CONSUMER ARBITRATION:
A Fair and Effective Process?

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The masculine is used generically in this report.

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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, regarding the issue of economic 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.

INTRODUCTION

> "Arbitration presupposes a balance of power; everywhere that balance is disturbed, arbitration suffocates."[1] - Henry Motulsky.

The validity and effectiveness of arbitration as an alternative dispute-resolution method are now widely recognized and accepted, commercially and internationally. This dispute-resolution method is widespread in consumer contracts; following the example of American companies, Canadian merchants and retailers are making ever-greater use, in their consumer contracts, of arbitration clauses forcing consumers to submit any eventual dispute to arbitration, to the exclusion of the courts.

The Supreme Court of Canada, in the Dell[2] order, has recognized arbitration as an acceptable consumer dispute-resolution method, and those who promote arbitration praise its advantages and merits. But others raise serious doubts as to the respect, in the consumer arbitration process, for essential guarantees that should be granted to the consumer in a fair and equitable dispute-resolution process. Faced with those reservations, some provincial legislators have decided to intervene to prohibit mandatory arbitration of consumer disputes. However, this doesn't stop consumers from agreeing, once a dispute arises, to go to arbitration. Without a specific framework adapted to consumer disputes and taking into account the specific imbalance between the parties, can consumers who choose arbitration or those who, in jurisdictions where such arbitration clauses are not prohibited, are forced to submit to it, really expect to benefit from a fair, equitable process that respects certain essential guarantees?

The purpose of the present study is to determine the pros and cons of consumer arbitration, notably on the basis of the essential guarantees that consumer arbitration should include to be considered a dispute-resolution method benefiting consumers. This study will also examine certain types of consumer arbitration currently offered in Canada. We will attempt to evaluate whether the systems put in place offer and respect the essential guarantees that should be provided by a dispute-resolution method acceptable to consumers.

We will try to determine what features and procedures would guarantee that a consumer arbitration system is effective, protects consumers adequately, and deserves to be promoted by consumer organizations.

The results of our research should also enable us to formulate recommendations on consumer arbitration and on legislative measures apt to favour essential guarantees, protect consumers adequately, and make this dispute-resolution method benefit consumers.

Without attempting an exhaustive study, our research will focus on certain foreign legislative measures regarding arbitration, on the operation of arbitration systems established in certain foreign jurisdictions, and on the means taken by those systems to respect essential guarantees. The study will not discuss the issue of trans-border consumer contracts, or arbitration in the context of conflicts of jurisdiction.

[1] Henry MOTULSKI, *L'arbitrage et les conflits du travail*, Rev.arb. 1956, 78. On justifying the prohibition of arbitration in labour relations. Our translation.
[2] *Dell Computer Corporation v. Union des consommateurs*, 2007 SCC 34.

CHAPTER 1: ALTERNATIVE METHODS OF CONSUMER DISPUTE RESOLUTION

I. ALTERNATIVE METHODS OF DISPUTE RESOLUTION

Disputes between merchants and consumers remain the area where consumer access to justice shows the most flagrant deficiencies[3]. When a justice system crisis occurred in the mid-sixties, the system was widely criticized for its slowness, long delays, costs, and the resulting overall deterioration in the image of the justice system[4]. In particular, the justice system was reprimanded for not being suited for consumer disputes. From the seventies to the mid-nineties, small claims divisions were established across Canada, with the main goal of increasing access to justice in cases where the amounts at stake did not justify resorting to the traditional legal process.[5] In parallel, the eighties saw the emergence in Canada of new dispute-resolution methods, which aimed to lower the number of cases before the courts, whereas in the United States, proceedings called independent assessment processes (IAPs) were already well established[6].

Given the problems raised by access to common law courts in consumer matters, one of the main objectives of alternative methods, which make available to consumers a panoply of alternatives to legal proceedings, is to facilitate access to justice. These alternative measures include negotiation, conciliation, mediation and arbitration.

The alternative dispute-resolution methods have the following features: first, since dispute-resolution is the object, remedial law is obviously involved, as opposed to preventive law[7]. Thus, although alternative dispute-resolution methods may defuse a conflict or prevent its aggravation, the ultimate goal of IAPs is to dejudicialize disputes and lead to resolution outside the courts[8].

A second fundamental feature of IAPs resides in volunteerism – the parties' agreement to participate in a given process in order to settle a dispute. Whereas a court will debate a case whether the defendant agrees or not, the IAPs operate differently: As mentioned by the authors Jean Morin and Martine Lachance, "*alternative methods could not exist without the express desire of the parties.*"[9]

Moreover, as opposed to the courts, alternative dispute-resolution methods have the advantage, at least in theory, of being flexible enough to adapt, depending on the situation, to the parties' needs as well as the constraints and requirements specific to the dispute[10].

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[3] Pierre-Claude LAFOND et al., *L'émergence des solutions de rechange à la résolution judiciaire des différents en droit québécois de la consommation: fondement et inventaire* dans Pierre-Claude LAFOND (dir.) *Mélanges Claude Masse: En quête de justice et d'équité*, Cowansville, Éditions Yvon Blais, 2003, p. 191.
[4] *Ibid.,* pages 186 and 187.
[5] UNION DES CONSOMMATEURS, *L'accès à la justice: Comment y parvenir ?*, Montreal, June 2004, page 42 and following.
[6] *Op. cit.,* note 3 (Lafond)., pages 192 and 193.
[7] Jean MORIN and Martine LACHANCE, *Les modes alternatifs de résolution des litiges*, Montreal, Chambre des notaires du Québec, 2006, p. 3.
[8] *Ibid*., p. 2.
[9] *Op. cit.,* note 7 (Morin and Lachance). Our translation.
[10] Ibid., p. 4.

We will now discuss the main alternative dispute-resolution methods available to consumers and companies when a consumer dispute arises.

A. Negotiation

Negotiation can be defined as a "dynamic communication process with the goal of reaching an agreement or convincing one or more parties."[11] Two essential elements govern the progress of any negotiation: communication and agreement[12]. The negotiating parties attempt, through mutual concessions, to conciliate interests that, on certain points, appear incompatible, and to arrive at a satisfactory agreement on the way to resolve the dispute.

Negotiation is a means of communication and transaction found in all facets of society and daily life. It can apply between two individuals or, for instance, between companies or states. Depending on the parties involved or the issues in dispute, negotiation will entail a level of complexity, costs, and an extremely variable degree of formality.

A the time of their conclusion, negotiations are usually submitted to written confirmation. In some cases, they are part of a broader process that may require more or less elaborate or restrictive formality. In many cases, they are conducted by the parties' representatives. All these requirements may be costly, but they don't usually apply in simple consumer contracts. Still, there is one common denominator: The parties retain at all times the last word on the result of the negotiations, since no participant is responsible for deciding the outcome.

Negotiation remains the primary alternative dispute-resolution method available to consumers, and the one to which they often resort before any other. Consumers most often undertake on their own any negotiations with the merchant; at times they call upon a third party to enter in communication with the merchant on their behalf. Negotiation enables the parties to manage the issue opposing them and aims to give them better control over the monetary impact of the dispute, in a context they have established themselves[13]. This procedure may prove more satisfactory to the parties than if they go to court, where a third party would impose a decision on their rights and obligations. Ideally, rather than determining a winner and a loser, as the courts most often do, negotiation searches for a win-win formula, whereby each party finds satisfaction following mutual compromises.

Negotiation undeniably has many advantages: no formality or regulation over the negotiation itself, no obligation to have a third party intervene during the negotiation, no fees, each party's freedom over its actions and decisions without being subjected to a binding decision imposed by a third party. In addition, as opposed to court proceedings, reaching an agreement together enables the parties to retain a mutual understanding.

However, with regard to these admitted advantages, a few determining factors should be emphasized: The parties' unequal balance of power plays an essential role in the progress and outcome of any negotiation – that imbalance involves each party's skill and experience, margin of manœuvre, and resources to pursue its own interests if negotiations fail. In addition, each party's level of knowledge – of a given market's usual practices, applicable legislation, and the

[11] Pierre CARDINAL, *Les modes de résolution alternative des conflits: Introduction à la médiation commerciale*, (1993) 1 *C.P. du N.* 1, 23 and 24. Our translation.
[12] Op. cit., note 7 (Morin and Lachance), p. 4.
[13] Martine LACHANCE, *Le contrat de transaction: étude de droit privé comparé et de droit international privé*, Cowansville, Éditions Yvon Blais, 2005, p. 4 and 5.

way a court would have handled such a dispute – will affect the concessions that may be deemed reasonable.

In the event that the dispute cannot be settled by negotiation or is aggravated, the parties to a consumer dispute may resort to other alternative dispute-resolution methods, such as conciliation or mediation.

B. Conciliation and mediation

As with negotiation, the goal of conciliation and mediation is to reach a compromise and thus resolve a dispute, while respecting the interests of each party. As with negotiation, these informal resolution methods aim both to help the parties arrive at a satisfactory solution and to maintain or re-establish mutual understanding between them. As opposed to negotiation, these processes generally require the presence of a third party who will intervene between the disputing parties to put things in perspective and help them arrive at an agreement, by providing them with relevant information on the context of their dispute and, eventually, by suggesting an appropriate solution to them.

Basically, the difference between negotiation and these two dispute-resolution methods, conciliation and mediation, is thus the presence of a third party – the conciliator or mediator – who will assist the parties in the search for a settlement that is suitable to them. What is the specific purpose of either method, and its degree of intervention by a third party? We hoped, as part of this study, to present the features that distinguish these two dispute-resolution methods; however, it must be admitted that they are often conflated and that no consensus exists on a precise definition.

To some authors, the difference between these two processes is fundamental: Théodore Garby explains that mediation is less interested "*in disputes than in underlying conflicts, while conciliation deals with the dispute itself, i.e., the parties' mutual claims*"[14]. Conciliation has been defined, in the international context, as a process to "have a dispute examined by a body accepted by the parties and authorized to present proposals to them in view of an arrangement."[15]

Traditional conciliation assigns the conciliator to search for relevant facts and analyse the resulting legal situation, in a role that resembles that of a judge, except that the latter could not impose a decision. In traditional mediation, the mediator brings out the parties' emotions, needs and interests to enable the parties to find their own solution themselves. Conciliation traditionally focuses on the facts, mediation on the persons. Based on the parties' common interests, mediation opens a path to the future, whereas, based strictly on a solution to the dispute, conciliation resolves the past.

In this view, the conciliator's task, as part of a dispute-resolution process, is to suggest a solution to the parties if they have not reached one themselves; for his part, the mediator provides support, as part of a communication management process whereby the parties search for their own solution. As opposed to the conciliator, the mediator is not responsible for issuing

[14] Théodore GARBY, *La gestion des conflits*, CMA Economica, Paris, 2004; cited in Jean A. MIRIMANOFF and Sandra VIGNERON-MAGGIO-APRILE, *LA GESTION DES CONFLITS* Geneva, February 19, 2009. Our translation.

[15] L. Yves FORTIER, *La diplomatie et l'arbitrage,* (1998) 11.1 R.Q.D.I. 327, p. 330. Available on the website of the Société Québécoise de Droit international, [Online] http://www.sqdi.org/volumes/pdf/11.1_-_fortier.pdf (Page consulted on April 17, 2008). Our translation.

recommendations and propose solutions he believes favourable to the attainment of an eventual settlement. In this view, mediation's main purpose is to preserve relations between the parties, without relying "*on purely legal considerations*" [16]. However, some authors state that the conciliator is not responsible for suggesting solutions to the parties to conciliation or for participating in the recommendations. In this view, the conciliator's role is limited essentially to that of a facilitator[17].

In a guide intended for Swiss practitioners, Lausanne University researchers identified these definitions retained by the Groupement suisse des Magistrats pour la Médiation et la conciliation, while observing that in both cases confidentiality has been omitted – because it goes without saying:

> "*1. By mediation is meant … a formal communication management process, freely agreed to by the parties and supported by an independent, neutral and impartial mediator – non-magistrate – freely named by the parties; through this process, the parties search for their own solution.*
>
> *2. By conciliation is meant … an informal dispute-resolution method, either mandatory or optional, led by a named conciliator – an independent, neutral and impartial magistrate; during this process, he may suggest a solution to the parties if they have not reached one themselves.*"[18]

It remains that the terms *mediation* and *conciliation* appear at times to be used interchangeably to mean the same dispute-resolution process. In Quebec, for example, it is possible to have access to a mediation service at the small claims division, the family section of the Superior Court or the Court of appeal, and a conciliation service at the Tribunal administratif du Québec or the Régie du logement, without the mandates for those services differing significantly. In Ontario, the Mandatory Mediation Program for civil proceedings other than those of family law was established in late 2002 in three large cities, Toronto, Ottawa and Windsor. The purpose of this program is to enable the parties to a civil dispute or those who wish to resolve estate issues to "*attempt to settle their cases before they get to trial, thereby saving both time and money*".[19] Although it is quite easy to note features common to these two processes, it thus seems arduous to distinguish features exclusive to each one.

The information issued about these services, whether for mediation or conciliation, presents them as flexible, simple and free-of-charge processes[20] enabling the parties to play an active

[16] *Op. cit.* note 3 (Lafond), page 203. Our translation.
[17] *Op. cit*. note 7 (Morin and Lachance), page 5.
[18] Jean A. MIRIMANOFF and Sandra VIGNERON-MAGGIO-APRILE, *La gestion des conflits*, Geneva, February 19, 2009. [Online] http://www.gemme.ch/rep_fichier/nouvelle_conciliation_judiciaire.pdf (Page consulted on May 12, 2009). Our translation.
[19] Ministry of the Attorney General, *Courts. Mandatory Mediation*, available [Online] http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.asp (Page consulted on April 22, 2009).
[20] This is notably the case for mediation at the Small Claims Division in Quebec. See the La presse newspaper: Section Lapresse affaires, *La médiation aux petites créances est à votre portée*. March 11, 2009. Available [Online] http://lapresseaffaires.cyberpresse.ca/dossiers/affaires-juridiques/publireportage/200903/11/01-835493-la-mediation-aux-petites-creances-est-a-votre-service.php (Page consulted on May 4, 2009).
For conciliation at the Régie du logement, see: Régie du logement. *The Régie du logement's Conciliation Service*. [Online] http://www.rdl.gouv.qc.ca/en/outils/servconc2009.asp. (Page consulted on May 4, 2009).

role in resolving the dispute amicably. The mediator's role at the Small Claims Division is to facilitate communication between the parties. He must do everything in his power to help the persons develop a solution and negotiate an agreement suitable to them. The conciliator's role at the Tribunal administratif du Québec is to facilitate out-of-court dispute settlements by helping the parties to communicate and negotiate, whereas that of the conciliator at the Régie du logement consists of helping both parties maintain good communication throughout a meeting. The role of the mediator and conciliator in these three examples is essentially the same. Enabling the parties to meet and communicate with one another is a central aspect of these dispute-resolution methods, since "*Generally, the best solution to a problem is one worked out by the parties themselves.*"[21]

The two processes undeniably show strong similarities on determining features: the parties' freedom regarding the solution; the third party's independence, impartiality and neutrality; the third party's non-decision-making role as to the settlement of the dispute; the confidentiality of the mediation process and the progress of conciliation; the efficiency, quickness and cost reduction offered by the two systems; the resumption of dialogue; the active role played by the parties; and the search for a solution based on mutual understanding and agreement.

Accordingly, the purpose of conciliation, like that of mediation, "*is not to determine who wins and who loses, but to develop creative solutions to disputes in a way that is not possible at a trial.*"[22]

Given that the terms "conciliation" and "mediation" are used by the aforementioned organizations and that these methods display the same features, we conclude that the two dispute-resolution methods have more similarities than differences, and that either term will be used to define a service offered to parties, in the presence of a third party, to resolve a dispute out of court. The role of the impartial third party – a mediator or conciliator – consists of helping the parties determine the solution that suits them best, establish and maintain communication between them, target points of discord, enjoin the parties to participate in developing solutions worthy of consideration and, as the case may be, propose adequate solutions to the parties. Here again, the solutions reached by the parties who participate in this dispute-resolution method, freely undertaken, will have no binding force, except for the parties' voluntary commitment to comply with them. The third-party mediator or conciliator will have no power to make any decision effective.

Although conciliation and mediation are mandatory in certain areas (for instance: labour law, the Canadian Human Rights Act, family law and lease and rental regulations in certain countries), no framework is being planned, either for conciliation or mediation, with regard to consumer disputes.

Some of the negative aspects we pointed out regarding negotiation, which were mainly related to a power imbalance between the parties, and which nothing tended to correct, appear attenuated when a third party is involved in the dispute-resolution undertaking.

For conciliation at the Court of Appeal of Québec, see: Court of Appeal of Québec, *Mediation.* [Online] http://www.tribunaux.qc.ca/c-appel/English/Altres/mediation/mediation.html (Page consulted on May 4, 2009).

[21] Ministry of the Attorney General, *Courts. Mandatory Mediation*, available [Online] http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.asp (Page consulted on April 22, 2009).

[22] Ministry of the Attorney General, *Courts. Mandatory Mediation*, available [Online] http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.asp (Page consulted on April 22, 2009).

This advantage is, however, accompanied by a significant drawback: In the event that the parties to a consumer contract decide to use the service of an impartial third party to settle their dispute, they obviously must pay his fees. However, as we will see below, the simple fact that the procedure may entail fees can suffice, given the minimal amounts often involved in consumer disputes, to dissuade the consumer from turning to a given dispute-resolution method. Recourse to an impartial third party may indeed prove less costly than legal proceedings before higher courts, but consumer disputes most often have financial implications that fall under the jurisdiction of small claims divisions, where proceedings cost minimal fees, generally lower for the consumer than conciliation or mediation.

In addition, we note that one of the advantages of mediation and conciliation is to maintain harmonious relations between the parties; in consumer affairs and once the dispute is settled, this advantage would likely be of greater interest to the merchant than the consumer. In fact, relations between the parties are often of short duration and will not necessarily last beyond the dispute settlement. We suspect that the merchant will be more concerned than the consumer to know that the other party to the contract will only have good things to say about him…

D. Arbitration

In some areas, such as labour relations, the law often imposes binding arbitration on the parties, As part of the present study, we will focus only on conventional consumer arbitration, which is provided for or agreed to contractually.

Legal doctrine and jurisprudence regarding arbitration have been developed largely in response to commercial and international needs and in the area of labour relations. Given that consumer relations are different from those binding the parties in these areas, the related texts can only have a very limited scope or application in terms of our research.

After a brief overview of the history and features of arbitration, we will identify the specific features of consumer arbitration, the essential principles that consumer arbitration should have, and the framework that could guarantee their application.

I History, types and features of arbitration

The history of arbitration in Canada

Arbitration has been defined as "*a generally informal process, whereby the parties voluntarily submit their dispute to a contracting authority [and even, at times, to several contracting authorities] that have the power to render binding decisions*"[23].

Arbitration took a long and winding path in Canada before its acceptance as a legitimate dispute-resolution method became widespread. In Quebec, for instance, before 1966, arbitration clauses[24] were prohibited, because they were considered against public order[25]. In 1966, section 951 of the *Code of Civil Procedure* was amended to make arbitration clauses legal. Despite this disappearance of the legislative prohibition against arbitration clauses, the courts, distrustful, continued to consider recourse to courts of law as part of public order. The courts' position in the years following the 1966 legislative amendment was accurately reflected in Judge Bernier's *Couplan Inc.* order, which declared that arbitration clauses "*are seen as in derogation of the right of recourse to courts of law; accordingly, as to its scope and the authority of the arbitration board, such a clause must be interpreted narrowly*"[26].

It wasn't until 1983, almost twenty years after the 1966 legislative amendment, that the Supreme Court of Canada, in the *Zodiak* order[27]*,* established the validity of arbitration clauses said to be "perfect", i.e., clauses stipulating first that recourse to arbitration is mandatory and secondly that the adjudication is final and without appeal[28]. Finally, in 1986, the Quebec codifier adopted specific arbitration rules[29], thus acknowledging the widespread use of arbitration in

[23] *Op. cit.,* note 3 (Lafond), page 199. Our translation.
[24] Arbitration clause: provision whereby the parties to a contract agree to submit to arbitration, to the exclusion of the courts, any dispute that might arise in relation to the contract.
[25] *National Gypsum Co. v. Northern Sales Ltd*., [1964] S.C.R. 144.
[26] *Couplan Inc. v. C.E.V.M.I. – Chimie*, [1979] A.C. 234. Our translation.
[27] *Zodiak International Productions Inc. v. Polish People's Republic*, [1983] 1 S.C.R. 529.
[28] *Arrêt Zodiak*, p. 529,533. Article 2638 of the C.C.Q. specifies that an arbitration agreement is "a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts".
[29] *Act to amend the Civil Code and the Code of Civil Procedure in respect of arbitration*, S.Q. 1986, v. 73. See also the following text on "perfect" arbitration clauses: Frédéric BACHAND, *Pour l'abandon par les tribunaux québécois de la notion de clause compromissoire parfaite et des formalités s'y rapportant*, Revue du Barreau du Québec, Tome 64, spring 2004.

Quebec. Similarly, over the following decade, the other Canadian provinces followed by adopting arbitration laws[30].

It should be noted that this recognition of arbitration in Canada is a direct result of the rise of this alternative dispute-resolution method in international trade. The United Nations had already adopted in 1958 *the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[31] [hereinafter the *New York Convention*], which Canada signed on May 12, 1986[32]. As its name suggests, the objectives of the *New York Convention* were to have member states comply with arbitration clauses and to facilitate the execution of arbitral awards[33]. Deemed insufficient, the Convention was supplemented by the *Model Law on International Commercial Arbitration*[34] in 1985. The Model Law is not a treaty, but rather "*a model law that the UN recommends that states take into consideration to make international trade arbitration rules uniform*"[35]. The Canadian Parliament adopted, in the eighties, its own *Commercial Arbitration Act*[36] and the *United Nations Foreign Arbitral Awards Convention Act*[37].

Arbitration has become an alternative dispute-resolution method widely accepted in Canada, and well appreciated within contracts by the business community. What are the forms and features of arbitration?

[30] See Annex IV herein: Canadian Arbitration Legislation.
[31] United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* (1958) from the United Nations Conference on International Commercial Arbitration. Available online: website of the United Nations Conference on International Commercial Arbitration. [Online] http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (Page consulted on May 4, 2009).
[32] *Ibid.,* par. 39.
[33] *Op. cit.* note 7 (Morin and Lachance), page 19.
[34] United Nations, *UNCITRAL Model Law on International Commercial Arbitration – 1985 – With amendments as adopted in 2006,* Vienna, 2008. Available online: website of the United Nations Conference on International Commercial Arbitration. [Online] http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (Page consulted on May 4, 2009). *Op. cit.,* note 7 (Morin and Lachance) , p. 19.
[35] *Op. cit.* note 3 (Lafond), par. 40. Our translation.
[36] *Commercial Arbitration Act*, R.S.C. (1985) v. 17, (2nd Supp.).
[37] *United Nations Foreign Arbitral Awards Convention Act*, R.S.C. (1985) v. 16 (2nd Supp.).

The forms of arbitration

Arbitration can take three forms: *ad hoc*, semi-organized or organized.[38]

Arbitration is called *ad hoc* when the material organization of the process, although guided by the arbitration agreement reached between the parties, is left to the entire discretion of the arbitrator. The latter is then responsible for the entire procedural aspect of the process, including admissible evidence and the exclusion of third parties during the hearing. Some authors warn against this form of arbitration: "*Ad hoc arbitration can be problematic when the parties have unequal power; the dominant party can impose its choices and thus obtain de facto certain advantages that are irreconcilable with the spirit of arbitration*."[39]

Arbitration is called semi-organized when "*the parties submit the settlement of their dispute to a model arbitration resolution, independent of any institution, and providing breakthrough measures applied if necessary.*"[40]

Finally, in organized or institutional arbitration, the dispute is submitted to an arbitration institution governed by rules pre-established by the institution itself. Said institutions consider this of course to be the ideal form of arbitration, since under this form, arbitration "*serves to compensate for the imbalance of power*" between the parties[41].

The features of arbitration

As part of arbitration, the arbitrator can decide in law or equity regarding a dispute submitted to him[42], as long as he follows the method provided for in the arbitration agreement. If he decides in equity, the arbitrator is dispensed, to a certain extent (within the limits of public order, notably) and if he feels it necessary, from applying the usual rules, including substantive law, to the type of dispute submitted to him. The search for equity during arbitration "leaves to subjectivity much greater latitude than does application of the rule of law."[43]

Arbitration provided for in a contract being a private process, the rules generally recognized in a public justice process are not all applied. For instance, the parties must pay to cover the decision-maker's fees[44], which, as we will see below, may prove very substantial.

Arbitration being private in nature, the principle of publicizing decisions, which is generally the rule for courts of law, is not applied in arbitration. Arbitration clauses and procedures stipulate almost systematically that the parties are obliged to keep confidential any information about their arbitration dispute, including of course the decision rendered by the arbitrator. As the author Frédéric Bachand mentions, merchants can find satisfaction in arbitration due to its

[38] *Op. cit.,* note 7 (Morin and Lachance) , p. 20.
[39] *Ibid.* Our translation.
[40] Nabil ANTAKI, *L'arbitrage commercial: Concept et définitions*, (1987) *C.P. du N. 485, 498.* Our translation.
[41] CENTRE D'ARBITRAGE COMMERICAL NATIONAL ET INTERNATIONAL DU QUÉBEC, *Le règlement des différends impliquant une PME ou des partenaires d'inégale force de négociation,* memorandum presented at the Sommet de la Justice, February 17 to 20, 1992, p. 42. Our translation.
[42] Nabil ANTAKI, *L'arbitrage collectif: pourquoi pas?*, dans *La justice en marche. Du recours collectif à l'arbitrage collectif* (dir. Nabil ANTAKI), Montreal, les Éditions Thémis, 2007 , p. 55.
[43] *Op. cit.,* note 7 (Morin and Lachance) , p. 45. Our translation.
[44] See Annex I herein: *Canadian Arbitration Organizations*, which specifies arbitration costs.

private nature[45], which allows companies to maintain the confidentiality of disputes opposing them to consumers, out of sight of their business partners, the media and their clientele. Several opponents of consumer arbitration reply that this arbitration confidentiality, and the fact that the company for its part is aware of previous decisions, give merchants definite and undue advantages. The consequence of merchants' knowledge of the workings of arbitration is called the "repeat player effect", which we will examine below.

Public order

We discussed above the distrust of arbitration that Quebec courts used to have, in considering that the right to appeal to courts of law was part of public order and that any waiver of this right was suspect. As of 1987, the Supreme Court adopted the opposite approach, i.e., a very strict conception of public order limits on the arbitrability of disputes[46]. In section 2639 of the Civil Code of Quebec, Quebec legislation stated that a dispute on the condition and capacity of persons, regarding family matters or issues of public order, cannot be submitted to arbitration.

The choice of submitting a dispute to arbitration is not in itself contrary to public order; the case is heard. Some disputes, because they fall under public order, will not be arbitrable. As we have seen, the arbitrator will be free, if the parties so agree, to adjudicate the dispute in equity and set aside the rules that usually apply; this freedom nevertheless is limited by public order, which the arbitrator cannot set aside[47].

We must keep in mind the distinction between directive public order and protective public order. The authors Baudouin and Jobin distinguish them as follows:

> "*Within directive public order in social and economic affairs are all jurisprudence texts and orders that attempt to imprint on individual behaviour a given political, social or economic direction [...]*
>
> *Protective public order, to the contrary, is defined by texts and orders [...] whose primary mission is to protect the individual. Consumer protection is a perfect example."*[48]

The interaction of public order and arbitration can thus prove very complex, since the concepts of arbitration and public order overlap in various ways. The arbitrators' observance of public order during arbitration, their capacity to hear disputes concerning the application of public order, and the non-arbitral nature of some disputes are governed by public order.

Whereas no one can override directive public order, protective public order has a "relative" nature that may be overridden as long as certain rigorous conditions are met[49]. The fact that the

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[45] Frédéric BACHAND, *Le mythe du caractère fondamentalement inéquitable des clauses d'arbitrage insérées dans les contrats de consommation- Observations critiques sur l'article 11.1 de la Loi sur la protection du consommateur* in *Le droit de la consommation sous influences* (dir. Pierre-Claude Lafond), Cowansville, Les Éditions Yvon Blais, 2007, p. 181.

[46] Stéphanie RAYMOND-BOUGIE, *L'arbitrage des différends en droit de la consommation. Une nouvelle approche*, Cowansville, les Éditions Yvon Blais, 2005 , p. 22.. For further information, see: Marcel DUBÉ, *Justice privée et ordre public: les leçons de la Cour suprême en matière d'arbitrage contractuel*, [2004] 2 R.P.R.D. 1.

[47] *Op. cit.,* note 7 (Morin and Lachance), page 35.

[48] Jean-Louis BAUDUOIN and Pierre-Gabriel JOBIN, *Les obligations*, 5th ed. Cowansville, Éditions Yvon Blais, 1998, par. No. 133 and 134, pages 157 and 159. Our translation.

[49] *Op. cit.,* note 46 (Raymond-Bougie) p. 22.. For further information, see: Marcel DUBÉ, *Justice privée et ordre public: les leçons de la Cour suprême en matière d'arbitrage contractuel*, [2004] 2 R.P.R.D. 1.

arbitrator has no discretion to waive public order laws and provisions without offering stronger protection in exchange provides the consumer with an additional guarantee regarding the observance of certain guidelines put in place to protect him.

However, it should be noted that public order is not everything; those guidelines are not the only ones that were put in place to protect the consumer. As some of those other guidelines may not be applied by the arbitrator, one can still believe that the consumer may suffer a few disadvantages in arbitration.

II. The pros and cons of arbitration, and special considerations

The virtues that some see in consumer arbitration are far from being acclaimed unanimously. Whereas some authors, companies and arbitration organizations praise such arbitration, many consumer associations and authors deplore the inconveniences and risks of arbitration for consumers[50].

In the following pages, we will study the pros and cons of arbitration for consumers and companies, and the attraction that this consumer dispute-resolution method can exert to consumers and companies alike.

The pros and cons of arbitration

Speed

It is well known that disputes that go before the courts can last a very long time. If the consumer goes to court, he may face interminable delays: setting and postponing hearing dates, the duration of hearings, the length of deliberations…[51] For example, in the judicial district of Montreal (Quebec), the period between filing a legal claim and the hearing date is 14 to 15 months[52]. At the other end of the country, the British Columbia small claims division registered in 2006 a median period of 296 days from filing a legal claim to the hearing date[53]. Compared to these waiting periods, the speed of arbitration certainly has an advantage to the consumer.

