Arbitration Class Action Waivers in the United States and Canada

By

STEVEN P. CAPLOW

Reprinted from
(2008) 74 *Arbitration* 57-64

Sweet & Maxwell Limited
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

(2008) 74 ARBITRATION 1

Arbitration Class Action Waivers in the United States and Canada

by STEVEN P. CAPLOW

1. INTRODUCTION

Dell Computer Corporation, a major computer retailer with operations in the United States and Canada, mistakenly listed several handheld computers at a fraction of their true price on its English-language website.[1] The next day Dell caught the error and blocked access to the order pages. Yet, using "deep links" obtained from an acquaintance, Olivier Dumoulin from Quebec succeeded in circumventing the block and ordered a $379 handheld computer for only $89. Over the course of the weekend, during which time Dell typically would make only three sales, 354 Quebec consumers placed 509 orders for the mispriced computers. When Dell refused to honour the sales, Mr Dumoulin, in disregard of an arbitration provision barring class actions,[2] commenced legal proceedings to institute a class action against Dell.

As *Dell Computer* illustrates, in the United States and Canada companies increasingly try to limit such lawsuits with arbitration clauses containing provisions known as "class action waivers" (or "collective action waivers") that prevent parties from commencing or participating in class actions. In an opinion issued the same day as *Dell Computer*, the Canadian Supreme Court applied principles established in *Dell Computer* to address the enforceability of another arbitration provision containing such a class action waiver in a case brought by a Canadian dentist who incurred $4 a minute roaming charges while on a trip to the United States.[3]

2. WHERE YOU STAND DEPENDS ON WHERE YOU STAND

The United States and Canada—separated by an imaginary line—use different terminology and policies to consider the arbitrability of disputes. Although companies and customers increasingly do business throughout the United States and Canada, the countries' judicial systems still stop at the border. Unexpectedly, the two countries view arbitrability fundamentally differently. Despite broadly similar statutory frameworks for arbitration, the two countries focus on different concerns with respect to the basic question of whether the court or the arbitrator should decide gateway questions of arbitrability.

Broadly speaking, courts in the United States focus on the contractual nature of arbitration. US courts believe they serve as the safeguard to ensure that no party "be required to submit to arbitration any dispute which he has not agreed so to submit."[4] Accordingly, arbitrability is an "issue for judicial determination" unless the "parties clearly and unmistakably provided otherwise."[5] Contract law provides the decisional framework for US decisions, and the outcome can depend on which jurisdiction supplies the applicable law. In the USA, courts, not arbitrators, generally resolve issues of arbitrability, including the enforceability of class action waivers.

Across the border in Canada, courts tend to emphasise the competence of the arbitrators to adjudicate their own jurisdiction, and the decision to compel arbitration will generally bar the

[1] *Dell Computer Corp v Union des Consommateurs* 207 SCC 34 at [4]–[5] (*Dell Computer*).
[2] See Factum of Appellant, Dell Computer Corporation, at 89 available at *http://www.mcgill.ca/files/arbitration/DellFactum.pdf* [Accessed December 20, 2007].
[3] *Rogers Wireless, Inc v Muroff* 2007 SCC 35.
[4] *Steelworkers v Warrior & Gulf Nav. Co* 363 U.S. 574, 582 (1960).
[5] *AT&T Technologies v Communications Workers* 475 U.S. 643, 649 (1986).

class action even without a class action waiver. Canadian courts particularly struggle with the thorny public policy of promoting efficient arbitration of disputes. As the Canadian Supreme Court recently observed in *Dell Computer*, while allowing the arbitrator to decide initially the arbitrator's own jurisdiction risks a duplication of proceedings, because it defers court review of the issue of arbitrability until completion of the proceedings, it prevents delaying tactics. Like many European countries, Canada favours the "competence-competence" principle, which allows the arbitrator to decide on arbitrability (essentially the arbitrator is presumed competent to decide on jurisdictional competence to resolve the dispute). The Canadian Supreme Court takes into account judicial efficiency and the respective capabilities of the court and the arbitrator to resolve legal and factual issues to evaluate arbitrability. Although the Canadian decisions look for guidance from countries throughout Europe, they notably ignore decisions from the United States (and the United States is equally oblivious to its sister courts in Canada) even on issues like class action waivers in which there is a considerable body of US law.

