

A DISPUTED ALTERNATIVE TO ALTERNATIVE DISPUTE RESOLUTION — A DISCUSSION OF CLASS-WIDE ARBITRATION AND ITS RELEVANCE FOR QUÉBEC CLASS ACTION LITIGANTS AND PRACTITIONERS

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Class-wide arbitration, which combines traditional class action and arbitration procedure, has existed in the United States for several years. A recent decision of the United States Supreme Court has underlined its importance for contemporary American litigation. Although courts in Canada and Québec have never recognized class-wide arbitration specifically, a string of judgments have allowed for the consolidation of arbitration disputes. This suggests that class-wide arbitration of the type practised south of the border may be received into our own legal systems. The consequences of such a development for defendant companies, in particular, as well as a new range of plaintiffs, are arguably extensive. This paper looks at the relevant United States, Canadian, and Québec case law, with a view to analysing the hybrid procedure and evaluating its potential impact.

L'arbitrage collectif – une synthèse de l'arbitrage et du recours collectif – existe aux États-Unis depuis plusieurs années. En effet, un arrêt récent provenant de la Cour Suprême a souligné l'importance de cette procédure dans le contexte du litige contemporain. Quoique les cours canadiennes et québécoises n'ont jamais invoqué l'arbitrage collectif en tant que tel, une série de décisions ont élaboré le principe de la consolidation de différends. Ceci indique que l'arbitrage collectif pratiqué par nos voisins pourrait un jour faire partie de notre système juridique. Les conséquences d'une telle évolution pour les sociétés défenderesses en particulier, ainsi que pour un nouveau groupe de demandeurs, seraient probablement importantes. Cet article survole la jurisprudence américaine, canadienne et québécoise en vue d'analyser l'arbitrage collectif et d'évaluer son impact potentiel.

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Classwide arbitration, as Sir Winston Churchill said of democracy, must be evaluated, not in relation to some ideal but in relation to its alternatives.

Grodin, J.
 Supreme Court of California

I. *Introduction*

In the last two decades, class-wide arbitration has become a controversial feature of the American legal landscape. It has bridged the gap between two institutions, the class action and arbitration, that have traditionally been viewed and treated by legislatures as separate, different, and essentially unrelated. The appearance of class-wide arbitration in United States litigation, and the body of case law and divergent judicial opinion it has generated, indicate that it can no longer be viewed simply as an unforeseen anomaly. On the contrary, the recent decision of a plurality of the United States Supreme Court in *Green Tree Financial Corp. v. Bazzle*¹ demonstrates that it has become a hot commodity in the legal marketplace and must be treated seriously by contracting parties who include an arbitration clause in their written

¹ 539 U.S. 444 (U.S.S.C. 2003) [*Bazzle*], aff’g 569 S.E. 2d 349 (S.C.S.C. 2002). Note that this case will be discussed more extensively under section III. of the heading “American Case Law”.

undertakings. The decision has empowered arbitrators to the detriment of courts, and signalled that arbitration agreements are more flexible than drafting parties may ever have expected. In effect, the ruling caps a long line of cases and seems to give arbitrators powers of contract interpretation that have, until now, been exercised by superior court judges to the exclusion of other authorities.

The practical impact of class-wide arbitration is considered by some to be enormous. To date, arbitration clauses have been included in contracts of adhesion² in order to avoid protracted litigation, and keep legal and transaction costs as low as possible. The mechanism of class-wide arbitration, however, allows individual and often minor disputes to be compounded, and can result in huge multi-million dollar awards.³ While the phenomenon has thus far been a distinctly American one, Canadian jurisdictions, companies, entrepreneurs, customers, and legal counsel can no longer afford to remain in the dark. More specifically, residents of Québec, who are governed by a *Code of Civil Procedure*⁴ which recognizes and provides substantive rules with respect to class actions and arbitration, should be apprised of these crucial developments. Already, courts in Ontario, British Columbia, and Québec have touched upon the outer contours of the very issues that are eliciting a great deal of debate among our southern neighbours. By studying the American case law, we can better anticipate the arguments that may soon confront our own attorneys and judges. We can also infer how Québec courts are likely to orient themselves. Whether class-wide arbitration will ever be received into the civil law is, of course, purely speculative. That we should speculate on a matter of such importance, however, is imperative.

