union des consommateurs

Consumer arbitration: a fair and effective process

Executive summary
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Dispute arbitration has become commonplace in commercial and international litigation. In recent years, consumers have seen arbitration proposed – and even imposed – on them to settle disputes about their consumer contracts. The proven effectiveness of arbitration in commercial and international litigation is said to demonstrate the advantages of arbitration over cumbersome and costly legal proceedings.

The advocates of arbitration emphasize its many advantages, whereas others raise serious doubts on whether consumer arbitration provides consumers with the essential guarantees of a fair and reasonable dispute settlement process.

In 2007, the Supreme Court of Canada recognized, in the *Union des consommateurs v. Dell* decision[1], that arbitration as a dispute settlement method was acceptable in consumer affairs; however, some legislators deemed it wise to prohibit clauses making arbitration mandatory. When a dispute arises, consumers remain free to accept the merchant's offer to submit it to arbitration.

Given the imbalance between the parties that characterizes consumer-merchant relations, can consumers who choose arbitration or have it imposed on them really expect to benefit from a fair and reasonable process that carries the same essential guarantees as a court of law?

The present study identifies the pros and cons of consumer arbitration, notably on the basis of the essential guarantees that consumer arbitration should carry to be considered a dispute settlement mechanism that benefits consumers. The study examines certain arbitration processes currently provided in Canada, and proposes a comparative study of consumer arbitration in other countries. The report evaluates the respect of essential guarantees by arbitration bodies, and determines the minimal guarantees that a dispute settlement mechanism acceptable to consumers should carry. The report concludes with a list of characteristics and procedures that would guarantee the effectiveness of a consumer arbitration system and ensure that arbitration offers consumers adequate protection.

The research reveals that other than the arbitration system for the Guarantee Plan for New Residential Buildings in Quebec and the Canadian Automobile Manufacturers Vehicle Arbitration Program, there exists no arbitration program administered by government or private organizations that is dedicated to consumer litigation.

Arbitration appears to offer several advantages: speed, flexibility, confidentiality, reduced costs, the arbiter's expertise, a procedure adapted to the parties' dispute, etc. However, the transposition to consumer litigation of arbitration as it exists for commercial litigation is flawed,

[1] *Dell Computer Corporation v. Union des consommateurs*, 2007 CSC 34.

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revealing marked disadvantages for the consumer in comparison with courts of law: the characteristics of arbitration, acceptable and advantageous for parties of relatively equal power, tend to accentuate the imbalance of forces between consumers, individually and collectively, and merchants. The “repeat player effect”, whose consequences are no longer in doubt, compels us to question the application of principles that should be the very foundation of any fairness process.

The study reaffirms that, to be a valid consumer redress system, consumer arbitration must establish a balance of power between the parties and ensure the respect of essential guarantees; it presents the essential attributes that consumer arbitration should have.

Our study leads us to conclude that arbitration, with its inherent characteristics and its advantages as a dispute settlement system for parties in commercial and international litigation, cannot be imported as is to consumer litigation. Indeed, a case-by-case study of those characteristics, and an examination of the adjustments to them that would be necessary to make arbitration an acceptable dispute settlement mechanism, leads us in the opposite direction. We conclude that the necessary process to be established is much less similar to that of known arbitration processes than to that made available to consumers across Canada by the courts (small claims courts, among others), for settling matters in which relatively small amounts are in dispute.

So-called arbitration systems established abroad have also turned away from arbitration in the strict sense, and have in fact few characteristics inherent to arbitration.

The justice system as currently organized does not meet the specific needs of consumer litigation. Establishing a consumer court that would borrow certain benefits of arbitration, while being free of its disadvantages, appears necessary. It would modernize an obsolete and unsuitable justice system in terms of consumer affairs, and would offer consumers better access to justice. Consumers’ procedural rights would thus be protected, and a balance between consumers and merchants would be established.

Finally, until such a consumer court is created, the report recommends that provinces that have not done so adopt legislation prohibiting the imposition of arbitration on the consumer. We also recommend that provincial governments form independent expert committees, notably including consumer representatives, charged with developing, in collaboration with Justice Departments, criteria for creating in each province a consumer court suitable for the specific needs and characteristics of consumer litigation.

French version available on our website.

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