3. ARBITRABILITY BELOW THE IMAGINARY LINE: A UNITED STATES PERSPECTIVE

The US Supreme Court used the recent decision of *Buckeye Check Cashing*[6] to reaffirm the "severability rule," which holds that the arbitration clause can always be "severed" from the agreement, with the counter-intuitive result that the court considers challenges to the validity of the arbitration clause, while the arbitrator considers challenges to the arbitration agreement as a whole. Although 40 years ago in his dissent to *Prima Paint*,[7] the decision that originally adopted the severability rule, Black J. described the rule as "fantastic" (in the sense of being ludicrously odd), it has gained complete acceptance. In *Buckeye* the plaintiff filed a putative class action lawsuit in a Florida state court, alleging that the interest rate Buckeye charged for its cheque cashing services was "criminal on its face", rendering the whole contract illegal and void *ab initio* under Florida state law. Not illogically, the Florida Supreme Court concluded that it, not the arbitrator, should resolve this threshold matter of Florida public policy and contract law. Applying ordinary state law rules of contract interpretation, which unequivocally prohibited severability, the Florida Supreme Court refused to allow Buckeye to salvage the arbitration provision contained in a contract that was illegal and void under Florida law. The US Supreme Court allowed the appeal, holding that the severability rule is a matter of substantive federal arbitration law notwithstanding the fact that the plaintiff filed the lawsuit in a state court and the contract could not be severed under applicable state law. *Buckeye* reaffirmed the basic rule that, because the plaintiffs challenged the validity of the *entire agreement*, not just the arbitration provision,[8] the agreement to arbitrate remained enforceable, and the question of the contract's legality properly had to be decided by the arbitrator, not the court.

The specific outcome of *Buckeye*—which directed the arbitrator to decide validity—should not distract from the more significant point that, by allowing the courts to decide most issues as to the *validity* of arbitration clauses and the related issue of the *existence* of a binding agreement to arbitrate,[9] the severability rule actually operates as a huge exception to policies favouring arbitration. As the US Supreme Court explained in *First Options*, the parties must

[6] *Buckeye Check Cashing, Inc v Cardegna* 546 U.S. 440 (2006).

[7] *Prima Paint v Flood & Conklin* 388 U.S. 395, 407 (1967) (Black J. dissenting).

[8] Courts often struggle as to whether the complaint challenges the entire agreement, or just the arbitration provision, e.g. *Nagrampa v Mailcoups, Inc* 469 F.3d 1257, 1271–77 (9th Cir. 2006) (reviewing circuit decisions).

[9] Although not yet addressed by the US Supreme Court, *Buckeye Check Cashing* 546 U.S. at n.1 (reserving issue and collecting appellate cases), federal appellate courts have ruled that "challenges to the *existence* of a contract as a whole must be determined by the court prior to ordering arbitration." *Sanford v Memberworks* 483 F.3d 956, 962 & n.8 (9th Cir.

include "clear and unmistakable" evidence that they intend the arbitrator to adjudicate validity or existence of the arbitration provision to overcome the "presumption" that they intend the court to resolve this issue.[10] In this manner, "the law treats silence or ambiguity about the question" as an indication that the parties reserved the issue for the courts to decide. For example, in a recent international dispute involving companies in Florida and the United Kingdom, the parties agreed that claims "may" be arbitrated under the International Chamber of Commerce (ICC) Rules in London.[11] Despite the fact that Art.6 of the ICC Rules provides that the arbitration panel decides questions of arbitrability, the trial court in Florida held that the use of the term "may" in the arbitration clause engendered sufficient ambiguity that, notwithstanding the reference to ICC Art.6, the provision was unclear and therefore the court, not the arbitration panel, should decide whether the parties agreed to mandatory arbitration.[12]

Like validity and existence, the question of whether a valid arbitration provision covers a particular grievance, generally referenced as "scope" or "applicability" of the arbitration agreement, will be decided by the court unless the parties clearly and unmistakably provide otherwise. As the US Supreme Court explained, whether an "agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination."[13] In evaluating the *scope* of the arbitration clause, however, a court "reverses the presumption"[14] and any doubts about the breadth of the arbitration clause are resolved in favour of arbitration.[15] Under this strong presumption in favour of arbitration, courts deem even the lack of sufficient clarity or silence in the arbitration clause as acquiescence to resolve the specific grievance through arbitration.[16]

