the tribunals with the most ambitious and broadest powers (Gauteng's Consumer Affairs Court (CAC); the Indian system of District Forums, State Commissions and National Forum; Pakistani Punjab's District Consumer Court (DCC); the Turkish Consumer Courts) are those where the pro-consumer mandate seems clearest.

Indeed, the mandates of those three institutions – as well as the Turkish Consumer Courts – go beyond simple dispute resolution. All have a power to judge infractions of the law even without damage suffered directly by a consumer. For its part, the Tribunal for Consumer Claims of Malaysia (TCCM) was instituted as a mechanism for applying the law, but only to the extent that a consumer has suffered damage. The only triable infractions to the law are those that have caused damage and for which a consumer seeks redress.

The initiatives of Malta, Lisbon and Malaysia were instituted to offer *specifically to consumers* a means to assert their rights and obtain redress. Offering consumers recourse from a venue specializing in consumer affairs is among the *raison d'être* of those tribunals.

In contrast, the *Consumer, Trader and Tenancy Tribunal* (CTTT) of New South Wales is presented in a more neutral way, simply as a “dispute resolution mechanism,” an initiative to group and rationalize administrative justice in many fields within a single institution, in order to make that justice system more efficient and accessible. That neutrality translates into a broad definition of “consumer” (which includes not only natural persons but also firms, companies and many types of profit and non-profit associations) and a “good.” Nevertheless, the divisions (general, motor vehicles and residential construction) with a mandate to apply consumer law are dedicated to applying consumer rights, since they can only receive claims from consumers against merchants, as is the case with all the institutions studied in this report.

Tribunal powers

All the tribunals examined in our research have in common the necessary powers for adjudicating common consumer disputes and thus order redress for damage or loss suffered from a contract between a consumer and a supplier, i.e.: to honour the warranty, return the good or service, repair the good, replace it, offer the service again, repair the damage caused

by the defective good or service, etc. To render decisions, the tribunals consider the parties' obligations under the relevant laws and the contracts.

There again, there are several variations. At one end of the spectrum, at the Lisbon Consumer Conflicts Arbitration Centre (LCCAC), those powers only apply to member companies (which have thus agreed to submit to its jurisdiction). Again at the LCCAC, but also at the CTTT, the TCCM and Malta's Consumer Claims Tribunal (CTT), no proceeding or claim can be presented to the tribunal without a consumer having suffered loss or damage from a contract to purchase a good or service. In those four institutions, an infraction of consumer protection laws is not triable if has not caused a loss or damage to a consumer. Those institutions' decisions can only apply to the parties directly involved in the case.

At the other end of the spectrum, we find broader powers to sanction infractions that have not made direct victims or infringed on collective rights, or to issue orders applying to third parties.

The Indian Commissions and Forums can receive actions from a consumer association acting on behalf of a wronged consumer, whether or not he is a member of the organization. In cases of recourses against an unfair business practice, a consumer association may pursue its action even if the wronged consumer and the defendant reach a settlement of the dispute. Those same Indian tribunals can receive class actions ("on behalf of, or for the benefit of, all consumers so interested"), as well as actions brought by the central government or a State government "either in its individual capacity or as a representative of interests of the consumers in general²³⁵." In addition, while decisions cannot apply to third parties, in some cases of unfair business practices the Forums have suggested that the regulatory authorities adopt corrective measures.

For their part, the Punjabi DCCs can receive actions from District authorities, which may bring actions for infractions of the law even if no consumer has been wronged directly. In addition, both the Indian and Pakistani institutions can issue orders against merchants who are not parties to a case: orders to cease unfair business practices or to cease offering a good or service until it meets standards. In Turkey, while the arbitration committees only have the function of settling disputes, the Consumer Courts can handle certain criminal cases and receive from consumer associations and the government actions pertaining to infractions of the consumer protection law.

Finally, Gauteng's Consumer Affairs Court (CAC) may declare a business practice "unfair," thus making it illegal²³⁶. The CAC is empowered to hear actions for any infraction of the *Consumer Affairs (Unfair Business) Act* of 1996, and may issue orders in any case submitted to it. Actions can be brought to it even in the absence of a direct victim. The Consumer Protector acts as a public prosecutor charged with investigating and prosecuting lawbreakers. The Court's decisions establish case law. Finally, the CAC has the power to issue emergency orders and name a trustee to take charge of a business in order to redistribute its profits to wronged consumers.

²³⁵ *The Consumer Protection Act, 1986 (CPA), sec. 12.*

²³⁶ This power is detailed in two sections: "Order by court prohibiting unfair business practice" (sec. 22) and "Declaration of certain business practices to be unlawful" (sec. 24). *Consumer Affairs (Unfair Business Practices) Act, 1996*, Provincial Legislature of Gauteng, <http://www.ledet.gov.za/docs/new%20acts/consumer%20affairs%20unfair%20business%20practice%20act.pdf>.

Simplified proceedings

Designed as alternatives to courts of law, the institutions studied have all adopted simplified proceedings intended to make tribunals more accessible, quicker and more inexpensive. Freed from the weight of the usual rules of evidence, they still must guarantee respect for the principles of natural justice and procedural fairness. In most cases, the judges, arbitrators or tribunal members are called upon to play a more inquisitorial role or one similar to a duty to provide assistance. The two exceptions in this regard are those of Indian and Punjabi tribunals, where proceedings are considered simplified, but where cases are handled in several days of hearings, distributed over several weeks, several months, and even several years in India, where the proceedings have apparently become more adversarial than inquisitorial.

Lawyer representation

With the same intention to simplify proceedings and accelerate decision-making, representation (by a lawyer or others) is only allowed exceptionally or is discouraged (in Malta, for instance, no lawyer's fees may be paid). Two examples differ from this general rule. 1) In the Indian system, representation is allowed and even encouraged – which appears to be one of the main reasons for the system being bogged down in myriad proceedings and adjournments. It should be noted that representation in Punjabi DCCs is allowed without being either encouraged (although lawyer's fees may be paid) or discouraged. 2) In Gauteng, the Consumer Protector not only introduces the case before the CAC, but also represents the consumer (the Consumer Protector may hire a lawyer, but the practice is discouraged). Between the two examples is Turkey, where representation is neither mandatory nor prohibited, but is “in practice” not necessary thanks to consumer associations' assistance to consumers.

Fees to bring an action

Gauteng's CAC, Turkey's Arbitration Committees and Consumer Courts, the LCCAC and Punjabi's DCC charge no administrative fees to bring an action. The TCCM charges fixed fees lower than \$2 to file a case. Malta's CCT, the CTTT, and India's Commissions and Forums charge “nominal” fees modulated according to the value of the claim; the latter two also grant specific terms to vulnerable clientele²³⁷.

Alternative dispute resolution mechanisms and other measures to make justice more accessible: consumer information, assistance and orientation.

Given that justice is not only a matter of process and law, but also of results and material equity, a consumer must have access to the type of recourse suitable for the type of grievance he wants resolved, and to that end, he must be able to find his way in the legal jungle, i.e., know his rights and the recourses made available to him to assert those rights.

Several institutions have chosen to facilitate and accelerate cases by establishing mechanisms favouring out-of-court settlements negotiated between the parties.

In the Indian Commissions and Forums, where the problems of case-handling times are most acute, there is no measure to induce the parties to attempt a negotiated agreement. Likewise for Turkey's committees and tribunals. In all the other institutions considered here, we find at least minimal measures to favour negotiated agreements between the parties. In almost all cases (India and Malta being the exceptions), negotiated settlements may obtain court sanction and thus become legally binding (including for the LCCAC).

²³⁷ Indian consumers below the poverty line do not have to pay administrative fees, whereas New South Wales students and retirees benefit from a special fee of \$5 (v. \$35 for most cases).

At the Maltese CCT, the Gauteng CAC and the LCCAC, consumers are first received by paralegal organization employees who inform them of their rights and responsibilities, assist them in their undertakings and try to act as mediators helping the parties reach a negotiated settlement. It should be noted that at the CAC, the consumer is accompanied at every stage, including at the hearing, where the Consumer Protector represents him.

The CTTT process does not provide express functions of consumer information and assistance. But the parties are invited to attempt reconciliation before the hearing; a room is made available to them and, in most locations where the hearing takes place, a conciliator as well, to help obtain a negotiated settlement. Moreover, to favour everyone's access, hearings may take place by telephone, and the CTTT's website provides a lot of information (in several languages and also addressed to its native population) about the CTTT's proceedings²³⁸.

At the Malaysian TCCM, the tribunal member may, when he deems appropriate, act as a conciliator to help the parties reach a negotiated settlement. Finally, the law in the Punjab province – where processing times seem longest after those of Indian tribunals – provides what may be called a passive mechanism: the law requires a consumer to first communicate his grievance to the merchant before bringing an action before the DCC, whereas the “summary procedure” provides a few days between the summons and the hearing's start to allow the parties to consider the possibility of reaching an out-of-court settlement.

Administrative tribunal or court of law

Almost all the institutions studied are administrative tribunals empowered by specific laws (related to consumer protection) and reporting to a specific ministry (the one responsible for consumer protection), rather than to the Justice Ministry or the legal system. Only Punjabi DCCs are empowered as a branch of the justice system and report to the Higher Court, in Lahore. Apart from those two main options, Lisbon's Arbitration Centre belongs to private law, while being supported by public authorities.

Case processing and settlement times

The most problematic situation in terms of case processing times is of course that of the Indian system, where over 50% of cases nationally require over 150 days and where cases commonly take three or four years, or even more, to be settled. By contrast, the CTTT settled 75% of cases introduced in 2009-2010 on the very day of the hearing; the TCCM has settled 86% of cases introduced since its foundation in less than 45 days. We have seen several factors that explain this problem. But in addition to inadequate means to render justice quickly and efficiently, the problem of the Indian Commissions and Forums is that they have no requirement compelling them to render their decisions more quickly. They have great discretion in the use of their power to charge fees, and yet, according to our interlocutor, they do not use it to penalize parties that make abusive use of proceedings and requests for adjournment. Although we have no truly reliable data to rigorously compare all the institutions studied here, the Indian system appears exceptional not only by its poor performance, but also by apparently being the only one that does not have to meet deadlines for processing cases.