II. *Class-Wide Arbitration*

Class-wide arbitration, unheard of until the 1980s, can be characterized as a synthesis of two legal mechanisms: the class action and arbitration. On its face, such a combination is by no means self-evident. This is due to the fact that the two institutions in question were born out of different

² The Supreme Court of California in *Keating*, note 11 below at para. 8, accepted the respondent's characterization of an adhesion contract as "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." The *Civil Code of Québec*, R.S.Q., 1991, c. 64, [C.C.Q.], adopts a similar definition in the first paragraph of Article 1379. See also Article 1437 C.C.Q., note 130 below.

³ A good example is the large award confirmed by the South Carolina Supreme Court in *Bazzle*, *supra* note 1, later reversed by the United States Supreme Court and remanded to arbitration.

⁴ R.S.Q. c. C-25 [C.C.P.].

legal concerns and, from an historical point of view, a different factual setting. In effect, arbitration statutes were a legislative response to the common law's longstanding hostility towards arbitration clauses. Such clauses provide that a dispute between the parties, instead of being litigated in the traditional court setting, must be brought before an objective third party, the arbitrator, who can decide the matter and impose binding obligations on the disputants. The older courts considered such clauses to be unenforceable because they stripped the parties to the agreement of their time-honoured rights.⁵ For centuries, it was argued, a contracting party, feeling he has been wronged, could address himself to the common law courts, avail himself of various civil procedures, and ultimately obtain a judge-ordered remedy.⁶ To disqualify a party from doing so was, in the opinion of these earlier jurists, unconscionable and illegal. The opposition of American courts to arbitration as a valid means of dispute resolution was quelled in 1925 when Congress adopted the *Federal Arbitration Act*.⁷ Considering it was desirable to reduce the volume of litigation and to encourage a quicker, less costly way of resolving disputes, the federal government bucked the jurisprudential trend for reasons of basic social policy.⁸ Similar pieces of legislation have since been enacted throughout the Western world, including Great Britain in 1950, Québec in 1986, and Ontario in 1992.

The class action, on the other hand, was not so much a legislative innovation as a child of the courts. By the 1940s, American judges determined that there was a basic imbalance in terms of resources between individual plaintiffs and defendant companies, who were often far wealthier, more sophisticated, and more powerful than their opponents. In addition, it was believed that it was unreasonable, and indeed not in the public interest, to compel each person alleging a common breach by a common party to litigate their issues separately. To do so would have the effect of discouraging wronged persons from ever coming forward or receiving the damages to which they would otherwise be entitled. Doffing their common law hats and donning their

⁵ See Paul L. Sayre, "Development of Commercial Arbitration Law" (1927) 37 Yale L.J. 595. See also Sen. Rep. 536, 68th Congress., 1st Sess (1924) at 2.

⁶ *Ibid.*

⁷ Title 9, US Code, Section 1-14, was first enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 674), and amended September 3, 1954 (68 Stat. 1233). Chapter 2 was added July 31, 1970 (84 Stat. 692), two new Sections were passed by the Congress in October of 1988 and renumbered on December 1, 1990 (PLs669 and 702); Chapter 3 was added on August 15, 1990 (PL 101-369); and Section 10 was amended on November 15. [F.A.A.] or the [Act].