Although US courts reserve arbitrability as a "gateway" issue for courts, not all gateway disputes are for a court to decide. Further complicating the analysis, the US Supreme Court concluded that parties "would likely expect" that an arbitrator would decide procedural gateway matters that "grow out of the dispute and bear on its final disposition."[17] Accordingly, conditions precedent to arbitration, like completion of grievance procedures and other "prerequisites" and defences to arbitrability such as time limits, notice, laches, estoppel, waiver and delay, are "presumptively for the arbitrator, not the judge."[18]

2007) (emphasis in original). According to these authorities, unlike validity challenges, the separability rule need not apply, because courts properly consider existence challenges to both the entire contracts and to the arbitration provision. However, the purview of courts to consider existence challenges to the entire contract is not without limits. Questions as to whether a contract containing an arbitration clause has "expired, terminated, or been repudiated are matters for the arbitrator." *Flores v Jewels Marketing and Agribusiness* 2007 WL 2022042 (E.D.Cal. July 9, 2007).

[10] *First Options of Chicago, Inc v Kaplan* 514 U.S. 938, 944–45 (1995).

[11] *Conax Florida Corp v Astrium Ltd* F. Supp.2d, 2007 WL 2083582 (M.D. Fla. July 18, 2007) (No.8:07-CV-76-T-TGW).

[12] *Conax Florida* F. Supp.2d, 2007 WL 2083582 at n.8.

[13] *AT&T Technologies* 475 U.S. at 649 (holding that a court should decide whether a labour-management layoff controversy falls within the arbitration clause of a collective bargaining agreement).

[14] Despite the use of the term "reverse," the presumptions are not symmetrical: for validity/existence the presumption applies to the arbitrability question of whether the court or arbitration panel has jurisdiction, while for scope the arbitrability question applies to interpreting the breadth of the provision. Therefore, statements that the "law reverses the presumption" apparently refer to the broader question of whether a particular issue will be resolved by arbitration, not just the specific problem of allocating decisional authority between the court and the arbitration panel.

[15] *First Options* 514 U.S. at 945.

[16] *First Options* 514 U.S. at 944.

[17] *Howsam v Dean Witter Reynolds, Inc* 537 U.S. 79, 84 (2002) (citation and quotations omitted).

[18] *Howsam* 537 U.S. at 85 (holding that National Association of Securities Dealers six-year time limit was not a dispute of "arbitrability" for the court).

The severability rule and related decisional rules for arbitrability apply equally to the enforcement of class actions waivers. Generally, unless they characterise it as a procedural gateway matter, or find unmistakable evidence that the parties intended the issue to be resolved by the arbitration panel, courts in the United States will resolve the existence, validity and scope of class action waivers. Not surprisingly, given the decision thicket that applies to the analysis, courts that even stop to consider the issue apply different rationales for whether the court or the arbitrator should adjudicate enforcement of the waiver. Most commonly parties challenge the validity of the class action waiver by arguing that it is substantively unconscionable.[19] Under the severability rule, courts should only decide conscionability if the challenge applies to the arbitration provision and not the contract as a whole. Some courts have applied a highly mechanistic approach looking to the "location and subject matter" of the class action waiver; under this approach the court evaluates conscionability when as is often the case the class action waiver is "located" (that is included) as part of the arbitration provision.[20] Other courts resolve the question based on whether a successful challenge will invalidate or affect the entire contract, or just the arbitration provision.[21] In other instances courts have ruled that the arbitrator not the court should resolve the issue because the challenge to the class action waiver was procedural,[22] delegated to the arbitrator by the "plain language" of the agreement,[23] or logically separate and irrelevant to the arbitration provision.[24]

4. ARBITRABILITY ABOVE THE IMAGINARY LINE: A CANADIAN PERSPECTIVE

Canada, like many European countries, although sometimes reaching the same result as a court in the United States, gives precedence to the arbitration process. Canadian courts follow the competence-competence principle, which presumes, albeit to varying degrees, that the arbitral tribunal may rule on its own jurisdiction, including many objections with respect to the validity and existence of the arbitration agreement. In *Dell Computer*, after a survey of international and Quebec law, the Canadian Supreme Court outlined general rules that at least apply in Quebec, although they will likely affect consideration of the

[19] For international arbitrations, however, the Federal Arbitration Act incorporates the New York Convention, 9 U.S.C. §§ 201–208, which does not recognise the unconscionability defence under the Convention's "null and void" clause, *Khan v Parsons Global Serv, Ltd* 480 F. Supp. 2d 327, 340 (D.C.C. 2007).