The laws constituting the Pakistani Punjab's TCCM and DCCs compel the latter to settle cases within certain maximum periods. We have seen that the Punjab reality does not reflect what the law prescribes, but without that requirement the situation would likely be more similar to what is observed in its Indian neighbour. Other institutions, such as Gauteng's CAC, the CTTT and the LCCAC, have given themselves processing time objectives and succeed in processing the great

²³⁸ Consumer, Trader & Tenancy Tribunal, www.cttt.nsw.gov.au.

majority of cases on the same day as the hearing, and less than a few months after the first contact made by the consumer. The TCCM belongs in fact to both categories, since it has pledged, in a “Charter of Client Service,” to meet deadlines even stricter than those imposed by law.

Tribunal composition

The composition of tribunals varies by institution in a few aspects, such as the number of tribunal members (from one in Malta up to 83 members of different status at the CTTT), the quorum required for holding a hearing, and the qualifications required. The details and variations in those regards are many, not always significant for our purposes, and not always comparable (how to compare Malta’s two one-member tribunals with hundreds of Indian tribunals?).

It should be mentioned that we find two major models. The first is collegial: the tribunal is comprised of a panel of members that is often presided by a legal expert, with members generally chosen for their expertise and/or representativeness. Gauteng’s CAC, the Turkish Arbitration committees and the Indian system belong to this category. The second model, to which all the other institutions belong, is “unitary,” i.e., the sitting tribunal is comprised of a single decision-maker. An institution may thus be constituted by several judges or tribunal members (CTTT, TCCM) or by a single judge (Malta²³⁹). It should be noted that Turkey’s two-level system belongs to both categories – the Arbitration Committees are collegial and the Consumer Courts are unitary.

Although it is difficult, on the basis of the information we have, to go further in our analysis, the composition of those tribunals cannot be neglected. The Indian example demonstrates this, in that the recruitment method and the remuneration are barriers to recruiting (and retaining) candidates sufficiently qualified and motivated to settle cases quickly. In other words, the method of recruiting tribunal members must be designed to help carry out the mission and meet the objectives assigned to the tribunal.

Public decisions

The decisions of the Gauteng CAC, the Punjabi DCCs, the Maltese Tribunal²⁴⁰ and the Indian Commissions and Forums are all public. But there are few dissemination mechanisms to make decisions accessible, and often no mechanism is provided. Regarding most of the institutions, we were told that the newspapers reported decisions from time to time. The LCCAC also makes public (while preserving the parties’ anonymity) the principles on which decisions are based, which is exceptional for an Arbitration Centre.

At the CTTT and TCCM, decisions are generally communicated only to the parties. But at the CTTT, decisions rendered under the *Home Building Act 1989* must be provided to the “Commissioner for Fair Trading” to be included in the public register. Then, reasoned decisions in writing (available only on request by the parties) are published on the Internet. For its part, the TCCM plans to launch the *Malaysian Consumer Law Journal*. As for the LCCACs, the information is made public in the press and in annual reports.

²³⁹ As we specified in the section on Malta, there are in fact two consumer courts there – one for the Island of Malta territory and the other for the Island of Gozo territory. Both courts are presided by a single judge.

²⁴⁰ Consumer Affairs Act, sec. 26.

Jurisdiction

A priori, the tribunals we studied have jurisdiction over any transaction concluded between consumer and merchant for the sale of a good or the provision of a service, subject to the complaint being filed by the consumer. From that point, various aspects characterize or limit that jurisdiction.

Several institutions (CTTT, TCCM, LCCAC, Maltese Tribunal) see their jurisdiction limited by a ceiling imposed on the value of admissible disputes. No limit of this type is imposed on the jurisdiction of Gauteng's CAC or the Punjab's DCC, whereas the Indian system admits all disputes, but defines jurisdictional levels (Forums, State Commissions, National Commission) according to the monetary value of disputes. Similarly, the Turkish Arbitration Committees have jurisdiction over disputes valued at below a certain ceiling, while the Consumer Courts may receive all disputes above that amount. The LCCAC's jurisdiction is limited to actions brought against member companies.

The laws empowering consumer courts also often exclude (CTTT, TCCM, CAC) certain fields from their jurisdiction because the laws governing them are rather administered by different organizations. The Indian system probably has the broadest jurisdiction, including several types of services explicitly excluded almost everywhere else: medical care, housing, insurance, credit, public services, etc. In fact, the only exclusions are services provided free of charge, transactions made by the "consumer" for commercial purposes, and personal service contracts.

Another possible limit resides in statutes of limitation. The Punjabi DCC can hear cases only if they are filed within 30 days following the event prompting the dispute (some exceptions allow extensions of up to one year).

Differences with small claims courts

In all the jurisdictions we studied (except Turkey), we find, in addition to the institutions studied in this report, a small claims court in one form or another. How are these two types of tribunal different?

At the highest level, the difference between the two is that consumer courts are constituted with the specific objective of improving access to justice *for consumers*. From this specific objective flows a whole series of institutional distinctions.

We have seen how, in Quebec, the small claims courts are overloaded and often used, in reality, by merchants and professionals to collect their debts. In some small claims courts of the jurisdictions we examined, there is no limit to the status of persons (artificial or natural) who may rely on those institutions. Thus, while consumers must appear before those courts, it is most often against their will, because they are dragged there by a merchant or professional. The consumer courts reverse this situation, since they receive only actions brought *by* consumers against merchants; it is then easier to adapt the institution, its proceedings and parameters to consumers' needs while taking into account issues of access to consumer justice.

Among the differences between the two types of courts, those that handle consumer disputes have, with regard to the value of admissible claims, higher and even unlimited ceilings, as in Gauteng, India and Pakistan (only Malta has identical ceilings at small claims courts and consumer courts). Where it was possible to compare information, we observed that the fees for filing an application for remedy were always lower (or nonexistent) in consumer courts than small claims courts.

Another major difference between the two types of courts is that half of the consumer courts studied herein (Gauteng, India, Pakistan, Turkey) are empowered to handle criminal cases. Indeed, government or consumer association representatives may bring an action before those courts, which have the necessary powers to intervene against a merchant who has not complied with consumer protection laws. This gives those courts a deterrent and curative power that no small claims courts have.

Finally, and not least, the consumer courts specialize in their field. As we have pointed out several times, this enables better knowledge of the laws, situations and types of disputes likely to appear before the consumer court, and can only lead to cases being handled more efficiently and quickly, and to better decisions.

Conclusion

In the cases we have studied, the presence or form of certain elements appear to have an impact on access to justice. From the two types of tribunals (Indian tribunals and Pakistani district consumer courts) with the worst case-handling times, to the most efficient tribunals (Gauteng's CAC, CTTT, TCCM, LCCAC), the presence of certain aspects or modalities varies at the same time as the "performance" of tribunals: truly simplified proceedings that make it possible to hear and settle most dispute-settlement stages in a single day of hearings; a limitation of legal representation; consumer information and assistance services; out-of-court settlement mechanisms; specific objectives or constraints to settle cases quickly. The greater the presence of these aspects, the more efficient the administration of justice appears to be (see the summary table on the next page).

4.2 Summary Table

	Procedure		Consumer assistance and information	Alternative dispute resolution mechanism; incentives for negotiated settlements	Case processing objective	Performance (average duration between filing and settling the case)
	Simplified procedure	Representation				
Lisbon Consumer Conflicts Arbitration Centre (LCCAC)	Yes	Yes	Yes	Yes	N/A	30 to 40 hours between first contact and settlement by the tribunal.
Consumer, Trade and Tenancy Tribunal (CTTT) – New South Wales	Yes	Allowed only exceptionally.	No	Yes	Yes – Plaintiffs must be ready to proceed within 28 days.	75% of cases settled on the same day as the hearing (less than 42 days).
Tribunal for Consumer Claims Malaysia (TCCM)	Yes	Allowed only exceptionally.	No	Yes	Objectives (law): 60 days – even more ambitious objectives adopted by the TCCM.	86% of cases settled on the same day as the hearing (less than 45 days).
Consumer Affairs Court (CAC) – Gauteng, South Africa	Yes	Allowed but discouraged. The Consumer Protector represents consumers.	Yes	Yes	Yes 60 days via mediation/negotiation by the Office of Investigation ===; 21 days more for resolution by the Consumer Protector, including the decision.	N/A
Malta Consumer Tribunal	N/A	Allowed but discouraged.	Yes	Yes	N/A	N/A
District Consumer Court (DCC) - Punjab, Pakistan	More or less	Yes	No	Only passive measures.	Yes The law provides that cases must be handled in 6 months.	10 months on average.
District Forums, State Commissions, National Commission – India	More or less	Allowed and reportedly favoured.	No	No	No	Over 50% of cases processed in over 150 days. Processing times may be several years.
Consumer Dispute Arbitration Committees & Consumer Courts – Turkey	Yes	Allowed, but reportedly unnecessary in practice due to assistance from consumer associations.	No (but consumer associations provide assistance)	N/A	N/A	N/A

4.3 Comments by Researchers Specializing in Access to Consumer Justice

We consulted expert researchers in the issue of consumer access to justice in an effort to obtain their comments and views about the opportunity to centralize consumer recourses within a specialized institution, modelled on those we examined abroad. To that end, we presented them with a summary document presenting an overview of the seven institutions with which we were in contact (thus excluding Turkey).

The three experts we consulted are University of Montreal Full Professor Pierre-Claude Lafond (consumer law, access to justice, alternative dispute resolution mechanisms, class actions), Université du Québec à Montréal Professor Thierry Bourgoignie (international and comparative consumer law, European integration law, commercial law, economic law) and Laval University Law Professor Marc Lacoursière (consumer law, banking law, electronic commerce law, business corporation law)²⁴¹.

It should be noted that we only submitted institution descriptions to our three experts, without the final report's overviews or summary analysis of the main trends and contrasts. All three pointed out this shortcoming, with reason.

Comments by Marc Lacoursière (Laval University Faculty of Law)

Professor Lacoursière sent us comments that pertained more generally to aspects that should have been developed, rather than to what could be retained from the aspects uncovered by our research. For example, he mentions that “on the basis of this study, it would be appropriate to conduct a Quebec scientific study of litigants, lawyers (and the Bar), even of notaries, and of judges to obtain their views.” (Our translation.)