The procedural rules of the various organizations offering arbitration services in Canada frequently provide not only for precise periods for arbitral awards to be rendered, but also other periods to be observed from filing the claim to following other procedures prior to the hearing, in order to guarantee the swiftness of the process. The *British Columbia International Commercial Arbitration Centre* provides, in its procedural rule 18, for holding a preliminary meeting within 21 days following the naming of an arbitrator and, in rule 36, for a period of 60 days until arbitral awards are pronounced[54]. The *ADR Institute*, in *National Mediation Rules*, stipulates that the arbitration court is obliged to render its sentence within 60 days following the conclusion of hearings, or within any other period agreed to in writing or ordered by a court of law of

[50] Public Interest Advocacy Centre and Option Consommateurs, *Mandatory Arbitration and Consumer Contracts*, November 2004.
[51] *Op. cit.,* note 45 (Bachand), p. 171.
[52] *Ibid.*
[53] Ministry of the Attorney General and Ministry Responsible for Multiculturalism, *Budget 2008: 2008/09-20010-11 Service Plan*, February 2008, page 18. Available [Online] http://www.bcbudget.gov.bc.ca/2008/sp/pdf/ministry/ag.pdf (Page consulted on April 29, 2009).
[54] *Rules of Procedures*. Available [Online] http://www.bcicac.com/bcicac_dap_dca_rules.php (Page consulted on April 30, 2009).

competent jurisdiction[55]. This swiftness also benefits both the consumer, who may see his case resolved more quickly, and the company, since it spares them lawsuits that would drag on and entail substantial legal fees[56].

It is of course important that these goals regarding the speed of the arbitration process, if they are to be considered an advantage, don't have the effect of setting aside the rigorous application of fundamental justice principles. This arbitration speed should not translate into a hasty process that would not allow the parties to present their views adequately. In addition, the speed of the process should in no case justify ignoring the essential guarantees ensuring the integrity of a legitimate dispute-resolution process.

Flexibility

Arbitration is based on the willingness, shared by the parties, to choose a forum other than legal proceedings to settle their dispute. Whereas contractual freedom allows the parties to waive their right to go to a court of law, that same contractual freedom allows them, in theory, to determine everything belonging to the procedural aspect of the arbitration process, while observing the rules of natural justice. This malleability of arbitration procedures can thus allow the parties to choose less-cumbersome procedures than would be applied in legal proceedings, where the steps and requirements are largely established in advance and applicable to all.

The arbitration clauses are generally minimal, usually only requiring that any dispute be submitted to arbitration and naming an arbitrator. At the first arbitration hearing, the arbitrator will invite the parties to reach an arbitration compromise that completes the arbitration clause by establishing the details of the procedure to be followed.

Essentially, arbitration applies a less formal and thus faster procedure for processing a dispute. Arbitration thus enables the consensual parties to bypass the cumbersome aspects of the traditional legal system and to set up, in a manner of speaking, their own court. The parties have carte blanche as to the implementation of the arbitration system to which they will submit their dispute. Indeed, the parties may decide on the number of arbitrators, their selection, the place of arbitration, the procedural rules that will apply, etc.

This arbitration flexibility enables the parties to adopt customized measures so that arbitration meets their needs as well as possible[57].

What is presented as resulting from total contractual freedom may still have a few limits imposed on it: It should be noted that certain organizations providing arbitration have a Procedural Code that the arbitrators must apply (although some arbitration institutions allow the parties to establish procedural rules other than those established by the organization). In some jurisdictions, such as Quebec[58], supplemental procedural rules are allowed. The legal texts of Canadian provinces that apply in a supplemental manner provide a framework for naming arbitrators, for orders that may be issued regarding the evidence to be submitted, for other procedures that may take place during arbitration, and for the form that must be adopted by the arbitral award and its execution[59].

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[55] *National Mediation Rules,* Rule 44, par. 3. Available [Online] http://www.adrcanada.ca/media/med_rules_2005_06_13.pdf (Page consulted on February 22, 2009).
[56] *Op. cit.,* note 46 (RAYMOND-BOUGIE), p. 109.
[57] Nabil N. ANTAKI, *L'arbitrage collectif: pourquoi pas?*, dans *Du recours collectif à l'arbitrage collectif* (dir. Nabil ANTAKI), Montreal, les Éditions Thémis, 2007, p. 55.
[58] *Code of Civil Procedure of Quebec*, R.S.Q. v. C-25, article 940 and following.
[59] See Annex 4: Canadian Arbitration Legislation.

As for contractual freedom, it should be understood that a consumer who enters into an adhesion contract that contains an arbitration clause will have no freedom to discuss the choices made by the company regarding the arbitration procedure.

The arbitrator's expertise

The particular qualifications and specialized knowledge of the arbitrators on whom the parties may rely for the resolution of their dispute represent a priori a distinct advantage over courts of law. The parties will likely present more succinct evidence than would be necessary before a judge in a court of law, thanks to the arbitrator as decision-maker, with his expertise and his knowledge of many relevant aspects of the dispute. In addition, arbitration reduces the need to call upon experts to establish the evidence, thus lowering dispute-related costs that might have been incurred before a court of law.

However, it is important to distinguish between arbitrator and expert. The arbitrator is a third party, who may have expertise in a specific field, but who is assigned to a judicial function. His task is to settle a dispute opposing two parties, by analysing in the light of his expertise the arguments and information submitted to him. The expert, on the other hand, has the task of "*performing technical verifications or estimations to assist another person in the decision-making process*"[60]. The arbitrator's expertise could therefore, to a certain extent, be a double-edged sword; some would say that the arbitrator's expertise doesn't give him the historical perspective to evaluate the file submitted to him and to take a decision based on the evidence presented.[61] In addition, this expertise will provide the decision-maker with data that, in a consumer dispute for instance, will never be brought to the consumer's attention, as the legal process would have required. Indeed, as opposed to the merchant or the arbitrator, the consumer doesn't have such expertise, and will certainly not be able to contradict or minimize the importance of a given aspect of the issue, which will thus be taken into consideration unbeknownst to him.

The nature of the decision

As opposed to the other dispute-resolution methods we have briefly described (negotiation, mediation, conciliation), the decision taken by the arbitrator is final and without appeal[62]. This near-guarantee that the decision will settle the dispute once and for all constitutes an advantage for the company and the consumer alike. The possibility of compelling the execution of that decision, given that it constitutes a judicial act that binds the parties and is executable, also presents a significant guarantee compared to commitments made, in consumer affairs, within the framework of a negotiation, a conciliation or a mediation.

However, it should be remembered that the consumer arbitral award becomes effective only following its certification by the court of competent jurisdiction[63]. Although this procedure doesn't carry the same degree of risk or stress for the parties involved as the court proceedings that would have included an examination of the basis for the dispute, it remains that the application for certification before the court entails additional delays and costs, both for the party requesting it and the one opposing it. The necessity of certifying this type of decision also sheds doubt on the certainty that appeared to flow naturally from the final nature of the decision. In fact, the

[60] *Op. cit.,* note 7 (Morin and Lachance), pages 19 and 20. Our translation.
[61] Gil RÉMILLARD, *La justice en marche: du recours collectif à l'arbitrage collectif, en passant par la médiation*. In *Du recours collectif à l'arbitrage collectif* (dir. Nabil ANTAKI), Montreal, les Éditions Thémis, 2007, page 4.
[62] We note, however, that regular law courts have a monitoring power that may allow a party to request a review of an arbitral decision, in certain circumstances. See also article 947 of the *Code of Civil Procedure of Quebec:* motion to quash.
[63] For example, Articles 946 to 946.6 of the *Code of Civil Procedure of Quebec*.

court may always reject the application for certification of an arbitral award if it estimates that the law justifies such rejection[64]. In the end, confronted with a legal process before a court, the consumer risks missing the necessary legal knowledge for adequate representation, unless of course he hires a lawyer. To meet the necessary procedural requirements, benefit from appropriate representation and improve the chances of his application for certification or his opposition to the opposing party's application, the consumer will likely deem it wiser to be represented by a lawyer. At that point, he will obviously incur the legal fees that the arbitration procedure was supposed to spare him.

The costs of arbitration

The argument most often put forward in favour of arbitration is the low cost of this dispute-resolution method compared to legal proceedings[65]. As mentioned above, the cost can be very attractive to companies that want to avoid the high legal costs that can be entailed by endless proceedings before a court of law. But what about the consumer?

Is arbitration truly a means for settling disputes at lesser cost? In the public justice system, the parties don't pay the judges; in arbitration, the arbitrators are most often paid and the fees are high. Given that the proceedings are shorter and less complex, the eventual legal fees, if applicable, will most likely also be lower than for proceedings before a court of law.

Still, we may ask to what extent these aspects, with regard to costs, are likely to benefit the consumer. We recall that every Canadian province has established small claims divisions, i.e., venues for legal proceedings at low cost before a court of law. A consumer who wants to know the costs entailed by arbitration before turning to this procedure might have a lot of difficulty finding this information.

In reading the arbitration clauses of the various consumer contracts across Canada[66], we observe that the arbitration fees incurred by the consumer are, to use a euphemism, uncertain. Lacking in clarity, the clauses don't inform the consumer of the financial consequences of arbitration. The clauses thus provide for "*a process likely to prove much more costly to the consumer than recourse to the lightened proceedings of small claims courts*"[67]. Are the costs of arbitration actually an advantage for consumers, or a hidden inconvenience? Indeed, few are the companies that clearly establish parameters for the arbitration process to which the parties will have to submit their dispute, whereas this question proves of crucial importance for the consumer. Without such prior information on the framework of arbitration, particularly the location and cost of the process, the consumer risks encountering nasty surprises when the time comes to obtain redress against the company. Arbitration-related costs and the possibility of having to travel abroad may well dissuade the consumer from undertaking, in the event of a dispute, proceedings before an arbitration organization that might resolve the dispute.

To compare the relative costs that may be entailed by consumer arbitration proceedings and court proceedings, we conducted a comparative analysis of the legal fees for proceedings before small claims divisions across Canada and before the two largest Canadian arbitration organizations. Given that consumer disputes generally involve amounts that are, in most jurisdictions, eligible for small claims divisions, we reached the estimation that the costs incurred

[64] For example, the reasons for refusing homologation are fond in articles 946.4 (2) and 946.5 of the *Code of Civil Procedure of Quebec.*

[65] *Op. cit.,* note 46 (Raymond-Bougie), page 3.

[66] See Annex 3 herein: The Use of Arbitration Clauses in Consumer Contracts, and Annex 1 herein: Canadian Arbitration Organizations.

[67] *Op. cit.,* note 45 (Bachand), page 175. Our translation.

before those courts are more likely to be reasonable for a consumer initiating proceedings against merchants.

The data collected draw a portrait that is not flattering to the argument that arbitration is less costly. As shown in Annex 4, which lists the fees of small claims divisions across Canada, the lowest law stamp fees in Canada, for a claim before a small claims division, are $15 in the Northwest Territories for any claim of $500 or less, and $39 for a claim exceeding $500[68]. The highest fees for a claim filed by a consumer are $200, in Alberta, for a claim of $7,501 to $25,000, and only $100 for any claim of $7,500 or less[69]. Claims before small claims divisions don't generally incur other fees (e.g., for renting the hearing premises, using fax or telephone services) that might be entailed in arbitration; most importantly, the consumer doesn't have to directly pay for the salary of the small claims judge. Dispute amounts eligible for small claims divisions vary by province from $5,000 to $25,000.

All the organizations listed that offer arbitration services in Canada have fees largely exceeding those of Canadian small claims divisions[70]. In the majority of cases, the arbitration fees would be likely to dissuade a consumer from using this method for resolving a dispute with a merchant[71]. It should be noted that a consumer who has signed a contract including an arbitration clause has waived the right to use other methods that would have been available to him to handle a consumer dispute.

The two most important arbitration centres in Canada are the Canadian Commercial Arbitration Centre (CCAC) (formerly known as the Québec National and International Commercial Arbitration Centre) (QNICAC) and the British Columbia International Commercial Arbitration Centre (BCICAC)[72]. Although we analysed the fees of five arbitration centres in Canada and of two major arbitration centres in the United States, we will discuss in the present section the fees of the Canadian Commercial Arbitration Centre (CCAC) and the British Columbia International Commercial Arbitration Centre (BCICAC), given that these two arbitration institutions are representative of the other Canadian centres analysed[73].

The Canadian Commercial Arbitration Centre (CCAC)

The CCAC has established arbitration fees that vary according to the dispute amount. Two distinct proceedings are provided for, with different costs: The bipartite general arbitration proceeding that applies to disputes of up to $10 million, and the accelerated proceeding. Given the relatively low consumer claim amounts, it may be expected that the *accelerated arbitration proceeding* will apply most often in disputes of less than $50,000 that involve a hearing day of 7 hours or less[74].

To proceed with the arbitration of a consumer dispute with the CCAC's accelerated proceeding, the party that applies for it has to pay administrative fees of $600, which include a $200 non-

[68] Article 33, *Territorial Court Civil Claims Rules*, N.W.T. Reg. 034-92, Annex on the clerk's fees, [Online] http://www.justice.gov.nt.ca/legislation/documents/TerritorialCourtCivilClaimsRules.pdf (Page consulted on March 17, 2009).
[69] *Provincial Court Fees and Costs Regulation*, Alta. Reg. 18/1991, Rule 1.
[70] See Annex 1 herein: Canadian Arbitration Organizations and arbitration fees.
[71] Julia A. SCARPINO, *Mandatory Arbitration of consumer Disputes: A Proposal to Ease the Financial Burden on Low-income Consumers*, (July 17, 2003) *Washington College Law, page* 681.
[72] *Op. cit.,* note 7 (Morin and Lachance), page 21.
[73] See Annex 1 herein: Canadian Arbitration Organizations, for the detailed arbitration fees of each arbitration institution analysed.
[74] Canadian Commercial Arbitration Centre, *The centre's administrative fees*. Available [Online] http://www.cacniq.org/en/tarifs.php (Page consulted on April 30, 2009).

refundable fee for opening the file. The arbitrator's fees vary from $899 to $2,000 per day and exclude travel and accommodation expenses. There are additional fees for renting a room, faxing, messaging, etc. If a party wants to postpone the hearing, his request will cost him $225. If the hearing requires more than one day or the file is forwarded to the Centre's general arbitration procedure, each party will have to pay $175 more.

The bipartite general procedure, intended for claims of $1,000 to $10 million for which a hearing of more than 7 hours is planned, involves different charges, depending on the dispute amount: A case for $1,000 to $50,000 costs administrative fees of 3% of the claim amount, for a minimum of $600 and a maximum of $1,500. The administrative fees paid by the applicant are deductible from his share of total arbitration fees[75]. Administrative fees exclude the arbitrator's fees, which are set at an hourly rate, as well as fees for renting a room and fax and telephone services. The higher the dispute amount, the higher the percentage required in administration fees[76].

The British Columbia International Commercial Arbitration Centre (BCICAC)

The BCICAC, a non-profit organization, requires, when an arbitration application is filed, non-refundable initial fees of $500, plus applicable taxes, for claims of $1 to $50,000[77]. To these amounts are added administrative fees of $150 payable by each party. These fees don't include other expenses, such as renting the hearing room and the arbitrator's fees, which are established at the hourly rate set by the arbitrators[78]. Minimum fees just for filing an arbitration claim of less than $50,000 with the BCICAC thus total $650, plus taxes[79].

It should be added that the rules of certain arbitration organizations also provide for the losing party to assume the costs, which can also be stipulated in the arbitration clause or in the arbitration agreement[80]. And some arbitration agreements have the claim heard by three arbitrators[81], thus multiplying the arbitrator's fees.

Although proceedings before a small claims division may last longer than the settlement of a dispute before an arbitrator, the argument in favour of arbitration costs does not appear to reflect reality, at least concerning the consumer and the usual consumer dispute, i.e., a dispute that would be eligible for a small claims division. All the more so because to the fees for obtaining a decision will be added, in the case of an arbitration decision, those that may be required by the application for the decision's certification – an indispensable procedure for making the arbitration decision effective should the losing party refuse to implement it voluntarily[82].

This monetary disadvantage of arbitration for consumers whose dispute would be eligible before a small claims division is all the more troubling because arbitration clauses make consumers

[75] Fees available on the website of the Canadian Commercial Arbitration Centre. [Online] http://www.ccac-adr.org/fr/tarifs.asp#2 (Page consulted on April 30, 2009).
[76] See Annex 1 herein: Canadian Arbitration Organizations.
[77] *Domestic commercial Arbitration Fee Schedule*, available [Online] http://www.bcicac.com/bcicac_dap_dca_fees.php (Page consulted on May 16, 2009).
[78] *Ibid.*
[79] In British Columbia, the legal fee for filing a claim before the Small Claims Division is $100 for claims of $3,000 or less, and $156 for claims over $3,000. *Small Claims Rules*, B.C. Reg. 360/2007, Schedule A.
[80] *Op. cit.,* note 71 (Scarpino), page 689.
[81] *Op. cit.,* note 61 (Rémillard), p.4.
[82] To the fees mentioned in the paragraph below can be added other legal fees and attorney fees resulting from any request before regular courts of law with regard to arbitration on issues of competence or jurisdiction, as well as any other proceeding that may take place despite the arbitration agreement.

commit themselves, without their knowledge, to submit eventual disputes to arbitration without first knowing the resulting financial obligations.

One Initiative should be recognized: No doubt aware of the barrier that arbitration fees represent for consumers, the Rogers company and its latest acquisition, FIDO, developed an arbitration protocol for disputes between them and their customers[83]. That protocol grants the complainant the choice of an arbitrator (who may be a retired judge or any other person, subject to the opposing party's approval)[84] and states that the company pledges to pay "*all costs and expenses associated with any such application to the Court, including the reasonable legal fees of the Complainant*"[85]. Although we commend such an initiative, concerns persist regarding the "repeat player effect" in arbitrations.

The confidential nature of arbitration

Arbitration being a private proceeding, the parties to arbitration are almost systematically bound by a confidentiality agreement or clause[86]. This attribute of arbitration suits companies well and often constitutes one of its main advantages, for several reasons: the companies' concern for preserving the confidentiality of their business relations and not publicizing their difficulties, but also for not publicly disclosing – as would occur in a legal proceeding, which is public by nature – the documents or testimony submitted as evidence to the decision-maker[87] (for example, in the case of a commercial dispute: financial statements, tax returns, market studies, business plans, trade secrets, research and development projects, etc.). The private nature of arbitration will also enable companies to avoid any bad publicity whose impact might be difficult to manage.

Although this advantage benefits both parties when, in a commercial dispute for example, they share the same concerns, it must be acknowledged that in a consumer dispute, the merchant will be the only party to insist on and benefit from the privacy and confidentiality of proceedings.

As opposed to legal proceedings, arbitration decisions don't create precedents or jurisprudence trends that would enable consumers to assume how a given type of dispute will be treated. If we add the number of proceedings initiated by consumers and the related disputes that were kept secret, the confidential nature of arbitration quickly comes to be seen not only as an undue advantage for the merchant, but also as a real disadvantage for the consumer. Given the confidential nature of the arbitral award, consumers are not able to determine, in the light of prior decisions, the arbitrator's likely interpretation of their consumer contract clauses. Consumers cannot even know whether a dispute similar to theirs has already been submitted and settled, although this knowledge alone might suffice at times to avoid the litigation.

The negative impact of the confidentiality clause on the consumer should not be minimized. this is the position adopted by the State of California court with regard to the requirement of confidentiality, in a case opposing AT&T and consumers. The court considered such a confidentiality requirement abusive, for the following reasons:

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[83] *Arbitration Protocol of Fido Solutions Inc. and its Subsidiaries and Affiliates.* Available on Fido's website. [Online] http://www.fido.ca/web/content/terms/arbitration_protocol (Page consulted on April 22, 2009); *Arbitration Protocol of Rogers Communications Inc. and its Subsidiaries and Affiliates.* Available on Rogers' website, [Online] http://your.rogers.com/about/legaldisclaimer/RogersArbitrationProtocol.asp?shopperID=D6DE47E72V1W8MFPFMU6TMG5D96Q0RX0 (Page consulted on April 30, 2009).

[84] *Ibid.,* in section 6 of the two companies' arbitration agreements.

[85] *Ibid.,* in section 7 of the two companies' arbitration agreements.

[86] *Op. cit.,* note 77 (British Columbia International Commercial Arbitration Centre), Rule 25.

[87] *Op. cit.,* note 46 (Raymond-Bougie) 104.

> "*We conclude however that if the company succeeds in imposing a gag order, plaintiffs are unable to mitigate the advantages inherent in being a repeat player. This is particularly harmful here, because the contract issue affects million of Californians. Thus AT&T has placed itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, AT&T accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract. Further, the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against AT&T. For these reasons, we hold that the district Court did not err in finding the secrecy provision unconscionable.*"[88]

This determination by the California court clearly states the inequalities caused in consumer affairs by the confidential nature of the arbitration process, and points out the unfair effects of what it calls the "*repeat player*" advantages.

Several authors have examined the "*repeat player effect*", and have emphasized the many advantages for one of the parties to have several cases in arbitration, particularly before the same arbitrators or organization. Companies that frequently hire the services of a particular organization know the arbitrators' positions and have the necessary funds to conduct research on the arbitrators made available to them[89] and to choose the one who suits them best. Moreover, as opposed to consumers, companies have knowledge about the interpretation of contracts and the positions previously adopted by arbitrators, so they are better prepared than consumers. In addition to these advantages, the authors mention the advantage derived from the income received by arbitrators from the causes submitted to them, in that the companies, being more constant users of arbitration than individual consumers, are ensuring that income. The authors also mention that these concerns could well have a significant effect on the independence and neutrality of arbitrators:

> "*Arbitration companies and arbitrators have an inherent financial interest to rule in favor of defendant corporations (a problem directly related to the weak conflict of interest standards mentioned above). Because these large corporations are more likely than any individual consumer to require arbitration in future matters, they are considered "repeat-players" that arbitration companies should appease to secure future business. This severely undermines the notion that arbitration is a neutral process. Arbitration companies face the threat of losing profits or being dropped as a corporate client's designated arbitrator if they too frequently rule for consumers and against these repeat-players.*"[90]

Professor Jean Sternlight stated, for her part, that since the arbitrator "*can expect to see many disputes involving the same company, there may be a heightened pressure on the arbitrator to rule in favor of the company or else risk losing future arbitration work.*"[91]

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[88] *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), page 1151 and 1152.
[89] *Op. cit.,* note 50 (Public Interest Advocacy Centre), page 36.
[90] TortDeform, CIVIL JUSTICE PRESIDENTIAL PLATFORM: Binding Mandatory Arbitration Reform. (2008). Available [Online] http://www.tortdeform.com/archives/2007/11/binding_mandatory_arbitration.html (Page consulted on May 2, 2009).
[91] Nathan KOPPEL, *Arbitration Firm Faces Questions Over Neutrality*, Wall Street Journal, April 21, 2008.

Arbitration organizations are criticized for deciding too seldom in favour of consumers. The American arbitration organization National Arbitration Forum Inc. was criticized most often, with one court refusing to recognize the validity of an arbitration clause because the organization's financial dependence of frequent arbitrations concerning the same companies "*impinges on neutrality and fundamental fairness*". In another case, the court noted that one of the parties benefited from possible advantages by being a "*repeat player*" and thus acquiring *"[the] knowledge of the arbitrators' temperaments, procedural preferences, styles and the like, and the arbitrators' cultivation of further business*".[92]

The decision-maker's impartiality is absolutely essential in a judicial process. The public nature of the legal system, the framework for the decision-makers therein, and the remuneration guaranteed by the state rather than either party contribute to the widespread trust in the decision-makers' independence. But the private nature of arbitration, its required confidentiality – which some associate with a lack of transparency – and the particular economic relation that develops between companies and arbitrators contribute to distrust in the impartiality of the process.

The confidentiality of the process and decisions rendered also imply that, as opposed to companies benefiting from the "*repeat player effect*", consumers don't have all the information that would be useful in preparing their case, make an informed decision as to the organization to which they want to submit their dispute, or decide whether they would be better served by arbitration than the courts. And what about the possibility, for consumer associations, of determining whether the number of lawsuits or complaints before courts of law would necessitate a class action before a court of law in order to stop a practice that contradicts the rights of a great number of consumers? The confidentiality of arbitration, by preventing consumers from being aware of a consumer problem that would require more weighty proceedings, reinforces the advantages to companies of a process that, by its very nature, should be impartial.

Special considerations regarding arbitration

Unfair arbitration clauses

Given that the contract may provide for the way of adjudicating disputes between the parties, it may also provide for different treatments depending on the types of dispute likely to be encountered.

Some companies have pushed this possibility to the extreme: Consumer contracts commonly contain clauses forcing the consumer to submit to arbitration his claims against the company, while reserving to the company any recourse regarding its own claims against the consumer[93]. Given the difference in treatment established by the adhesion contract proposed by the company, which openly gives itself the advantage, it is difficult to interpret this clause as other than an attempt to dissuade consumers from initiating proceedings. If one of the main objectives of alternative dispute-resolution methods must be to facilitate access to justice, such clauses obviously counter this objective. As indicated by author Frédéric Bachand, critics of consumer arbitration are right "*to protest arbitration clauses that are clearly abusive in having the effect, if fully mandatory, of undeniably reducing consumer access to justice*."[94]

[92] *Ibid.*

[93] This is the case for the Service Terms, section 16 of Telus Mobility and Koodo Mobile. See Annex 6 herein: Contractual Terms Analysed.

[94] *Op. cit.,* note 45 (Bachand), page 174. Our translation.

Waiving certain rights and recourses

Contractual clauses regarding arbitration can even contain a waiver by consumers to participate in a class action, or an exclusion of the option to request or obtain exemplary damages. Several authors state unequivocally that one of the reasons why arbitration clauses have spread in consumer contracts is that companies want immunity against class actions[95]. As Jean Sternlight puts it, "*Today one of the primary purposes companies require their consumers, employees and franchisees to arbitrate is in order to avoid (or attempt to avoid) class actions*." [96]

The American courts that have decided on the validity of such clauses have not hesitated to consider them abusive, while emphasizing the perverse effects of this intention of companies to spare themselves the risk of class actions:

> "*The court held that the class action prohibition was not only procedurally unconscionable, but substantively unconscionable as well. The court emphasized that '[t]he manifest one-sidedness' of the provision was 'blindingly obvious' because it could negatively affect only cardholders. The court then explained that the clause was intended to preclude customers with small claims from obtaining relief, thereby providing Discover [the company] with 'virtual immunity from class actions.' The court found this immunity troubling, not only because it was 'harsh and unfair' to Discover customers who might be owed a relatively small sum of money, but . . . also [because it] serves as a disincentive for Discover to avoid the type of conduct that might lead to class action litigation in the first place.*"[97]

Class actions constitute an essential instrument for re-establishing the balance of power between merchants and consumers. This procedure notably aims to ensure access to justice for everyone whose individual recourse alone might not justify initiating legal proceedings because, for example, the dispute amounts would not be sufficient. Clauses that attempt to restrict consumer recourses, or that preclude initiating or participating in class actions, are "*clearly harmful, and even opposed to public order*".[98] The class action proceeding is an important social tool, in enabling consumers to unite in opposition to such clauses – a powerful deterrent against reprehensible merchant practices. Prohibiting consumers from using this tool becomes abusive not only toward those who want to initiate proceedings and resolve their dispute, but also toward all consumers and society. As the court stated in the *Discover* case in the United States, not only do companies attempt to arm themselves against class actions, but they also try to remove any incentive to end practices that are precisely the cause of such proceedings. If only for this reason, this type of clause should be considered contrary to public order.

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[95] Claude MARSEILLE and André DUROCHER (Fasken Martineau), *The Use of Arbitration Clauses in Quebec to Manage the Risk of Institution of Class Actions*. June 2004; see also: Claude MARSEILLE, *Contrats de consommation: L'utilisation de clauses d'arbitrage au Québec pour parer aux abus du recours collectif*, in *Troisième Conférence sur les recours collectifs - Revue complète des plus récents développements,* Insight Information Co., January 24 and 25, 2005, Montreal, tab 7, p. 40-41.

[96] Jean STERNLIGHT, *Contracts and Arbitration: A Brief Summary of Current Law & Issues*. Presentation to the American Association of Law Schools (AALS) on Exploring the Boundaries of Contract Law. June 15, 2005, Montreal, Canada. Available [Online] http://www.aals.org/2005midyear/contracts/Outlinesternlight.pdf (Page consulted on May 2, 2009).

[97] Jean R. STERNLIGHT et Elizabeth J. JENSEN, *Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice Or Unconscionable Abuse?* 2004. Available [Online] https://www.law.duke.edu/journals/lcp/downloads/lcp67dwinterspring2004p75.pdf (Page consulted on April 18, 2009). Professor Sternlight was referring to the Szetela v. Discover Bank case, 118 Cal. Rptr. 2d 862 (Ct. App. 2002).

[98] *Op. cit.,* note 56 (Bachand), pages 175 and 176.

Among the other clauses that may be abusive are those that impose the choice of a jurisdiction other than the one in which the consumer lives. Whether to benefit from laxer laws, or because of preferred relations with a particular arbitration organization, or because it will be easier for the company to send a representative to its place of choice, it is clear that this type of clause benefits only the company that wrote it, with no consideration for the consumer. Some legislators have become aware of the disadvantage to consumers of such a waiver, and have passed laws enabling the consumer to benefit from the jurisdiction of his place of residence, notwithstanding any consumer waiver[99].

Other clauses impose a limitation on damages the company might pay, even totally excluding certain types of damages. Although Quebec and Ontario laws prohibit excluding exemplary damages[100], companies still insert such stipulations in their consumer contracts, thus again restricting consumer access to justice by getting consumers to believe that they have less rights than they actually do. And how will the arbitrator treat such clauses? Will he apply them despite the fact that the law prohibits them, or will he refuse to apply them? Whether he decides one way or the other, will his decision open the door to legal challenges to the lawfulness of his decision, and thus neutralize the advantages that this dispute-resolution method was supposed to provide?[101]

In the light of the above, we must conclude that arbitration clauses, which trigger the arbitration process – by their content, which is imposed on consumers as part of adhesion contracts – offer many disadvantages to consumers and offer them paltry advantages in return. The proliferation of such clauses in consumer contracts[102] is of great concern, because the consumer thereby loses his rights and protections, particularly procedural protections recognized by traditional decision-making bodies[103].

Application of fundamental principles of justice

As mentioned above, the choice of submitting a dispute to arbitration results, in consumer affairs, solely from the parties' willingness to do so. This is true so long as it is understood that each party expresses himself in equivalent manner about all the provisions of an adhesion contract. As we have seen, arbitration has, among other advantages, that of allowing participants to submit their dispute to a tribunal customized to their desires, needs and the characteristics of their dispute. However, any judicial body is required to apply principles of fundamental justice and must provide the same guarantees as courts of law. Any party submitting a dispute to arbitration must benefit from application of the following principles: the right to express his views to the decision-maker and to submit his dispute to an impartial and independent decision-maker. As we will see in the next section, the decision-making body is also required to apply other principles in support of these essential guarantees.