[20] *Muhammad v County* 189 N.J. 1, 912 A.2d 88 (2006). In addition to the class-arbitration waiver, the parties' agreement also included a "broad class action waiver." *Muhammad* 189 N.J. 1, 912 A.2d 88 (2006) at 14. Although the court suggests its authority was limited to examining the validity of just the class-arbitration waiver, it later invalidated the broad class action waiver too, *Muhammad* 189 N.J. 1, 912 A.2d 88 (2006) at 22.

[21] See, e.g. *Bess v DirectTV* 2007 WL 2013613 (Ill.App. 5 Dist. July 10, 2007) (No.5-05-0394). On the first appeal, the court remanded for the arbitrator to determine whether the arbitration provision permitted arbitration of class actions, and the lower court to evaluate validity. On the second appeal, after finding the arbitration provision procedurally unconscionable, the court declined to address the lower court's finding that the class action waiver was substantively unconscionable.

[22] e.g. *Davis v ECPI Collect of Technology L.C.* 227 Fed.Appx. 250 n.2 (4th Cir. March 20, 2007) (unpublished).

[23] e.g. *Spann v American Exp. Travel Related Services Co, Inc* 224 S.W.3d 698 (Tenn.Ct.App. August 30, 2006) (the parties stipulated, however, to the court addressing the issue), appeal denied (January 29, 2007).

[24] e.g. *In Re American Express Merchant's Litigation* 2006 WL 662341 (S.D.N.Y. March 15, 2006) (although plaintiffs argued that the class action waivers in the arbitration clause were an unlawful restraint of trade and monopoly maintenance device, the court held that their enforceability was for the arbitrator to decide).

same issue in other provinces that have similar statutory provisions for arbitration.[25] Unlike courts in the United States, which rely on contract principles for the decisional framework, the arbitrability rules set forth in *Dell Computer* are procedural and evidentiary based. First, a challenge to the arbitrator's jurisdiction must be resolved by the arbitrator unless the challenge is based "solely on a question of law." This exception to the systematic referral to arbitration is justified by factors such as the courts' expertise in resolving such questions and the fact that the arbitrator's decision regarding jurisdiction is subject to judicial review. Secondly, if the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record. The arbitration panel should evaluate its jurisdiction under these circumstances because it has similar resources and expertise as the courts. Thirdly, the exceptions to the general rule of referral only apply if the court is satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic.

5. ARBITRATION OF CLASS ACTIONS

Courts in the United States and Canada have addressed the arbitration of class actions. Although the high court decisions of both countries emphasise that class actions are procedural, the United States allows such arbitrations, while Canada does not.

The US Supreme Court addressed the issue in *Green Tree Financial*.[26] Green Tree, a commercial lender, included an arbitration clause which, like most arbitration provisions, did not explicitly address the issue of class actions. Green Tree apparently failed to provide its customers with a legally required form and was sued in a South Carolina state court. That court certified a class action and ordered arbitration. The parties mutually agreed to an arbitrator selected by Green Tree. After the arbitrator awarded $10.9 million in statutory damages plus attorneys' fees, Green Tree appealed disputing the permissibility of the class action arbitration. Later the same year, in a related case, the same arbitrator awarded another class $9.2 million in statutory damages plus attorneys' fees. This was also appealed. The South Carolina Supreme Court assumed jurisdiction of the consolidated appeals and ruled that, because the contracts were silent with respect to class arbitration, they consequently authorised class arbitration. The US Supreme Court by a majority ruled that, because the parties had agreed that "all disputes" would be subject to arbitration, the parties "seemed to have agreed that an arbitrator, not a judge, would answer the relevant question." Additionally, the Supreme Court ruled that the relevant question involved not the applicability of the arbitration clause, but "contract interpretation and arbitration procedures," which properly should be resolved by the arbitrator. The dissent, focusing on the fact that a class action substantively implied the method of selecting the arbitrator for the class action proceeding, argued that the question was for the courts, rather than a procedural question for the arbitrator.