Noting that the study covered few developed countries (“except Portugal (a developed country, but undergoing a grave financial and economic crisis) and the state of New South Wales, in Australia”) (our translation), he asked whether developed Western countries (France, the United Kingdom, Sweden, the other Nordic countries, English Canadian provinces) have consumer courts and pointed out that “Brazil is an interesting source of consumer law studies...” (Our translation.)

Professor Lacoursière then asked whether consumer courts replace small claims courts in those countries.

More directly on the opportunity to consider creating a consumer court, he then raised the following questions:

est-ce que le Québec a besoin d'un tribunal de la consommation? Je répondrais oui, s'il était démontré que la difficulté d'accéder à la justice serait résolue par l'entremise d'un tel tribunal. Est-ce que la Cour des petites créances ou la Régie du logement, pour ne nommer que ces deux instances, sont adéquates? Un point commun de votre étude est

²⁴¹ Faculty of Law, University of Montreal, http://www.droit.umontreal.ca/professeurs_personnel/corps_professoral/pierre-claude.lafond.html.
Legal Sciences Department, Université du Québec à Montréal, http://www.grdp.uqam.ca/fiche_bourgoignie.htm.
Faculty of Law, Laval University, http://www.fd.ulaval.ca/site/cms/affichage.php?menu=78&page=quest/afficher_profil_quest.php&idul=malac82&vitrine=prof.

que la procédure y est facilitée et que, dans la plupart des cas, l'absence d'avocat peut être la norme. Je comprends l'intérêt d'un tribunal de la consommation pour servir de guichet unique (un peu comme l'Autorité des marchés financiers, par exemple), mais je crois que les autres tribunaux québécois dont j'ai fait mention sont également notoires dans la population.

He concluded by confiding that: "I think that an adequate mediation and arbitration service should certainly be encouraged."

Comments by Pierre-Claude Lafond (University of Montreal Faculty of Law)

We obtained comments from Professor Pierre-Claude Lafond by telephone. Here is an account of the conversation we had²⁴².

Generally, Professor Lafond found interesting the survey of models so different from one another, because we cannot simply hope to reproduce here a model found abroad. By studying how different countries have addressed similar problems, we may then consider how this can inform an effort to create here an original model adapted to our realities and context.

Professor Lafond emphasized the importance that a consumer court be adapted to the realities of Canadian provinces and that it not reproduce the error of the Quebec Court's Small Claims Division by recreating proceedings with (or even without) lawyer representation that would be unsuitable for the realities of consumers who are intimidated and lost in the legal maze. Case processing times are made extraordinarily long there, so that consumers are turning away from it: in fact, reports Mr. Lafond, the number of cases filed at the Small Claims Court has fallen sharply in recent years.

Among the factors that can prevent such a model and that he found in the foreign proceedings examined, Professor Lafond particularly appreciated the gradation of mechanisms and recourses offered: several of the institutions studied offer various dispute resolution mechanisms (mediation, conciliation), and dispute adjudication only after the parties have had the opportunity to attempt a negotiated solution. Such dispute resolution mechanisms are often more beneficial not only by processing cases more quickly and less expensively, but also at times by allowing both parties to end up winning (as opposed to adjudication, whereby only one party is declared a winner after the proceedings).

Professor Lafond also pointed out the potential of such tribunals in terms of equity: the justice system being a means to an end, the parties should have an opportunity to settle their dispute equitably when they see it in their interest to do so.

Regarding the Lisbon Arbitration Centre, the only arbitration tribunal in our study, Professor Lafond did not appreciate its voluntary character for companies, i.e., the model of a tribunal with jurisdiction only over merchants that want it; he states that the law must apply to everyone. However, in addition to the gradation of mechanisms and the possibility for the tribunal to decide on equity, he appreciated that arbitration verdicts are published there.

Questioned on the possible effect of such an institution, as an administrative tribunal or as a Court of Law division, Professor Lafond answered, citing the example of the Régie du logement

²⁴² Mr. Lafond has had occasion to reread and confirm the accuracy of this accounting.

du Québec where many months are also necessary to obtain a hearing²⁴³, that the tribunal's judicial or administrative nature did not appear very important to him. More important is taking advantage of the opportunity of establishing such an institution to seriously rethink the proceedings, recourses and services offered to consumers.

On the issue of the qualifications or status required for being a consumer court member, Professor Lafond was in favour of opening such institutions to legal experts who would not formally be judges, but he was more sceptical about naming court members who would not have legal training, because the justice system is too important to be completely abandoned as a dispute processing tool. Moreover, he would see no problem in a court comprising several members, some of whom would not be legal experts, because such a solution could have a place for the technical qualifications required in some disputes, while maintaining the presence of a legal expert able to apply the law when necessary.

Pierre-Claude Lafond recalls with regret that the Office de la protection du consommateur du Québec (OPC) has recently abolished its conciliation service, which could handle thousands of disputes annually. Instead, the OPC has adopted an approach based on making consumers accountable. In his view, while this new approach offers the consumer information to take steps on his own, it leads to the consumer's undertakings culminating in the dispute being handled in the Small Claims Court. Not only is that Court burdened by the problems we have examined, but Professor Lafond criticizes the constant attempt to judicialize all disputes – an all-judicial approach that serves consumers poorly, particularly the most vulnerable ones. Professor Lafond sees a second problem with this approach: it is laudable to want to make consumers accountable, but why not try to do the same to companies?

Regarding The Quebec pilot projects of community justice centres, Professor Lafond found those initiatives very interesting, notably in that the centres can help citizens find the information resources they need. Similarly, such centres can teach citizens about existing dispute resolution resources. Teaching about existing mechanisms and increasing their use would be an important first step.

To governments that would respond, to any demand of access to justice reform, that the budgetary context makes those reforms difficult, Professor Lafond insists: one day we will have to realize that justice and access to justice entail costs. Declaring one's dedication to improving access to justice means little if one does not want to take the necessary means to that end.

Comments by Thierry Bourgoignie (Legal Sciences Department of Université du Québec à Montréal)

Professor Bourgoignie wrote that in his view, it was:

extrêmement difficile d'opter de manière définitive pour l'un ou l'autre des systèmes présentés. Ceux-ci ont tous des points forts et des points faibles. En outre, ils doivent être vus et évalués dans leur contexte culturel et judiciaire propre. Le réel intérêt de l'analyse comparative effectuée serait de conclure, dans une section finale, par la proposition d'une grille de lecture identifiant les conditions selon lesquelles un tribunal de la consommation devrait fonctionner ou serait reconnu comme «consumer-friendly».

²⁴³ It took on average 75.3 weeks to obtain a first hearing in a general case, 37.3 weeks in a priority case, 32.7 weeks in a rent setting and review case, and about 6 weeks in urgent and non-payment cases. Régie du logement, *Rapport annuel de gestion 2009-2010*, Government of Québec, 2010, p. 31.

Une telle grille permettrait de soumettre d'autres tribunaux de consommation nationaux à un même examen.

Professor Bourgoignie informed us that one of his students is working on a Master's thesis on the opportunity of establishing a consumer court in Quebec. Her work is based on the European Commission's recommendations of 30 March 1998 and 4 April 2001 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes²⁴⁴:

Ces deux recommandations proposent de retenir les mêmes critères pour les systèmes impliquant l'intervention d'un tiers (médiateur, arbitre, ...) (recommandation du 30 mars 1998) et ceux favorisant la conciliation directe des parties (recommandation du 4 avril 2001). [Le mémoire visera à] évaluer la pertinence de ces critères dans le cadre d'une procédure judiciaire, telle celle qui serait applicable devant un tribunal de la consommation. Il est évident toutefois qu'il s'agit d'adapter les critères énoncés dans les recommandations et d'éventuellement les compléter.

Professor Bourgoignie suggested that we also rely on those recommendations in order to establish a framework for evaluating whether consumer courts would in fact benefit consumers. He sent us a summary of those two recommendations, adapted to the needs of an eventual consumer court in Quebec.

Those two European Commission recommendations are based on 5 criteria, and Professor Bourgoignie adds a sixth – the appropriateness of sanctions. The 6 criteria are:

1. The tribunal's broad jurisdiction

- The tribunal would be empowered to adjudicate “consumer disputes,” but this concept must be defined.
- A jurisdiction that would be clear and specific in consumers' eyes, which does not necessarily correspond to the way lawmakers segment the jurisdiction.
- The minimum requirement is thus to cover the CPA's scope.
- But we know that this scope may prove too restrictive:
 - in terms of subjects: excluding real estate, housing, insurance, product safety, financial products and services, etc.
 - in terms of the persons concerned: excluding professionals, public service providers, etc.
- We also know that certain subjects essential to consumer protection are covered in the Civil Code of Québec: unfair clauses, product liability.
- The consumer court's jurisdiction must therefore be broadened beyond the CPA's scope and include other laws in effect that pertain directly to consumer protection.
- The consumer court would not have the authority to receive class actions.
- If the consumer court is called upon to replace the Small Claims Courts, a ceiling should be set for the value of disputes within its purview, but that ceiling should be high; one should consider the opportunity of providing exceptions to the ceiling with regard to certain products, such as motor vehicles and real estate.

²⁴⁴ Commission's recommendations of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, *Official Journal of the European Communities*, April 17, 1998, number L 115, p. 31.

Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies in the consensual resolution of consumer disputes, *Official Journal of the European Communities*, number L 109, April 19, 2001, p. 56.

2. **Impartiality**

- Impartiality appears guaranteed by the independence of the person presiding the consumer court, the unchallenged qualifications of that person, and a balanced representation of the interests involved.
- Three-judge panel:
 - Chief judge: a retired judge or a university professor;
 - 2 other non-professional “judges”: 1 representing the industry or business and the other representing consumers.
- Subdivide the consumer court into chambers specializing by subject, and name “judges” specializing in those subjects. The judges would be named both by professional organizations and consumer organizations.

3. **Transparency**

- Ensure the institution’s visibility: consumer awareness campaigns, etc.
- Ensure knowledge of the consumer court’s proceedings: disseminate information on access to the court, evidence to present, procedures, costs and processing times, the nature of possible sanctions, the effects of the decision rendered, etc.
- Publish the decisions in the same way as judicial ones. Create a legal journal to that end or require the consumer court to publish an annual report on activities, including the text of decisions along with useful statistical data.