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[99] This is notably the case in Quebec, where article 3149 of the *Civil Code of Québec* states: "*A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.*"

[100] Art. 1621, *Civil Code of Québec*; art. 272, *2002 Consumer Protection Act* of Ontario.

[101] In her aforementioned document, author Stéphanie Raymond-Bougie further analyses the waiver of punitive damages, as well as the arbitrator's granting of such damages: *Op. Cit.*, note 46 (Raymond-Bougie), page 101 and following.

[102] Already in 2002, it was estimated in California that one third of consumer contracts contained such a clause. See: Linda J. DEMAINE & Deborah R. HENSLER, *Volunteering to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 Law & Contemp. Probs. 55 (2004).

[103] Susan SCHIAVETTA, *Does the Internet Occasion New Directions in Consumer Arbitration in the EU?* , 2004(3) *The Journal of Information, Law and Technology (JILT)*. Available [Online] http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_3/schiavetta (Page consulted on May 2, 2009).

However, the arbitration clauses that we have analysed don't spell out the procedural rules that will apply in consumer arbitration, and at times only mention that arbitration will be held under applicable laws in a given province. In addition to being unaware, when the contract is signed, of the type of procedure to which they consent, consumers run the risk of being committed to a process whose procedural rules may not benefit them.

Given that arbitration clauses are integrated to adhesion contracts whose content the consumer can in no way negotiate, it is doubtful that such contracts contain clauses specifically aimed at preserving consumers' procedural rights and tilt the balance of power in their favour. The small claims divisions across Canada, which are also required to observe procedural guarantees, apply procedural rules that are less strict, but that cannot – as opposed to what is observed in arbitration – be modified according to a party's wishes, even if that party has the advantage in the balance of power. Moreover, small claims judges play an interventionist role, supporting the parties in the working of the system, and the court uses simplified language to facilitate the consumer's understanding, while assuring them of the application of certain procedural guarantees.

What are the essential guarantees that consumer arbitration should offer in order to become a dispute-resolution method that is legitimate and adequate for consumers?

Essential consumer arbitration guarantees

An arbitrator, like a judge in a court of law, is required to apply the principles of fundamental justice and procedural fairness. As specified by Judge L'Heureux-Dubé of the Supreme Court of Canada, given that the arbitration process is a "*substitution of state justice, it is important that the process guarantee to the justiciables the same measure of justice as that rendered by the courts, and thus develop procedural rules intended to ensure the arbitrator's impartiality and the application of rules of fundamental justice such as the audi alteram partem rule.*"[104] Given the particular nature of the arbitration process, the arbitrator has wide latitude as to the procedural rules that will govern the arbitration; those procedures must be established with respect for the rules of natural justice[105] and procedural fairness.

The fundamental justice that must be respected by any decision-making body is expressed in two basic principles, known and often cited in their Latin name: *Audi Alteram Partem* (the right of all parties to be heard) and *Nemo judex in causa dua debet esse* (No one shall be a judge in their own cause). In addition, as recognized in article 10 of the *Universal Declaration of Human Rights*, "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations*".

Consumers therefore have procedural rights that cannot be set aside during arbitration. Observance of these essential guarantees is vital to the protection of consumer rights and ensures the integrity of arbitration systems.

[104] *Sport Maska v. Zittrer*, [1988] 1 S.C.R. 564, 581 (j. L'Heureux-Dubé). Our translation.
[105] *Op. cit.,* note 7 (Morin and Lachance), pages 39 and 40.

Audi alteram partem

This Latin phrase presents one of the main rules of fundamental justice, originating from common law: "*No one is to be condemned, punished or deprived of his property in any judicial proceedings unless he has had an opportunity of being heard*."[106]" The rule is indispensable: Any person who is party to a judicial process has the right, if the coming decision is likely to affect his rights, to be heard and have the opportunity to express his point of view.

Any party also has a right to a fair hearing "*as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have*".[107] That includes the right to a hearing where the parties have the same rights and are treated fairly.

To make the right to be heard effective, the above principles have been developed to cover other essential principles and guarantees of procedural fairness: the right to be advised of the facts that gave rise to the dispute and eventually to the decision; the right to submit any relevant evidence; the right to call witnesses, to cross-examine the witnesses of the opposing party and to reply to its claims; the right to have sufficient time to prepare one's defence; and the right to be advised of the hearing date. The decision-maker is always responsible for seeing to it that the rules of natural justice are followed.[108]

The arbitrator also has the obligation to explain his decision, under the rules of natural justice. This decision-maker's obligation to explain how he has arrived at his decision "*imposes rigour on the approach and attenuates the suspicions of arbitrariness. It also facilitates control of compliance […] with public order*." [109]

To constitute a dispute-resolution method that is fair to consumers, arbitration absolutely must guarantee their right to be heard. Given that the position held by consumers in arbitration is less favourable than that held by companies, which have greater financial and other means at their disposal, and which benefit from the "repeat player effect", it is essential that any arbitration proceeding apply procedural rules that aim to establish a balance of power between the parties and to enable the consumer to express his point of view with full parity.

To ensure the observance and application of the principle of natural justice and the right to be heard, other rights have been stated, such as the right to an oral or written hearing and the right to be represented by a lawyer. From the right to be heard also flows the decision-maker's duty to act fairly during a decision-making process. Such a right implies that the parties to a dispute must be treated equally and benefit from the same procedural tools during the decision-making process. The principles of procedural fairness that apply to administrative decisions are much less strict than the protection conferred by the right to be heard, which directly follows from the

[106] W.J. BRYNE, *Broom's Selection of Legal Maxims: Classified and Illustrated*, 9th edition. Sweet & Maxwell, Ltd. (1924).
[107] *Cardinal and Oswald v. Kent Institution (Director)*, [1985] 2 S.C.R. 643.
[108] *Op. cit.,* note 7 (Morin and Lachance), page 28.
[109] Nabil ANTAKI, *The Mediator*, in *Proceedings of the 1st International Commercial Arbitration Conference,* Montreal, Wilson & Lafleur, 1986, page 160. Our translation.

principles of natural justice[110]. As the law evolved, Canadian courts specified that this duty to act fairly applied solely to judicial and quasi-judicial decisions[111].

The arbitrator is thus not bound to apply the rules that follow from the principle of procedural fairness applicable to administrative tribunals, but the procedural protection that follows from principles of natural justice cannot be ignored; arbitration being a decision-making process that affects the parties' rights, the arbitrator is bound to hear the parties equally, treat them fairly, ensure that they benefit from the same procedural tools to have their views heard, and advise the parties of the facts he will take or has taken in consideration to decide on the matter.

Nemo judex in causa dua debet esse
another Latin phrase, another principle of fundamental justice, also deriving from common law[112]: No one should be a judge in his own action. This maxim "*underlies the doctrine of 'reasonable apprehension of bias'*"[113] and states the principle that no one may decide a case or settle a dispute in which he has a personal interest.

In the legal system, various safeguards have been established to guarantee the impartiality of decision-makers and institutions: rules for naming decision-makers, accountability, assignment of cases, etc.

A golden rule has often been repeated and cited, from time immemorial: "*Justice must not only be done but also appear to be done*"[114]. As with any decision-maker, certain rules for guaranteeing his impartiality must apply to the arbitrator in order to ensure that the system is fair and transparent.

Independence and impartiality
As stated by the Quebec Court of Appeal in the decision *Desbois v. Industries A.C. Davie Inc.*, "*The principle of independence must be observed with respect to what remains a judicial act intended to settle a dispute, even though the reference to that jurisdiction ultimately rests on the will of the parties*".[115] Although the arbitrator's jurisdiction, as opposed to that of a judge in a judicial tribunal who refers to the law, follows from the will of the parties, arbitration remains a judicial act that requires the independence and impartiality of the decision-makers. The arbitration system's essential guarantees of independence and impartiality will also have the effect of establishing the credibility of the process, which is often criticized in this regard, with the private nature of the process raising doubts as to its impartiality.[116]

Now that the essential guarantees of an adequate arbitration system are established, we will examine in the next section the consumer arbitration that is available to Canadian consumers. We will also examine the case of two private American organizations that are active in arbitration and to which some Canadian merchants refer their customers for dispute arbitration.

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[110] Warren J. Newman, *Droit public fondamental: Le pouvoir exécutif et le droit administratif: Quelques principes de base et développements récents* , November 2008. Available [Online] www.droitcivil.uottawa.ca/index.php?option=com_docman&task=doc_download&gid=861 (Page consulted on May 2, 2009).
[111] See notably *Martineau v. Matsqui*, [1978] 1 S.C.R. 118, and *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311.
[112] Frome United Breweries Co. v Bath 1926 A.C. 586
[113] *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301
[114] *R. v. Roy* (A.C.Q., June 7, 2002) No. 500-10-001773-009; R. v. Teskey, 2007 SCC 25
[115] *Desbois v. Industries A.C. Davie Inc.* [1990] A.Q. (Quicklaw) No. 616 (A.C.).
[116] *Op. cit.,* note 45 (Bachand), page 177.

CHAPTER 2: ARBITRATION OF CONSUMER DISPUTES

I. CANADIAN ORGANIZATIONS OFFERING ARBITRATION SERVICES

We have identified in Canada five private organizations that offer commercial arbitration services while offering consumer arbitration; no organization of this type only offers consumer arbitration. There are also "supervised" arbitration programs for consumer disputes, such as The Canadian Motor Vehicle Arbitration Plan (CAMVAP) and the Guarantee Plan for New Residential Buildings.

The private organizations identified in Canada are: The Canadian Commercial Arbitration Centre, the Institut de médiation et d'arbitrage du Québec, the ADR[117] Institute of Canada, the British Columbia International Commercial Arbitration Centre and the *ADR Chambers*.

Several of these organizations describe themselves as non-profit organizations[118]. As mentioned above, the two most important arbitration centres in Canada are the Canadian Commercial Arbitration Centre (CCAC) and the British Columbia International Commercial Arbitration Centre (BCICAC).

II. ORGANIZATIONS OFFERING ARBITRATION SERVICES OUTSIDE CANADA

Because American companies that do business or have subsidiaries in Canada often turn to American arbitration organizations, we have found it opportune to discuss a few American arbitration organizations before which Canadian consumers may find themselves, depending on their contracts.[119] This is notably the case for Dell, which refers its customers to the *National Arbitration Forum* (NAF)[120], or for Amazon.ca, which refers any dispute with its customers to Washington for arbitration by the *American Arbitration Association* (AAA)[121]. Referring consumer disputes to organizations in the United States results of course not only from consumer contract clauses used by companies in Canada, but also from the widespread use of trans-border e-commerce, which has grown strongly in recent years.[122]

The NAF and the AAA have seen the number of disputes submitted to them increase considerably due to the ever-greater use of arbitration clauses in American consumer

[117] ADR: Alternative Dispute Resolution
[118] See Annex 1 herein: Canadian Arbitration Organizations, for the legal quality of the arbitration organizations reviewed.
[119] See Annex 2: Arbitration Organizations Outside Canada.
[120] Dell website. [Online] http://www1.ca.dell.com/content/topics/segtopic.aspx/policy?c=ca&l=en&s=gen&~section=012&~ck=pn (Page consulted on May 9, 2009).
[121] Amazon.ca website. [Online] http://www.amazon.ca/gp/help/customer/display.html?ie=UTF8&nodeId=918816 (Page consulted on February 4, 2009).
[122] Statistics Canada press release, *The Daily*, April 24, 2008: [Online] http://www.statcan.gc.ca/daily-quotidien/080424/dq080424a-eng.htm (Page consulted on May 9, 2009).

contracts.[123] Founded in 1926[124], the American Arbitration Association was the first organization offering arbitration services to adopt the *Consumer Due Process Protocol*, which aims to guarantee a fair process to the parties to arbitration.[125] The protocol is based on 15 key principles that must be applied in consumer arbitration. In this respect, the AAA has been innovative regarding consumer arbitration. To develop its protocol, the organization has obtained the support of consumer associations and set up a consultation system for consumer arbitration decisions.[126]

The *National Arbitration Forum* was founded in 1986, with the goal of offering "*the integrity of the court system with more choices and control*"[127] regarding disputes. As opposed to the AAA, the NAF has seen its impartiality called into question on several occasions.[128] In its publication of June 5, 2008, the American magazine *Businessweek* reported strong criticisms of the NAF in cases of credit card company collection practices.[129] In March 2008, the San Francisco attorney general filed a lawsuit against the NAF for having issued arbitration decisions without sufficient justification, thus ignoring consumer rights.[130]

III. GOVERNMENT RECOGNITION OF CERTAIN ARBITRATION ORGANIZATIONS

Consumer arbitration is not specifically regulated by government authorities in Canada. Most provinces have procedural rules for arbitration in the event that the parties have not provided for specific rules; those provinces have also established rules providing a framework for arbitration cases, the certification process for arbitral awards, and the annulment of the latter. Of course, the parties and arbitration institutions are obliged to observe the rules of natural justice and of jurisprudence. However, private organizations that provide arbitration services don't have to meet specific government requirements or to submit to any control whatsoever. Those organizations are subject to no government certification or permit application.

It is only as part of certain government-established arbitration programs that government imposes specific minimal requirements to organizations wanting to arbitrate disputes. This is notably the case with the Canadian Motor Vehicle Arbitration Plan (CAMVAP). In Quebec, requirements are imposed on organizations that want to arbitrate within the framework of the Guarantee Plan for New Residential Buildings administered by the Régie du bâtiment. The *Regulation respecting the guarantee plan for new residential buildings* stipulates, among other things, in articles 127 and following, that the arbitration body has the obligation to "*provide*

[123] *Op. cit.,* note 71 (Scarpino), page 688.
[124] Website of the *American Arbitration Association.* [Online] http://www.adr.org/aaa_mission (Page consulted on May 17, 2009).
[125] Website of the *American Arbitration Association.* [Online] http://www.adr.org/sp.asp?id=22019#STATEMENT_OF_PRINCIPLES (Page consulted on March 5, 2009).
[126] *Op. cit.,* note 46 (Raymond-Bougie), page 36.
[127] Website of the NAF. [Online] http://www.adrforum.com/main.aspx?itemID=249&hideBar=False&navID=1&news=3 (Page consulted on March 17, 2009).
[128] *Op. cit.,* note 46 (Raymond-Bougie), page 35.
[129] Berner, R. & Grow, B. (2008, June 5). *Bank v. consumers (Guess Who Wins). Businessweek Magazine.* Available [Online] http://www.businessweek.cm/print/magazine/content/08_24/b4088072611398.htm (Page consulted on March 9, 2009).
[130] *Ibid.*

administrative support for the arbitrators' activities, with due respect for the autonomy and independence of each of its arbitrators"[131], as well as the obligation to publish annually the decisions rendered[132]. The regulation also contains requirements for updating lists of arbitrators, the continuous training of arbitrators, and the arbitration complaint and administration process.

The government framework for these two existing Canadian consumer arbitration systems[133] deserves further analysis.

IV. CANADA: THE CANADIAN MOTOR VEHICLE ARBITRATION PLAN (CAMVAP) AND THE GUARANTEE PLAN FOR NEW RESIDENTIAL BUILDINGS

A. CAMVAP: Structure and operation

Established in 1994 by an auto manufacturing group, the Canadian Motor Vehicle Arbitration Plan (CAMVAP) arbitrates disputes opposing auto manufacturers and consumers[134], on condition that the disputes concern vehicle manufacturing defects and manufacturer's warranties on new vehicles. Its administration reports to a non-profit federal association whose members are the provincial and territorial governments, the *Motor Vehicle Manufacturers' Association*, the *Consumers Association of Canada*, the *Canadian Automobile Dealers Association* and the *Association of International Automobile Manufacturers of Canada*[135]. To be eligible for the CAMVAP program, the consumer must meet a set of criteria stated in section 4 of the *Agreement for Arbitration*[136].

So that the consumer may file a claim before CAMVAP, the vehicle that is the object of the claim must be "*a passenger car, light duty truck, van, sport utility vehicle or multi-purpose passenger vehicle which weighs no more than 4,536 kg (10,000 lbs)*" that *"has travelled not more than 160,000 kilometres at the time of the hearing*". In addition, the vehicle must be of the current model year or one of the previous fourteen model years.[137] Section 4.4 of the *Agreement to Arbitrate* lists fifteen (15) disputes that cannot go to arbitration before CAMVAP – for example, disputes opposing the consumer only to the authorized dealer[138] or disputes "*Involving personal injury and/or 3rd party property damage (including property damage to your own Vehicle) resulting from the use, ownership or operation of your Vehicle even if you allege a defect in vehicle assembly or materials*".[139]

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[131] *Ibid.,* s. 131.
[132] *Ibid.*, s. 131.
[133] We are aware that dispute resolution systems exist in other fields, such as Ombudsmen in banking and real estate, but we are restricting our research to the systems of CAMVAP and the Guarantee Plan for New Residential Buildings.
[134] Canadian Motor Vehicle Arbitration Plan, *Agreement for Arbitration*, May 2006. [Online] http://www.camvap.ca/downloads/camvap_agreement_arb_eng.pdf (January 30, 2009).
[135] Available on the CAMVAP website, [Online] http://camvap.ca/eng/consumers_guide.htm#What%20to%20expect%20at%20Your%20CAMVAP%20Hearing and at http://www.camvap.ca/downloads/camvap_agreement_arb_eng.pdf (Pages consulted on January 30, 2009).
[136] Section 4.3 of the *Agreement for Arbitration*.
[137] *Ibid.*
[138] Section 4.4.4 of the *Agreement for Arbitration*.
[139] Section 4.4.1 of the *Agreement for Arbitration*.

Many authors and academics agree that CAMVAP is clearly a success. The criteria of speed and accessibility being essential to an efficient arbitration system, CAMVAP provides that a hearing date must be scheduled by the provincial administrator within fifty (50) days following the date of receipt of the arbitration application form sent by the consumer[140], and that an arbitral award must be rendered within 14 days following the hearing or the technical inspection.[141] The program offers the consumer a quick alternative to court proceedings, since the period between filing a claim and receiving an arbitral award is about 70 days.[142] In addition, arbitration is free of charge for the consumer, with the fees defrayed by participating manufacturers. It should be noted that costs incurred by witnesses, legal fees if the consumer is represented by legal counsel, the consumer's travel and accommodation expenses, as well as witness summons fees are all charged to the consumer.[143]

The program is funded by industry, so for the purpose of impartiality the consumer is responsible for choosing an arbitrator, subject to the manufacturer's approval[144]. To ensure the integrity of the arbitrator and the system put in place, the parties are not able to communicate with the arbitrator, except in the presence of one another[145].

The transparency of CAMVAP's arbitration system induced a certain reticence in Quebec, which joined the program only in 2000.[146] Before it arrived in Quebec, the Agreement to Arbitrate contained a confidentiality clause that has since been removed. Henceforth, statistics on decisions rendered are published annually on the CAMVAP website.[147] This publication allows the consumer to find out about certain aspects of prior decisions in disputes similar to his.

As this is not a mandatory arbitration program for consumers, they retain the right to go to court rather than arbitration. However, once the claim is filed with the provincial administrator, the consumer is obviously not allowed to initiate legal proceedings regarding the same dispute with the manufacturer or dealer who is a party to it[148].

Although being represented by legal counsel is permitted[149], the statistics show that in 2007, only 1% of consumers and no manufacturers were so represented in CAMVAP arbitration[150]. Finally, CAMVAP has adopted various measures for the parties to express their claims through hearings, teleconferences and written comments.

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[140] Section 7.6.1. of the *Agreement for Arbitration.*
[141] Section 11.1 of the *Agreement for Arbitration.*
[142] *Your Guide to CAMVAP.* [Online] http://www.camvap.ca/eng/consumers_guide.htm#CAMPAV%20Is%20Fast. (Page consulted on February 2, 2009).
[143] Section 13 of the *Agreement for Arbitration*. With regard to fees for summons to appear, if the arbitrator deems that the testimony proves relevant to the case, he may order the manufacturer to reimburse a maximum amount of one hundred (100) dollars under sections 9.8 and 9.9 of the *Agreement for Arbitration*.
[144] Sections 5.6 and 5.7 of the *Agreement for Arbitration*.
[145] Section 7.7 of the *Agreement for Arbitration*.
[146] *Op. cit.,* note 46 (Raymond-Bougie), page 34.
[147] The statistics are available on CAMVAP's website. [Online] http://www.camvap.ca/eng/stats_2008.htm (Page consulted on May 4, 2009).
[148] Section 15.1 of the *Agreement for Arbitration*.
[149] Section 7.5.2 of the *Agreement for Arbitration*.
[150] See CAMVAP's 2007 Annual Report. [Online] http://camvap.ca/eng/2007_CAMVAP_Annual_Report.pdf (Page consulted on February 10, 2009).

CAMVAP's arbitral awards are final, effective, and bind the parties.[151] In 2007, CAMVAP processed 337 files across Canada, of which 267 were the object of an arbitration hearing.[152]

Although for some, CAMVAP is the model of consumer arbitration success, the Automobile Protection Association (APA), whose mission is to defend consumers' rights in the area, expresses some concern about this system, which seems exceptional on paper, but which is reportedly not a model of efficiency in reality. Among the APA's concerns: consumer dissatisfaction when the arbitrator orders, for example, that the merchant do additional repairs; and vehicle repurchase calculations that, in the APA's view, do not reflect the vehicles' fair market value.

In the English version of its website, the APA comments as follows on CAMVAP's success rate: "*The published success rate for consumers is around 61%, but 54% of consent awards and 21% of arbitrated cases were ordered back to the dealer for yet another repair. For many consumers who have gone through the arbitration process, this is not a satisfactory resolution, but in CAMVAP's statistics they appear as a successful resolution*".[153] According to the APA, CAMVAP falsely claims to be a program enabling a consumer who has purchased a "lemon" to obtain the vehicle's repurchase. The APA attributes the absence of guidelines regarding "lemons" to the program's control by industry, and to the low representation of consumers and governments within the program. To increase CAMVAP's effectiveness, the APA suggests the establishment of guidelines similar to those of American *Lemon Laws*, so that arbitrators be able to adequately determine the situations where a vehicle is a "lemon" and requires stricter orders than for repairs to be done. The APA also deplores that recent changes to the program no longer admit vehicle replacements.[154]

The APA does not expressly throw doubt on the competence of CAMVAP arbitrators[155]. APA president George Iny opines that Quebec has impressive arbitrators who have enormous arbitration experience. But he states that the nature of certain decisions rendered suggests that the arbitrators are aware that their decisions have an effect on the very existence of CAMVAP, given the control exercised by auto manufacturers.

As for CAMVAP's transparency, the APA estimates that the publication of statistics is a good start compared to other arbitration programs. However, the APA would have preferred certain decisions to be published in their entirety, to better inform consumers about the aspects that would bolster their cases by reference to prior decisions.[156] With regard to CAMVAP's policy of no arbitration fees, Mr. Iny reports that it is difficult for a consumer to win his case without the assistance of an expert, whose fees will be charged to the consumer.

In May 2004, a Radio-Canada broadcast, *La Facture*, reported on a consumer's problems in turning to CAMVAP.[157] His vehicle had quickly become slower after only 14,000 kilometres showing on the odometer; 8 months after his claim was filed with the provincial administrator, an arbitration decision ordered repairs – an order that CAMVAP deemed favourable to the

[151] Section 12.1 of the *Agreement for Arbitration*.
[152] *Op. Cit.*, note 179 (Annual Report), page. 6.
[153] Automobile Protection Association, *Advice for Consumers Planning to Use CAMPAV*. [Online] http:///www.apa.ca/template.asp?DocID=156 (Page consulted on January 31, 2009).
[154] *Ibid.*
[155] Interview of February 4, 2009 with Mr. George Iny, President of the Automobile Protection Association.
[156] Interview of February 4, 2009 with Mr. George Iny, President of the Automobile Protection Association.
[157] See [Online] http://www.radio-canada.ca/actualite/lafacture/275/citron.shtml (Page consulted on February 2, 2009).

consumer. Forced to accept this decision, the consumer found himself in the garage no less than 12 times since he purchased his vehicle in 2002, two years previously.

Although CAMVAP's advantages for consumers and industry – speed, impartiality and low costs – are obvious, consumer organizations are still concerned about the decisions rendered and the auto industry's control over this arbitration program. As for its operation and the observance of essential guarantees, CAMVAP appears to be a consumer arbitration success, with reservations as to the arbitrators' independence since the program is only funded at the industry's discretion.

B. The Guarantee Plan for New Residential Buildings

Buying a residence is in most cases the largest consumer purchase[158], and construction problems may diminish the pleasure of owning a home. Many homebuyers experience difficulties getting contractors and builders to meet their legal and contractual obligations. In addition, high costs, legal fees, expertise fees, etc., may result from a lawsuit opposing buyer and contractor. As a result, various arbitration programs regarding disputes related to the guarantee of new residential buildings have been established across Canada.

Programs related to the Guarantee Plan for New Residential Buildings have existed in Canada since the early seventies. We have in Canada three types of new residential building guarantees. First there are mandatory guarantees prescribed by provincial law. This is particularly the case in Ontario and Quebec. There are also voluntary non-profit programs and voluntary for-profit programs, found in the rest of Canada. As explained in a 2007 study by the *Consumers Council of Canada* (CCC), the majority of new residential building guarantees, whatever their designation, offer dispute-resolution services, from mediation to arbitration.[159] Quebec has established a voluntary arbitration system for new residential building guarantees that is worthy of examination. Does it meet essential guarantees? Is it an arbitration model that can be emulated in other consumer areas? First we will take a quick look at the establishment of Quebec's Guarantee Plan for New Residential Buildings.

In 1999, Quebec adopted the *Regulation respecting the guarantee plan for new residential buildings*[160], which made the guarantee plan mandatory for certain new buildings. The plan is managed by a government body, the Régie du bâtiment (hereinafter referred to as the Régie), which authorizes certain corporations to act as administrators of the program so long as they meet the criteria stated in articles 41 and following of the Regulation. Those criteria include those for guaranteeing the financial viability of corporations wanting to act as administrators. The main reason for imposing such criteria appears to be public protection. There are three authorized administrators in Quebec: La Garantie des maîtres bâtisseurs, La Garantie Habitation du Québec Inc. and La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc.[161]

Under the guarantee plan, a homebuyer may complain and file a claim with the plan administrator is the contractor defaults on his obligations as laid out in the warranty. The consumers or contractors against whom the administrator would render an unfavourable

[158] CONSUMER COUNCIL OF CANADA, *Gaps in New Home Warranty Coverage Across Canada,* 2007, [Online] [http://www.consumerscouncil.com/site/Consumers_Council_of_Canada_69/pdf/Gaps.pdf] (Page consulted on February 5, 2009).
[159] *Op. cit.,* note 158 (Consumers Council of Canada), page 47.
[160] *Regulation respecting the guarantee plan for new residential buildings*, R.Q. v. B-1.1, r.0.2.
[161] Website of the Régie du bâtiment du Québec. [Online] http://www.rbq.gouv.qc.ca/dirEnglish/guaranteePlan/administration-an.asp (Page consulted February 5, 2009).

decision may submit the dispute to mediation – with the mediator chosen from a list drawn by the ministère du Travail – or to arbitration[162]. The rules governing arbitration as part of the guarantee plan are provided for in Division III, sections 106 to 131, of the *Regulation respecting the guarantee plan for new residential buildings*. Arbitration must be submitted to an organization authorized by the Régie du bâtiment, and this organization can certify as arbitrators "*only natural persons with experience in guarantee plans or having professional training in matters related to the questions raised by the arbitration, such as in finance, accounting, construction techniques or law*".[163] The arbitrator will adjudicate lawfully, but will also apply fairness where circumstances warrant.[164] The organizations must also meet the criteria set forth in sections 127 to 131 of the *Regulation*.

The arbitrators' impartiality and competence, as well as the efficiency, accessibility, transparency and credibility of the arbitration system, are guaranteed by sections that stipulate, for instance: "*Only a body devoted entirely to the arbitration of disputes may be authorized by the Board to organize the arbitration provided for in this Regulation*."[165] Those sections require the continuous training and administrative support of arbitrators, respect for the autonomy and independence of each arbitrator, and the publication of decisions. The organization must also have a code of ethics for arbitrators and an arbitration procedure that contains the procedural rules prescribed by the regulation[166]. Three organizations have received authorization from the Régie to arbitrate disputes related to the guarantee plan[167]: the Canadian Commercial Arbitration Centre (CCAC), the Société pour la résolution de conflits Inc. (SORECONI) and the Groupe d'arbitrage et de médiation sur mesure (GAMM).

As opposed to the practices found in current consumer arbitration processes, the Regulation requires that decisions rendered be published annually in a compendium of arbitration decisions. It should also be noted that the arbitration decisions are final and without appeal, and that they bound both the parties and the administrator.[168] For an arbitral award to be effective, it must be certified under the *Quebec Code of Civil Procedure.*[169]

As an essential aspect of an effective arbitration system to which consumers can turn, arbitration costs should not dissuade consumers from using the dispute-resolution method offered to them. The allocation of the costs of an application for arbitration of a dispute covered by the guarantee plan depends on the applicant. If he is the plan's beneficiary, i.e., the consumer, the costs are defrayed by the administrator. If the beneficiary loses his case entirely, the arbitrator can allocate the fees between the administrator and the consumer.[170] When it is the contractor who files the application for arbitration, the fees are shared equally between him and the administrator.[171] As with CAMVAP, this is a field that often requires an expert's intervention to present adequate evidence. For arbitration related to the guarantee plan, if the

[162] Sections 19 to 24 and 35 to 40 of the *Regulation respecting the guarantee plan for new residential buildings*, R.Q. v. B-1.1, r.0.2
[163] Sections 107 and 112 of the *Regulation respecting the guarantee plan for new residential buildings*, R.Q. v. B-1.1, r.0.2.
[164] Sec. 116 of the *Regulation respecting the guarantee plan for new residential buildings*, R.Q. v. B-1.1, r.0.2.
[165] Sec. 127 of the *Regulation respecting the guarantee plan for new residential buildings*.
[166] Sec. 128 of the *Regulation respecting the guarantee plan for new residential buildings*.
[167] Sec. 131 of the of the *Regulation respecting the guarantee plan for new residential buildings*.
[168] Sec. 20, 36, 120 of the of the *Regulation respecting the guarantee plan for new residential buildings*.
[169] Sec. 121 of the of the *Regulation respecting the guarantee plan for new residential buildings*. Sections 946 to 946.6 of the Code of Civil Procedure cover homologation of an arbitration decision.
[170] Sec. 123, par. 2 of the *Regulation respecting the guarantee plan for new residential buildings*.
[171] Sec. 123, par. 1 of the of the *Regulation respecting the guarantee plan for new residential buildings*.

applicant wins his case in whole or in part, the arbitrator is responsible for establishing the quantum of reasonable expert fees to be reimbursed by the program administrator[172].