Canada takes the firm view that class actions are a procedural device that cannot be used in arbitration.[27] In a recent ruling under Quebec's Code of Civil Procedure, the Supreme Court of Canada observed "as important as it may be, the class action is only a legal procedure."[28] On finding that the case was subject to arbitration, the court denied the plaintiff's motion for authorisation to institute a class action.[29] The arbitrability of the dispute essentially resolved the class action issue. The courts of British Columbia approach the analysis from

[25] Under the Civil Code of Quebec (CCP) the "arbitrators may decide the matter of their own competence," 943 CCP but the court is authorised to find the agreement "null" rather than referring this to arbitration, 940.1 CCP.

[26] *Green Tree Financial Corp v Bazzle* 539 U.S. 444 (2003).

[27] *Bisaillon v Concordia University* (2006) 1 S.C.R. 666.

[28] *Dell Computer* 207 SCC at [106].

[29] New Quebec consumer protection legislation, however, invalidates contractually imposed consumer arbitration clauses for many industries. Bill 48, which applies to contracts agreed

the other direction and treat the completion of the analysis of the certification application as a prerequisite to resolving arbitrability of the claim.[30] If the class action is certified, the court will not compel arbitration because the class action renders the arbitration clause "inoperative."

6. CLASS ACTION WAIVERS IN THE UNITED STATES

With the large number of class actions, and the growing trend of class actions alleging violations of state consumer protection laws,[31] courts in the United States and Canada increasingly struggle with the issue of whether to enforce arbitration provisions containing class action waivers in which the parties contractually agree to bar initiation of or participation in a class action. While such waivers have been upheld, lower courts in the United States also invalidate such waivers on the basis that they improperly deny consumers substantive statutory rights.[32] Under the Federal Arbitration Act (FAA), when evaluating the validity of an arbitration agreement, a US court may properly consider state law that applies to "any contract"[33] or that is "generally applicable",[34] such as fraud, duress, or unconscionability. To adjudge the merits of these defences, even federal courts apply ordinary state-law principles governing the formation and enforceability of contracts. The FAA pre-empts, however, and therefore bars, a US court from invalidating an arbitration agreement in reliance on a state law (usually a statute) that is not "generally applicable" or that does not apply to "all contracts."[35] In particular, the FAA will override a state law that places arbitration clauses on an "unequal footing"[36] by imposing requirements applicable only to arbitration provisions. For example, in *Doctor's Associates*, the US Supreme Court held that the FAA overrode a Montana state law that required notice of the arbitration provision in underlined capital letters on the first page of the contract. Under federal law, the notice provision could not serve as a defence to arbitration because it uniquely applied to arbitration clauses.

The US Supreme Court has not addressed the validity of class action waivers, and lower courts throughout the United States remain deeply divided. Courts that uphold the waivers simply enforce the express terms of the agreement,[37] or conclude that the ability to recover prevailing party attorneys' fees ensures that consumers can vindicate substantive rights.[38] Although a slight majority of jurisdictions continue to enforce class action waivers,

to as of December 14, 2006, amended the Quebec Consumer Protection Act by prohibiting certain provisions that limit consumers' right to go before a court, or from bringing a class action. Under the amendment an arbitration agreement can validly be concluded by a merchant and a consumer only after a dispute has arisen.

30 *MacKinnon v National Money Mart* (2004) 203 B.C.A.C. 102 at [3]–[4], [52] (order regarding staying the action premature until the court determines whether the proceeding will be certified); *Tracy v Instaloans Financial Solutions Centres (B.C.) Ltd.* (2006) 2006 BCSC 1018 at [86].

31 A. Bronstad, "Consumer Class Actions Usurping Personal Injury Claims" *National Law Journal*, July 11, 2007 ("Plaintiffs lawyers are filing an increasing number of class actions under state consumer-protection laws in conjunction with, or in place of, traditional personal injury class actions, which have become too difficult in recent years to certify.").

32 Pending legislation before the US Congress, the Arbitration Fairness Act would make void mandatory arbitration clauses in contracts corporations make with consumers, employees and franchisees. S. 1782 and H.R. 3010.

33 9 U.S.C. § 2

34 *Doctor's Assoc, Inc v Casarotto* 517 U.S. 681, 687 (1996).

35 *Bradley v Harris Research, Inc* 275 F.3d 884, 890 (9th Cir. 2001) (pre-empting California statute requiring adjudication of franchise agreement disputes in California because it applies only to forum selection clauses in franchise agreements and "therefore does not apply to any contract").