4. **Efficiency**

- Internet-based remote access by means of an online complaints form available on several consumer websites (OPC, consumer organizations), but also at places of business.
- No charge or modest fees proportional to the claim amount.
- Written rather than oral proceedings. Assistance provided by consumer organizations to a consumer who fills out the complaints form.
- Exclude the presence of a lawyer or of a consultant to the parties.
- Grant the judges great freedom of investigation and draw a list of potential experts.
- Encourage conciliation.
- Set complaints-handling times.
- The possibility of appeal would be limited to matters of law.
- Enforcement of the decision rendered.
- Guarantee of the institution’s funding, including the judges’ remuneration by the ministère de la Justice.

5. **Equity**

- The consumer court would rule on an equitable basis.

Personally, I add a criterion:

6. **Appropriateness of sanctions**

- Admissibility of an action in injunction granted to the OPC chairperson and consumer organizations.
- The consumer court’s option to extend the scope of a decision in order to give it a collective effect (for example, declare a clause unfair not only between one consumer and one seller, but with regard to all sellers using the same clause and to the professional associations who recommended its use).
- Diversity of individual and corrective remedies made available to the judge: replacement, repair, discount, full or partial refund, contract termination, granting damages, granting exemplary damages.

5. Conclusion

As recently described in a special edition of *L'Actualité* magazine²⁴⁵, access to the courts and to legal remedies has become eminently problematic for ordinary litigants (“Une affaire de riche?” was the cover story’s title), thus undermining citizens’ trust in the justice system. The issue of access to justice has another dimension in consumer law, where disputes generally involve little monetary value, so that there is “a disproportion between the economic value at stake and the cost of its judicial settlement²⁴⁶.”

But court access, however important, is only one aspect of access to justice. The instrument should not be confused with the end it serves, even though that instrument is indeed the main one for applying justice. First, justice certainly has as much to do with the nature of laws as that of the institutions mandated to apply them. Thus, it would be absurd to reflect on access to consumer justice without considering the laws that govern this sector of activity.

Moreover, justice is a matter of results. The average citizen does not concern himself with the law or proceedings for their own sake. Justice is accordingly a citizen’s ability to have his rights respected or, in a dispute, to obtain a satisfactory settlement within reasonable time and cost – the clogs of legal or institutional mechanisms are of little concern to him. Accessible justice is thus related not only to access to legal remedies, but also to their ability to deliver results.

Finally, justice is not limited to attempts to settle open disputes. It is also a “peacetime” promise – to use a martial metaphor – that consumers will not need to be constantly on their guard and wary of disputes. The framework of (just) laws and the justice system must *a priori* promote respect for consumer rights and the adoption of lawful behaviour. To that end, the justice system must have deterrent, preventive and corrective functions. In other words, it must be able to “promise” any violator that he will face justice and bear the consequences of his actions, and that the sanctioning power will be adequate for eliminating illegal and harmful behaviours. This aspect of justice is all the more important in consumer law because only a minority of disputes are taken to court and because individual dispute resolution mechanisms, such as small claims courts, are not used by vulnerable consumers and disadvantaged segments of the population. Of course, since the justice system’s capacity to exercise those deterrent and corrective functions also depends on the laws to be applied and the means provided by lawmakers, the laws must be considered in any discussion about justice.

The obstacles facing consumers wanting to bring legal action are many and well known. Those obstacles are material or objective (court costs, enforcement costs, lawyer’s fees, slow proceedings) and psychological (stress, intimidating character of the institutions, etc.). All those obstacles are slight for some, and insurmountable for others. In consumer affairs, where the stakes involved in a dispute are generally clearly identifiable, quantifiable and of little economic value, access to legal action, if it does not appear minimally profitable to a consumer who would contemplate it, will only be illusory. For the process to be worthwhile, all the costs and inconveniences borne by a person bringing an action must be reasonable when compared with the stakes involved in the dispute. But the low economic value of consumer disputes often

²⁴⁵ *L'Actualité*, May 1, 2011 edition.

²⁴⁶ Commission's recommendations of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, *Official Journal of the European Communities*, April 17, 1998, number L 115, p. 31.

makes it more cost-effective to absorb a net loss than to bring an action in a system that is not necessarily adapted to this type of dispute. This observation is particularly true for people who are also victims of exclusion factors, which widen the gulf between them and justice.

Given the repeated finding that the justice system is inadequate for consumer law issues, we adopted the two lines of thought stated by P.-C. Lafond: to guarantee access to justice, it is necessary to adapt existing proceedings to the needs of consumer law and incorporate new, more suitable recourses and proceedings. We would add another plan: to focus on the preventive, corrective and deterrent aspects of justice, so as to attenuate the asymmetry in the balance of power, which remains the real source of access to justice problems. The idea is to guarantee greater justice *a priori* – rather than only *a posteriori*, where it is *de facto* inaccessible to much too many consumers.

The measures typically proposed to improve access to justice do not appear able to handle the multiplicity and magnitude of the challenges facing access to consumer justice. In addition to the recurrent issue of the very restrictive admissibility criteria for legal aid, the impossibility of turning to the latter for monetary claims disqualifies it from the outset for consumer disputes. As for legal insurance, it does not appear to be a particularly suitable mechanism for the low value of consumer disputes, and it does not generally cover those who would most gain from it. Generalizing its use by including legal insurance by default in general insurance policies would not change much, in our view, for the main victims of the situation. Indeed, near-universality would risk inflating prices and increase dependency on a resource – the legal system – whose use should rather be reconsidered in consumer disputes. However, legal assistance provided as part of legal insurance would likely lower certain information costs to the consumer, by giving him more power to assert his rights on his own.

The small claims courts appear, at least in Canada, to have missed their targets, which are to simplify access to justice, make it less expensive and democratize it. As Professor Lafond emphasized, one of the fundamental errors was to reproduce a model designed for lawyers while removing the lawyers. The results are not enviable: excessively lengthy processing times, proceedings that are not very accessible and are intimidating to the average consumer, an institution that is more and more deserted, with the number of cases falling year after year, and that is mainly used for debt collection by professionals. Moreover, since the jurisdiction of small claims courts is limited to individual claims, the courts' usefulness is restricted in consumer law by having no deterrent effect.

Class actions are certainly an essential instrument in the arsenal of access to justice measures, particularly by being a rare instrument with deterrent and corrective effects that can influence behaviours industry-wide. However, class actions can be brought only when there are clear victims, in sufficiently large numbers – which limits the capacity to intervene upstream of a problem or of practices that would not make direct victims.

Alternative dispute resolution mechanisms (ADRM) can be useful in reducing dispute resolution costs and times. Their capacity to yield decisions more quickly rests, among other things, on their specialization in a specific field of activity and thus in specific types of disputes. But ADRMs integrated to the justice system miss the essential part of the target in consumer law, where most disputes do not end up before the court. As for ADRMs that operate outside the justice system, several problems arise there as well. In many cases, it remains complicated and expensive to turn to those ADRMs. In some sectors, such as finance, there are many actors with mandates and qualifications that are difficult for consumers to distinguish. Worse, the latter may waste several months in the maze of those mechanisms only to find themselves, at the end

of a dispute, with a decision that the companies are not even bound to apply. For their part, private ADRMs have the effect of consolidating companies' dominant position. Companies are repeat users of those institutions and thus develop an expertise and distribute their dispute costs over many cases. This adds to their advantage against individual consumers – one-time users ignorant of case law and procedures. Finally, in privatizing dispute resolution, those ADRMs have no deterrent effect.

Community justice centres can lessen many of the difficulties facing a consumer who wants to assert his rights on his own, particularly by lowering the many costs of acquiring the knowledge and information necessary to that end. However, the current state of this Quebec initiative remains very timid, confined to offering information and orientation services. We think the effect of those centres to lessen the many inequalities in access to justice could be considerably increased by a more proactive approach offering consumers more assistance to settle their disputes, notably through mediation or conciliation services.

All those measures present, in terms of access to justice, a certain interest and usefulness; but none has been designed specifically for the problems, issues and peculiarities of access to consumer justice. Accordingly, none seriously succeeds in offering means to such access. Moreover, while a pluralistic approach is necessary in allowing a diversity of recourses, the current problem resides more in a dispersion of initiatives that are too numerous and ill-suited for the specific field of consumer affairs. Such findings have led us to consider consumer courts as an overall, ambitious solution for substantially bridging the gulf between the majority of consumers and access to justice.

A consumer court as a solution to problems of access to justice?

Our examination of foreign consumer courts has demonstrated that there are many organizational models for this type of institution. Some trends and models lead us to believe that this type of approach could offer a serious solution, particularly in acting simultaneously on the three paths of access to consumer justice we have identified as essential.

To study this type of proceedings dedicated to consumer cases, we focused on institutions established in 8 countries:

- Consumer Affairs Court, Gauteng, South Africa;
- Consumer, Trader and Tenancy Tribunal, New South Wales, Australia;
- District Forums, State Consumer Disputes Redressal Commissions, National Consumer Disputes Redressal Commission, India;
- Tribunal for Consumer Claims, Malaysia;
- *Centro de arbitragem de conflitos de consumo*, Lisbon, Portugal;
- District Consumer Court, Punjab, Pakistan;
- Consumer Claims Tribunal, Malta.
- Arbitration Committees and Consumer Courts, Turkey.

Most of the consumer courts we examined were established with a double objective in mind: to promote access to justice by offering a quicker and less expensive alternative to traditional courts of law, and to offer specifically to consumers a means to assert their rights. The presence of this second objective cannot but influence the institution's structure, services, proceedings and ultimately its effectiveness in protecting consumer rights²⁴⁷. This objective is in fact the main significant difference between a consumer court and a small claims court; and from this objective flows an entire series of other differences. For example, we find higher ceilings on the

²⁴⁷ That being said, there may of course be a wide margin between intention and outcome.

value of admissible claims, lower administrative fees, and a greater offer of services in consumer courts than in small claims courts.

But the most important differences are the following. First, consumer courts receive only actions brought by consumers, and leave to small claims courts the claims filed by merchants or professionals for debts unpaid by consumers; this enables consumer courts to focus on and adapt to the issues of access to consumer justice. Second, many consumer courts are empowered to handle criminal cases, i.e., to receive actions brought against companies that violate consumer protection laws, even in the absence of direct and easily identifiable victims. This power gives consumer courts a deterrent and curative effect that has no equivalent in small claims court proceedings. Finally, specialization enables consumer courts to proceed more efficiently and quickly toward rendering better decisions.