As prescribed by the Regulation, the organizations arbitrating disputes related to the Guarantee Plan have a regulation or a code of ethics for arbitrators, which requires the observance of certain essential guarantees such as impartiality and equity.[173]

In theory, the observance of essential guarantees is imposed by the adoption of regulatory measures and the application of codes of ethics. To recognize the viewpoint of consumers and organizations working in the consumer sector, we discussed with Ms. Albanie Morin, coordinator of the Association des consommateurs pour la qualité dans la construction (ACQC), a consumer rights organization in this field. In her view, guarantee plan arbitration has several advantages, such as increasing consumers' access to justice by giving them access to a third party who will listen to them and take a decision, thus sparing them the sluggishness and long delays of the court system.[174] Indeed, without such a program, the consumer would have no recourse other than bringing a lawsuit for hidden defects or manufacturing defects. The ACQC indicates that arbitration of the guarantee plan has, among other advantages, that of being more accessible for consumers and being less costly than a court case, particularly when the consumer's claim involves substantial amounts. However, the ACQC identifies certain shortcomings of the arbitration system that may indicate a lack of respect for essential guarantees.

First, the ACQC recalls that arbitration is not entirely free of charge for beneficiaries of the guarantee plan: The fees for expert intervention, which is almost indispensable, are charged to the consumer, until, if he wins his case, the arbitrator orders the administrator's reimbursement of part of those fees.[175] But the greatest shortcoming identified by the ACQC is related to what we have called the "repeat player effect". Since there are only three major Quebec centres arbitrating disputes related to the Guarantee Plan, the companies continually find themselves before the same arbitrators, acquire a knowledge of the arbitrators' tendencies, and can choose the arbitrator who is likely to be most favourable to them. Under circumstances where there is already an imbalance of power between consumers and companies, the ACQC estimates that companies thus have an additional undue advantage. The fact that consumers are intimidated by this process, which greatly resembles the legal process, and with which they are less familiar than the companies, adds to this imbalance.

The ACQC also deplores that consumers don't obtain all necessary information about arbitration. According to Ms. Morin, users of guarantee plan arbitration don't benefit from the same access to information as at the small claims division, for example. Lack of information on the operation of arbitration, difficulties due to ignorance of the law, and a frequent absence of the skills required for building evidence and presenting it adequately are of course detrimental to consumers. The ACQC strongly recommends that consumers who want to go to arbitration obtain legal counsel, because the administrator and the contractor often do. However, given the costs involved, legal representation makes arbitration more costly and reduces economic access to it.

[172] Sec. 124 of the of the *Regulation respecting the guarantee plan for new residential buildings*.
[173] GAMM. [Online] http://www.legamm.com/code.asp (Page consulted on February 6, 2009), SORECONI. [Online] http://www.arbitrage.soreconi.ca/code.htm (Page consulted on February 6, 2009), CCAC, [Online] http://www.ccac-adr.org/fr/code_deontologie.asp (Page consulted on February 10, 2009).
[174] Interview of September 30, 2008 with Ms. Albanie Morin, coordinator of the Association des consommateurs pour la qualité dans la construction (ACQC).
[175] Sec. 124 of the *Regulation respecting the guarantee plan for new residential buildings*.

On the other hand, the ACQC applauds the publication of arbitration decisions, which adds to the effectiveness of the process. Ms. Morin recognizes the recent improvements made to the arbitration decision search engine. But she criticizes the fact that the corporation administering the publication of arbitral awards, SOQUIJ, publishes only the decisions it judges relevant. This is harmful to the consumer who, wanting to verify the reliability of a contractor in the light of the number of complaints against him, cannot access all the decisions to which the contractor was a party.

The ACQC admits not being able to say whether essential guarantees are observed during the arbitration process, given that arbitration hearings take place behind closed doors. She thinks that observance of essential guarantees is the best way to correct the imbalance between the parties to arbitration, and that it depends on strict application of the arbitrators' code of ethics. According to the ACQC, which has received consumer complaints about ethics infractions, any infraction of this code should be subject to a complaint through an efficient and simplified system.

Finally, to increase consumer access to arbitration as part of the guarantee plan for new residential buildings, the ACQC proposes multiplying the venues of arbitration hearings across Quebec.

C. Conclusion

The arbitration systems of CAMVAP and of the Guarantee Plan for New Residential Buildings certain increase access to justice by giving consumers access to a faster and less costly process than legal proceedings. Legislative standards imposing certain criteria, and the observance of essential guarantees, improves the appearance of impartiality and credibility of these two consumer arbitration processes. Still, it remains impossible to precisely verify the observance of essential guarantees. Some aspects of the arbitration programs, such as the publication of arbitration decisions, appear essential to the system's credibility. But some shortcomings seem to persist regarding the information provided to the consumer prior to arbitration.

What stands out from this analysis of Canadian arbitration systems is that "*access to justice depends first on access to information*".[176] It is not sufficient to establish laws and arbitration systems; consumers must be adequately informed and advised. The transparency of programs through publication of statistics or even of arbitration decisions strengthens the trust of consumers in the arbitration in place. Similarly to private arbitration, the fact that arbitration within these two systems is partially confidential complicates verification of the observance of essential guarantees.

Although at first sight arbitration appears to be a satisfactory means for resolving consumer disputes, it is necessary that such an alternative dispute-resolution method offer the same essential guarantees as the courts. The present analysis shows that a government framework for arbitration systems, such as CAMVAP and arbitration related to the Guarantee Plan for New Residential Buildings, guarantees that benchmarks are established for applying principles of fundamental justice, and tends to correct the imbalance of power between consumers and companies.

[176] Elodie LACHAMBRE, *Arbitrage International et Droit de la consommation*, Université Panthéon-Assas Paris II, Mémoire d'admission, 2005, under the direction of Dominique Bureau, page 39 [Online] http://mja.u-paris2.fr/etudiants/memoires/2005/Elodie_Lachambre_memoire.pdf (Page consulted on February 11, 2009). Our translation.

IV. CONSUMER SECTORS THAT MOST OFTEN GO TO ARBITRATION

Due to the confidential nature of the arbitration process, it is impossible for us to have access to the data of arbitration organizations in order to analyse them and establish the sectors using their services most. There is no database of consumer arbitration decisions rendered in any Canadian province or territory. Admittedly, making such a database available to the general public would contradict the appeal – confidentiality – of arbitration for companies. Indeed, Professor Jean Sternlight pointed out this problem of access to information in her research on arbitration: "*It has always been difficult to do studies, because it is difficult to obtain access to the data, and difficult to say how a particular matter would have been resolved had it gone a different route than it did*"[177].

In a telephone interview, a representative of the Shaw cable television company (whose contracts contain arbitration clauses[178]) admitted not being able to report the number of consumer files that had been arbitrated; in his view, no case had gone to arbitration since the clause came into effect, whose dissuasive effect he admitted. As we have seen, arbitration clauses are legion in American consumer contracts. Whether extermination contracts, credit agreements, contracts for tickets to shows or sporting events, etc., all contain arbitration clauses. Although such a practice is not as widespread in Canada, it remains that the use of arbitration clauses has been spreading in recent years.

To be able to establish sectors that go to arbitration, we studied various consumer contracts[179] and identified those that contain an arbitration clause. Our analysis concerned consumer contracts in the following fields: cable television, cell telephony, residential telephony, Internet service and online purchasing. We focused our analysis on the contracts of the major Canadian providers in the sectors mentioned.

A. Results of the contract analysis: prevalence of arbitration clauses

Cable television

With regard to cable television, we analysed the contracts of six companies: Shaw, Rogers, Bell Express Vu, Star Choice, Vidéotron and Cogeco[180]. Half (50%) of the contracts studied contain arbitration clauses. The contracts of those companies do not mention that this type of clause is prohibited in some Canadian provinces, which tends to give consumers the impression that they benefit from less rights than they actually do. Indeed, despite the presence of such a clause in the contract, and despite the apparent contradiction, consumers in certain Canadian provinces are free to go to court in the event of a dispute. Moreover, although half of the clauses also provide for consumers waiving their right to initiate or participate in any class action against cable television providers, this prohibition has no legal effect in provinces where arbitration clauses are prohibited.

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[177] Jean R. STERNLIGHT, *The Ultimate Arbitration Update: Examining Recent Trends in Labor and Employment Arbitration in the Context of Broader Trends with Respect to Arbitration*, 2003. Available [Online] http://www.abanet.org/labor/lel-aba-annual/papers/2003/sternlight.pdf (Page consulted on May 4, 2009).

[178] See Annex 3 herein: Arbitration Clause Usage in Consumer Contracts.

[179] See Annex 6 herein: Contractual Terms Analysed.

[180] Details of the analysis are reproduced in Annex 3 herein: The Use of Arbitration Clauses in Consumer Contracts.

Cellular telephony
We then performed a similar analysis of nine cell phone contracts – those of: Bell Mobility, Telus Mobility, FIDO, Koodo Mobile, Virgin Mobile, Rogers Wireless, Alliant, TBaytel and MTS Allstream. The results were similar those for cable television: Fifty-six percent (56%) of the wireless telephone contracts studied contain arbitration clauses. The contracts containing such clauses also contain a waiver of consumers' right to initiate or participate in class actions.

Two (2) companies – Koodo and its parent company, Telus Mobility – go so far as to include in their arbitration clause a mandatory mediation session prior to going to arbitration. But no mention is made of the mediation mechanism that will be adopted, or even of the related fees.

The clauses in question mention that, should applicable laws annul the obligation to submit to arbitration, the related paragraphs of the contract will be withdrawn; but no mention is made of the provinces where arbitration clauses are prohibited. Other companies, even less explicit, simply mention that the clause (as does the entire contract, we might add) applies within the limits of the law. Another clause totally omits such a mention regarding the application of provincial laws to its arbitration clause.

An interesting fact is that the arbitration clauses of three (3) of those companies also exclude from mandatory arbitration any proceedings that service providers might initiate to collect amounts due. It is curious that those companies, which see fit to impose arbitration on consumers and laud its merits, reserve the right not to avail themselves of it when their own interests are at stake.

As mentioned above, it should be noted that two companies state in the *Arbitration Protocol* that they will assume all reasonable arbitration fees and expenses, and provide consumers with more information about the holding of arbitration in the event of a dispute. Although this commitment – by FIDO and its parent company, ROGERS, which has the same protocol – seems to benefit consumers, in no way does it limit the problems related to the "repeat player effect". It is not difficult to imagine a doubt arising in the consumer's mind regarding an arbitrator's independence and his ability to render an impartial decision, when the company is paying his salary and constitutes the majority of his clientele.[181]

Residential telephony
As in the other sectors, we observe a prevalence of arbitration clauses in residential telephony contracts. 62.5% of the contracts analysed contain an arbitration clause. None of those clauses mentioned that they were prohibited in certain Canadian provinces.[182]

Internet service
Internet service is the area where we observe the least arbitration clauses. After analysing nine (9) of the largest Canadian Internet service providers, we note that only 22% of Internet service contracts contained arbitration clauses. The lack of information about the arbitration process is similar in Internet service contracts. Only Rogers has developed an Arbitration Protocol, which applies to all its other services as well.[183]

[181] Suzan DRUMMOND, *Is the Class Action a Public Order Institution?* (July 17, 2007). Available [Online] http://www.thecourt.ca/2007/07/17/is-the-class-action-a-public-order-institution/ (Page consulted on February 9, 2009).
[182] See Annex 6 herein: Contractual Clauses Analysed. Details of the analysis are reproduced in Annex 3 herein: Arbitration Clause Usage in Consumer Contracts.
[183] See Annex 6 herein: Contractual Clauses Analysed.

I. Online purchasing

The percentage of contracts containing an arbitration clause with regard to online purchases is 44%. So slightly less than half of the contracts analysed contained an arbitration clause.

V. Observance of Essential Guarantees by Organizations Currently in Place

The analysis of policies adopted by the various Canadian arbitration organizations reveals that they require the observance of essential guarantees in consumer arbitration. The codes of ethics, arbitration rules and arbitration agreements provide for the observance of essential guarantees such as the right to be heard, impartiality, independence and fair treatment of the parties.[184] However, on-site verification of the application of those principles proves particularly complex.

Because of the confidential nature of arbitration and the fact that once consumer disputes go to arbitration, consumers are required to maintain the confidentiality of any information related to their dispute, we cannot review the consumer arbitration decisions in order to verify that essential guarantees are met. This difficulty is compounded by the fact that arbitration hearings are most often held behind closed doors.

In the course of the present research, we observed that it is difficult, if not impossible, to obtain information from companies or private arbitration organizations about the number of consumer disputes brought before arbitration organizations. As mentioned above, one of the main attractions of arbitration is its confidentiality. This blocks access to data on consumer arbitration decisions and on the process itself. What is more, since Canada, unlike California[185], has no mandatory database that would publish information about consumer arbitration decisions rendered, it is impossible to analyse the data on this type of arbitration.

As emphasized above, it is indispensable that justice be done, but just as indispensable that it be seen to be done. A simple mention of applicable principles, with no possible verification of the application of those principles, appears to us a very questionable way of ensuring that justice is seen to be done.

[184] Annex 1 herein, Canadian Arbitration Organizations, discusses all the codes of ethics and the rules of procedure adopted by Canadian arbitration institutions.
[185] Section 1281.96 of the *California Code of civil Procedure*.

CHAPTER 3: CANADIAN ARBITRATION LEGISLATION

I. CANADIAN ARBITRATION LEGISLATION: ADEQUATE CONSUMER PROTECTION?

One of the roles of government is to ensure balance in the relations between parties of unequal power. For example, with regard to contracts, issues of residential housing are very strictly regulated for the protection of tenants. The same applies to employment issues: federal and provincial laws protect workers; some laws require mandatory arbitration as a preferred dispute-resolution method. These are areas where arbitration has a very strict framework of laws and government bodies.

In consumer affairs, the legislators have also intervened to protect the vulnerable parties – consumers. Consumer arbitration is not prohibited, except, in certain jurisdictions, when a company would attempt to impose it before a dispute arises; but this type of arbitration has no specific framework. Could the effectiveness and fairness of the consumer arbitration process depend on an efficient legislative framework for this type of dispute-resolution method?

To evaluate the degree of consumer protection provided by arbitration, we have identified the Canadian provincial laws that are applicable to this type of process.[186]

A. Prohibition of arbitration clauses

Unlike the American courts, Canada's federal courts refuse to consider arbitration clauses as abusive. The Quebec and Ontario legislatures have therefore adopted regulations prohibiting this type of clauses in consumer contracts to which the two provinces' consumer protection laws apply.[187]

In addition to prohibiting arbitration clauses, section 7 of Ontario's *Consumer Protection Act, 2002* contains other paragraphs regulating consumer arbitration that may be resorted to by the parties to settle a dispute. Section 7(1), for example, states: "*The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.*" However, section 7(3) specifies: "*Despite subsections (1) and (2), after a dispute over which a consumer may commence an action in the Superior Court of Justice arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law.*" And section 7(4) adds: "*A settlement or decision that results from the procedure agreed to under subsection (3) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning an agreement to which this Act does not apply*". Under section 7(5), the decision to go to this type of conventional arbitration entails the application of the *Arbitration Act, 1991*[188], which provides for the application of certain mandatory provisions and of others that may be set aside or modified by the parties.[189]

[186] Annex 4: *Canadian Arbitration Legislation*.
[187] Sec. 7(2), *Consumer Protection Act, 2002*, S.O. 2002, c. 30 (Schedule A). Sec. 11.1, *Consumer Protection Act*, R.S.Q. c. P.40.1. It should be noted that not all consumer contracts are covered by Ontario's *Consumer Protection Act, 2002* or by Quebec's *Consumer Protection Act*.
[188] *Arbitration Act, 1991*, S.O. 1991, c. 17.
[189] Sec. 3, of the *Arbitration Act*, S.O. 1991, c. 17.

As with the Quebec arbitration rules contained in the *Civil Code of Québec*[190] and the *Code of Civil Procedure*[191], the *Arbitration Act, 1991* regulates various aspects of arbitration generally. Holding the arbitration, naming arbitrators, the form of the arbitration agreement, the appeal and certification of the arbitral award are some of the arbitration aspects thus regulated. Such a framework facilitates holding the arbitration and the execution of arbitral awards, and legitimizes arbitration as a viable alternative to the legal process.

As opposed to Quebec and Ontario, the other Canadian provinces and territories have no provision in their consumer protection laws that covers arbitration clauses. Saskatchewan's section 44 of the *Consumer Protection Act* invalidates any verbal or written agreement stipulating the non-applicability of certain provisions of that law by limiting, abrogating or modifying the rights and recourses granted by the law. In section 44's second paragraph, consumer arbitration is mentioned: It is indicated that notwithstanding the first paragraph, dispute resolution through arbitration or mediation extinguishes the rights granted by the Act. The Maritime Provinces[192], Manitoba[193] and the Territories[194] have adopted legislative provisions similar to section 44 of the Saskatchewan law.

Such a legislative provision, which simply invalidates agreements stipulating the non-applicability of certain provisions that revoke, limit, abrogate or modify the rights and remedies benefiting consumers, does not appear to prohibit mandatory consumer arbitration imposed on consumers; in fact, the *Manitoba Law Reform Commission* reaches this conclusion in its 2008 report, which states that "*legislative intervention is necessary to ensure that Manitoba consumers retain access to their choice of court proceedings, including class proceedings*".[195] The Commission recommends that "*concurrent statutory amendments should be enacted to The Consumer Protection Act and The Business Practices Act, which stipulate that a mandatory arbitration clause in a consumer agreement is invalid or prohibited*".[196] As for Alberta, in applying the *Fair Trading Act*, the director may provide the disputing parties with information on alternative dispute-resolution methods, such as arbitration and mediation, and make available to them a dispute-resolution process.[197]

[190] Sec. 2638 to 2643 and articles 3121, 3133, 3148 and 3149 of the *Civil Code of Québec*.
[191] Sec. 940 to 952 of the *Code of Civil Procedure of Quebec*, R.S.Q. c. C-25.
[192] Sec. 22, *Consumer Protection Act*, R.S.N.S. 1989, c. 92, Sec. 23, *Consumer Protection Act*, R.S.P.E.I. 1988, c. C-19., Sec. 26, *Consumer Protection Act*, R.S.N.L. 1989, c. C-31.
[193] Art. 96, *Loi sur la protection du consommateur*, C.C.S.M. c. C-200.
[194] Sec. 88, *Consumers Protection Act*, R.S.Y. 2002, c. 40. And sec. 107, *Consumer Protection Act*, R.S.N.W.T. 1988, c. C-17.
[195] Law Reform Commission of Manitoba, *Judicial Consideration of Mandatory Arbitration Clauses and Consumer Class Proceedings*. 2008. Available [Online] ttp://www.gov.mb.ca/justice/mlrc/pubs/ma2008.html (Page consulted on April 23, 2009).
[196] *Ibid.*
[197] Art. 142, *Fair Trading Act*, R.S.A. 2000 v. F-2.

In Quebec and Ontario – where certain consumer contracts are not submitted to the prohibition of arbitration clauses that is provided for in consumer protection laws – and in the provinces and territories that do not prohibit arbitration clauses, consumers may be forced to submit to arbitration. This, while Canada has no adequate consumer arbitration systems that could serve consumers' interests and correct the imbalance of power between consumers and merchants. Although Ontario and Quebec legislators have recognized the disadvantages to consumers of arbitration clauses, all consumer contracts – those governed by consumer protection laws and the others – should be submitted to the same prohibition of arbitration clauses, if only for the purpose of coherence. Failing in the near future to establish a consumer arbitration system observing essential guarantees and adapted to consumer disputes, or to reform the legal system to better adapt it to consumer disputes, all the provincial legislatures should adopt provisions that prohibit arbitration clauses in all consumer contracts. This would better protect consumers and guarantee them access to all recourses and thus to justice, whether in class actions or individually.

As we can see, the provinces have adopted different approaches to arbitration clauses. Otherwise, the approach to conventional arbitration is the same everywhere: The general rules of arbitration apply to consumer arbitration. Indeed, all provinces and territories have laws or legislative provisions regarding arbitration in general, to provide a framework for the process, by creating rules for naming arbitrators, holding arbitration, certifying the arbitral award, etc.

It remains to be seen whether the arbitration framework is suited for consumer disputes, given the imbalance between the parties and between the economic stakes and the time, energy and, often, the costs that the process requires of the consumer. For comparison purposes, we will attempt a comparative study of consumer arbitration systems established in other jurisdictions.

CHAPTER 4: CONSUMER ARBITRATION IN OTHER JURISDICTIONS

I. FOREIGN ARBITRATION SYSTEMS

Undeniably, the establishment of new procedures enabling consumers to resolve their consumer disputes quickly and at low cost increases access to justice. To that end, several countries have adopted mediation, conciliation and arbitration programs. Professor Pierre-Claude Lafond, in his text titled *Le consommateur et le procès*[198], reports on alternative dispute-resolution methods established in several countries in view of settling consumer disputes fairly and quickly. For instance, Belgium has formed various commissions in several consumer areas[199], and those commissions have been highly successful[200]. Likewise for Spanish consumer arbitration, which has been written about in various texts and articles and was the model for Argentina's system. The latter has also proven effective. On March 11, 1998, by presidential decree, as provided for in section 59 of *Argentina's Consumer Defence Law*[201], Argentina set up the *Consumption Arbitration System* (NCAS), designed as a quick and effective method for settling disputes between consumers and suppliers of goods and services transparently, quickly and free of charge.[202]

In the present section, we will also focus on the American private arbitration system, and on that of the Portuguese Consumer Dispute Arbitration Centres.

A. Argentina: Government intervention and effectiveness

Argentina has established a consumer dispute arbitration system whose main features are swiftness, impartiality, voluntarism[203] and no-charge service[204]. The arbitrators are chosen by government. Disputes are usually heard by a quorum formed by an arbitrator chosen by the consumer, another chosen by the company, and a third chosen by the government. In the case of disputes of less than US$500, the file is presented to a single arbitrator, chosen by the government. A panoply of rules, procedural and other, has been adopted to ensure the impartiality of arbitrators and the integrity of the system put in place. For example, the salary of arbitrators is paid by the government's *Secretary of Trade*, thus quenching any doubt as to the arbitrators' impartiality that might result from their remuneration by one of the parties to the arbitration process or from the effect that one of the parties might have on such remuneration (see above: "repeat player effect"). According to authors Antonio Serra Cambaceres and José

[198] Pierre-Claude LAFOND, *Le consommateur et le procès-Rapport général*, in Les Cahiers de Droit (2008) 49 C. de C. 131-157.
[199] The areas covered are travel, furniture purchasing, real estate and textile maintenance.
[200] Hakim BOULARBAH, "Rapport Belge" in ASSOCIATION HENRI CAPITANT, "4. Le consommateur et le procès : Questionnaire et rapports," in *Journées internationales colombiennes de l'Association Henri Capitant des Amis de Culture Juridique Française*, Bagota and Carthagène, September 24-28, 2007 [Online] http://www.henricapitant.org/spip.php?article77 (Page consulted on January 14, 2009), page 2.
[201] *Argentina's Consumer Defence Law*, No. 24.240, Art. 59,.
[202] Antonio Serra CAMBACERES and José Luis LAQUIDARA, "Consumer Arbitration in Argentina" in *The 8th International Consumer Law Conference*, Auckland New Zealand, April 9-11, 2001, [Online], http://www.consumidoresint.cl/documentos/legal/consumer_arbitration_in-argentina_final.doc (Page consulted on January 14, 2009), page 2.
[203] Decree No. 276/98, Sec. 1. Although arbitration is voluntary for consumers, it is mandatory for companies that display at their place of business the logo of the Consumer Arbitration Courts, which confirms the company's commitment to arbitration.
[204] *Op. cit.,* note 202 (Cambaceres and Laquidara).

Luis Laquidara, the consumer arbitration program is highly popular among consumers in Buenos Aires, where court access encounters the same problems as in Canada. Decree No. 276/98 contains, in section 11, procedural rules regarding the arbitration process' observance of principles of natural justice, by the holding of an adversary hearing where the parties are treated equally. In addition, the Consumer Arbitration Courts are able to require any relevant proof for resolving a dispute.[205]

B. Consumer arbitration in the United States

Two American organizations share the majority of consumer arbitration cases: the *American Arbitration Association* and the *National Arbitration Forum.*

Given the widespread use of arbitration clauses in the United States and the strong criticisms of consumer arbitration, some private American arbitration organizations offer specific programs for consumer disputes. This is the case for the *American Arbitration Association* (AAA), which set up in 2003 a program for disputes regarding wireless telephony.[206] Wireless arbitration is funded by the *Cellular Telecommunications Industry Association*[207], grouping American mobile service providers; those services include cellular and PCS wireless services. There are three levels of arbitration, depending on the amounts in dispute.

This arbitration program applies the *Consumer-Related Disputes Supplementary Procedures*[208], which are specific to consumer cases and are less formal. In addition, for arbitration to be more accessible to consumers whose contracts contain arbitration clauses, the AAA provides for less costs to consumers than those that would apply in commercial arbitration. In the case of a claim of less than US$10,000, the arbitration fees payable by the consumer total $125.[209] Administrative fees ($750 for claims of less than $10,000) are paid by the company, which also assumes other fees if a hearing is held.[210]

To make the AAA's consumer arbitration rules applicable, the following conditions must be met: (i) Mention is made, in an arbitration clause, of the AAA or its arbitration rules in the contract between the consumer and the company; (2) An adhesion contract is involved; (3) The good or service has been acquired for household or personal use.[211]

As for essential guarantees, the AAA has adopted the *Consumer Due Process Protocol*[212] [the Protocol], which sets forth the principles of natural justice to be applied for arbitration to be fair. Among other things, it advocates independence and impartiality, the quality and competence of arbitrators, reasonable costs and waiting periods, the right to be represented, and the parties' right to maintain the option to go to Small Claims Court.[213] The Protocol also requires that the

[205] *Op. cit.,* note 202 (Cambaceres and Laquidara), page 14.
[206] American Arbitration Association, *Wireless Industry Arbitration Rules*, July 1, 2003, [Online] http://adr.org/sp.asp?id=22010 (Page consulted on January 14, 2009).
[207] *Ibid.*
[208] American Arbitration Association, *Consumer-Related Disputes Supplementary Procedures*, September 15, 2005, [Online] http://adr.org/sp.asp?id=22014&printable=true (Page consulted on January 16, 2009).
[209] *Ibid.,* in sec. C-8. In accordance with sec. 1284.3 of California's *Civil Code*, consumers with a monthly income of less than 300% of federal poverty guidelines may be granted a waiver of arbitration fees and related costs (sec. C-7).
[210] *Ibid.*
[211] *Op. Cit.*, note 208 (American Arbitration Association), sec. C-1.
[212] American Arbitration Association, *Consumer Due Process Protocol*, April 17, 1998, [Online] [http://www.adr.org/sp.asp?id=22019&printable=true] (Page consulted on January 16, 2009).
[213] *Ibid*. in Principle 5.

arbitration agreement contain certain mandatory mentions, such as: clear notice of the voluntary or mandatory nature of the arbitration, reasonable access to arbitration information, and an explanation of the distinction between arbitration and the legal process, as well as a clear statement regarding the consumer's option to choose legal proceedings rather than arbitration.[214]

To the extent that all the conditions for the program's application are present, American consumers have access, through the AAA, to a less costly dispute-resolution method than the commercial arbitration offered by the AAA. Arbitration decisions concerning California consumers are published.[215] Those statistics enable the AAA to perform an annual analysis of consumer arbitration cases. From January 2007 to August 2007, the AAA processed 310 consumer arbitration cases. According to the AAA, it processes annually about 1,500 consumer cases. According to the organization's analysis of its statistics, consumers have won 48% of the cases where they were claimants, while companies received favourable arbitral awards in 74% of the cases where they were claimants.[216] Several major companies submit their consumer disputes to this organization, which conducts a large part of arbitration hearings in the United States.[217]

[214] *Ibid.,* in Principle 11. It should be noted that as opposed to the AAA's *Consumer-Related Disputes Supplementary Procedures*, which apply only when the consumer contract contains an arbitration clause, the *Consumer Due Process Protocol* applies whether arbitration is mandatory or not.
[215] American Arbitration Association, CCP Section 1281.96 Data Collection Requirements, October 1, 2008, [Online] [http://www.adr.org/CCPQ306.pdf] (Page consulted January 20, 2009).
[216] American Arbitration Association, *Analysis of the American Arbitration Association's Consumer Arbitration Caseload Based on Consumer cases Awarded between January and August 2007*. Available [Online] http://www.adr.org/si.asp?id=5027 (Page consulted on May 4, 2009).
[217] Amazon.ca, Conditions of Use, [Online] http://www.amazon.ca/gp/switch-language/help/customer/display.html/ref=topnav_switchLang?ie=UTF8&nodeId=918816&language=en%5FCA (Page consulted on January 21, 2009).

Like the AAA, the NAF has produced a text – the *Arbitration Bill of Rights*[218] – that requires its arbitration process to provide guarantees. Similar to the Protocol, this document also preaches the observance of certain essential guarantees: integrity, fairness, impartiality, reasonable fees, the right to be represented, and the independence and competence of arbitrators. The NAF has also adopted a *Code of Conduct*[219]*,* which contains five principles that arbitrators must apply: arbitration integrity and fairness, impartiality, prohibition against communicating with either party in the other's absence, honesty, and the maintenance of confidentiality. The NAF has also adopted a *Statement of Principles*[220], which essentially contains the same principles as the two other texts mentioned above.

Although the NAF's *Code of Conduct* appears to guarantee to parties the observance of essential guarantees, it should be noted that the Code's preamble states: "*While this Code of Conduct is intended to provide ethical guidelines, it does not form part of the arbitration rules or the* Code of Procedure *of the National Arbitration Forum or of any other organization*".[221]

As mentioned above, the NAF was criticized in June 2008 by the American magazine *BusinessWeek*[222], which questioned its impartiality in arbitration cases initiated by credit card companies and involving consumers. The article accused the NAF to flout the rules of natural justice and render decisions hastily, without allowing consumers to give their version of the facts. Thanks to the obligation to publish arbitral awards in California, it was possible to observe that 99.8% of this type of cases before the NAF were resolved in favour of the banks[223]: Essentially, of the 18,075 cases in arbitration from January 2003 to March 2007, consumers had only won 30 times.