36 *Doctor's Assoc* 517 at 686 (citation and quotation omitted).

37 e.g. *Sherr v Dell, Inc* 2006 WL 2109436 (S.D.N.Y. 2006) (No.05 CV 10097).

38 e.g. *Jenkins v First Am. Cash Adv. of Ga.* 400 F.3d 868, 878 (11th Cir. 2005).

increasingly courts invalidate them on the basis that class actions are necessary to vindicate statutory rights. As one court succinctly put it, "[w]hether right to a class action is a substantive or a procedural one, it is certainly necessary for the effective vindication of statutory rights".[39]

In a recent decision, a majority of the Washington State Supreme Court invalidated class action waivers in consumer contracts for mobile phone services as substantively unconscionable, notwithstanding the fact that, unless the customer's claim was found to be frivolous, the defendant company had agreed to pay American Arbitration Association filing, administrator and arbitration fees and, if the customer recovered at least the demanded amount, to reimburse the customer for reasonable attorneys' fees and expenses for the arbitration.[40] The majority ruled that such waivers are unconscionable because they "drastically forestall attempts to vindicate consumer rights" and effectively exculpate the drafter from potential liability for small claims no matter how widespread. As to exculpation, the majority noted that "of course, on its face, the class action waiver does not exculpate [the Company] from anything", but relied on a highly regarded federal judge who had observed: "the realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30". The Washington Supreme Court also addressed the issue of federal pre-emption under the FAA, which requires courts to put arbitration clauses on the same footing as other contracts. The majority rejected such pre-emption on the basis that the "arbitration clause is irrelevant to the unconscionability",[41] apparently because the court would invalidate all such waivers. As the dissent points out, the "majority departs from the usual case-by-case analysis for determining contract unconscionability in favor of a sweeping rule that will invalidate thousands of arbitration contracts without regard to the specific terms of those agreements."

7. CLASS ACTION WAIVERS IN CANADA

In Ontario, unlike the Washington Supreme Court, the superior court rejected the argument that the class action waiver in the arbitration provision was equivalent to an exemption clause.[42] The court explained:

> "an arbitration clause is not at all the same as an exemption clause. The latter serves to remove one contracting party's liability to the other whereas the former simply requires that the parties seek their relief in a different forum".

Although the Ontario court upheld the class action waiver, pending consumer protection legislation in Ontario will invalidate class action waivers in consumer agreements.[43]

Rogers Wireless, Inc v Muroff involved a potential class action by a Quebec resident who had incurred $4 per minute roaming charges while using his mobile phone in the Northeast United States. The subscriber agreement contained an arbitration provision that prohibited the customer from commencing or participating in a class action. The customer sought to use a variety of evidence including transcripts of oral examinations of the company's representatives. Applying the standard endorsed by the majority in *Dell Computer*, which

[39] *Wong v T-Mobile USA, Inc* 2006 WL 2042512 (E.D. Mich. July 20, 2006) (No.05-73922).

[40] *Scott v Cingular Wireless* P.3d, 2007 WL 2003404 *1 (Wash. July 12, 2007).

[41] Although the challenge was to the class action waiver in the arbitration provision, the majority concluded that this provision was "irrelevant" to its analysis. Arguably, unconscionability should therefore have been adjudicated by the arbitrator, not the court, under the severability rule, *Buckeye* 546 U.S. 440 (2006) at 1209 ("unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance").

[42] *Kanitz v Rogers Cable* (2002) 58 O.R. (3d) 299 (Sup. Ct.).

[43] Pending amendment to Consumer Protection Act, 2002 c.30 Sch.A s.8(1) invalidates provisions that prevent a consumer from commencing or participating in a class action.

requires referral to arbitration on questions of mixed law and fact, the Supreme Court held that the arbitrators should decide their own jurisdiction under the competence-competence principle, and whether the arbitration clause was abusive. The Court acknowledged that Bill 48, which prohibits class action waivers in Quebec, would change the outcome of the decision for agreements entered into after December 14, 2006.

8. CONCLUSION

Companies in the United States and Canada have sought to use arbitration and waivers to limit class actions. In the United States, blocking class actions usually depends on the enforceability of the class action waiver, while in Canada it generally turns on the arbitrability of the dispute. Complicating the analysis for multinational corporations that operate in both countries is the fact even within each country there are significant splits in authority depending on the jurisdiction and which arbitration Act applies.