The low economic value of consumer disputes, which raises the (direct or indirect) costs of legal action, was a reason for constituting consumer courts that process cases as simply, quickly and inexpensively as possible. Indeed, almost all the elements of the “efficiency” criterion in the grid proposed by Professor Bourgoignie on the basis of European Commission recommendations (see the previous section), i.e., elements that help reduce the costs and duration of the process for consumers, are found in one or other of the institutions studied:

- Widespread access – online complaint form available on several consumer websites, but also in places of business;
- Free access or modest fees proportionate to the claim amount;
- Written rather than oral procedure. Assistance to consumers filling out the complaint form;
- Excluding the presence of lawyers for the parties;
- Great freedom of investigation given to judges;
- Establishing a list of potential experts;
- Encouraging conciliation;
- Complaint processing deadlines;
- Appeal limited to legal questions alone;
- Binding force of the decision rendered;
- Guaranteed funding of the institution, including the judges’ remuneration by the Justice Ministry.²⁴⁸

²⁴⁸ After being asked for complementary information, Professor Bourgoignie clarified the aspect of a “written rather than oral procedure”: “By ‘oral procedure’ I mean that motion and defence procedures should mainly be written on pre-written forms. In many cases, the number of oral arguments would be reduced by decisions based on such a written file. That would considerably unclog the courts.” (Our translation.)

Only New South Wales’ CTTT could apparently make decisions based on a written documents if the tribunal member deems it appropriate and the parties agree to it (see “Dispute resolution and hearing” in the section on the CTTT), but no assistance is provided for preparing the written file. Other tribunals, such as the Arbitration Centre or Gauteng’s CAC, assist consumers, but the possibility of deciding based solely on the written file is not explicitly mentioned. It is obviously desirable to try to unclog the courts, but the idea of making decisions based on the written file and reducing the number of oral arguments appears to entail certain risks – mainly that of reproducing the asymmetry of expertise between merchants and consumers. So a necessary condition of such an approach seems to be that consumers benefit from assistance from consumer associations in preparing and writing their file.

In the consumer courts of several jurisdictions (Gauteng, Lisbon, Punjab, Turkey), there are no fees to bring an action, whereas elsewhere only “nominal” fees according to the claim’s value are charged.

The variable results obtained by consumer courts in terms of handling cases allow us to identify what could be the best practices. Among the elements that distinguish the institutions that obtain the shortest processing times, we observed the greatest contrast with traditional judicial mechanisms: by simplifying their procedural rules to the extent possible; by considerably limiting – or even prohibiting – recourse to legal representation; by having performance or legal constraint objectives for processing cases; by offering consumers information and assistance services or alternative dispute resolution mechanisms within the institution. It should be noted that those measures pertain to cost reductions. By contrast, the Indian and Pakistani tribunals, operating most similarly to the usual judicial mechanisms, with more laborious proceedings and the merchants’ option to hire a lawyer, obtain the poorest results.

Of course, the nature of case processing data – which are not always comparable or absolutely reliable – leads us to remain cautious in the conclusions we draw from them. Still, we may retain that with appropriate measures to simplify and accelerate processes effectively, it is possible to obtain truly convincing results in terms of quick and efficient case handling. Appropriate cost-reduction measures – broadly speaking, taking into account the many difficulties (time, money, effort, stress) facing a claimant – are a way to adapt judicial proceedings to consumer needs, which is a first step toward better consumer access to justice.

An important aspect of a consumer court’s efficiency is specialization. Dedicated to the administration of consumer law, the members of such a tribunal – so long as the selection and remuneration method helps retain competent and impartial candidates – will become experts, thus inevitably speeding up the handling of cases and reducing the period of hearings, while improving the quality of decisions.

The institutions studied also present interesting features in terms of improving access to justice, through the addition of new functions and proceedings that are not necessarily judicial – a second step toward better consumer access to justice. Recourse to several of the institutions studied would thus be configured so that a consumer, before bringing a formal action, may benefit from several types of services to help him settle his dispute on his own or obtain a negotiated settlement. The offer of information, assistance and orientation services welcoming consumers at their first contact with the justice system also appears able to reduce the many costs to consumers seeking justice. The cost and time spent on acquiring information (on the laws, rights, recourses, mechanisms, etc.) would be reduced considerably, as well as the emotional (stress) and opportunity costs. Indeed, such services can improve consumers’ position in the balance of power between them and merchants, and thus, by improving their negotiating power, lead to more out-of-court settlements.

Such an information, orientation and assistance service also has the advantage of offering a structure that is more flexible and more capable of providing services adapted to the various difficulties and inequalities making access to justice difficult. For example, such a specialized service could offer legal information in clear and plain language, more understandable to consumers who do not necessarily have the high level of literacy necessary to understand legal documentation. Moreover, it would be easier to make such services geographically and materially accessible to all types of claimants (disabled, in regions, or available only outside regular hours).

In Gauteng, Lisbon and Malta, not only can a consumer receive information and assistance, but he can also benefit from mediation or conciliation services within a single institution. An out-of-court settlement can thus be directly ratified by the tribunal, thus making it enforceable. Such a way of proceeding reinforces all the more the “single window” aspect of such a mechanism, reduces the number of undertakings required of a consumer (thus reducing the adventure’s costs) and, given the follow-up on the consumer, limits the need to constantly re-explain the situation. It also makes it possible to offer impartiality guarantees and the necessary “moral weight” for the parties to agree to participate in good faith in an alternative dispute resolution mechanism – since refusal to participate would automatically bring the case before the decision-making body.

We have seen that consumer self-representation can pose an additional obstacle to accessibility, because consumers must then prepare and present their case themselves, and so are abandoned in the “legal jungle.” According to M. J. Trebilcock, prohibiting representation can lead to cases that are less well prepared, and thus to loss of time and to inefficient use of court resources, and even to poor decisions²⁴⁹. Adding a consumer assistance service for preparing hearings, as in Lisbon, is certainly one way to mitigate those problems, by not leaving a consumer to his own devices, so that stress is limited and the case is better prepared, while excessive judicialization is avoided. Processing and hearing times can only be shortened if the judge can then focus on a decision-making rather than inquisitorial role.

The model of Gauteng’s Consumer Affairs Court (CAC) is also worth considering. As we have seen, not only is a consumer accompanied by a representative of the Office for the Investigation of Unfair Business Practices in an attempt to obtain a negotiated settlement, but also his case will be heard in court and defended by the Consumer Protector. So the “repeat-player effect” now rightly favours consumers: the Consumer Protector constantly appears before the CAC, so no one is better placed to know the relevant case law, since specialization constantly improves his ability to defend consumers. The Consumer Protector’s great expertise is also likely to improve his ability to obtain out-of-court settlements, speed up hearings (notably because he is more aware of the burden of passing time that weighs on consumers) and therefore shorten CAC processing times.

Some may argue that such an institutional bias in favour of consumers is excessive. And yet, the current state of the justice system is in fact unfavourable to consumers. Consumer representation by consumer defence experts, experienced in appearing in court, could reduce many legal costs and much of the uncertainty. Reversing the “repeat-player effect” to make it favour the most vulnerable people, for once, would also improve the preventive and deterrent aspects of the legal system: merchants would have a greater fear of going to court, so they would no doubt improve their practices. Indeed, the goal of consumer protection measures is to establish a balance of power between consumers and merchants.

One solution of this type, adapted to the Canadian context, could be modelled after what is done at the Employment Insurance Board of Referees, where groups supporting unemployed workers are allowed to represent the latter. So to avoid a structure that could become cumbersome by excessive centralization, an eventual consumer court might allow consumers to be represented by consumer associations or another type of interested party – who could be required to be duly accredited to avoid abuses or miscarriages of justice.

²⁴⁹ Michael J. Trebilcock, “Rethinking Consumer Protection Policy,” p. 88, in C. E. F. Rickett and T. G. W. Telfer, *International Perspectives on Consumers’ Access to Justice*, *op. cit.*

The third avenue we have proposed toward consumer access to justice was to develop the preventive, curative and deterrent aspects of justice. Mechanisms that would attenuate or even reverse the “repeat-player effect” to favour consumers are a major aspect of the deterrent effect that consumer courts can have. We have just discussed ways to give a consumer more power to settle his problems himself: by making easily understood information more accessible to him, by providing him with alternative dispute resolution mechanisms that are fair and efficient, and by assisting him throughout the process of defending his rights and interests. In that vein, the visibility and transparency of tribunals, as well as the publication of their decisions, so as to raise public awareness of consumer rights, promote companies’ *a priori* adoption of practices and behaviours that are more lawful and more respectful of consumers’ rights. Fearing and anticipating court decisions, companies would thus be strongly encouraged to comply with previous court decisions. Moreover, this public character of decisions would neutralize the informational asymmetry favouring repeat players.

The nature and scope of consumer court powers obviously have a major impact on their deterrent or curative nature. The tribunals of Turkey, Gauteng, Pakistan and India exercise not only civil justice functions, but also certain penal functions. Those tribunals can receive actions from the authorities (and from consumer associations, in Turkey and India) against violations of the law, including in the absence of identified victims. As an important function in terms curative justice, the tribunals’ decisions can also apply to third parties.

It should also be noted that those penal functions are adapted to consumer disputes. In India, Pakistan and Turkey, for example, certain provisions increase the powers of judges by allowing the latter to prohibit or recall defective products or those hazardous to health or safety. This aspect resembles the “relevance of sanctions” criterion developed by Thierry Bourgoignie (see the preceding section). Such powers would give a consumer court’s decisions curative and deterrent effects lacking in current small claims courts.

Our study of foreign consumer courts did not seek a model simply to be imported here as is. Rather, the goal is to promote better access to justice and more effective consumer law, learn from solutions tested elsewhere, adapt them to our context and introduce innovative solutions here.

Our study leads us to conclude that creating a consumer court – an institution entirely dedicated to consumer issues and adapted to problems of consumer access to justice – would be a way to meet those objectives. This approach would integrate within a single institution many of the advantages of approaches hitherto adopted to promote access to justice. Those advantages, presently scattered among the various measures we examined (chapter 2), are: information, orientation, assistance and mediation services offered under one roof, in a single window easily identified and accessible by consumers; an inexpensive, efficient, reliable and impartial dispute resolution mechanism; that mechanism’s specialization in consumer law, thus improving and speeding up decisions; and the mechanism’s truly preventive, curative and deterrent effects.