The article also reported on a study conducted by the Washington-based consumer organization *Public Citizen*[224]*,* which denounced the NAF's partiality for companies that frequently used their arbitration service ("repeat players") – the great majority of the NAF's clientele. Despite the organization's statements of principle in favour of natural justice, the reality appears quite different...

Outraged by the apparent violations of principles of natural justice, San Francisco's attorney general filed in March 2008 a lawsuit against the NAF, alleging its lack of impartiality in rendering without justification decisions in favour of creditors, thus flagrantly abusing consumer rights.[225]

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[218] National Arbitration Forum, *Arbitration Bill of Rights*, 2007, [Online], [http://www.adrforum.com/users/naf/resources/ArbitrationBillOfRights3.pdf] (Page consulted on January 21, 2009).

[219] National Arbitration Forum, *Code of Conduct* (2006), [Online], https://secure.arb-forum.com/main.aspx?itemID=399&hideBar=False&navID=156&news=3 (Page consulted on January 21, 2009).

[220] National Arbitration Forum, *Statement of Principles*, [Online], https://secure.arb-forum.com/main.aspx?itemID=401&hideBar=False&navID=300&news=3] (Page consulted on January 21, 2009).

[221] *Op. cit.,* Note 219 (NAF- *Code of Conduct*) Preamble, page 1.

[222] *Op. cit.,* note 129 (Berner and Grow).

[223] *Ibid.,* (Berner and Grow), page 1.

[224] John O'DONNELL, Public Citizen, *The Arbitration Debate Trap: How Credit Card Companies Ensnare Consumers* 15, 2007 [Online], [http://www.citizen.org/documents/ArbitrationTrap.pdf] (January 21, 2009).

[225] As the present report was being written, the application filed in the Superior Court of San Francisco on March 24, 2008 was the object of a series of incidental applications and requests and is still at the stage of a preparatory conference, scheduled for May 22, 2009. The *people of the State of California, acting by and through San Francisco City Attorney Denis J. Herrera vs. NAF*, Superior Court of San Francisco.

C. Europe: Regional guidelines and national initiatives

Regionally, the European Commission has adopted various recommendations on the settlement of consumer disputes. The first recommendation, dated March 30, 1998, concerns the principles applicable to organizations responsible for the extrajudicial resolution of consumer disputes.[226] This recommendation states the measures that should be adopted by organizations responsible for the extrajudicial resolution of consumer disputes, to ensure that their procedures "*meet minimum criteria guaranteeing the impartiality of the body passing judgment, the efficiency of the procedure and the publicizing and transparency of proceedings*".[227] This recommendation, which emphasizes the necessity of observing the principles of independence, transparency, adversary debate, as well as the principles of efficiency, equality, freedom and representation, had a limitation, though: Recommendation 98/257 EC is limited to "*procedures which lead to the settling of a dispute through the active intervention of a third party, who proposes or imposes a solution*".[228] The wording of this provision excludes other resolution attempts (mediation or conciliation, which would not include settlement proposals by a third party, for example), so the European Commission proceeded afterward to adopt the recommendation of April 4, 2001.

The Commission's recommendation of April 4, 2001 regarding the principles applicable to the bodies responsible for the consensual resolution of consumer disputes[229] thus also applies to attempts at rapprochement, while taking technological developments into account. The recommendation of April 4, 2001 establishes the means to be adopted by consumer dispute-resolution bodies for the processes to be transparent and impartial and apply the principles of natural justice. This recommendation imposes on dispute-resolution organizations the obligation to take necessary measures to guarantee the impartiality of procedures, among other things.[230] In another example of measures proposed by recommendation 2001/310 EC to guarantee the transparency of the process, the Commission recommends that "*Information about the contact details, functioning and availability of the procedure should be readily available to the parties in simple terms so that they can access and retain it before submitting a dispute*".[231]

Following the recommendations of the European Community, some European countries and organizations adopted consumer arbitration systems that apply the principles and rules set forth by those recommendations. This is notably the case for Belgium and Spain. Portugal, for its part, had long acquired a specific framework for consumer arbitration.

D. Portugal and the Centro de Arbitragem de conflitos de Consumo

Adopted in 1986, the Portuguese law respecting arbitration[232] is one of the oldest in Europe. The approach adopted in this country is in contrast to that found in Canada and the United

Case Number: CGC-08-473569. See the docket of the Superior Court of San Francisco, available [Online] http://webaccess.sftc.org/Scripts/Magic94/mgrqispi94.dll (Page consulted on May 5, 2009).

[226] The Commission's recommendation of March 30, 1998 regarding the principles applicable to the bodies responsible for the extrajudicial resolution of consumer disputes (OJ L 115 of 17.4.1998, p.31) 98/257/EC.

[227] *Ibid.*

[228] *Ibid.*

[229] The Commission's recommendation of April 4, 2001 regarding the principles applicable to the bodies responsible for the consensual resolution of consumer disputes (OJ L 109/06 of 19.4.2001) 2001/310/EC.

[230] Recommendation 2001/310 EC, page 3.

[231] Recommendation 2001/310 EC, page 4.

[232] *Law No. 31/86* of August 29, 1986. Published in the official journal of the Portuguese Republic, *Diàro da Republica*, series I, No. 198, August 29, 1986, pages 2259-2264. this 1986 law was completed by

States, where private organizations offer various types of arbitration services and offer their services to consumers and companies involved in consumer disputes.

Already in 1994, the *Journal of Consumer Policy* reported remarkable progress in Portuguese consumer law, following the establishment of a consumer arbitration system.[233] The inauguration of Lisbon's Arbitration Centre took place on November 20, 1989.[234] This was a pilot project aiming to increase simple access to justice.[235] An essential aspect of the pilot project: an accumulation of several services, involving legal consultation and dispute resolution. According to the director of the consumer dispute arbitration centre, Isabel Mendes Cabeçadas, this "*combination of efforts by the civil society and the municipality, through concerted action [...] has earned the trust of consumers and entrepreneurs*".[236]

With the success of the pilot project, a non-profit private organization was created in 1993. The founding members of the new association were the Lisbon City Hall, the Portuguese Consumer Defence Association (DECO) and the Union of Trade and Service Associations.[237] The establishment of this association was accompanied by the conclusion of the *Technical and Financial Cooperation Protocol* between the Ministry of Justice, the Secretaries of State for Trade and Consumer Rights, and the Lisbon City Hall. This agreement enabled the Arbitration Centre to benefit from administrative and financial autonomy.[238] This funding method also eliminated all dispute-resolution costs, including judgement execution fees.[239] It should be noted that in Quebec, before September 1995, the decision execution fees of the small claims division were defrayed by the ministère de la Justice du Québec. In the view of several analysts, the decrease in Small Claims Court proceedings initiated by consumers after that date is directly related to the increased costs of an application and to the fees consumers incur for having judgements executed[240].

As proof of the great success of the Portuguese arbitration system, in 1994 the Arbitration Centre was recognized by the government as a "*public interest non-governmental organization*"[241], and the concept has since been extended to several other Portuguese cities.

Decree No. 425/86 of December 27, 1986, published in *Diàro da Republica*, series I, No. 297, December 27, 1986, pages 3832-3833. The Decree governs the creation of arbitration centres.

[233] Isabel MENDES CABEÇADAS, *The Development of Portuguese consumer Law with Special Regard to Conflict Resolution*, in the Journal of Consumer Policy, Vol. 17, No 1, March 1994, pages 113-122.

[234] 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), [Online], http://ec.europa.eu/internal_market/finservices-retail/docs/policy/hearing-cabecadas_fr.pdf (Page consulted on January 28, 2009).

[235] *Ibid.*

[236] *Op. cit.,* note 233 (Mendes Cabeçadas), page 2. Our translation.

[237] Bob SCHMITZ, *Un exemple original: Les Centres d'Arbitrage au Portugal*, as part of the Conference of April 28, 2006 at the University of Luxembourg: *Les Règlements Alternatifs de Litiges de consommation*, [Online], http://www.eco.public.lu/salle_de_presse/evenements/2006/04/10_consommateur/Expose_Bob_Schmitz.pdf (Page consulted on January 28, 2009).

[238] *Regulation of the Arbitral Tribunal of the Consumer Dispute Arbitration Centre*, Sec. 3, [Online], http://www.mj.gov.pt/CACCL/sections/pt/apresentacao5510/regulamento/regulamento478 (Page consulted on January 28, 2009).

[239] *Decree-Law No. 103/91* of March 8, 1991 establishing the waiver of provisional costs and of expenses incurred in executing sentences handed down by the Arbitral Tribunal.

[240] Stéphane, DUSSAULT. *Les gros clients des petites créances*, Montreal, Protégez-vous magazine (Mach 2003), page 30, [Online], http://www.protegez-vous.org/pages/pdf/AnciensPDF/pdf/20030327.pdf (Page consulted on February 16, 2009).

[241] *Op. cit.,* note 233 (Mendes Cabeçadas), page 3.

The following paragraphs will provide a better understanding of the operation of Portuguese Consumer Arbitration Centres, and of the measures adopted to ensure the observance of essential guarantees and enable the Centre to benefit from the trust of consumers and companies alike.

The creation of consumer arbitration centres is governed by the *Voluntary Arbitration Act.*[242] The Centre's primary goal is to "*promote the resolution of small consumer disputes and to handle claims by means of information, mediation, conciliation and arbitration*".[243] The Arbitration Centres exercise their authority over disputes involving the acquisition of goods and services in companies located in a given city, municipality or region. The Arbitration Centres only hear disputes of less than €5,000[244] (about CA$8,000).

Two essential services are offered there – the legal service and the Arbitration Tribunal.[245] First, the legal service, provided by six full-time legal officers[246], directly meets with consumers who decide to avail themselves of the Centre's services. Once the legal officers have taken cognizance of the dispute, they inform the consumers of their rights and recourses and guide them regarding their eventual claim, which will begin by submitting the dispute to an alternative dispute-resolution method. It should be noted that while the process is voluntary for the consumer, it is mandatory for all companies that subscribe to the Centre's services[247]. At the stage of consumer information, the legal service also conducts a mediation session with the company. In the event that the parties cannot arrive at an agreement, the file is forwarded to the conciliation stage. Conciliation is conducted by the Arbitration Centre's legal officers. If conciliation works, the resulting agreement is submitted to an arbitrator-judge for certification.[248] If the conciliation process fails, the parties may submit their dispute to the Arbitration Tribunal.

Since this is an extrajudicial process aiming to facilitate access to justice and bypass the obstacles facing consumers during legal proceedings, the procedure is simplified, while respecting the principles of fundamental justice. First, the Arbitration Tribunal is formed by a single arbitrator who is a magistrate named by the Superior Judicial Council.[249] An arbitrator-judge is named to increase the tribunal's independence and impartiality, and to strengthen the parties' trust in the system in place. The arbitrator-judge renders an arbitral decision depending on the laws in effect or, if he obtains the parties' prior approval, a fairness decision.[250]

We will briefly describe the other means adopted by the Arbitration Centre to respect essential guarantees. In line with the principle of adversary debate, the Centre's regulation states that the party against whom a claim has been filed receives a copy of it and may contest it in writing or verbally before the arbitrator-judge.[251] Article 11 of the regulation also provides for the parties to call a maximum of three witnesses, who can introduce any legally admissible evidence.[252] The arbitrator may, at his discretion or at the request of either party, request the filing of documents,

[242] *Op. cit.,* note 232 (*Law No. 31/86* of August 29, 1986).
[243] *Regulation of the Arbitral Tribunal of the Consumer Dispute Arbitration Centre*, Art. 1, [Online], http://www.mj.gov.pt/CACCL/sections/pt/apresentacao5510/regulamento/regulamento478 (Page consulted on January 28, 2009). Our translation.
[244] *Regulation of the Arbitral Tribunal of the Consumer Dispute Arbitration Centre*, Sec. 5, par. 1.
[245] *Regulation of the Arbitral Tribunal of the Consumer Dispute Arbitration Centre,* Sec. 3.
[246] *Op. cit.,* note 237 (SCHMITZ).
[247] *Regulation of the Arbitral Tribunal of the Consumer Dispute Arbitration Centre,* Sec. 6, par. 1 and 2.
[248] *Regulation of the Arbitral Tribunal of the Consumer Dispute Arbitration Centre,* Sec. 10, par. 1 and 2.
[249] *Regulation of the Arbitral Tribunal of the Consumer Dispute Arbitration Centre,* Sec. 8.
[250] *Regulation of the Arbitral Tribunal of the Consumer Dispute Arbitration Centre,* Sec. 13.
[251] *Regulation of the Arbitral Tribunal of the Consumer Dispute Arbitration Centre,* Sec. 11.
[252] *Regulation of the Arbitral Tribunal of the Consumer Dispute Arbitration Centre,* Sec. 12.

name an expert or hear other witnesses.[253] Observance of the principle of transparency being fundamental to the Arbitration Centre's credibility, the Centre regularly publishes information in newspapers, as well as an annual report of its activities.[254] The Centre's arbitral decisions are also published.[255]

It is not mandatory for the parties to represented by counsel, so that dispute-related costs are kept as low as possible. But as stipulated is section 18 of the Regulation, the parties may name another person to represent them, such as an organization representing their interests. Since the Centre aims to apply the principle of effectiveness, arbitration decisions have the same value as decisions by a court of first instance[256], without it being necessary to certify them to proceed to their execution; section 20 of the Regulation states that in view of the implementation of an arbitration decision, the latter is deemed to correspond to that of a court of first instance. The effectiveness of the arbitration system depends on the duration of the Centre's arbitration process. Isabel Mendes, the Centre's director, reports that "*the time between the Centre's cognizance of the affair and its resolution is thirty to forty days*".[257]

The Centre also adopts the principle of equality: During the arbitration process, a status of substantive and not simply formal equality is guaranteed to the parties.[258] The Centre insists on the process' voluntary nature; it is essential that consumers be adequately informed of the arbitration process and the binding character of decisions before they agree to submit their dispute to arbitration.[259] Finally, the Centre promotes the principle of material truth, founded on "*the proximity of the judge to the parties and the suppression of procedural formalities that detract at times from an appreciation of the facts*". [260]

The system established by the various Portuguese levels of government, consumer organizations and company representatives thus emphasizes respect for the principles of natural justice, and deems them essential to the adequate operation of a consumer arbitration system. Companies that fully subscribe[261] to these services can use the Centre's logo on their premises and are entered on a published list[262]. Using the logo assures consumers that in case of an eventual conflict, the merchant will agree, if the consumer wishes it, to submit to this dispute-resolution method.

The Centre's statistics eloquently describe the success of consumer arbitration in Portugal: as of July 31, 2007, 3,469 companies from the Lisbon area had subscribed to the Centre. Since its opening, 10,861 consumer disputes have been settled in this manner, and 3,265 have resulted in an arbitral award. The Centre has also responded to 38,369 requests for information. In 2006 alone, there were 2,191 requests for information, the arbitration of 976 consumer disputes and the resolution of 887 of them, including 217 settled by an arbitral award.[263]

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[253] *Ibid.*
[254] *Op. cit.,* note 233 (Mendes Cabeçadas), p. 4.
[255] Available on the website of the Arbitration Centre, [Online], http://www.mj.gov.pt/CACCL/sections/pt/jurisprudencia (January 29, 2009)
[256] *Regulation of the Arbitral Tribunal of the Consumer Dispute Arbitration Centre,* Sec. 16, par. 2.
[257] *Op. cit.,* note 233 (Mendes Cabeçadas), page 5. Our translation.
[258] *Ibid.,* (Mendes Cabeçadas), p. 3.
[259] *Ibid.,* (Mendes Cabeçadas), p. 4.
[260] *Ibid.,* (Mendes Cabeçadas). Our translation.
[261] Full subscription: Companies that choose this type of subscription agree to submit all their present and future disputes to the arbitration offered by the Centre.
[262] Sec. 6, par. 5, *Regulation of the Arbitral Tribunal of the Consumer Dispute Arbitration Centre.*
[263] *Op. cit.,* note 233 (Mendes Cabeçadas), p.5.

To ground all the measures adopted by the Lisbon Consumer Dispute Arbitration Centre that aim to ensure the observance of essential guarantees, the Centre upholds the following fundamental principles: equality of the parties; the adversarial nature and verbal exchange; representation; independence and impartiality; transparency; effectiveness; legality; freedom; material truth.[264]

[264] *Op. cit.,* note 233 (Mendes Cabeçadas), p. 4.

CONCLUSIONS AND RECOMMENDATIONS: IN SEARCH OF EFFECTIVE, FAIR AND IMPARTIAL CANADIAN CONSUMER ARBITRATION

The purpose of the present study was to identify essential guarantees of an arbitration system that would be fair to consumers; to verify the observance of those essential guarantees by certain organizations currently offering consumer arbitration; and to define, theoretically as well as practically, the pros and cons, for consumers, of consumer arbitration.

Our study also aimed to define the necessary parameters and legal principles that an arbitration system must apply in order to ensure respect for guarantees deemed essential, and to offer consumers an effective alternative to the legal system.

As we have seen, arbitration has, in principle, many advantages over legal systems: speed, flexibility, confidentiality, cost reduction, arbitrator expertise. The simple fact that this type of dispute resolution holds such an important place, in international and trade relations as well as in labour relations, should suffice to prove its effectiveness.

However, it must be recognized that, as soon as an attempt is made to apply it to consumer affairs, arbitration appears to lose much of its lustre from the consumer's viewpoint: The costs prove higher than in some legal proceedings; the confidentiality of the process and decisions presents a disadvantage, in depriving the consumer of information that would be essential for taking advantage of this process; the arbitrator's expertise in rendering decisions is based on aspects of which the consumer has never been informed; etc. The absence of guarantees as to the observance of certain principles of natural justice is also of concern. The "repeat player effect" phenomenon, whose consequences are no longer in doubt, makes one question the application of principles that should be the very foundation of any process to render justice: transparency, independence, impartiality, etc.

Is it conceivable that arbitration could be applied in consumer affairs to preserve its strong innate advantages, while correcting or limiting aspects that – rather than making it an additional tool for gaining access to justice – accentuate the manifest imbalance of power between consumers and merchants?

The possibility of having consumer disputes arbitrated is supposedly an opportunity to give the consumer greater access to justice. So to ensure that the consumer benefits from all the guarantees offered by the legal proceedings to which it is supposed to be an alternative, should arbitration not be integrated – like mediation and conciliation – to a broadened justice system offering dispute-resolution alternatives? Our analysis of foreign consumer arbitration systems reveals that an adequate consumer arbitration system is not impossible. Of course, necessary benchmarks first have to be identified and put in place to ensure that the system meets expectations.

I. THE MODEL ORGANIZATION AND ITS FEATURES

A. Funding

In interviews with consumer organizations, and in our review of the literature, we have observed that the arbitration systems in place and supported by a given industry raised serious concerns about the actual independence of decision-makers, and thus about the impartiality of consumer arbitration.

Given that consumer arbitration is intended as an adequate alternative to court proceedings, the consumer dispute arbitration system should ideally be integrated to the justice system, and administered by provincial Justice Departments.

Government control of consumer arbitration funding and organization removes doubts as to the impartiality of an arbitration system or of the arbitrator himself. The experience of Portuguese Consumer Dispute Arbitration Centres, which have adopted this formula and entailed the adhesion of consumers as well as companies, indicates the path to follow.

B. Extrajudicial recourse and complementary services

As mentioned above, access to justice should also include the access of consumers to information on their rights and recourses, and on the various dispute-resolution methods proposed to them. Like the other bodies created to facilitate access to justice according to the needs and realities of certain cases (small claims divisions, mediation and conciliation services), a consumer dispute arbitration system should, to fulfil its role adequately, assist consumers by providing them with useful and complete arbitration information and relevant legal assistance. These complementary services would enable consumers to have a better knowledge of the arbitration tribunal's operation, in order to make an informed choice of this alternative over the legal process. In addition, by providing the consumer with necessary assistance for adequately preparing his case, they would mitigate the advantages given to merchants by the "repeat player effect".

By centralizing the legal system and the dispute-resolution system, the consumer dispute arbitration system would make it possible to settle disputes simply, quickly and effectively.

C. The voluntary nature of arbitration

Like the other dispute-settlement methods said to be alternative (mediation, conciliation), the decision to go to arbitration rather than the courts results in principle from an agreement freely entered into between the parties.

In consumer affairs, the arbitration clauses integrated to adhesion contracts contravene this principle. It can easily be assumed that if companies thereby impose arbitration on consumers, the reason is the paucity of arguments that could convince consumers that they would benefit from such arbitration. Given that arbitration should favour access to justice, it is strange that arbitration clauses are used to restrict it, by prohibiting individual or collective recourse to the courts, and even class actions. To better protect consumers, some provinces have decided to prohibit arbitration clauses in consumer contracts; the legislators of provinces that have not followed this example would be well advised to do so.

An arbitration system that would be to their benefit and offer them the same protections as those of the legal system, but faster and at lower cost, should suffice to ensure the popularity and credibility of this type of process. Consumers, without being forced to use it, would likely consider it as a very attractive option.

Portugal has made the choice of imposing arbitration only to companies that have accepted the consumer's choice beforehand; those companies demonstrate to consumers their adhesion to the arbitration system by displaying a logo to that effect. This process has proven successful, with a relatively high adhesion rate. We think that left to companies, this choice unduly complicates management of this dispute-resolution method. Worse, the consumer can settle by arbitration only those disputes with a company that has indicated beforehand its acceptance of arbitration. So even before entering into a contract, the consumer has to agree to settle an eventual dispute by arbitration, although he is ignorant of the ins and outs of such arbitration.

The legislators have also decided to impose, in some fields, recourse to certain dispute-resolution methods whose choice should in principle result from an agreement between the parties: For instance, mediation is often imposed in marital cases, and arbitration in labour affairs. Likewise, the arbitration process has been imposed for disputes under the Guarantee Plan for New Residential Buildings. If an arbitration system were integrated to a justice system favouring consumer access, the tribunal that would be used for consumer disputes would likely become the venue where all parties should settle such disputes.

D. Consumer arbitration costs

While one of the main advantages of arbitration is monetary, it offers the consumer an acceptable alternative recourse only if related costs are lower than those of other recourses, notably small claims courts.

Our research demonstrates that no arbitration system available in Canada sufficiently guarantees a cost advantage. To ensure the accessibility of consumer arbitration, the latter should ideally be free of charge to the consumer; if fees are charged, they should in no case exceed those of other venues set up to facilitate access to justice (small claims courts, Régie du logement).

For consumer arbitration to be economically accessible and advantageous, it is not sufficient that it be free of charge (or low cost) in theory alone. For instance, the fees for certifying an arbitral award to make it effective should be eliminated. If an arbitration system were integrated to a justice system, arbitral awards should be legally effective. If the consumer wins his case, execution costs should also be defrayed by the arbitration system. Indeed, experience has shown that the consumer's obligation to bear execution costs is a barrier to remedies made available to him.

E. The jurisdiction of the arbitration system

To prevent clogging a consumer dispute-resolution venue, legislators might consider imposing certain limits, notably regarding the maximum eligible amount or the type of disputes under the jurisdiction of said venue. First, it might be considered reasonable for the jurisdiction to match that of small claims courts with regard to the amounts in dispute. Legislators could also provide for maximum amounts, which would vary according to certain pre-established consumer sectors. Such an approach would reconcile those adopted in Portugal, for example, which

imposes a financial limit, and by the Guarantee Plan for New Residential Buildings, which limits access to a given sector.

F. Accessibility

"*Making laws is not sufficient to protect consumers; they must be given adequate means to defend those rights that, in practice, risk becoming a 'dead letter'*"[265].

In the course of our research, we observed the difficulties that could be posed by the location of arbitration. In Quebec, whether in dispute arbitration related to the Guarantee Plan for New Residential Buildings or in arbitration offered by one of the arbitration organizations listed, a consumer who goes to arbitration must travel to major urban centres or pay additional costs, such as the room rental and the arbitrator's travel and accommodation expenses.

The consumer may have greater legal protection measures and multiple recourses, but if effective means to exercise his rights are not put in place, those measures don't facilitate access to justice. In that vein, arbitration locations should be as accessible as possible. Grouping those services with legal services, in each courthouse, would have the double advantage of favouring accessibility and reinforcing the credibility of the process by linking it physically to the courtroom locations.

[265] See BORREGO, opening session, in III European Conference on Consumer Access to Justice, Lisbon, May 21-23, 1992. Our translation.

II. RESPECT FOR ESSENTIAL GUARANTEES

To be a viable alternative to legal proceedings, arbitration must offer the same guarantees as any process intended to ensure that justice is done. Therefore, the following must be scrupulously respected and guaranteed: the right to be heard, procedural fairness, impartiality, and the independence and transparency of the process and decision-makers.

An adequate consumer arbitration system must be governed by a set of mandatory procedural rules for guaranteeing its impartiality, independence, and observance of rules of fundamental justice.

A. The code of ethics and respect for essential guarantees

The arbitrators are guardians of essential guarantees during the hearing and prior procedures. To ensure the observance of essential guarantees and the implementation of measures ensuring their observance, a Code of Ethics that sets forth the obligations and duties of arbitrators may prove a valuable tool; some of the bodies we have studied have adopted such codes. In tandem to developing a Code of Ethics, the establishment of a control system that aims to ensure the application and respect of the rules therein is essential, as well as a complaint system that enables users to report observed shortcomings. Indeed, a Code, however complete, will have no effect unless it is correctly applied. Our study raises reasonable doubts about the application of ethics rules adopted by private arbitration organizations, and reveals shortcomings in variance monitoring and reporting even in government-controlled organizations.

The integration of an arbitration system in the state's justice system would eliminate these problems or concerns. With the obligation to report directly to government, arbitration systems and decision-makers would be subject, as are other decision-makers whose mandate is set by law, to precise and uniform rules, and the control systems already in place could be applied to those systems.

B. Impartiality and independence

The arbitration system and arbitrators assigned to render decisions obviously must be totally independent from the parties that call upon them, and must demonstrate impartiality. It is equally important that this independence and impartiality be clearly apparent to everyone.

The arbitrators and arbitration system put in place must be independent and of course have no interest in arbitrated cases. If the arbitrators' livelihood or the financial health of the arbitration organization depend on the decisions taken, there is a high risk that the decision-maker's interest influenced those decisions.

To ensure that impartiality and allow it to be displayed openly, the consumer arbitration system contemplated must therefore benefit from administrative and financial independence. This is why government funding, as well as developing rules and verifying their observance, appear preferable to us, and why we exclude from the outset any possibility of industry control, whether practical, effective or presumed.

The process of naming and providing a framework for arbitrators must inspire the trust of consumers as well as companies. Decision-makers must be free of any direct or indirect relation to or interest in the disputes they hear. They must receive their mandate from an organization that shows the same independence.

Portugal has chosen to select arbitrator-judges from members of the judiciary; the criteria for their accession to the judiciary, and their duties, offer additional guarantees of independence, impartiality and accountability. The arbitrator's expertise being one of the advantages usually recognized in arbitration, recourse to arbitrators who, rather than legal training, have a certain expertise in a given consumer area, might also be considered. This choice raises some reservations: The experts might not have the necessary objectivity or reflexes to arbitrate disputes opposing parties of very unequal power who also don't have legal expertise. As Gil Rémillard noted with humour: "[...] We know that the arbitrators' expertise obviously doesn't prevent recourse to expert witnesses, and that in some cases, it's better to have a judge who can have a certain objectivity than an arbitrator too limited by his scientific knowledge to be open to the realities of the dispute. We know the old principle that "you don't have to lay an egg to know what the omelette tastes like."[266]

Whatever the selection or nomination system considered, the same criteria of independence, impartiality and accountability must apply; it is also important to assure the arbitrators of a certain irremovability, to guarantee that their position does not depend on their decisions.

C. The right to be heard

Because this right constitutes the cornerstone of the principles of natural justice, it is essential that consumer dispute arbitration allow the parties to be heard by the arbitrator who will adjudicate their dispute.

Abundant jurisprudence has focused over the years on the content of this right to be heard, and has concluded that, beyond certain basic rules, applying this right will vary according to the venues, files, disputes, parties... It should be remembered that arbitration must remain a flexible process and give the arbitrator a certain discretion in applying the rules. Still, the parties must have a legal right to have their arguments heard and know the arguments or evidence that the decision-makers are likely to retain. As we have seen, the "repeat player effect" and the specialization of arbitrators put those rights at risk.

The decision-maker must therefore see to it that the parties have equal opportunity to submit their evidence and present their position, in the manner most apt to favour a less restrictive process (documentary proof or teleconferences, for example). So that consumers are informed of all relevant aspects of the decision-making, it would be wise to compel disclosure of any item of evidence that the decision-maker might deem relevant, to give the consumer an opportunity to reply to it.

To ensure the transparency of the process and the consumer's opportunity to know his rights well and thus be heard adequately, the rules for applying the right to be heard should be express and explicit and be communicated to the consumer who would consider submitting his dispute to arbitration.

D. Procedural fairness

During arbitration, the parties must benefit from fair treatment at all times. While the basis for this rule is incontrovertible, the restrictions imposed by the obligation of procedural fairness also vary depending on the venues and types of cases that the decision-maker will have to adjudicate. Although the flexibility of the process requires a less strict application of certain

[266] *Op. cit.,* note 61 (Rémillard), page 4.

procedural rules, it is important that the parties have the same information about the procedures to be followed, the evidence to be submitted, etc.

Any arbitral award must be justified; rules could require its justification to be written and transmitted to the parties in time to ensure the effectiveness and speed of the system.

The establishment of rules for the arbitration process and the decisions rendered is a matter of rigour and transparency. It would strengthen the trust of consumers while lessening any suspicion of arbitrariness, and would make it easier to verify the conformance of the process and the arbitration decisions. Rules of procedural fairness should be express and explicit and be communicated to the consumer.

E. Transparency

Transparency is a key aspect of our justice system. In addition to giving everyone the opportunity to know the legal situation, this transparency enables everyone to see that justice is done.

As mentioned above, companies have much more to gain from the confidentiality of the process and of arbitration decisions than consumers, taken individually or collectively. Not only will a transparent system earn the trust of the parties involved in consumer arbitration, but it will also enable consumers to find out about the trends regarding certain types of disputes, and the aspects that had an influence on their outcome, while mitigating the “repeat player effect” and establishing, as a justice system must, a certain balance between the parties.

An arbitration decision that is justified and rendered in writing increases transparency and enables verification of the observance of essential guarantees; publication of arbitration decisions rendered by the organization also improves transparency, and constitutes a pool of decisions that enables the public and the decision-makers to know the general orientation that the treatment of certain disputes may take. This knowledge alone is likely to prevent some disputes from persisting and to settle more quickly the cases that go forward.

III. A BODY DEDICATED TO CONSUMER DISPUTES

As we have seen, the advantages generally associated with arbitration are: speed, flexibility, confidentiality, cost reduction, and the arbitrator's expertise.

We have analysed each of these advantages, and reached findings on necessary adjustments to them, in a process where the unequal strength of the parties is striking. The purpose of our analysis is to make consumer arbitration an acceptable process for consumers. This leads us to consider a venue that is quite removed from the arbitration venues we have studied.

Government management and administration, publicizing the decisions, respect for essential guarantees, naming legal officers as arbitrators or arbitrator-judges, and establishing a system quite similar to the court system lead us to conclude as follows. Given the imbalance of power between consumers and companies, and to ensure respect for essential guarantees while establishing an acceptable balance of power, it is necessary to impose benchmarks similar to those of the court system. However, the many requirements we think essential remove from this dispute-resolution method many of the features that are attractive to companies.

Our study leads us to the conclusion that arbitration, with its specific features and the advantages that make it a dispute-resolution method that is beneficial to parties in a trade or international dispute, cannot be imported as is to consumer disputes. A case-by-case study of those features, and an examination of the adjustments that would make arbitration an acceptable – i.e., effective and fair – consumer dispute-resolution method, lead us to conclude otherwise. In our view, the process that should be established would resemble, much more than current arbitration processes do, the courts of law (such as small claims courts) made available to consumers across Canada for settling cases where small amounts are in dispute.

Besides, we must recognize that so-called arbitration systems established abroad have also strayed far from arbitration *stricto sensu*. Whether it is the Spanish consumer arbitration system, the Portuguese dispute arbitration tribunals, or the Argentine consumer arbitration system, an examination of them shows that those systems don't correspond to the traditional definition of arbitration, since they often have few of the features of arbitration and are much more similar to courts of law.

This finding should not be surprising. As Élodie Lachambre aptly explains:

> "*The organization of a specific arbitration proceeding governed by consumer law undoubtedly risks distorting the institution. If arbitration is organized by the public authorities, it will appear as a complementary dispute-resolution method, and no longer as an alternative method. Rather than multiplying related proceedings more or less successfully, would it not be better to resolve the problems of existing proceedings? While arbitration is currently organized by private organizations on a volunteer basis, to institutionalize it runs the opposite risk of overwhelming a proceeding whose effectiveness and swiftness suffer more and more from time-consuming remedies. 'Arbitration would no doubt lose its credibility in wanting to spread everywhere*'."[267]

[267] *Op. cit.,* note 176 (Lachambre), page 55, quoting P. Delebecque, *Arbitrage et droit de la consommation*, in Nouvelles perspectives en matière d'arbitrage, Droit et patrimoine n°104, May 2002. Our translation.

What would then be the advantage of this new body intended for consumer disputes, and what specific aspects of arbitration would it retain? What would differentiate such a consumer tribunal from the courts of law?

If alternative dispute-resolution methods are sought, it is evidently because the legal system as currently organized doesn't meet the specific needs involved in consumer disputes. Establishing a Consumer Tribunal as a true judicial tribunal responsible for adjudicating consumer disputes, while correcting the balance of power between consumers and companies and observing essential guarantees, would thus modernize an obsolete judicial system and improve consumers' access to justice. The various features borrowed from arbitration, and inspired by foreign arbitration systems established for the same purpose, would make this new body likely to ensure necessary speed and flexibility, along with the decision-maker's expertise, at minimal cost to the consumer.

In the light of the above, Union des consommateurs submits the following recommendations:

RECOMMENDATIONS

Whereas all dispute-resolution methods provided to consumers must provide certain essential guarantees: the right to be heard, procedural fairness, impartiality, independence and transparency;

Whereas there is a great disparity between consumers' economic interest in consumer disputes and the efforts they must invest in the process;

Whereas it is important to develop new avenues of access to justice regarding consumer disputes;

Whereas the advantages of arbitration do not materialize unless the parties to it are of equal strength and have equivalent resources and expertise;

Whereas there is in consumer affairs an imbalance of power between consumer and merchant;

Whereas the arbitration services offered by private organizations in Canada are in no way suited for consumer disputes;

Whereas alternative dispute-resolution methods such as arbitration, although they are likely to favour consumers' access to justice, must, to ensure the observance of essential guarantees, be regulated by procedural benchmarks similar to those prevailing in courts of law;

Whereas it is impossible to counter, in consumer affairs, the negative effects of certain arbitration characteristics;

Whereas it appears impossible to transpose, without substantial modifications, traditional arbitration processes to consumer disputes;

Whereas the substantial modifications that should be made to arbitration to adapt it to consumer arbitration have the effect of distorting its nature;

Whereas taking into consideration some of the intended advantages of arbitration (speed, flexibility, the decision-maker's expertise, minimal costs) should lead to the establishment of a dispute-resolution method adapted to consumer disputes;

Union des consommateurs recommends:

- That provincial governments proceed to establish a body specializing in handling consumer disputes;

Whereas the imbalance of power between consumers and merchants is largely based on the disproportion between the information resources they have regarding their rights and obligations, the procedures followed by a given body, the nature of required evidence, the trends of past decisions on a given issue, etc.;

Whereas the arbitration services and awards currently offered by private Canadian arbitration organizations are confidential;

Whereas this confidentiality disadvantages consumers in relation to those who often use this dispute-resolution method or who often do business with the same arbitration centre or arbitrator;

Whereas the confidentiality of the process and decisions considerably limits the possibility of verifying the observance of essential guarantees;

Union des consommateurs recommends:

- That a Consumer Tribunal be established;
- That such a Consumer Tribunal make available to justiciables the legal services of lawyers who will work there full-time and will provide justiciables not only with legal information on their rights and remedies and the preparation of their case, but also with information on the operation of the Consumer Tribunal;
- That the decisions of this Tribunal be published and presented so that consumers may be easily informed of the interpretation previously given to contracts similar to theirs and of the treatment reserved for certain types of consumer cases or issues;

Whereas access to justice depends on access to the bodies responsible for rendering justice;

Whereas consumer dispute arbitration currently offered in Canada is available only in large urban centres;

Whereas the private arbitration of consumer disputes that is offered to consumers may entail substantial fees;

Whereas arbitration according to the Guarantee Plans and CAMVAP is free of charge to the consumer at the application stage;

Whereas the amounts involved in consumer contract disputes are at times very modest;

Whereas consumer contracts may also involve substantial amounts;

Whereas consumer disputes are an area where poor access to justice has often been observed;

Union des consommateurs recommends:

- That recourse to the Consumer Tribunal be entirely free of charge to consumers. Services should be guaranteed free of charge to consumers, for filing the claim, processing it and executing the decision;
- That the services of the Consumer Tribunal be offered in each courthouse on the provincial territory in order to give greater access to consumers;
- That the relevance of imposing conditions on access to the Consumer Tribunal be evaluated, conditions that might be inspired by those adopted for the small claims divisions of each province (limit to the monetary value of disputes over which the Tribunal would have jurisdiction, quality of the parties, limit to the access on demand of certain companies, etc.).

Whereas the establishment of a Consumer Tribunal would aim to improve access and guarantee more-effective handling of consumer disputes;

Whereas certain bodies have the exclusive mandate of handling particular consumer disputes;

Whereas it might be relevant to group under the same roof the processing of all consumer cases;

Whereas experience has shown that disputes could be settled by communication between the parties as part of conciliation or mediation;

Union des consommateurs recommends:

- That a conciliation and mediation service be offered by the Consumer Tribunal, prior to hearing a case;
- That under the jurisdiction of the Consumer Tribunal be included consumer dispute arbitration systems such as CAMVAP, and the arbitration of disputes related to Quebec's Guarantee Plan for New Residential Buildings;
- That rules be established for the parties' right to representation by counsel, to maintain fairness and balance between the parties, as well as the effectiveness of the Consumer Tribunal;

Whereas the technical expertise of decision-makers might present certain advantages in consumer disputes and improve the effectiveness of the Consumer Tribunal;

Whereas a decision-maker's mastery of legal knowledge may be important for adjudicating disputes raising legal issues;

Union des consommateurs recommends:

- That the possibility be considered of constituting a pool of decision-makers formed by legal officers and experts in various consumer areas, to whom cases would be assigned by a dispatching judge according to the needs of each case;

Until the establishment of such a Consumer Tribunal:

Whereas companies are making ever-greater use of arbitration clauses in their consumer contracts;

Whereas arbitration clauses are unfair, in reserving to companies the possibility of recourse to courts of law for their legal claims, while consumers have to submit all their disputes to arbitration;

Whereas arbitration clauses also require the consumer's waiver to initiate or participate in a class action against the company, and reduce consumer access to justice;

Whereas the legislators of certain Canadian provinces have decided to prohibit arbitration clauses in certain consumer contracts;

Whereas consumers in provinces that have not adopted such a prohibition may be compelled to submit their consumer disputes to arbitration and waive the right to initiate or participate in a class action;

Whereas the prohibition required by certain Canadian legislators does not cover all consumer contracts;

Union des consommateurs recommends:

- That Canadian provinces that have not done so adopt legislative provisions prohibiting arbitration clauses in any consumer contract;

Whereas the present study lays the foundations for what should be taken into consideration for establishing Consumer Tribunals;

Whereas the feasibility study for establishing such Tribunals remains to be done;

Whereas each province should ensure the harmonization of such a body with its specific rules and justice system;

Whereas consumer associations are able to recognize the scope of problems encountered by consumers in their legal claims before the courts;

Whereas particular expertise is necessary for establishing a Consumer Tribunal responding to the specifics of consumer disputes;

Whereas consumer associations have the necessary expertise for disseminating the necessary consumer rights information to the public;

Union des consommateurs recommends:

- That Canadian provincial governments form independent expert committees assigned to develop, in collaboration with Justice Departments, necessary criteria for establishing in each province a Consumer Tribunal responding to the specific needs and features of consumer disputes;
- That national consumer rights associations, notably, be invited to participate in those committees;

- That governments make sufficient resources available to consumer representatives to ensure their adequate participation in those committees and their work.

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ANNEX 1: CANADIAN ARBITRATION ORGANIZATIONS

ORGANIZATIONS	FEES AND EXPENSES	CODE OF ETHICS	ESSENTIAL GUARANTEES
1. **CANADIAN COMMERCIAL ARBITRATION CENTRE (CCAC)** - Non-profit	a. **General Bipartite Arbitration:**[268] - Dispute of $1,000 to $50,000: Administrative fees of 3% Min. of $600 and Max. of $1,500 - Dispute of $50,000 to $200,000: $1,500 + 2% of amount exceeding $50,000 - Dispute of $200,000 to $1 million: $4,500 + 1% of amount exceeding $200,000 - Dispute of $1 million to $10 million: $12,500 + ½% of amount exceeding $1 million b. **Expedited Arbitral Proceedings:** (File of less than $50,000 requiring a day of hearings of 7 hours or less) - The Centre's administrative fees (non-refundable): $600 - Arbitrator's fees (excluding travel and accommodation fees): $900 to $2,000 - Other fees: Room, faxes, messaging, etc. - Postponement of hearing: $225 - Fee for extending the hearing: $175 per party. c. Others: - Withdrawal: administrative fee of $75 + fees of $75 if before the hearing date is scheduled, or of $175 after the hearing date is scheduled. - Allocation: distances greater than a radius of 80 km of the business address: 50% of the hourly rate for the arbitrators. - Travel and accommodations: Guidelines of the Conseil du Trésor for travel and accommodation expenses are applicable.	- *Code of Ethics*	- **Article 2 -** Honesty, integrity, impartiality, a general knowledge in terms of guarantee plan and a training in law or a professional training in the fields related to questions raised by arbitration are essential qualities required from any arbitrator. -**Article 3 -** The arbitrator must act in an impartial and objective manner. He must be free of any tie towards the parties. **-Article 6 -** The arbitrator must act with dignity, maintain the integrity of his function and demonstrate necessary reserve. - No publication of its decisions.
2. **INSTITUT DE MÉDIATION ET D'ARBITRAGE DU QUÉBEC** - Private non-profit organization	- The IMAQ offers no institutional arbitration services, so no fees are posted on its website. The IMAQ provides only a forum giving access to a list of arbitrators offering their services. There are only annual registration fees, which are posted for individuals, organizations and companies wanting to become IMAQ members.	- The *Code d'éthique des arbitres* was being developed as the present grid was being written. - *Code of Ethics*	-Art. 2 of the *Code de déontologie:* Obligation de maintien de l'intégrité et de l'équité procédurale -Art. 7 of the *Code de déontologie*: Obligation de mener tous les débats de façon juste et diligente, en faisant preuve d'indépendance et d'impartialité. -Art. 5 of the *Code de déontologie:* Obligation du membre de révéler tout intérêt ou relation pouvant influer sur l'impartialité ou créer une apparence de partialité ou de parti pris. - No publication of its decisions and no annual report.

[268] We have omitted the fees and expenses for the arbitration proceeding specializing in disputes between IDA or the Montreal Stock Exchange and their clients, as well as the arbitration fees and expenses under the Regulation respecting the Guarantee Plan for New Residential Buildings. Source of the rates: schedule of the centre's administrative fees, available [Online] http://www.ccac-adr.org/en/tarifs.php. (Page consulted on February 3, 2009).

3. **ADR INSTITUTE OF CANADA** [269] - Non-profit organization	a. **Administrative Fees:** [270] - Claim of $0 to $10,000: Initial fee of $300 and no administrative fees. - Claim above $10,000 to $75,000: Initial fee of $350 and no administrative fee. - Claim above $75,000$ to $150,000: Initial fee of $750 and administrative fee of $250. - Claim above $150,000 to $500,000: Initial fee of 1 000$ and administrative fee of 500$. - Claim above $500,000 to $5 million: Initial fee of $3,000 and administrative fee of $2,000. - Claim above $5 million: Initial fee of $4,000$ and administrative fee of $3,000.	-*Code of Ethics* - *National Arbitration Rules*	- Rule 16 *National Arbitration Rules:* 16. **Independence and Impartiality** (a) Unless otherwise agreed by the parties an Arbitrator shall be and remain at all times wholly independent. (b) An Arbitrator shall be and remain wholly impartial and shall not act as an advocate for any party to the arbitration. (c) Every person must, before accepting an appointment as Arbitrator, sign and deliver to the parties a statement declaring that he or she knows of no circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality and that he or she will disclose any such circumstances to the parties if they should arise after that time and before the arbitration is concluded. No Arbitrator shall be disqualified or subject to challenge by reason of one or more of the Arbitrator, counsel, party or representative of a party being a member, officer or director of the Institute. - Rule 23 *National Arbitration Rules:* 23. **Conduct of the Arbitration** (b) Each party shall be treated fairly and shall be given a fair opportunity to present its case. -*Code of Ethics* **Art. 3:** A member shall uphold the integrity and fairness of the arbitration and mediation process. **Art.7**: A member, in communication with the parties, shall avoid impropriety or the appearance of impropriety. **art. 8:** A member shall conduct all proceedings fairly and diligently, exhibiting independence and impartiality. - No publication of its decisions and no annual report.

[269] It should be noted that the ADR Institute has no regional office in Quebec. It has other affiliates elsewhere in Canada, such as the Alberta Arbitration & Mediation Society [Online] http://www.aams.ab.ca/
Arbitration & Mediation Institute of Ontario Inc., [Online] http://www.amim.mb.ca/AMIO.html. (Page consulted on February 2, 2009) The ADR and all its affiliates have the same code of ethics.
[270] Source of the rates: *National Arbitration Rules*, Schedule "A" Arbitration Administrative Fee Schedule. Available [Online] http://www.adrcanada.ca/resources/documents/RulesasamendedOctober2008withGST.pdf (Page consulted on February 3, 2009).

4. **THE BRITISH COLUMBIA INTERNATIONAL COMMERCIAL ARBITRATION CENTRE** - Non-profit organization	a. **Commencement fee:**[271] - For claims and counterclaims up to $50,000: $500 + GST - For claims and counterclaims over $50,000 or unspecified amount: $1,500 + GST - If the commencement fee is $500 and the tribunal awards an amount in excess of $50,000, the fee is adjusted to $1,500 b. **Administration fee:** - 50 + GST per party. N.B.: This fee does not include other expenses, such as room rentals and arbitrator's fees; the latter vary in hourly rates from one arbitrator to the other.	*Domestic Commercial Arbitration: Rules of procedure.*	**13.** (1) An arbitrator shall be and remain at all times wholly independent and impartial. (2) Every person must, upon accepting an appointment as arbitrator, sign a statement declaring that he or she knows of no circumstance likely to give rise to justifiable doubts as to his or her independence or impartiality and that he or she will disclose any such circumstance to the parties should such arise after that time and before the arbitration is concluded. A copy of the statement shall be filed with the Centre and a copy provided to all parties. **19**. (1) Subject to these Rules, the arbitration tribunal may conduct the arbitration in the manner it considers appropriate but each party shall be treated fairly and shall be given full opportunity to present its case. (2) The arbitration tribunal shall strive to achieve a just, speedy and economical determination of the proceeding on its merits. - No publication of its decisions and no annual report.
5. THE CANADIAN MOTOR VEHICLE ARBITRATION PLAN (CAMVAP) - Administered by the provincial governments. - This is a voluntary consumer program.	No fees are charged to consumers. The program is funded by participating automobile manufacturers[272].	*Agreement for Arbitration*[273]	**2.1.** Arbitration means that You and the Manufacturer both agree to accept the decision of an impartial person (the Arbitrator) who will listen to both sides of the case, weigh the evidence, and make a decision that is final and binding on both You and the Manufacturer, subject to Section 12. **7.1.1** The arbitration will be conducted in accordance with the terms and procedures set out in this Agreement for Arbitration and all applicable laws in the Province or Territory in which You reside, including legislation governing arbitrations. The Arbitrator is also bound to apply the rules of natural justice, as well as, in Quebec, any rule of public order. The hearing will be conducted by the Arbitrator in the manner which is most appropriate in the circumstances. **7.7.** An important principle of arbitration under the Plan is that the Parties may not communicate with the Arbitrator except in the presence of one another. All communications to and from the Arbitrator, either before or after the hearing, must be through the Provincial Administrator who, in turn, will pass the information to the Arbitrator and to the other Party.

[271] BCICAC fees: *Domestic Commercial Arbitration Fee Schedule*, available [Online] http://www.bcicac.com/bcicac_dap_dca_fees.php (Page consulted on February 5, 2009) It should be noted that initial fees are non-refundable.

			-Publishes statistics and annual reports, but not the decisions rendered.
6. **ADR CHAMBERS** -With offices in Vancouver and Toronto, ADR Chambers offers its arbitration service across Canada.	- a. Fee for filing a request for arbitration: $500.00 non-refundable, plus a room rental fee.[274] - b. Additional administrative fee: 100 plus taxes. - c. Rental fee: If the parties decide to use the premises of ADR Chambers, there are administrative fees of $450.00 to $750.00 plus taxes per day for the hearing room.[275] If the ADR Chambers coordinator reserves another venue, there is a fee of $150.00[276] - The arbitrators set their own hourly fees. - d. Deposit: For the Western region, $4,800 to $6,000 plus taxes for each day of hearings reserved. For the Atlantic region, a deposit of $2,800 to $3,600 plus taxes for each day of hearings reserved.	*ADR Chambers Arbitration Rules*	**6. Independence and Impartiality**. a. Unless otherwise agreed by the Parties, an arbitrator shall be and remain at all times wholly independent. b. An arbitrator shall be and remain wholly impartial and shall not act as an advocate for any Party to the arbitration. […] d. Every arbitrator shall, before accepting an appointment, sign and deliver to the Parties and the Co-ordinator a statement declaring that he or she knows of no circumstances likely to give rise to a reasonable apprehension of bias and that he or she will avoid and, if necessary disclose to the Parties any such circumstances arising after that time and before the arbitration is concluded. No arbitrator shall be disqualified or subject to challenge by reason of the arbitrator or any Representative of a Party being a member, officer or director of ADR Chambers **8. Communication with arbitral Tribunal** No Party or person acting on behalf of a Party may communicate ex parte with the Arbitral Tribunal. 9.2 Any procedural hearing may take place by conference telephone call. 9.4 The Arbitral Tribunal may dispense with an oral hearing if it determines, after hearing the submissions of the Parties, that oral evidence is not necessary given the issues in dispute or not warranted given the amount in dispute.

[272] CAMVAP website. [Online] http://www.camvap.ca/eng/arb_agre.pdf (Page consulted on February 16, 2009). Sec. 13 of CAMVAP's *Agreement for Arbitration*.
[273] CAMVAP [Online] http://www.camvap.ca/eng/arb_agre.pdf (Page consulted on March 26, 2009).
[274] ADR Chambers website [Online] http://adrchambers.com/ca/arbitration/regular-arbitration/arbitration-fees/ (Page consulted on March 26, 2009).
[275] Rule 17.1 *ADR Chambers Arbitration Rules* [Online] http://adrchambers.com/ca/arbitration/regular-arbitration/arbitration-rules/ (Page consulted on March 28, 2009).
[276] Rule 17.2 *ADR Chambers Arbitration Rules.* [Online] http://adrchambers.com/ca/arbitration/regular-arbitration/arbitration-rules/ (Page consulted on April 2, 2009).

ANNEX 2: ARBITRATION ORGANIZATIONS OUTSIDE CANADA[277]

ORGANIZATIONS	FEES AND EXPENSES	CODE OF ETHICS	ESSENTIAL GUARANTEES
1. **AMERICAN ARBITRATION ASSOCIATION ® (AAA)** - Non-profit organization - This organization was the first to adopt the Consumer Due Process Protocol	a. Administrative fees: [278] These fees are based on the size of the claim and counterclaim in a dispute. b. Arbitrator fees: • For cases in which no claim exceeds $75,000, arbitrators are paid based on the type of proceeding that is used. • For arbitration without the parties' presence or by telephone conference: $250 • For in-person hearings: $750 per day. c. Fees and deposit to be paid by the consumer: • If the consumer's claim or counterclaim does not exceed $10,000, then the consumer is responsible for one-half the arbitrator's fees up to a maximum of $125 • If the consumer's claim or counterclaim is greater than $10,000, but does not exceed $75,000, then the consumer is responsible for one-half the arbitrator's fees up to a maximum of $375. • For cases in which a claim or counterclaim exceeds $75,000, arbitrators are compensated at the rates set forth on their panel biographies. d. Fees and deposit to be paid by the business: **(i) Administrative fees:** • If neither party's claim or counterclaim exceeds $10,000, the business must pay $750 and a Case Service Fee of $200 if a hearing is held. • If either party's claim or counterclaim exceeds $10,000, but does not exceed $75,000, the business must pay $950 and a Case Service Fee of $300 if a hearing is held. • If the claim exceeds $75,000 or is not quantified, the Commercial Fee Schedule applies.	*Consumer Due Process Protocol*	PRINCIPLE 1. FUNDAMENTALLY-FAIR PROCESS All parties are entitled to a fundamentally-fair ADR process. As embodiments of fundamental fairness, these Principles should be observed in structuring ADR Programs. PRINCIPLE 3. INDEPENDENT AND IMPARTIAL NEUTRAL; INDEPENDENT ADMINISTRATION 1. Independent and Impartial Neutral. All parties are entitled to a Neutral who is independent and impartial. 2. Independent Administration. If participation in mediation or arbitration is mandatory, the procedure should be administered by an Independent ADR Institution. Administrative services should include the maintenance of a panel of prospective Neutrals, facilitation of Neutral selection, collection and distribution of Neutral's fees and expenses, oversight and implementation of ADR rules and procedures, and monitoring of Neutral qualifications, performance, and adherence to pertinent rules, procedures and ethical standards. 3. Standards for Neutrals. The Independent ADR Institution should make reasonable efforts to ensure that Neutrals understand and conform to pertinent ADR rules, procedures and ethical standards. 4. Selection of Neutrals. The Consumer and Provider should have an equal voice in the selection of Neutrals in connection with a specific dispute. 5. Disclosure and Disqualification. Beginning at the time of appointment, Neutrals should be required to disclose to the Independent ADR Institution any circumstance likely to affect impartiality, including any bias or financial or personal interest which might affect the result of the ADR proceeding, or any past or present relationship or experience with the parties or their representatives, including past ADR experiences. The Independent ADR Institution should communicate any such information to the parties and other Neutrals, if any. Upon

[277] Given that several American-based companies, such as Dell, use contracts containing arbitration clauses naming American organizations such as the American Arbitration Association (AAA) and the National Arbitration Forum (NAF) as being the arbitration tribunal to which will be submitted any eventual dispute between the consumer and the merchant, we deemed it appropriate to make a brief study of those organizations.

[278] Available on the AAA's website, [Online] http://www.adr.org/sp.asp?id=29466 (Page consulted on March 26, 2009).

ORGANIZATIONS	FEES AND EXPENSES	CODE OF ETHICS	ESSENTIAL GUARANTEES
	(ii) Arbitrator fees: • The business must pay for all arbitrator compensation deposits beyond those that are the responsibility of the consumer. e. Waiver of premium: If a party has an annual gross income corresponding to less than 200% of U.S. federal poverty guidelines, it may benefit from a fee waiver or deferral. f. Service Pro Bono: This is possible in cases where an individual might otherwise be financially unable to pursue his or her rights in the arbitral forum.		objection of a party to continued service of the Neutral, the Independent ADR Institution should determine whether the Neutral should be disqualified and should inform the parties of its decision. The disclosure obligation of the Neutral and procedure for disqualification should continue throughout the period of appointment. PRINCIPLE 5. SMALL CLAIMS Consumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction. PRINCIPLE 9. RIGHT TO REPRESENTATION All parties participating in processes in ADR Programs have the right, at their own expense, to be represented by a spokesperson of their own choosing. The ADR rules and procedures should so specify. PRINCIPLE 12. ARBITRATION HEARINGS 1. Fundamentally-Fair Hearing. All parties are entitled to a fundamentally-fair arbitration hearing. This requires adequate notice of hearings and an opportunity to be heard and to present relevant evidence to impartial decision- makers. In some cases, such as some small claims, the requirement of fundamental fairness may be met by hearings conducted by electronic or telephonic means or by a submission of documents. However, the Neutral should have discretionary authority to require a face-to-face hearing upon the request of a party. 2. Confidentiality in Arbitration. Consistent with general expectations of privacy in arbitration hearings, the arbitrator should make reasonable efforts to maintain the privacy of the hearing to the extent permitted by applicable law. The arbitrator should also carefully consider claims of privilege and confidentiality when addressing evidentiary issues. PRINCIPLE 13. ACCESS TO INFORMATION No party should ever be denied the right to a fundamentally-fair process due to an inability to obtain information material to a dispute. Consumer ADR agreements which provide for binding arbitration should establish procedures for arbitrator-supervised exchange of information prior to arbitration, bearing in mind the expedited nature of arbitration. PRINCIPLE 14. ARBITRAL REMEDIES The arbitrator should be empowered to grant whatever relief would be available in court under law or in equity.

ORGANIZATIONS	FEES AND EXPENSES	CODE OF ETHICS	ESSENTIAL GUARANTEES
2. **NATIONAL ARBITRATION FORUM ® (NAF)**	**A. Claim amount of less than $75,000:**[279] • Claim of $1,500 or less: filing fee of $19, commencement fee of $23, administrative fee of $200, participatory hearing session fee of $125. • Claim of $1,510 to $3,500: filing fee of $29, commencement fee of $31, administrative fee of $225, participatory hearing session fee of 175$. • Claim of $3,501 to $8,000: filing fee of $37, commencement fee of $38, administrative fee of $300, participatory hearing session fee of 225$. • Claim of $8,001 to $13,000: filing fee of $39, commencement fee of $41, administrative fee of $400, participatory hearing session fee of 325$. • Claim of $13,001 to $19,000: filing fee of $49, commencement fee of $52, administrative fee of $600, participatory hearing session fee of 425$. • Claim of $19,001 to $35,000: filing fee of $62, commencement fee of $63, administrative fee of $700, participatory hearing session fee of 525$. • Claim of $35,001 to $55,000: filing fee of $112, commencement fee of $113, administrative fee of $975, participatory hearing session fee of 775$. • Claim of $55,001 to $74,999: filing fee of $242, commencement fee of $243, administrative fee of $1,025, participatory hearing session fee of $975[280]. • There are various other fees, such as an expedited hearing fee, objection fees, request for adjournment fee, suspension fee, subpoena fee, amendment fee, memorandum fee, and fees for written findings.	*Code of Conduct* *Arbitration Bill of Rights* *Statement of Principles*	***Code of Conduct***[281] CANON ONE An Arbitrator should uphold the integrity and fairness of the dispute resolution. CANON TWO An Arbitrator should disclose any interest or relationship that affects impartiality or creates an unfavourable appearance on partiality or bias. CANON THREE In communicating with the parties, an Arbitrator should avoid impropriety or the appearance of impropriety. CANON FOUR An Arbitrator should be honest and trustworthy and maintain confidentiality. CANON FIVE An Arbitrator should make decisions in a just, independent and deliberate manner. ***Arbitration Bill of Rights*** **PRINCIPLE 1**: FUNDAMENTALLY FAIR PROCESS All parties in arbitration are entitled to fundamental fairness. **PRINCIPLE 3**: COMPETENT AND IMPARTIAL ARBITRATORS. Competent and impartial Arbitrators. The arbitrators should be both skilled and neutral. **PRINCIPLE 6**: REASONABLE COST. Reasonable cost. The cost of arbitration should be proportionate to the claim and reasonably within the means of the parties, as required by applicable law. **PRINCIPLE 7**: REASONABLE TIME LIMITS Reasonable time limit. A dispute should be resolved with reasonable promptness.

[279] Rule 45 of the Forum's Code of Procedure allows a waiver of fees for filing the application, administrative fees and hearing participation fees for indigent persons according to the American federal poverty benchmarks.

[280] The fees mentioned herein are available on the NAF website, *Fee Schedule to Code of Procedure*, August 1, 2008: [Online] http://www.adrforum.com/users/naf/resources/2008FeeSchedule-FinalPrint1.pdf. (Page consulted on March 28, 2009). Administrative and hearing participation fees include the arbitrator's fees. If the consumer is the one to file an application for arbitration, the fees are allocated as follows: The consumer pays a deposit and half of the hearing participation fee up to $250, while the merchant pays the start-up fee and the remaining hearing participation fee. If the merchant is the one filing the application for arbitration, the consumer pays half of the hearing participation fee up to $250. The merchant pays the remaining hearing participation fee.

[281] The *Code of Conduct* includes more-specific subsections, which have been omitted. It should be noted that the preamble stipulates that the Code is solely a guide and is not part of the arbitration rules or the NAF's Code of Procedure.