This specialization in a field where the stakes are very specific, if only because of the constant imbalance between consumers and merchants, would give such a forum an opportunity to acquire an overview of consumer affairs, put in perspective company practices along with the obstacles facing consumers both in their relations with the legal system and in their consumer transactions, and develop coherent and efficient consumer law.

Constituting such a tribunal would certainly send a strong message in favour of consumer rights. It would also be an effective means for consumers to assert their rights and strike a balance between consumers and merchants.

Recommendations

- Whereas access to justice is paramount, in the broadest sense of the term “justice”;
- Whereas citizens, theoretically equal before the law and having equal rights, face factual inequalities when exercising and asserting those rights;
- Whereas the situation of access to justice is still highly problematic and undermines public trust in the justice system;
- Whereas the peculiarities of consumer law and its disputes generally aggravate problems of access to justice;
- Whereas judicial proceedings are ill-suited for typical consumer disputes and needs – particularly those of the most vulnerable consumers;
- Whereas it is important for claimants – particularly in consumer affairs – to obtain results quickly, efficiently and inexpensively, through a fair process;
- Whereas the costs and difficulties a consumer will consider before bringing an action are not only monetary and that other costs can be significantly high;
- Whereas consumer rights, protections and recourses are scattered;
- Whereas the imbalance of power between consumers and merchants, as well as their respective means of access to justice, dramatically increase the merchant’s advantage in a dispute;
- Whereas unequal access to justice adds to other forms of inequality and social exclusion and that their respective effects thus tend to be multiplied;
- Whereas it is necessary that justice play a preventive, deterrent and curative role;
- Whereas easily accessible institutions with sufficient sanctioning power will constitute the best way to promote *a priori* respect for the law and for consumer rights;
- Whereas individual dispute resolution mechanisms are less likely to benefit more-vulnerable consumers;
- Whereas merchants’ *a priori* respect for the law and for consumer rights is one of the best ways to offer more justice to the most vulnerable consumers;
- Whereas, with the striking exception of class actions, the measures typically put forward to address problems of access to justice do not appear able to cope with the magnitude of the specific challenges to such access in consumer affairs;
- Whereas an institution specifically founded to apply consumer protection laws would provide substantial advantages in consumer access to justice;
- Whereas a dedicated forum, with a clear and specific mission, is more suitable for consumer needs and access to justice, and sends a clear message on the importance of protecting consumers, and that such a forum’s specialization enables it to develop expertise in the field and focus on consumers’ claims and legal issues;
- Whereas such specialization can enable a quicker, more efficient process leading to better decisions;
- Whereas a dedicated forum that is easily accessible to consumers, quickly renders binding decisions and has the necessary powers to hear criminal cases in its field of expertise is likely to increase the deterrent, curative and preventive effect essential to consumer law;
- Whereas the application of criteria modelled after European Union recommendations, but adapted to consumer law realities in this country, has already been suggested to ensure the effectiveness of such an institution;
- Whereas it is necessary to adapt legal proceedings to consumer needs and consumer law requirements:

1. Union des consommateurs recommends that Canada's provincial governments study without delay the means for establishing a judicial or quasi-judicial institution as a single window for consumer recourses, in order to improve consumer access to justice and respect for consumer rights;
2. Union des consommateurs recommends that provincial governments establish task forces as soon as possible, with the mandate to suggest, on the basis of the best practices identified in the present report, a consumer court model to lawmakers;
3. Union des consommateurs recommends that consumer rights organizations be invited to those task forces in order to ensure that the needs and concerns specific to consumer law, and necessarily taken into account by those organizations, be adequately represented within those task forces;
4. Union des consommateurs recommends that sufficient resources be granted to those organizations to ensure adequate participation in the task forces.

- Whereas legal proceedings and courts are not justice itself, but instruments to serve justice;
- Whereas many obstacles to access to justice are upstream of the judicial system, due to socio-economic inequalities and consumers' unequal ability to know their rights, understand legal language and mobilize the necessary resources to defend their rights;
- Whereas it is necessary to give more power to citizens as consumers, particularly so that they may settle more disputes on their own, without having to go to court;
- Whereas it is necessary to dejudicialize many disputes;
- Whereas information, orientation and assistance services are ways of reducing the costs (direct and indirect) and difficulties faced by consumers in exercising their rights, and give consumers more power and means to assert their rights and settle their disputes on their own;
- Whereas the offer of this type of services, and of alternative dispute resolution mechanisms within a consumer court offering consumers one-stop shopping for their benefit, can lead to quicker and less costly dispute resolution;
- Whereas the integration of those various services within a forum with decision-making and enforceable powers compels good-faith participation in the alternative proceedings while guaranteeing to the parties that those proceedings respect the principles of natural law;
- Whereas the integration of those services, by offering within a single forum a useful gradation of recourses, is likely to lower costs and to accelerate and improve the entire process, with cases thus being better prepared and followed up;
- Whereas the costs of establishing and operating such a single window offering legal information, assistance, mediation and adjudication are likely to be largely recovered, due to an expected reduction of pressure on ordinary judicial forums, of the number of disputes that must end up in adjudication, and even of the number of disputes, given the substantial deterrent power of such an institution;
- Whereas it is necessary to establish new non-judicial proceedings better adapted to consumer needs:

5. Union des consommateurs recommends that Canada's provincial governments ensure that the mandate given to the task forces charged with studying the establishment of a consumer court include an examination of all services – of information, orientation, assistance and alternative dispute resolution mechanisms – that should be integrated within such an institution, in order to improve access to justice through an integrated process.

Mediagraphy

Adam, Nathan, “New body ready to tackle consumer complaints,” *Eyewitness News*, January 25, 2011, Johannesburg, South Africa. www.eyewitnessnews.co.za/articleprog.aspx?id=57907

Annoussamy, David, “Le consommateur et le procès dans l'Inde,” September 2007, 8 pages, Journées internationales colombiennes de l'Association Henri Capitant des Amis de la Culture Juridique française, Bogota/Cartagena, September 24-28, 2007, available on the website of the Association Henri Capitant des Amis de la Culture Juridique française, Paris, France. <http://www.henricapitant.org/sites/default/files/Inde.pdf>

Arie, Benjamin, “How Small Claims Court works in India - Justice is blind but can also be pricey and taking a long time,” 2010, available on the website of e-COURT, Canada. http://e-court.in/how_it_works/smallclaims.php

Australian Capital Territory Administrative and Civil Tribunal, Welcome to the ACT Civil and administrative Tribunal – the ACAT, on the website of the ACT Civil and Administrative Tribunal, no date, Canberra, Australia. <http://www.acat.act.gov.au/>

Barreau du Québec, *L'assurance “protection juridique” : pour un meilleur accès à la justice*, Montreal, Barreau du Québec, 1999.

Bellavance, Marie and Alexandre Morin, “*Le faible revenu au Québec : un état de situation*,” Centre d'étude sur la pauvreté et l'exclusion, 31 pages, 2008, Québec City. http://www.cepe.gouv.qc.ca/publications/pdf/CEPE_faible_revenu_au_Quebec_final2.pdf

Boularbah, Hakim, “Réponses pour la Belgique au questionnaire relatif au thème n°4 : le consommateur et le procès,” September 2007, 21 pages, Journées internationales colombiennes de l'Association Henri Capitant des Amis de la Culture Juridique française, Bogota/Carthagène, 24-28 septembre 2007, available on the website of the Association Henri Capitant des Amis de la Culture Juridique française, Paris, France. <http://www.henricapitant.org/sites/default/files/Belgique-3.pdf>

Brenner, Claude, “Le consommateur et le procès (Rapport français),” September 2007, 23 pages, Journées internationales colombiennes de l'Association Henri Capitant des Amis de la Culture Juridique française, Bogota/Carthagène, September 24-28, 2007, available on the website of the Association Henri Capitant des Amis de la Culture Juridique française, Paris, France. <http://www.henricapitant.org/sites/default/files/France-4.pdf>

Canadian International Development Agency (CIDA), “Pakistan,” January 10, 2010, available on CIDA's website, Gatineau, Quebec. <http://www.acdi-cida.gc.ca/acdi-cida/ACDI-CIDA.nsf/eng/JUD-12916929-STL>

Canadian Judicial Council, “*Access to Justice: Report on Selected Reform Initiatives in Canada*,” Sub-committee on Access to Justice (Trial Courts) of the Administration of Justice Committee, 24 pages, June 2008, Ottawa, Ontario. http://www.cjc-ccm.gc.ca/cmslib/general/2008_SelectedReformInitiatives_Report_final_EN.pdf

Centres de justice de proximité, Québec City

Page “À propos,” no date. <http://justicedeproximite.qc.ca/a-propos/>

Page “Bonne Nouvelle : Le premier centre de justice de proximité devrait ouvrir ses portes très prochainement,” August 24, 2010.

<http://justicedeproximite.qc.ca/2010/08/bonne-nouvelle-le-premier-centre-de-justice-de-proximite-devrait-ouvrir-ses-portes-tres-prochainement/>

Commission des services juridiques, Am I financially eligible? On the website of the Commission des services juridiques, no date, Montreal.

http://www.csj.qc.ca/SiteComm/W2007English/Main_En_v3.asp

Consumer Affairs (Unfair Business Practices) Act, 1996, Provincial Legislature of Gauteng, 20 pages, Gaunteng, South Africa.

<http://www.ledet.gov.za/docs/new%20acts/consumer%20affairs%20unfair%20business%20practice%20act.pdf>

Consumer Affairs Council, Government of Malta.

Page “Consumer Claims Tribunal,” no date, St-Venera, Malta.

http://finance.gov.mt/page.aspx?site=CAC&page=consumer_claims

Page “Submitting a Complaint,” no date, St-Venera, Malta.

http://finance.gov.mt/page.aspx?site=CAC&page=submit_compliant

Consumer and Competition Department, “Consumer Claims Tribunal,” Government of Malta, no date, St-Venera, Malta. <https://secure2.gov.mt/consumer/consumer-claims-tribunal?l=1>

Consumer, Trader & Tenancy Tribunal, New South Wales, Australia.