ORGANIZATIONS	FEES AND EXPENSES	CODE OF ETHICS	ESSENTIAL GUARANTEES
	B. Other claims: • For claims of $75,000 to $5 million, filing fees are $300-$1,750, commencement fees $300-$1,750, whereas administrative fees are $500-$1,500. Arbitration and hearing fees are charged at an hourly rate.		**PRINCIPLE 8**: RIGHT TO REPRESENTATION. All parties have the right to be represented in arbitration, if they wish, for example, by an attorney or other representative. **PRINCIPLE 10**: HEARINGS. Hearings should be convenient, efficient and fair for all. **PRINCIPLE 11:** REASONABLE DISCOVERY. The parties should have access to the information they need to make a reasonable presentation of their case to the arbitrator. **PRINCIPLE 12**: AWARDS AND REMEDIES. The remedies resulting from arbitration must be conform to the law.

ANNEX 3: ARBITRATION CLAUSE USAGE IN CONSUMER CONTRACTS

CABLE COMPANIES (TV)

Company	Arbitration Clause Usage	Our Data (Paper/Electronic Version)	Other Mention
Shaw	Yes and no class action	Electronic version	No mention that the clause is not applicable in certain provinces
Rogers	Yes	Electronic version	No mention that the clause is not applicable in certain provinces
Bell ExpressVu	No	Electronic version	N/A
Star Choice	Yes and no class action	Electronic version	No mention that the clause is not applicable in certain provinces
Vidéotron	No, but limitation of liability clause	Electronic version	N/A
Cogeco	No	Electronic version	N/A

MOBILE PHONE COMPANIES

Company	Arbitration Clause Usage	Our Data (Paper/Electronic Version)	Other Mention
Bell Mobility	No, but there is a liability limitation clause	Electronic version	N/A
Telus Mobility	Yes and no class action	Electronic version	• Prior mediation also mandatory. • Mention that should applicable laws cancel the obligation to go to mediation or arbitration or cancel the prohibition against taking part in a class action, the relevant provisions of this paragraph will be withdrawn in accordance with paragraph 16 of the agreement. No mention of provinces where the clause does not apply. • Telus' collection of amounts due is not submitted to arbitration.
FIDO	Yes	Electronic version	• Mention that the clause applies within the limits allowed by the applicable law. No mention of provinces where the clause does not apply. • Fido pays the arbitration's reasonable fees and expenses. • There is also an arbitration agreement to the effect, among other things, that the consumer will choose arbitration – a choice that will be submitted to FIDO's approval.
Koodo Mobile	Yes	Electronic version	• Prior mediation also mandatory. • Mention that should applicable laws cancel the obligation to go to mediation or arbitration or cancel the prohibition against taking part in a class action, the relevant provisions of this paragraph will be withdrawn in accordance with paragraph 16 of the agreement. No mention of provinces where the clause does not apply. • Koodo's collection of amounts due is not submitted to arbitration.
Virgin Mobile	Yes	Electronic version	• No mention that the clause is not applicable in certain provinces
Rogers Wireless	Yes	Electronic version	• Mention that the clause applies within the limits allowed by the

Rogers Wireless	Yes	Electronic version	• Mention that the clause applies within the limits allowed by the applicable law. No mention of provinces where the clause does not apply. • Rogers pays reasonable fees and expenses related to arbitration. • There is also an arbitration agreement to the effect, among other things, that the consumer will choose arbitration – a choice that will be submitted to Roger's approval .
Alliant	No, but there is a liability limitation clause	Electronic version	N/A
TBaytel	No, but there is a liability limitation clause	Electronic version	• There is no arbitration clause in mobile phone terms of service. However, another document titled "Terms and Conditions" also appears to apply[282].
MTS	No, but there is a	Electronic version	N/A

[282] The TBaytel website also contains service terms and conditions for using the website or any product or service available on the site. Those service terms and conditions include an arbitration clause stipulating that the arbitration is enforceable, that it will take place in Toronto in English, and that the consumer waives his right to a class action. [Online] http://tbaytel.net/corporate/terms.html. (Page consulted on March 21, 2009). This arbitration clause also applied to all TBaytel services, i.e., residential and cellular telephony and the Internet.

TELEPHONE (FIXED LINE)

Company	Arbitration Clause Usage	Our Data (Paper/Electronic Version)	Other Mention
Telus	Yes, as well as class action waiver	Electronic version	• Telus' collection of amounts due is not submitted to arbitration.
TBaytel (Thunder Bay, Ontario)	No, but there is a liability limitation clause	Electronic version	N/A. See footnote 1.
Bell	No, but there is a liability limitation clause	Electronic version	N/A
Rogers	Yes, as well as class action waiver	Electronic version	• -Terms of service that apply to Internet phone service also contain an arbitration clause[283]. • -There is also an arbitration agreement to the effect, among other things, that the consumer will choose arbitration – a choice that will be submitted to Roger's approval.
Videotron	No, but there is a liability limitation clause.	Electronic version	N/A
SaskTel	No, but there is a liability limitation clause	Electronic version	N/A
Shaw	Yes and no class action	Electronic version	• No mention that the clause is not applicable in certain provinces
Primus	No, but there is a liability limitation clause[284]	Electronic version	N/A

[283] [Online] http://your.rogers.com/store/cable/rhp/downloads/IPSTOS_Eng.pdf (Page consulted on March 21, 2009).
[284] [Online] http://www.primustel.ca/en/residential/legal/termsofuse.html (Page consulted on March 21, 2009).

INTERNET SERVICE

Company	Arbitration Clause Usage	Our Data (Paper/Electronic Version)	Other Mention
Rogers	Yes, as well as a class action waiver	Electronic version	• -Terms of service that apply to Internet phone service also contain an arbitration clause[285]. • -There is also an arbitration agreement to the effect, among other things, that the consumer will choose arbitration – a choice that will be submitted to Roger's approval.
Bell Sympatico	No, but there is a liability limitation clause[286].	Electronic version	
Shaw	Yes and no class action	Electronic version	No mention that the clause is not applicable in certain provinces
Vidéotron	No, but there is a liability limitation clause	Electronic version	N/A
Aliant	No, but there is a liability limitation clause	Electronic version	N/A
Telus	No	Electronic version	N/A
TBayTel	No, but there is a liability limitation clause	Electronic version	N/A
Cogeco	No, but there is a liability limitation clause	Electronic version	N/A
Primus	No, but there is a liability limitation clause	Electronic version	N/A

[285] [Online] http://your.rogers.com/store/cable/rhp/downloads/IPSTOS_Eng.pdf (Page consulted on March 21, 2009).
[286] As part of its Internet service, Bell makes available to its customers almost 25 different agreements that apply according to their contracts. The agreements are available on the Bell website [Online] http://assistance.sympatico.ca/index.cfm?language=en&method=content.view&category_id=550&content_id=929 (Page consulted on March 26, 2009).

ONLINE PURCHASES

Company	Arbitration Clause Usage	Our Data (Paper/ Electronic Version)	Other Mention
Amazon.ca	Yes and prohibits collective arbitration	Electronic version	• The clauses sends arbitration before the American Arbitration Association in Seattle, WA and confers jurisdiction to Washington State courts[287].
Ebay.ca	Yes, but the clause is not binding. It is possible to make a request for arbitration for any dispute where the claim is less than $15,000.	Electronic version	• Although the clause mentions that Canadian and Ontario laws apply, it confers jurisdiction, in legal disputes to courts in Santa Clara County, California[288]. • The clause also contains rules for holding such arbitration.
Sears Canada	No, but there is a liability limitation clause[289]	Electronic version	N/A
Chapters.indigo.ca	Yes[290], as well as a class action waiver	Electronic version	• The clause simply mentions the following: "Except where prohibited by applicable law […]"[291] without specifying the provinces where arbitration clauses don't apply.
HMV.ca	No, but there is a liability limitation clause[292]	Electronic version	• The agreement is governed by the laws of Ontario and Canada. Exclusive jurisdiction and control by Ontario courts or the Federal Court of Canada.
Réseau admission	No, but there is a liability limitation clause[293]	Electronic version	• For Quebec events, disputes are governed by the laws of Quebec and under the exclusive jurisdiction of Montreal, Quebec. • For events in the United States, disputes are governed by California State laws and under the jurisdiction of state or federal courts located in Los Angeles County in California.
Ticketmaster	Yes, only for people using TicketExchange to buy or sell tickets for an event held in Illinois[294]	Electronic version	• TicketExchange: Submitted to the *Commercial Arbitration Rules and Mediation Procedures* of the *American Arbitration Association*. • In the case of a ticket purchase for an event located in Canada, disputes are governed by the laws of Ontario. For events located in the United States, disputes are submitted to California laws, and the competent courts are those of Los Angeles County, California.
Archambault.ca	No, but there is a liability limitation clause[295]	Electronic version	N/A
Future Shop.ca	No, but proceedings must be brought before	Electronic version	N/A

	British Columbia courts[296]		

ANNEX 4: CANADIAN ARBITRATION LEGISLATION

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
ONTARIO	*Consumer Protection Act, 2002*, S.O. 2002, c. 30 (Schedule A).	section 7(2)	No waiver of substantive and procedural rights **7.** (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary. 2002, c. 30, Sched. A, s. 7 (1). Limitation on effect of term requiring arbitration (2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act. 2002, c. 30, Sched. A, s. 7 (2). Procedure to resolve dispute (3) Despite subsections (1) and (2), after a dispute over which a consumer may commence an action in the Superior Court of Justice arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law. 2002, c. 30, Sched. A, s. 7 (3). Settlements or decisions (4) A settlement or decision that results from the procedure agreed to under subsection (3) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning an agreement to which this Act does not apply. 2002, c. 30, Sched. A, s. 7 (4). Non-application of *Arbitration Act, 1991* (5) Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration. 2002, c. 30, Sched. A, s. 7 (5).
	Arbitration Act, 1991, S.O. 1991, c. 17.	All provisions	
QUEBEC	*Consumer Protection Act*, R.S.Q. c. P-40.1.	section 11.1	Prohibited stipulation. **11.1.** Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
			Arbitration. If a dispute arises after a contract has been entered into, the consumer may then agree to refer the dispute to arbitration.
	Civil Code of Quebec	Articles 2638 to 2643 and Articles 3121, 3133, 3148, 3149	**CHAPTER XVIII** ARBITRATION AGREEMENTS **2638.** An arbitration agreement is a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts. 1991, c. 64, a. 2638. **2639.** Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration. An arbitration agreement may not be opposed on the ground that the rules applicable to settlement of the dispute are in the nature of rules of public order. 1991, c. 64, a. 2639. **2640.** An arbitration agreement shall be evidenced in writing; it is deemed to be evidenced in writing if it is contained in an exchange of communications which attest to its existence or in an exchange of proceedings in which its existence is alleged by one party and is not contested by the other party. 1991, c. 64, a. 2640. **2641.** A stipulation which places one party in a privileged position with respect to the designation of the arbitrators is null. 1991, c. 64, a. 2641. **2642.** An arbitration agreement contained in a contract is considered to be an agreement separate from the other clauses of the contract and the ascertainment by the arbitrators that the contract is null does not entail the nullity of the arbitration agreement. 1991, c. 64, a. 2642. **2643.** Subject to the peremptory provisions of law, the procedure of arbitration is governed by the contract or, failing that, by the Code of Civil Procedure.

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
			1991, c. 64, a. 2643. — *Arbitration* **3121.** Failing any designation by the parties, an arbitration agreement is governed by the law applicable to the principal contract or, where that law invalidates the agreement, by the law of the country where arbitration takes place. 1991, c. 64, a. 3121. **3133.** Arbitration proceedings are governed by the law of the country where arbitration takes place unless either the law of another country or an institutional or special arbitration procedure has been designated by the parties. **3148.** In personal actions of a patrimonial nature, a Québec authority has jurisdiction where: (1) the defendant has his domicile or his residence in Québec; (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec; (3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec; (4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship; (5) the defendant submits to its jurisdiction. However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority. 1991, c. 64, a. 3148. **3149.** A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
	Code of Civil Procedure of Quebec, R.S.Q. c. C-25.	Articles 940 to 952	**BOOK VII** ARBITRATIONS **TITLE I** ARBITRATION PROCEEDINGS **CHAPTER I** GENERAL PROVISIONS **940.** The provisions of this Title apply to an arbitration where the parties have not made stipulations to the contrary. However, articles 940.2, 941.3, 942.7, 943.2, 945.8 and 946 to 947.4, as well as article 940.5 where the object of the service is a judicial proceeding, are peremptory. 1965 (1st sess.), c. 80, a. 940; 1986, c. 73, s. 2. **940.1.** Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null. The arbitration proceedings may nevertheless be commenced or pursued and an award made at any time while the case is pending before the court. 1986, c. 73, s. 2. **940.2.** Except in the case of article 940.1 or matters under the exclusive jurisdiction of the Superior Court, the court or judge referred to in this Title is the court or judge having jurisdiction to decide the matter in dispute submitted to the arbitrators. 1986, c. 73, s. 2. **940.3.** A judge or the court cannot intervene in any question governed by this Title except in the cases provided for therein. 1986, c. 73, s. 2. **940.4.** A judge or the court may grant provisional measures before or during arbitration proceedings on the motion of one of the parties. 1986, c. 73, s. 2. **940.5.** The service of documents shall be made in accordance with this Code. 1986, c. 73, s. 2.

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
			940.6. Where matters of extraprovincial or international trade are at issue in an arbitration, the interpretation of this Title, where applicable, shall take into consideration (1) the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985; (2) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session held in Vienna from 3 to 21 June 1985; (3) the Analytical Commentary on the draft text of a model law on international commercial arbitration contained in the report of the Secretary-General to the eighteenth session of the United Nations Commission on International Trade Law. 1986, c. 73, s. 2. **CHAPTER II** APPOINTMENT OF ARBITRATORS 941. There shall be three arbitrators. Each party shall appoint one arbitrator, and the two so appointed shall appoint the third. 1965 (1st sess.), c. 80, a. 941; 1986, c. 73, s. 2. 941.1. If one of the parties fails to appoint an arbitrator within 30 days after having been notified by the other party to do so, or if the arbitrators fail to concur on the choice of the third arbitrator within 30 days after their appointment, a judge shall make the appointment on the motion of one of the parties. 1986, c. 73, s. 2. 941.2. If the procedure of appointment contained in the arbitration agreement proves difficult to put into practice, a judge may on the motion of one of the parties take any necessary measure to bring about the appointment. 1986, c. 73, s. 2. 941.3. The decision of the judge under articles 941.1 and 941.2 is final and without appeal. 1986, c. 73, s. 2. **CHAPTER III** INCIDENTAL CESSATION OF ARBITRATOR'S APPOINTMENT

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
			942. In addition to the grounds set forth in articles 234 and 235, an arbitrator may be recused if he does not have the qualifications agreed by the parties. 1965 (1st sess.), c. 80, a. 942; 1986, c. 73, s. 2. 942.1. An arbitrator must declare to the parties any ground of recusation to which he is liable. 1986, c. 73, s. 2. 942.2. The party having appointed an arbitrator may propose his recusation only on a ground of recusation which has arisen or been discovered since the appointment. 1986, c. 73, s. 2. 942.3. The party proposing recusation shall make a written statement of his reasons to the arbitrators within 15 days after becoming aware of the appointment of all the arbitrators or of a ground of recusation. If the arbitrator whose recusation is proposed does not withdraw or the other party does not accept the recusation, the other arbitrators shall come to a decision on the matter. 1986, c. 73, s. 2. 942.4. If the recusation cannot be obtained under article 942.3, a party may within 30 days of being so advised apply to a judge to decide the matter. The arbitrators, including the arbitrator whose recusation is proposed, may continue the arbitration proceedings and make their award while such a case is pending. 1986, c. 73, s. 2. 942.5. If an arbitrator is unable to perform his duties or fails to perform them in reasonable time, a party may apply to a judge to have his appointment revoked. 1986, c. 73, s. 2. 942.6. If the procedure of recusation or revocation of appointment of an arbitrator contained in the arbitration agreement proves difficult to put into practice, a judge may on the motion of one of the parties decide the matter of the recusation or revocation of appointment. 1986, c. 73, s. 2. 942.7. The judge's decision on the matter of recusation or

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
			revocation of appointment is final and without appeal. 1986, c. 73, s. 2. 942.8. The prescribed procedure for the appointment of an arbitrator applies for his replacement. 1986, c. 73, s. 2. **CHAPTER IV** COMPETENCE OF ARBITRATORS 943. The arbitrators may decide the matter of their own competence. 1965 (1st sess.), c. 80, a. 943; 1986, c. 73, s. 2. 943.1. If the arbitrators declare themselves competent during the arbitration proceedings, a party may within 30 days of being notified thereof apply to the court for a decision on that matter. While such a case is pending, the arbitrators may pursue the arbitration proceedings and make their award. 1986, c. 73, s. 2. 943.2. A decision of the court during the arbitration proceedings recognizing the competence of the arbitrators is final and without appeal. 1986, c. 73, s. 2. CHAPTER V ORDER OF ARBITRATION PROCEEDINGS 944. A party intending to submit a dispute to arbitration must notify the other party of his intention, specifying the matter in dispute. The arbitration proceedings commence on the date of service of the notice. 1965 (1st sess.), c. 80, a. 944; 1986, c. 73, s. 2. 944.1. Subject to this Title, the arbitrators shall proceed to the arbitration according to the procedure they determine. They have all the necessary powers for the exercise of their jurisdiction, including the power to appoint an expert. 1986, c. 73, s. 2. 944.2. The arbitrators may require each of the parties to produce a statement of his claims with the supporting documents within an allotted time.

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
			Each of the parties shall transmit a copy of the statement and documents to the opposite party within the same time. Every expert's report or other document which the arbitrators may invoke in support of their decision must be transmitted to the parties. 1986, c. 73, s. 2. 944.3. Proceedings are oral. A party may nevertheless produce a written statement. 1986, c. 73, s. 2. 944.4. The arbitrators must give notice to the parties of the date of the hearing and, where such is the case, the date on which they will inspect the property or visit the place. 1986, c. 73, s. 2. 944.5. The arbitrators shall record the default and may continue the arbitration proceedings if one of the parties fails to state his claims, to appear at the hearing or to produce the evidence in support of his claims. If the party having submitted the dispute to arbitration fails to state his claims, the arbitrators shall terminate the proceedings unless one of the other parties objects. 1986, c. 73, s. 2. 944.6. Witnesses are summoned in accordance with articles 280 to 283. Where a person who has been duly summoned and to whom a loss of time indemnity and travel, meal and overnight accommodation allowances have been advanced fails to appear, a party may request the judge to compel the person to appear in accordance with article 284. 1986, c. 73, s. 2; 2002, c. 7, s. 147. 944.7. The arbitrators have the power to administer oaths. 1986, c. 73, s. 2; 1999, c. 40, s. 56. 944.8. Where, without a valid reason, a witness refuses to answer or refuses to produce any real evidence in his possession which is connected with the dispute, a party may with leave of the arbitrators apply to a judge to issue a rule under article 53. 1986, c. 73, s. 2; 1994, c. 28, s. 39.

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
			944.9. Articles 307, 308, 309, 316 and 317 apply to the hearing of witnesses. 1986, c. 73, s. 2. 944.10. The arbitrators shall settle the dispute according to the rules of law which they consider appropriate and, where applicable, determine the amount of the damages. They cannot act as amiables compositeurs except with the prior concurrence of the parties. They shall in all cases decide according to the stipulations of the contract and take account of applicable usage. 1986, c. 73, s. 2. 944.11. Every decision of the arbitrators shall be rendered by a majority of voices. One arbitrator, however, with authorization of the parties or of all the other arbitrators may decide questions of procedure. Written decisions must be signed by all the arbitrators; if one of them refuses to sign or cannot sign, the others must record that fact and the decision has the same effect as if it were signed by all of them. 1986, c. 73, s. 2. CHAPTER VI ARBITRATION AWARD 945. The arbitrators are bound to keep the advisement secret. Each of them may nevertheless, in the award, state his conclusions and the reasons on which they are based. 1965 (1st sess.), c. 80, a. 945; 1986, c. 73, s. 2. 945.1. If the parties settle the dispute, the arbitrators shall record the agreement in an arbitration award. 1986, c. 73, s. 2. 945.2. The arbitration award must be made in writing by a majority of voices. It must state the reasons on which it is based and be signed by all the arbitrators; if one of them refuses to sign or is unable to sign, the others must record that fact and the award has the same effect as if it were signed by all of them. 1986, c. 73, s. 2. 945.3. The arbitration award must contain an indication of the date and place at which it was made.

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
			The award is deemed to have been made at the indicated date and place. 1986, c. 73, s. 2. 945.4. The arbitration award binds the parties upon being made. A copy signed by the arbitrators must be remitted to each of the parties immediately. 1986, c. 73, s. 2. 945.5. The arbitrators may of their own motion, within 30 days after making the arbitration award, correct any error in writing or calculation or any other clerical error in the award. 1986, c. 73, s. 2. 945.6. The arbitrators may, on the application of a party made within 30 days after receiving the arbitration award, (1) correct any error in writing or calculation or any other clerical error in the award; (2) interpret a specific part of the award, with the prior agreement of the parties; (3) render a supplementary award on a part of the application omitted in the award. The interpretation forms an integral part of the award. 1986, c. 73, s. 2. 945.7. Any decision of the arbitrators correcting, interpreting or supplementing the award pursuant to an application contemplated in article 945.6 must be rendered within 60 days after the application. Articles 945 to 945.4 apply to the decision. If the arbitrators do not render their decision before the expiry of the prescribed time, a party may apply to a judge to make any order for the protection of the rights of the parties. 1986, c. 73, s. 2. 945.8. The decision of the judge under article 945.7 is final and without appeal. 1986, c. 73, s. 2. CHAPTER VII

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
			HOMOLOGATION OF THE ARBITRATION AWARD 946. An arbitration award cannot be put into compulsory execution until it has been homologated. 1965 (1st sess.), c. 80, a. 946; 1986, c. 73, s. 2. 946.1. A party may, by motion, apply to the court for homologation of the arbitration award. 1986, c. 73, s. 2. 946.2. The court examining a motion for homologation cannot enquire into the merits of the dispute. 1986, c. 73, s. 2. 946.3. The court may postpone its decision on the homologation if an application has been made to the arbitrators by virtue of article 945.6. If the court acts pursuant to the first paragraph, it may, on the application of the party applying for homologation, order the other party to provide security. 1986, c. 73, s. 2. 946.4. The court cannot refuse homologation except on proof that (1) one of the parties was not qualified to enter into the arbitration agreement; (2) the arbitration agreement is invalid under the law elected by the parties or, failing any indication in that regard, under the laws of Québec; (3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case; (4) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement; or (5) the mode of appointment of arbitrators or the applicable arbitration procedure was not observed. In the case of subparagraph 4 of the first paragraph, the only provision not homologated is the irregular provision described in that paragraph, if it can be dissociated from the rest.

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
			1986, c. 73, s. 2. 946.5. The court cannot refuse homologation of its own motion unless it finds that the matter in dispute cannot be settled by arbitration in Québec or that the award is contrary to public order. 1986, c. 73, s. 2. 946.6. The arbitration award as homologated is executory as a judgment of the court. 1986, c. 73, s. 2. CHAPTER VIII ANNULMENT OF THE ARBITRATION AWARD 947. The only possible recourse against an arbitration award is an application for its annulment. 1965 (1st sess.), c. 80, a. 947; 1986, c. 73, s. 2. 947.1. Annulment is obtained by motion to the court or by opposition to a motion for homologation. 1986, c. 73, s. 2. 947.2. Articles 946.2 to 946.5, adapted as required, apply to an application for annulment of an arbitration award. 1986, c. 73, s. 2. 947.3. On the application of one party, the court, if it considers it expedient, may suspend the application for annulment for such time as it deems necessary to allow the arbitrators to take whatever measures are necessary to remove the grounds for annulment, even if the time prescribed in article 945.6 has expired. 1986, c. 73, s. 2. 947.4. The application for annulment must be made within three months after reception of the arbitration award or of the decision rendered under article 945.6. 1986, c. 73, s. 2. TITLE II OF RECOGNITION AND EXECUTION OF ARBITRATION AWARDS MADE OUTSIDE QUÉBEC 948. This Title applies to an arbitration award made outside Québec whether or not it has been ratified by a competent authority. The interpretation of this Title shall take into account,

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
			where applicable, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as adopted by the United Nations Conference on International Commercial Arbitration at New York on 10 June 1958. 1965 (1st sess.), c. 80, a. 948; 1986, c. 73, s. 2. 949. An arbitration award shall be recognized and executed if the matter in dispute is one that may be settled by arbitration in Québec and if its recognition and execution are not contrary to public order. 1965 (1st sess.), c. 80, a. 949; 1986, c. 73, s. 2. 949.1. An application for recognition and execution is made by way of a motion for homologation to the court which would have had competence in Québec to decide the matter in dispute submitted to the arbitrators. The motion must be accompanied with the original or a copy of the arbitration award and of the arbitration agreement. These originals or copies must be authenticated by an official representative of the Government of Canada, by a delegate-general, delegate or head of delegation of Québec carrying on his duties outside Québec, or by the government or a public officer of the place where the award was made. 1986, c. 73, s. 2. 950. A party against whom an arbitration award is invoked may object to its recognition and execution by establishing that (1) one of the parties was not qualified to enter into the arbitration agreement; (2) the arbitration agreement is invalid under the law elected by the parties or, failing any indication in that regard, under the laws of the place where the arbitration award was made; (3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case; (4) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement; (5) the manner in which the arbitrators were appointed or the arbitration procedure did not conform with the

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
			agreement of the parties or, if there was not agreement, with the laws of the place where the arbitration took place; or (6) the arbitration award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the place or pursuant to the laws of the place in which the arbitration award was made. In the case of subparagraph 4 of the first paragraph, if the irregular provision of the arbitration award described in that paragraph can be dissociated from the rest, the rest may be recognized and declared executory. 1965 (1st sess.), c. 80, a. 950; 1970, c. 63, s. 3; 1986, c. 73, s. 2. 951. The court may postpone its decision in respect of recognition and execution of an arbitration award if the competent authority referred to in subparagraph 6 of the first paragraph of article 950 has made an application to have the award set aside or suspended. If the court postpones its decision, it may, on the application of the party applying for recognition and execution of the award, order the other party to furnish security. 1965 (1st sess.), c. 80, a. 951; 1986, c. 73, s. 2. 951.1. A court examining an application for recognition and execution of an arbitration award cannot enquire into the merits of the dispute. 1986, c. 73, s. 2. 951.2. The arbitration award as homologated is executory as a judgment of the court. 1986, c. 73, s. 2. 952. (Set aside by consolidation). 1965 (1st sess.), c. 80, a. 952.
BRITISH COLUMBIA	*Commercial Arbitration Act*, R.S.B.C.1996, c. 55.	Article 15	Stay of proceedings **15** (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings.

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
			(2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed. […]
ALBERTA	*Fair Trading Act*, R.S.A. 2000 c. F-2.	Article 142	Dispute resolution **142.** The Director may provide any person who is involved in a dispute respecting a matter under this Act with information on dispute resolution processes, such as arbitration and mediation, and may establish dispute resolution processes that the parties to the dispute may choose to use.
	Arbitration Act, R.S.A. 2002 c. A-43.	All provisions	
SASKATCHEWAN	*Consumer Protection Act*, S.S. 1996, c. C-30.1.	Article 44(2)	Waiver of benefits ineffective; inclusion of certain clauses forbidden **44(1)** Subject to subsection 43(1), every agreement or bargain, verbal or written, express or implied that states or implies any of the following is void: (a) that the provisions of this Part or the regulations made pursuant to this Part do not apply; (b) that any right or remedy provided by this Part or the regulations made pursuant to this Part do not apply; (c) that any right or remedy provided by this Part or the regulations made pursuant to this Part is in any way limited, modified or abrogated. (2) Notwithstanding subsection (1), where the parties to a dispute pursuant to this Part are able to resolve their dispute through mediation, arbitration or another process, the parties' rights pursuant to this Part are extinguished respecting that dispute. 1996, c.C-30.1, s.44.
	Arbitration Act, 1992, S.S. 1992, c. A-24.1.	All provisions	
MANITOBA	*Consumer Protection Act*, C.C.S.M. c. C-200.	Article 96	Agreements waiving benefits **96.** Every agreement or bargain, oral or written, expressed or implied, that any provision of this Act or the regulations does not apply, or that a benefit or remedy under this Act or the regulations is not available, or that in any way limits or abrogates, or in effect limits, modifies, or abrogates, a benefit or remedy under this Act or the regulations, is void;

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
			and moneys paid under or by reason of the agreement or bargain are recoverable in the court.
	Arbitration Act, C.C.S.M. c. A-120	All provisions	
NEW BRUNSWICK	Consumer Product Warranty and Liability Act, S.N.B. 1978, c. C-18.1.	None	No legislative provision prohibits the arbitration of consumer disputes in New Brunswick.
	Arbitration Act, S.N.B. 1992, c. A-1.0.	All provisions	
NOVA SCOTIA	*Consumer Protection Act*, R.S.N.S. 1989, c. 92.	None	No legislative provision prohibits the arbitration of consumer disputes in Nova Scotia. However, section 22 reads as follows: Rights preserved **22.** The rights of a buyer or borrower under this Act are in addition to any rights of the buyer or borrower under any other Act or by the operation of law and nothing in this Act shall be construed to derogate from such rights. *R.S., c. 92, s. 22*
	Arbitration Act, R.S.N.S. 1989, c.19	All provisions	
PRINCE EDWARD ISLAND	*Consumer Protection Act*, R.S.P.E.I. 1988, c. C-19.	None	Similarly to New Brunswick and Nova Scotia, Prince Edward Island's *Consumer Protection Act* contains no provision with regard to consumer arbitration. However, section 23 reads as follows: **23.** The rights of a buyer or borrower under this Act are in addition to any rights of the buyer or borrower under any other Act or by the operation of law and nothing in the Act shall be construed to derogate from such rights. R.S.P.E.I. 1974, Cap. C-17, s.24.
	Arbitration Act, R.S.P.E.I.	All provisions	

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
	1988, c. A-16.		
NEWFOUNDLAND AND LABRADOR	*Consumer Protection Act*, R.S.N.L. 1990 c. C-31.	None	Modelled on Prince Edward Island's *Consumer Protection Act*, Newfoundland and Labrador contains only the following provision: Rights preserved **26.** The rights of a buyer or borrower under this Act are in addition to the rights of the buyer or borrower under another Act or by the operation of law and nothing in this Act shall be construed to derogate from those rights.
	Arbitration Act, R.S.N.L. 1990, c. A-14.	All provisions	
YUKON TERRITORY	*Consumers Protection Act*, R.S.Y. 2002, c. 40.	No section specific to arbitration Section 88	**88.** Every agreement or bargain, oral or written, express or implied, that any of the provisions of this Act or the regulations does not apply or that a benefit or remedy under this Act or the regulations is not available or that in any way limits or abrogates, or in effect limits, modifies or abrogates a benefit or remedy under this Act or the regulations is void and money paid under or because of the agreement is recoverable in the court. *R.S., c.31, s.86.*
NORTHWEST TERRITORY	*Consumer Protection Act*, R.S.N.W.T. 1988, c.C-17.	No section specific to arbitration Section 107	**107**. Every agreement or bargain, oral or written, express or implied, that (a) any of the provisions of this Act or the regulations does not apply, (b) a benefit or remedy under this Act or the regulations is not available, or (c) in any way limits or abrogates, or in effect limits, modifies or abrogates a benefit or remedy under this Act or the regulations, is void and moneys paid under or by reason of the agreement or bargain are recoverable in the Supreme Court.
	Arbitration Act, R.S.N.W.T. 1988, c. A-5.	All provisions	
NUNAVUT	*Consumer Protection Act*, R.S.N.W.T. 1988, c. C-17.	No section specific to arbitration Article 107	**107.** Every agreement or bargain, oral or written, express or implied, that (a) any of the provisions of this Act or the regulations does not apply, (b) a benefit or remedy under this Act or the regulations is not available, or (c) in any way limits or abrogates, or in effect limits,

PROVINCE AND TERRITORY	LAW	SECTION	LEGISLATIVE PROVISION CONTENTS
			modifies or abrogates a benefit or remedy under this Act or the regulations, is void and moneys paid under or by reason of the agreement or bargain are recoverable in the Supreme Court.
	Arbitration Act, R.S.N.W.T. 1998, c. A-5.	All provisions	
CANADA	*Commercial Arbitration Act*, R.S.C. (1985) c. 17 (2nd supp.)	All provisions	
	United Nations Foreign Arbitral Awards Convention Act, R.S.C. (1985) c. 16, (2nd supp.)	All provisions	

ANNEX 5: SMALL CLAIMS FEES

PROVINCE/ TERRITORY	COURT	LAW	FEES	SPECIAL MENTIONS
ONTARIO	Ontario Superior Court of Justice – Small Claims Court	*Courts of Justice Act,* R.S.O. 1990, c. C.43, s. 22 to 33.1	• Fees for filing a claim vary between $40 and $100[297].	• Limit: Maximum of $10,000 excluding fees and interest[298]. • Representation: by a lawyer or other possible representative[299]. • An award of costs may not exceed 15% of the amount claimed or the value of the property sought, to be recovered unless the court considers it necessary[300]. • An appeal lies to the Divisional Court if the amount claimed or the value of the property sought exceeds $500[301].
QUEBEC	Court of Quebec – Small Claims Division	*Code of Civil Procedure*, R.S.Q., chapter C-25, sections 953 to 998.	- Fees for a claim filed by a natural person vary between $68 and $155. - Fees for a legal person vary between $115 and $202[302].	-Maximum claim of $7,000 or dissolution, resiliation or cancellation of a contract not exceeding $7,000[303]. -No representation by a lawyer, unless the dispute raises a complex legal issue. If necessary, natural persons may give a mandate to their spouse, a relative, a person connected by marriage or a friend[304] . -Judgements are final and without appeal[305].
BRITISH COLUMBIA	Provincial Court - Small Claims Court	*Court Rules Act* *Small Claims Act* *Small Claims Rules*, B.C. Reg. 360/2007	Fee for filing a claim of $0 to $3,000: $100. For claims of more than $3,000: $156[306].	-Limit of less than $25,000[307]. -Right of appeal[308]. -Representation: A natural person may be represented by a lawyer or an articled student. A company may be represented by a director or an authorized employee, and a sole proprietorship by the owner or an authorized employee[309].
ALBERTA	Provincial Court - Small Claims Court	*Provincial Court Act*, R.S.A. 2000, c. P-31	- Claims of less than $7,500: $100. - Claims of more than $7,500: $200[310].	-Maximum claim of $25,000[311]. -Representation by a barrister or solicitor[312]. -Right of appeal to the Court of Queen's Bench[313].
SASKATCHEWAN	Provincial Court – Small Claims Court	*Small Claims Act*, 1997, c. S-50.11.	- Claims of $0 to $ to $1,999: $20 - Claims of	-Maximum claim of $20,000[315]. - Representation: by a lawyer or agent[316].

PROVINCE/ TERRITORY	COURT	LAW	FEES	SPECIAL MENTIONS
			$2,000 to $20,000: 1% of the claim amount rounded in dollars to the nearest whole dollar, to a maximum of $100. - claim for unliquidated damages : $30[314].	- Appeal to the Court of Queen's Bench[317].
MANITOBA	Court of Queen's Bench – Small Claims Division	*Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285	Fee for filing a statement: $30.	- Maximum claim of $10,000[318]. - Appeal to the Court of Appeal on a question of law only and if authorization is granted[319]. - Representation: No legislative provision on representation.
NEW BRUNSWICK	New Brunswick Small Claims Court	*SMALL CLAIMS ACT*, S.N.B. 1997, c. S-9.1	- Fee when the amount claimed or the value of the property sought is $0 to $3,000: $50. - Fee when the amount claimed or the value of the property sought is greater than $3,000: $100[320].	- Maximum claim of $6,000[321]. -Appeal: to the Court of Queen's Bench through a new proceeding[322], as well as the possibility of appealing through a demand to the Court of Queen's Bench[323]. - Representation: by a lawyer; by an articled student-at-law; with leave of the adjudicator, by an unpaid agent; if a corporation, by an officer or employee; if a partnership, by a partner or an employee[324].
PRINCE EDWARD ISLAND	Supreme Court - Small Claims Division	*Rule 74*	- Fee: $25	- Maximum claim of $7,000. - Appeal: to the Appeal Division. -Representation:
NOVA SCOTIA	Nova Scotia Small Claims Court	*Small Claims Court Act*, R.S.N.S. 1989, c. 430	- Claim of $4,999 or less: $87.06 - Claim of $5,000 to $25,000: $174.13 - Fee for a claim requiring the return of property valued at less than $25,000: $87.06[325].	- Maximum claim: $25,000[326]. - Representation: by a lawyer or an agent[327]. - Appeal: to the Supreme Court of Nova Scotia[328].
NEWFOUNDLAND AND LABRADOR	Provincial court of Newfoundland - Small Claims Court	*Small Claims Act*, R.S.N. 1990 c. S-16	- Fee for a claim of less than $500: $50. - Fee for a claim of $500 or more: $100[329].	- Maximum claim: $5,000[330]. - Representation: by a lawyer, an agent or an articled student[331]. -Appeal: Supreme Court of Newfoundland and Labrador (Trial Division)[332].

PROVINCE/ TERRITORY	COURT	LAW	FEES	SPECIAL MENTIONS
NORTHWEST TERRITORY	Territorial Court	*Territorial Court Act,* R.S.N.W.T. 1988, c. T-2	- Fee for a claim of $500 or less: $15. - Fee for a claim of $500 or more: $30[333].	- Maximum claim: $10,000$[334]. - Representation: by lawyer[335]. - Appeal: before the Supreme Court, unless the dispute is valued at less than $500 or the parties have agreed not to appeal[336].
YUKON TERRITORY	Territorial Court – Small Claims Court	*SMALL CLAIMS COURT ACT*, R.S.Y. 2002, c. 204.	- Fee for a claim of less than $500: $50. - Fee for a claim of $500 or more: $100[337].	- Maximum claim: $25,000[338]. - Representation: by a lawyer or agent[339]. -Appeal: an appeal lies to the Supreme Court by way of trial *de novo*[340].
TERRITORY OF NUNAVUT	Nunavut Court of Justice	*JUDICATURE ACT,* S.N.W.T. 1998, c. 34	- Fee for filing and serving documents: $75[341].	-Maximum claim: $20,000[342]. -Appeal: before the Court of Appeal. Permission to appeal is necessary if the amount of the claim being appealed is less than $1,000[343]. -Representation: possibility of being represented by a lawyer[344].

ANNEX 6: CONTRACTUAL TERMS ANALYSED.

CABLE COMPANIES (TV)

Company	Contractual terms analysed
Shaw	14. Disputes and Governing Law ANY DISPUTES OR CLAIMS ("CLAIMS") WHATSOEVER BETWEEN SHAW AND YOU WILL BE REFERRED TO AND DETERMINED BY ARBITRATION TO THE EXCLUSION OF THE COURTS. IF YOU HAVE A CLAIM YOU SHOULD GIVE WRITTEN NOTICE TO ARBITRATE TO SHAW AT SUITE 900, 630 – 3RD AVENUE SW, CALGARY, AB T2P 4L4 ATTENTION: LEGAL DEPARTMENT. ARBITRATION WILL BE CONDUCTED BY ONE ARBITRATOR PURSUANT TO THE LAWS AND RULES RELATING TO COMMERCIAL ARBITRATION IN THE PROVINCE IN WHICH YOU RESIDE THAT ARE IN EFFECT ON THE DATE OF THE NOTICE. YOU AGREE TO WAIVE ANY RIGHT YOU MAY HAVE TO COMMENCE OR PARTICIPATE IN ANY CLASS ACTION AGAINST SHAW RELATED TO ANY CLAIM WHERE SUCH WAIVER IS PERMITTED. WHERE APPLICABLE. YOU ALSO AGREE TO OPT OUT OF ANY CLASS PROCEEDINGS AGAINST SHAW. IF SHAW HAS A CLAIM, SHAW WILL GIVE YOUR NOTICE TO ARBITRATE AT YOUR BILLING ADDRESS. IF THE CLAIM RELATES TO A MATTER THAT SHOULD BE BROUGHT BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION (CRTC) OR OTHER CUSTOMER COMPLAINTS BODY SET UP TO ADDRESS SUCH MATTERS, YOU AGREE THAT THE CRTC OR SUCH BODY WILL RESOLVE THE CLAIM. 2. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE PROVINCE IN WHICH YOUR BILLING ADDRESS IS LOCATED AND THE FEDERAL LAWS OF CANADA APPLICABLE THEREIN AND YOU HEREBY CONSENT TO THE EXCLUSIVE JURISDICTION OF THE COURTS OF SUCH JURISDICTION. THIS AGREEMENT CONSTITUTES THE ENTIRE AGREEMENT AND UNDERSTANDING BETWEEN THE PARTIES WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT AND SUPERCEDES AND REPLACES ANY AND ALL PRIOR WRITTEN OR VERBAL AGREEMENTS.[345]
Rogers	Arbitration To the extent permitted by applicable law, unless we agree otherwise, any claim, dispute or controversy, whether in contract or tort, pursuant to statute or regulation, or otherwise, and whether pre-existing, present or future, arising out of or relating to the following items will be determined by final and binding arbitration to the exclusion of the courts: • the Service Agreement; • the Services or Equipment; • oral or written statements, advertisements or promotions relating to the Service Agreement, the Services or Equipment; or • the relationships that result from the Service Agreement. 35. Where applicable, arbitration will be conducted in the Province in which you reside, on a simplified and expedited basis by one arbitrator pursuant to the current laws and rules relating to commercial arbitration in the province or jurisdiction in which you reside on the date of the notice. Rogers will pay all reasonable costs associated with any such arbitration. [346]
Bell express Vu	No arbitration clause.

Company	Contractual terms analysed
Star Choice[347]	29. Arbitration / No Class Action. Any claim or dispute (whether in contract or tort) arising out of or relating to these Terms of Service, the Services, or any oral or written statements or representations relating to the Services or these Terms of Service (collectively a "Claim") will be referred to and determined by a sole arbitrator (to the exclusion of the courts) whose decision will be final and binding. Unless prohibited by law, Customer agrees to waive any right Customer may have to commence or participate in any class action suit or proceeding against Shaw Direct arising out of or relating to any Claim and you also agree to opt out of any class proceedings against us. If you have a Claim you will give written notice to us at the address specified in Section 11, with a copy to VP, Law, Suite 900, 630 - 3rd Avenue S.W., Calgary, Alberta, T2P 4L4. If we have a Claim we will give you notice to arbitrate at your billing address. Any arbitration of a Claim will be pursuant to such rules as you and we agree and failing agreement will be conducted by a single arbitrator pursuant to the laws and rules relating to commercial arbitration in the province in which you reside that are in effect on the date of the notice to arbitrate[348].
Vidéotron	No arbitration clause.
Cogeco	No arbitration clause.

CELL PHONE COMPANIES

Company	Contractual terms analysed
Bell Mobility	No arbitration clause.
Telus Mobility	15. Arbitration Any claim, dispute or controversy (whether in contract or tort, pursuant to statute or regulation, or otherwise and whether pre-existing, present or future - except for the collection from you of any amount by TELUS) arising out of or relating to: (a) this agreement; (b) equipment or the service; (c) oral or written statements, or advertisements or promotions relating to this agreement or to a product or service; or (d) the relationships which result from this agreement (including relationships with third parties who are not parties to this agreement), (each, a "Claim") will be referred to and determined by private and confidential mediation before a single mediator chosen by the parties and at their joint cost. Should the parties after mediation in good faith fail to reach a settlement, the issue between them shall then be determined by private, confidential and binding arbitration by the same person originally chosen as mediator. Either party may commence court proceedings to enforce the arbitration result when an arbitration decision shall have been rendered and thirty (30) days have passed from the date of such decision. By so agreeing, you waive any right you may have to commence or participate in any class action against TELUS related to any Claim and, where applicable, you hereby agree to opt out of any class proceeding against TELUS otherwise commenced. If you have a Claim you should give notice to mediate and arbitrate to TELUS, 200 Consilium Place, Suite 1600, Scarborough, Ontario, M1H 3J3, Attention: General Counsel. If we have a Claim we will give you notice to mediate/arbitrate at your last known address of record. Mediation and arbitration of Claims will be conducted in such forum and pursuant to such rules as you and we agree upon, and failing agreement will be conducted by one mediator-arbitrator pursuant to the laws and rules relating to commercial arbitration in the province in which you reside that are in effect on the date of the notice to mediate and arbitrate. Some jurisdictions may not allow the use of compulsory mediation or arbitration or the waiver of rights to participate in a class action. If applicable law renders clauses requiring mandatory mediation or arbitration or the exclusion of the right to participate in a class action void, the provisions of this section shall be subject to severance in accordance with Section 16 of this agreement (http://www.telusmobility.com/en/QC/service_terms/).
FIDO	Arbitration 34. To the extent permitted by applicable law, unless we agree otherwise, any claim, dispute or controversy, whether in contract or tort, pursuant to statute or regulation, or otherwise, and whether pre-existing, present or future, arising out of or relating to the following items will be determined by final and binding arbitration to the exclusion of the courts: • the Service Agreement; • the Services or Equipment; • oral or written statements, advertisements or promotions relating to the Service Agreement, the Services or Equipment; or • the relationships that result from the Service Agreement. 35. Where applicable, arbitration will be conducted in the Province in which you reside, on a simplified and expedited basis by one arbitrator pursuant to the current laws and rules relating to commercial arbitration in the province or jurisdiction in which you reside

	on the date of the notice. Rogers will pay all reasonable costs associated with any such arbitration (http://www.fido.ca/web/content/terms/fido_terms_and_conditions) .
Koodo Mobile	**15. Arbitration** Any claim, dispute or controversy (whether in contract or tort, pursuant to statute or regulation, or otherwise and whether pre-existing, present or future - except for the collection from you of any amount by TELUS) arising out of or relating to: (a) this agreement; (b) equipment or the service; (c) oral or written statements, or advertisements or promotions relating to this agreement or to a product or service; or (d) the relationships which result from this agreement (including relationships with third parties who are not parties to this agreement), (each, a "Claim") will be referred to and determined by private and confidential mediation before a single mediator chosen by the parties and at their joint cost. Should the parties after mediation in good faith fail to reach a settlement, the issue between them shall then be determined by private, confidential and binding arbitration by the same person originally chosen as mediator. Either party may commence court proceedings to enforce the arbitration result when an arbitration decision shall have been rendered and thirty (30) days have passed from the date of such decision. By so agreeing, you waive any right you may have to commence or participate in any class action against TELUS related to any Claim and, where applicable, you hereby agree to opt out of any class proceeding against TELUS otherwise commenced. If you have a Claim you should give notice to mediate and arbitrate to TELUS, 200 Consilium Place, Suite 1600, Scarborough, Ontario, M1H 3J3, Attention: General Counsel. If we have a Claim we will give you notice to mediate/arbitrate at your last known address of record. Mediation and arbitration of Claims will be conducted in such forum and pursuant to such rules as you and we agree upon, and failing agreement will be conducted by one mediator-arbitrator pursuant to the laws and rules relating to commercial arbitration in the province in which you reside that are in effect on the date of the notice to mediate and arbitrate. Some jurisdictions may not allow the use of compulsory mediation or arbitration or the waiver of rights to participate in a class action. If applicable law renders clauses requiring mandatory mediation or arbitration or the exclusion of the right to participate in a class action void, the provisions of this section shall be subject to severance in accordance with Section 16 of this agreement. [349]
Virgin Mobile	How We'll Attempt To Resolve Disputes Subject to other legal rights and remedies available to you under applicable provincial consumer protection laws, and subject to your consent, you agree that a simplified arbitration proceeding by a sole arbitrator shall be the initial recourse used to resolve any claim or dispute (whether originating in contract or tort, or pursuant to any applicable statutes, regulations or common law principles and whether past, present or future) that arises out of or is related to: (a) these Terms of Service; (b) any oral or written statements; or (c) any promotions or advertisements related to the Virgin Mobile Services. You and Virgin Mobile will make every reasonable effort to agree on the appointment of the arbitrator within fifteen (15) days of the commencement of the arbitration proceeding, failing which, the arbitrator will be appointed by the court in the province in which you reside. [350]
Rogers Wireless	Arbitration To the extent permitted by applicable law, unless we agree otherwise, any claim, dispute or controversy, whether in contract or tort, pursuant to statute or regulation, or otherwise, and whether pre-existing, present or future, arising out of or relating to the following items will be determined by final and binding arbitration to the exclusion of the courts: • the Service Agreement; • the Services or Equipment; • oral or written statements, advertisements or promotions relating to the Service Agreement, the Services or Equipment; or

Rogers Wireless	Arbitration To the extent permitted by applicable law, unless we agree otherwise, any claim, dispute or controversy, whether in contract or tort, pursuant to statute or regulation, or otherwise, and whether pre-existing, present or future, arising out of or relating to the following items will be determined by final and binding arbitration to the exclusion of the courts: • the Service Agreement; • the Services or Equipment; • oral or written statements, advertisements or promotions relating to the Service Agreement, the Services or Equipment; or • the relationships that result from the Service Agreement. 35. Where applicable, arbitration will be conducted in the Province in which you reside, on a simplified and expedited basis by one arbitrator pursuant to the current laws and

TELEPHONE (FIXED LINE)

Company	Contractual terms analysed
Telus	5 **d) Mediation and Arbitration** Any unresolved dispute arising out of the marketing, sale or provision of the Services by TELUS or relating in any way to this Agreement, except the collection by TELUS of charges owing for the Services, may only be referred to a single mediator chosen by the parties, subject to any dispute resolution procedure established by Canadian telecommunications service providers generally to address customer complaints. Should the mediation not result in a settlement, the dispute will then be determined by private, confidential and binding arbitration by the same person originally chosen as mediator. The fees of the mediator and arbitrator shall be shared equally by the parties. By agreeing to mediation and arbitration of disputes, you waive any right you may have to commence or participate in any class action against TELUS, to the extent the waiver of such rights is permitted by applicable law.[352]
TBaytel	No arbitration clause.
Bell	No arbitration clause.
Rogers	Arbitration 34. To the extent permitted by applicable law, unless we agree otherwise, any claim, dispute or controversy, whether in contract or tort, pursuant to statute or regulation, or otherwise, and whether pre-existing, present or future, arising out of or relating to the following items will be determined by final and binding arbitration to the exclusion of the courts: • the Service Agreement; • the Services or Equipment; • oral or written statements, advertisements or promotions relating to the Service Agreement, the Services or Equipment; or • the relationships that result from the Service Agreement. 35. Where applicable, arbitration will be conducted in the Province in which you reside, on a simplified and expedited basis by one arbitrator pursuant to the current laws and rules relating to commercial arbitration in the province or jurisdiction in which you reside on the date of the notice. Rogers will pay all reasonable costs associated with any such arbitration.
Vidéotron	No arbitration clause.
SaskTel	No arbitration clause.
Shaw	14. Disputes and Governing Law ANY DISPUTES OR CLAIMS (“CLAIMS”) WHATSOEVER BETWEEN SHAW AND YOU WILL BE REFERRED TO AND DETERMINED BY ARBITRATION TO THE EXCLUSION OF THE COURTS. IF YOU HAVE A CLAIM YOU SHOULD GIVE WRITTEN NOTICE TO ARBITRATE TO SHAW AT SUITE 900, 630 – 3RD AVENUE SW, CALGARY, AB T2P 4L4 ATTENTION: LEGAL DEPARTMENT.

Company	Contractual terms analysed
	ARBITRATION WILL BE CONDUCTED BY ONE ARBITRATOR PURSUANT TO THE LAWS AND RULES RELATING TO COMMERCIAL ARBITRATION IN THE PROVINCE IN WHICH YOU RESIDE THAT ARE IN EFFECT ON THE DATE OF THE NOTICE. YOU AGREE TO WAIVE ANY RIGHT YOU MAY HAVE TO COMMENCE OR PARTICIPATE IN ANY CLASS ACTION AGAINST SHAW RELATED TO ANY CLAIM WHERE SUCH WAIVER IS PERMITTED. WHERE APPLICABLE. YOU ALSO AGREE TO OPT OUT OF ANY CLASS PROCEEDINGS AGAINST SHAW. IF SHAW HAS A CLAIM, SHAW WILL GIVE YOUR NOTICE TO ARBITRATE AT YOUR BILLING ADDRESS. IF THE CLAIM RELATES TO A MATTER THAT SHOULD BE BROUGHT BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION (CRTC) OR OTHER CUSTOMER COMPLAINTS BODY SET UP TO ADDRESS SUCH MATTERS, YOU AGREE THAT THE CRTC OR SUCH BODY WILL RESOLVE THE CLAIM. 2. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE PROVINCE IN WHICH YOUR BILLING ADDRESS IS LOCATED AND THE FEDERAL LAWS OF CANADA APPLICABLE THEREIN AND YOU HEREBY CONSENT TO THE EXCLUSIVE JURISDICTION OF THE COURTS OF SUCH JURISDICTION. THIS AGREEMENT CONSTITUTES THE ENTIRE AGREEMENT AND UNDERSTANDING BETWEEN THE PARTIES WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT AND SUPERCEDES AND REPLACES ANY AND ALL PRIOR WRITTEN OR VERBAL AGREEMENTS.[353]
Primus	No arbitration clause.

INTERNET SERVICE

Company	Contractual terms analysed
Rogers	Yes, as well as a class action waiver Electronic version -Internet phone service terms also contain an arbitration clause.[354] -There is also an arbitration agreement providing for the consumer to choose arbitration; his choice will be submitted to Rogers' approval.[355]
Bell Sympatico	No arbitration clause.
Shaw	14. Disputes and Governing Law ANY DISPUTES OR CLAIMS ("CLAIMS") WHATSOEVER BETWEEN SHAW AND YOU WILL BE REFERRED TO AND DETERMINED BY ARBITRATION TO THE EXCLUSION OF THE COURTS. IF YOU HAVE A CLAIM YOU SHOULD GIVE WRITTEN NOTICE TO ARBITRATE TO SHAW AT SUITE 900, 630 – 3RD AVENUE SW, CALGARY, AB T2P 4L4 ATTENTION: LEGAL DEPARTMENT. ARBITRATION WILL BE CONDUCTED BY ONE ARBITRATOR PURSUANT TO THE LAWS AND RULES RELATING TO COMMERCIAL ARBITRATION IN THE PROVINCE IN WHICH YOU RESIDE THAT ARE IN EFFECT ON THE DATE OF THE NOTICE. YOU AGREE TO WAIVE ANY RIGHT YOU MAY HAVE TO COMMENCE OR PARTICIPATE IN ANY CLASS ACTION AGAINST SHAW RELATED TO ANY CLAIM WHERE SUCH WAIVER IS PERMITTED. WHERE APPLICABLE. YOU ALSO AGREE TO OPT OUT OF ANY CLASS PROCEEDINGS AGAINST SHAW. IF SHAW HAS A CLAIM, SHAW WILL GIVE YOUR NOTICE TO ARBITRATE AT YOUR BILLING ADDRESS. IF THE CLAIM RELATES TO A MATTER THAT SHOULD BE BROUGHT BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION (CRTC) OR OTHER CUSTOMER COMPLAINTS BODY SET UP TO ADDRESS SUCH MATTERS, YOU AGREE THAT THE CRTC OR SUCH BODY WILL RESOLVE THE CLAIM. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE PROVINCE IN WHICH YOUR BILLING ADDRESS IS LOCATED AND THE FEDERAL LAWS OF CANADA APPLICABLE THEREIN AND YOU HEREBY CONSENT TO THE EXCLUSIVE JURISDICTION OF THE COURTS OF SUCH JURISDICTION. THIS AGREEMENT CONSTITUTES THE ENTIRE AGREEMENT AND UNDERSTANDING BETWEEN THE PARTIES WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT AND SUPERCEDES AND REPLACES ANY AND ALL PRIOR WRITTEN OR VERBAL AGREEMENTS.[356]
Videotron	No arbitration clause.
Aliant	No arbitration clause.
Telus	No arbitration clause.
TBayTel	No arbitration clause.
Cogeco	No arbitration clause.
Primus	No arbitration clause.

ONLINE PURCHASES

Company / Website	Contractual Terms Analysed
Amazon.ca	Disputes Any dispute relating in any way to your visit to the Amazon.ca site or to products you purchase through Amazon.ca shall be submitted to confidential arbitration in Seattle, Washington, United States, except that, to the extent that you have in any manner violated or threatened to violate the intellectual property rights of Amazon.ca or its affiliates, Amazon.ca or its affiliates may seek injunctive or other appropriate relief in any state or federal court in the state of Washington, and you consent to exclusive jurisdiction and venue in such courts. Arbitration under this agreement shall be conducted under the rules then prevailing of the American Arbitration Association. The arbitrator's award shall be binding and may be entered as a judgment in any court of competent jurisdiction. To the fullest extent permitted by applicable law, no arbitration under this Agreement shall be joined to an arbitration involving any other party subject to this Agreement, whether through class arbitration proceedings or otherwise.[357]
Ebay.ca	Resolution of Disputes If a dispute arises between you and eBay, our goal is to provide you with a neutral and cost effective means of resolving the dispute quickly. Accordingly, you and eBay agree that we will resolve any claim or controversy at law or equity that arises out of this Agreement or our services (a "Claim") in accordance with one of the subsections below or as we and you otherwise agree in writing. Before resorting to these alternatives, we strongly encourage you to first contact us directly to seek a resolution by going to the About Customer Support help page. We will consider reasonable requests to resolve the dispute through alternative dispute resolution procedures, such as mediation or arbitration, as alternatives to litigation. • **Law and Forum for Disputes** - This Agreement shall be governed in all respects by the laws of the Province of Ontario and the federal laws of Canada applicable therein. You agree that any claim or dispute you may have against eBay must be resolved by a court located in Santa Clara County, California, except as otherwise agreed by the parties or as described in the Arbitration Option paragraph below. You agree to submit to the personal jurisdiction of the courts located within Santa Clara County, California for the purpose of litigating all such claims or disputes. • **Arbitration Option** - For any claim (excluding claims for injunctive or other equitable relief) where the total amount of the award sought is less than C$15,000, the party requesting relief may elect to resolve the dispute in a cost effective manner through binding non-appearance-based arbitration. In the event that a party elects arbitration, they shall initiate such arbitration through an established alternative dispute resolution ("ADR") provider mutually agreed upon by the parties. The ADR provider and the parties must comply with the following rules: a) the arbitration shall be conducted by telephone, online and/or be solely based on written submissions, the specific manner shall be chosen by the party initiating the arbitration; b) the arbitration shall not involve any personal appearance by the parties or witnesses unless otherwise mutually agreed by the parties; and c) any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.[358]
Sears Canada	No arbitration clause.[359]
Chapters.indigo.ca	Except where prohibited by applicable law, any claim, dispute or controversy (whether in contract or tort, pursuant to statute or regulation, or otherwise, and whether pre-

Company / Website	Contractual Terms Analysed
	existing, present or future) arising out of or relating to: (a) these Terms of Use; or (b) the relationships which result from these Terms of Use (collectively, the "Claim") will be referred to and determined by a sole arbitrator (to the exclusion of the courts). Except where prohibited by applicable law, you waive any right you may have to commence or participate in any class action against us related to any Claim and, where applicable, you also agree to opt out of any class proceedings against us. In any action against us arising from the use of the Website, the prevailing party shall be entitled to recover all legal expenses incurred in connection with the action, including but not limited to its costs, both taxable and non-taxable, and reasonable legal fees.[360]
HMV.ca	No arbitration clause.[361]
Réseau admission	No arbitration clause.[362]
Ticketmaster Canada	Additional Provisions Applicable to Persons Using TicketExchange to Buy or Sell Tickets to any Event Located in the State of Illinois If, and only if, you are using TicketExchange to purchase or sell a ticket to an event that is located in the State of Illinois, then you understand, agree and acknowledge the following: This website is operated by Ticketmaster L.L.C. Ticketmaster's address in the State of Illinois is: 550 W. Van Buren Street, 13th Floor, Chicago, Illinois 60607. If you have a complaint or inquiry regarding ticket resales made through TicketExchange for any event located in the State of Illinois, please email us at ticketexchange@ticketmaster.com or call us at (877) 446-9450. These Terms shall be governed by and construed in accordance with the laws of the State of Illinois. In the event of a dispute, you, Ticketmaster, and all buyers and sellers of tickets through TicketExchange each agree to submit to the exclusive jurisdiction and venue of the state and federal courts located in Chicago, Illinois, and the parties consent to the exclusive and personal jurisdiction and venue of these courts, subject to the following: If you are a reseller of one or more tickets through TicketExchange and you have a dispute with any person or business who buys any of those tickets from you, or you are a buyer of one or more resold tickets resold through TicketExchange and you have a dispute with the person or business that sold any of those tickets to you, you hereby agree that that dispute will be solely and finally settled in Illinois by binding arbitration in accordance with the Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association, and the non-prevailing party in the arbitration shall pay the fees and expenses of the arbitrator(s) and the costs of arbitration and the enforcement of any award rendered therein, including the attorneys' fees and expenses of the prevailing party. In order to commence such a proceeding, please send a letter describing the dispute to Ticketmaster Legal Department, 8800 Sunset Blvd., West Hollywood, CA 90069.[363]
Archambault.ca	No arbitration clause.[364]
Future Shop.ca	No arbitration clause.[365]