Page “Decisions and orders,” November 2009.

http://www.cttt.nsw.gov.au/Orders/Decisions_and_orders.html

Page “Fact sheet: conciliation,” 1 page, no date

http://www.cttt.nsw.gov.au/pdfs/Resources/Publications/Fact_sheets/Conciliation.pdf

Page “Fact sheet: Rehearing and appeals,” 2 pages, September 2010

http://www.cttt.nsw.gov.au/pdfs/Resources/Publications/Fact_sheets/Rehearing_and_appeals.pdf

Page “Fact sheet: What happens at the Tribunal?,” 4 pages, CTTT-INFO-10/2008.

http://www.cttt.nsw.gov.au/pdfs/Resources/Publications/Fact_sheets/What_happens_at_the_Tribunal.pdf

Page “Facts and statistics,” February 21, 2011.

http://www.cttt.nsw.gov.au/About_us/Facts_and_statistics.html

Page “Fees and charges,” July 2010.

http://www.cttt.nsw.gov.au/Applications/Fees_and_charges.html

Page “Tribunal members,” February 2011.

http://www.cttt.nsw.gov.au/About_us/Tribunal_members.html

Cuming, David, “*L'accès à la justice : Comment y parvenir?*,” 88 pages, 2004, available on the website of Union des consommateurs, Montreal, Canada.

http://www.consommateur.qc.ca/union-des-consommateurs/docu/protec_conso/acces_justice.pdf

Danish Competition and Consumer Authority, “The Consumer Complaints Board,” Danish Competition Authority, København V, Denmark, no date.

<http://www.consumeragency.dk/Regulatory-framework/The-Consumer-Complaints-Board>

De Geschillencommissie, home page, website of De Geschillencommissie, XR Den Haag, Germany, no date. <http://www.degeschillencommissie.nl/>

Department of Justice and Constitutional Development, “Small Claims Courts,” 2006, Pretoria, Republic of South Africa. <http://www.justice.gov.za/scc/scc.htm>

Disputes Tribunal, About the Disputes Tribunal, sur le site de Disputes Tribunal, no date, Ministry of Justice, New Zealand. <http://www.justice.govt.nz/tribunals/disputes-tribunal>

District Consumer Court Gujrat, Facebook groups, Complaint about faulty service and defective product, Bahawâlpur, Pakistan, no date.

<http://www.facebook.com/group.php?gid=116129648424260#!/group.php?gid=116129648424260&v>

Duggan, Anthony J., “Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective,” pp 46-67, in Charles E. F. Rickett and Thomas G. W. Telfer, *International Perspectives on Consumers' Access to Justice*, Cambridge, 2003.

Europa, Brussels, Belgium,

Page “Consumer access to justice (Green Paper),” no date, Summaries of EU legislation.

http://europa.eu/legislation_summaries/other/l32023_en.htm

Page “Consumer Redress – Portugal,” 1 page, no date, European Commission, Directorate General of Health and Consumers,

http://ec.europa.eu/consumers/redress_cons/docs/MS_fiches_Portugal.pdf

Page Defective products: liability, April 27, 2011.

http://europa.eu/legislation_summaries/consumers/consumer_safety/l32012_en.htm

Forbrukertvistutvalget, “The Consumer Disputes Commission,” no date, Nydalen, Oslo.

<http://www.forbrukertvistutvalget.no/xp/pub/hoved/english/489330>

Galanter, Marc, “Why the “haves” come out ahead: Speculations on the limits of Legal Change,” *Law & Society Review*, Vol. 9, No. 1, pages 95 to 160, fall 1974, United States.

Gallins, Glenn, “Seizing Assets,” The Law Centre (University of Victoria, Faculty of Law), April 2008, Victoria, British Columbia, pages 95 to 160.

http://thelawcentre.ca/self_help/small_claims_factsheets/fact_18

Gordon, Sheldon, “Meet the legal service delivery vehicle of the 21st century: Judicare,” no date, The Canadian Bar Association, Ottawa, Ontario.

http://www.cba.org/CBA/practicelink/National_articles/PrintHtml.aspx?DocId=1924

Iles, Kevin, “The Consumer Protection Bill – Changing the Face of Litigation and Dispute Resolution,” on the website of Bowman Gilfillan, April 17, 2009, Johannesburg.

<http://www.bowman.co.za/LawArticles/Law-Article~id~2132417394.asp>

Institut de la Statistique du Québec, “Revenu moyen des hommes et des femmes bénéficiaires d'un revenu selon certaines caractéristiques (sexe, âge, type de famille et scolarité),” Québec City, 2008, March 4, 2011, Québec City.

http://www.stat.gouv.qc.ca/donstat/societe/famls_mengs_niv_vie/revenus_depense/revenus/revpart08_tab1.htm

Irfan Ahmed, Shahzada, “Act now,” The News on Sunday, September 2007, No. 2, Special Report, Pakistan. <http://www.jang.com.pk/thenews/sep2007-weekly/nos-02-09-2007/spr.htm#2>

Johns, Rowena. “The Consumer, Trader and Tenancy Tribunal,” Briefing Paper No. 11/2003, May 28, 2009, Parliament of New South Wales, Sydney, Australia.

<http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/B135D7C99E9FF0F5CA256ECF0084FE5>

Labelle, Yanick, “Consumer Arbitration: A Fair and Effective Process?,” Union des consommateurs, presented to Industry Canada’s Office of Consumer Affairs, June 2009,

http://uniondesconsommateurs.ca/docu/protec_conso/arbitrageE.pdf

Lacoursière, Marc, “Le consommateur et l'accès à la justice,” *Les Cahiers de Droit*, vol. 49, No. 1, March 2008, pp 97-130, Faculty of Law at Laval University, Québec City.

Lafond, Pierre-Claude

“L'accès des consommateurs à la justice,” Les Éditions Yvon Blais, 2010, 180 pages, Cowansville, Canada.

“L'émergence des solutions de rechange à la résolution judiciaire des différends en droit québécois de la consommation : fondement et inventaire,” in Pierre-Claude Lafond (dir.), *Mélanges Claude Masse – En quête de justice et d'équité*, Les Éditions Yvon Blais, Cowansville, Canada, 2003, 613 pages.

“L'exemple québécois de la Cour des petites créances : "Cour du peuple" ou tribunal de recouvrement ?,” *Les Cahiers de droit*, vol. 37, No. 1, 1996, pages 63-92, Faculty of Law at Laval University, Québec City.

“Le consommateur et le procès – Rapport général,” *Les Cahiers de Droit*, vol. 49, No. 1, March 2008, pages 131-157, Faculty of Law at Laval University, Québec City.

“*Le recours collectif comme voie d'accès à la justice pour les consommateurs*,” Les Éditions Thémis, Faculté de droit – Université de Montréal, Montreal, 1996, 831 pages.

LawAssist, “Claims and debts of \$10,000 or less,” no date, Law Access, Justice and Attorney General, New South Wales government, Australia.

http://www.lawlink.nsw.gov.au/lawlink/lawaccess/ll_lawassist.nsf/pages/lawassist_debt_small_claims_home

LawLink, Local Courts, Attorney General and Justice, New South Wales, Australia.

Page “About Courts,” January 18, 2011 .

http://www.onlineregistry.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_aboutus

Page “Local Courts Civil Claims Fees,” September 1, 2010.

http://www.onlineregistry.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_newwebsitefees05

Page “Welcome to the NSW Local Courts website,” January 17, 2011.

http://www.onlineregistry.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_index

Law Help Ontario, “A Guide to Fees in Small Claims Court,” 2008, Pro Bono Law Ontario, Ontario. http://www.lawhelpontario.org/small_claims/item.2264-PlainLanguage_Guides

Legal Aid Ontario, “Am I eligible for legal aid?,” 2011, available on the website of Legal Aid Ontario. Ontario, Toronto, Ontario. <http://www.legalaid.on.ca/en/getting/eligibility.asp>

Legal Services Society, “Do I qualify for legal representation?” 2011, British Columbia’s Legal Services Society, British Columbia, Canada.

http://www.lss.bc.ca/legal_aid/dolQualifyRepresentation.asp

Lemire, Louise, “Inégalités socioéconomiques et pauvreté Quelques facteurs déterminants,” Déjeuner-causerie, Service de surveillance, recherche et évaluation, Direction de santé publique et d’évaluation, Agence de la santé et des services sociaux de Lanaudière, Terrebonne et Joliette, March 2007.

http://www.agencelanaudiere.qc.ca/ASSS/SantePublique/DejeunerCauserie/D%C3%A9jeuner-causerie%2021et%2022%20mars%20finale_MJC_Animation2.pdf

Local Court Act 2007, New South Wales Consolidated Acts, January 7, 2011, Australian Legal Information Institute, Sydney, Australia.

http://www.austlii.edu.au/au/legis/nsw/consol_act/lca2007131/

López, Manuel Jesús Marín, “Questionnaire relatif au thème n° 4, Le consommateur et le procès : Rapport Espagnol,” 23 pages, Journées internationales colombiennes de l’Association Henri Capitant des Amis de la Culture Juridique française, Bogota/Cartagena, September 24-28, 2007, available on the website of the Association Henri Capitant des Amis de la Culture Juridique française, Paris, France.

http://www.henricapitant.org/sites/default/files/Espagne_traduit.pdf

Lord (Harry Kenneth) Woolf, *Access to Justice Report: Final Report to the Lord Chancellor on the civil justice system in England and Wales*, July 1996, The National Archives, U.K. Government Web Archive, United Kingdom.

<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/overview.htm>

MacDonald, Roderick, “Acces To Justice And Law Reform #2,” *Windsor Yearbook of Access to Justice* (Vol. 19), 2001, Windsor Law, University of Windsor, Windsor, Ontario.

Malaysian Bar, “Malaysian Court System,” September 29, 2008, The Malaysian Bar, Kuala Lumpur, Malaysia. http://www.malaysianbar.org.my/malaysian_court_system.html

Malta Communications Authority, “Legal Framework: Obligations towards Consumers,” website of the Malta Communications Authority, riana, Malta, no date.
<http://www.mca.org.mt/infocentre/openarticle.asp?id=1327&pref=50&pagepos=1#Link6>.

Manamela, Fati, “Institutional Arrangements: the Consumer Protection Court Perspective,” Consumer Protection Law Conference, March 4-5, 2010, 23 pages, Johannesburg.
<http://www.economic.gov.za/ccrd/Consumer/Manamela.pdf>

Mendes Cabeçadas, Isabel, “Centre d’arbitrage de Litiges de Consommation de Lisbonne,” 7 pages, Audition publique sur les services financiers de la Commission européenne, September 19, 2007, European Commission, Brussels.
http://ec.europa.eu/internal_market/finservices-retail/docs/policy/hearing-cabecadas_fr.pdf

Messick, Richard E., “What Governments Can Do To Facilitate the Enforcement of Contracts,” 18 pages, Prepared for Reforming the Business Environment: From Assessing Problems to Measuring Results, Cairo, Egypt, November 28 – December 1, 2005.
<http://www.businessenvironment.org/dyn/be/docs/77/Session3.1MessickDoc.pdf>

Ministère de la Justice du Québec, Québec City,
Page “Small Claims,” September 24, 2010.
<http://www.justice.gouv.qc.ca/english/publications/generale/creance-a.htm>

Page “Community Justice Centres,” follow-up information on the press release issued on April 21, 2009 by Justice Minister Kathleen Weil, February 2, 2011.
<http://www.justice.gouv.qc.ca/english/commun/centres-a.htm>

Ministry of Attorney General, “What is Small Claims Court?,” Government of British Columbia, revised version of March 3, 2011, British Columbia.
http://www.ag.gov.bc.ca/courts/small_claims/info/what_is.htm

Ministry of the Attorney General of Ontario, Government of Ontario, Ontario.
“Small Claims Court Pamphlets.”
http://www.attorneygeneral.jus.gov.on.ca/english/courts/scc/small_claims_court_brochures_EN_Jan_11.pdf

Page “Small Claims Court Pamphlets,” January 2011.
<http://www.attorneygeneral.jus.gov.on.ca/english/courts/scc/default.asp>

Moodley-Isaacs, Neesa, “How the consumer law will be enforced,” *Personal Finance Magazine*, No. 4, 2010, South Africa.
<http://www.iol.co.za/business/personal-finance/how-the-consumer-law-will-be-enforced-1.1016167>

Moog, Robert, “Democratization of justice: the Indian Experiment with Consumer Forums,” 27 pages, Center for Research on Economic Development and Policy Reform. Working paper No. 141, July 2002, Stanford University, Stanford, California.
<http://www.stanford.edu/group/siepr/cgi-bin/siepr/?q=system/files/shared/pubs/papers/pdf/credpr141.pdf>

National Consumer Disputes Redressal Commission, The Consumer Protection Act, 1986, Consumer Protection and National Consumer Disputes Redressal Commission, no date, Janpath, New Delhi. <http://ncdrc.nic.in/>

National Reconstruction Bureau, "District Government: Powers and Functions of District Coordination Officer," National Reconstruction Bureau, Government of Pakistan, no date, Islamabad, Pakistan. http://www.nrb.gov.pk/local_government/district_government_05.htm

New South Wales government, Consumer, Trader and Tenancy Tribunal, Trader and Tenancy Tribunal Act 2001 No. 82, on the website of the New South Wales government, CTTT legislation, January 31, 2011, New South Wales. <http://www.legislation.nsw.gov.au/fullhtml/inforce/act+82+2001+FIRST+0+N#pt.4-sec.28>

Official Journal of the European Communities

Page "Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes," pp. 0031-0034, March 30, 1998, Official Journal number L 115 of April 17, 1998, Brussels. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:EN:PDF>

Page "Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes," Official Journal of the European Communities, pages 56 to 61, number L 109, April 19, 2001, Brussels.

Ogilvy Renault LLP, "Class Actions, Arbitration and Alternative Dispute Resolution," website of the Norton Rose Group, London, United Kingdom, August 27, 2007. <http://www.nortonrose.com/>

Pekcanitez, Hakan and Nur Bolayır, "Le Consommateur et le Procès (Rapport Turque)," 15 pages, Journées internationales colombiennes de l'Association Henri Capitant des Amis de la Culture Juridique française, Bogota/Cartagana, September 24-28, 2007, available on the website of the Association Henri Capitant des Amis de la Culture Juridique française, Paris, France. <http://www.henricapitant.org/sites/default/files/Turquie.pdf>

Public Citizen, *Forced Arbitration: Unfair and Everywhere*, September 14, 2009, 24 pages, Public Citizen, Washington, DC. <http://www.citizen.org/documents/UnfairAndEverywhere.pdf>

Punjab Consumer Protection Act 2005 (PCPA), Pb. Act II of 2005, website of Punjab Laws online, Punjab, no date. <http://punjablaws.gov.pk/laws/477.html>

Queensland Administrative and Civil Tribunal, the website's home page, Queensland Administrative and Civil Tribunal, Brisbane, QLD, Australia, no date. <http://www.qcat.qld.gov.au/>

Raymond-Bougie, Stéphanie, *L'arbitrage des différends en droit de la consommation. Une nouvelle approche*, Collection Minerve, Éditions Yvon Blais, Cowansville, Québec City, 2005, 160 pages.

Research and Knowledge Directory of the Canadian Council on Learning, *The Social Consequences of Economic Inequality for Canadian Children: A Review of the Canadian Literature*, Executive Summary, Canadian Council on Learning, March 2006, 7 pages, Ottawa.
http://www.edu.gov.on.ca/eng/research/social_consequences2.pdf

Régie du logement, *Rapport annuel de gestion 2009-2010*, 90 pages, Government of Québec, Québec City, 2010. http://www.rdl.gouv.qc.ca/fr/pdf/Rapport_annuel_2009-2010.pdf

Roach, Kent and L. Sossin, *Access to Justice and Beyond*, 23 pages, Faculty of Law, University of Toronto, Toronto, 2009.
http://www.law.utoronto.ca/documents/conferences2/Trebilcock09_Roach-Sossin.pdf

Rickett, Charles E. F., and Thomas G. W. Telfer. “Consumers’ access to justice: an introduction,” pages 1 to 14, in Rickett and Telfer, *International perspectives on consumers’ access to justice*, 2003, Cambridge University Press, New York.

Sarwari, Bilal, Small Claims And Minor Offences Courts Ordinance, 2002, PakistanLaw, March 13, 2009, Pakistan. <http://www.pakistanlaw.net/pakistan-law/civil-law/small-claims-and-minor-offences-courts-ordinance-2002/>

Schmitz, Bob, “Un exemple original : Les Centres d’Arbitrage au Portugal,” 6 pages, dans le cadre de la Conférence *Les Règlements Alternatifs de Litiges de consommation*, Université de Luxembourg, April 28, 2006, Luxembourg.
http://www.eco.public.lu/salle_de_presse/evenements/2006/04/10_consommateur/Expose_Bob_Schmitz.pdf

Seana C. McGuire and Roderick MacDonald, “Small Claims Courts Cant,” *Osgoode Hall Law Journal*, Vol. 34, pages 509 to 551, 1996, Toronto.
http://www.ohlj.ca/archive/articles/34_3_mcuire_MacDonald.pdf

Singh, Anurag and Brajesh Kumar, “Consumer Empowerment: an Indian Experience (analysis of consumer forums initiatives),” *Journal of Marketing and Communication*, September-October 2008, Vol. 4. No. 2. New Delhi.

Small Claims BC, “An introduction to Smallclaimsbcc.ca,” Justice Education Society of BC, 2011, British Columbia. <http://www.smallclaimsbcc.ca/>

South African Government Information, “*Constitution of the Republic of South Africa*,” 1996, on the South African Government Information website, August 19, 2009, Pretoria, South Africa.
<http://www.info.gov.za/documents/constitution/1996/index.htm>

Statistics Canada, *Low Income Lines, 2008-2009*, Income Research Paper Series – Income, Income Statistics Division, Statistics Canada, No. 75F0002, 2010, Ottawa.
<http://www.statcan.gc.ca/pub/75f0002m/75f0002m2010005-eng.htm>

Statistics Canada and Organisation for Economic Co-operation and Development, *Learning a Living: First Results of the Adult Literacy and Life Skills Survey*, 339 pages, Statistics Canada and Organisation for Economic Co-operation and Development, 2005, Ottawa and Paris.
<http://www.oecd.org/education/educationeconomyandsociety/34867438.pdf>

The Consumer Protection Act, 1986 (CPA), sec. 10, 16 and 20, December 18, 2002.
http://ncdrc.nic.in/1_1.html

Trebilock, Michael J. K., “Rethinking Consumer Protection Policy,” pp. 68-98, in *International Perspectives on Consumers' Access to Justice*, edited by Rickett and T. G. W. Telfer, 427 pages, 2003, Cambridge, United Kingdom.

Tribunal Tuntutan Pengguna Malaysia, “Tribunal for Consumer Claims Malaysia,” on the website of Tribunal Tuntutan Pengguna Malaysia, June 24, 2009, Malaysia.
<http://ttpm.kpdnkk.gov.my>

Tribunal Tuntutan Pengguna Malaysia, “Type of Claims That May Be Brought Before The Tribunal,” on the website of Tribunal Tuntutan Pengguna Malaysia, July 25, 2008, Malaysia.
http://ttpm.kpdnkk.gov.my/portal/index.php?option=com_content&task=view&id=50&Itemid=36&lang=en

Union des consommateurs, *Access to Home and Auto Insurance: An Issue?*, Final Report of the Research Project to Industry Canada’s Office of Consumer Affairs, 96 pages, June 2009, Montreal. <http://uniondesconsommateurs.ca/docu/rapports2009-2010/AccessHomeAutoInsurance.pdf>

Victorian Civil and Administrative Tribunal, “Civil Disputes-Small claims,” on the website of Victorian Civil and Administrative Tribunal, 2011, Melbourne, Australia.
<http://www.vcat.vic.gov.au>.

Wikipedia, the free encyclopedia,
Page “Consumer, tenancy and trader Tribunal of New South Wales,” September 12, 2010,
Categories: New South Wales courts and tribunals.
http://en.wikipedia.org/wiki/Consumer_Tenancy_and_Trader_Tribunal_of_New_South_Wales

Page “Office for Fair Trading (Malta),” January 7, 2010, Categories: Government of Malta
[http://en.wikipedia.org/wiki/Office_for_Fair_Trading_\(Malta\)](http://en.wikipedia.org/wiki/Office_for_Fair_Trading_(Malta))