⁸ See also the majority's discussion in *Keating*, note 11 below, at para. 25 and *Blue Cross*, note 31 below, at para. 8.

equitable ones, the U.S. federal judiciary decided to right the balance in favour of the plaintiffs. In *Montgomery Ward & Co. v. Langer*⁹ we read:

The class action was an invention of equity...mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs...By rule 23 the Supreme Court has extended the use of the class action device to the entire field of federal civil litigation by making it applicable to all civil actions.¹⁰

Consequently, whereas arbitration was imposed to avoid the time-consuming and procedurally complex nature of litigation, the class action was an equitable procedure designed to strengthen the hand of disadvantaged plaintiffs and facilitate the means of redress. As a result, class-wide arbitration can be defined as a mechanism which has two fundamental and ostensibly distinguishable functions. First, it provides a much simpler, speedier procedural framework for the parties, who must address themselves to, and abide by the decisions of, an arbitrator rather than a judge. Second, it allows persons who have contracted with the same party, and who are covered by the same arbitration clause, to join their claims together into a single action. Seen in its most positive light, class-wide arbitration is a simpler and less costly way for an optimal amount of plaintiffs to seek relief. Seen in its most negative light, it allows for the possibility of huge damage awards while depriving defendants of the standard procedural safeguards (interlocutory measures, estoppel arguments and evidentiary exclusion rules).

III. *American Case Law*

Before looking at the body of American jurisprudence that has emerged out of class-wide arbitration, certain key observations should be made. In the first place, it must be emphasised that the legislation respecting arbitration exists at the federal, as well as at the state, level. Consequently, most of the decisions spend some time dealing with the interplay between the two statutory regimes. From a Canadian point of view, this aspect of the debate is somewhat less salient and will therefore be dealt with as briefly as possible. As well, decisions have been handed down by state and federal circuit courts. This fact must be borne in mind since, as we shall see, the case law coming from the two bars reflects a markedly different approach. Finally, the state court jurisprudence itself is not uniform as different statutes have been adopted by the various legislatures. California and South Carolina, for

⁹ 168 F.2d 182 (8th Cir. 1948). [*Langer*].

¹⁰ *Ibid.* at 187.

instance, have taken a larger, more liberal approach to class-wide arbitration than some of their sister states. All of these caveats serve to demonstrate that the issue of class-wide arbitration in the United States is by no means completely straightforward. Rather, it presents us with a complex and at times confusing picture. To make matters simpler, the American case law will be examined in relation to three specific questions:

- A. When did American courts first recognize class-wide arbitration and what were their reasons for doing so?
- B. If the arbitration clause is silent regarding class-wide arbitration, can it nevertheless be ordered?
- C. Who should decide whether class-wide arbitration is allowed in a given case, courts or arbitrators?

Although the short answer to these questions can, to some extent, already be inferred, a complete answer will shed light on the legal reasoning behind the various cases. It will help to delineate some of the crucial arguments that have been canvassed before the courts, and provide the material for a more thorough analysis of Québec law.

A. When did American Courts First Recognize Class-Wide Arbitration and what were Their Reasons for Doing so?

The most important early judgment to recognize class-wide arbitration is *Keating v. Superior Court*,¹¹ a decision rendered by a majority of the Supreme Court of California. The case involved a franchise agreement signed between the Southland Corporation,¹² a franchisor of 7-Eleven convenience stores, and approximately 800 of its California-based franchisees. The multiple claims alleged a variety of comparable contractual and statutory breaches. Each of the respondent franchisees, plaintiffs at the superior court level, had signed an agreement with Southland that contained an arbitration clause. This clause provided that any

controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association¹³...and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction thereof.¹⁴

¹¹ 31 Cal. 3d 584 (S.C.C. 1982).

¹² [Southland].

¹³ [A.A.A.].

¹⁴ Cited by Justice Grodin in *Keating*, *supra* note 11 at para. 2. Notes and parenthetical references have been omitted by the authors from all the citations.

Counsel for the franchisees contended that the arbitration clause was unenforceable on the grounds that it was unconscionable, given the adhesive nature of the contract. In the event that arbitration was allowed by the Court, counsel argued alternatively that it should be ordered to proceed on a class-wide basis. Although the Court rejected the argument that arbitration clauses within a contract of adhesion are repugnant as a matter of principle, it did acknowledge the legality of class proceedings in an arbitration setting. Affirming that courts already allow for consolidation of arbitration proceedings in situations involving tripartite relationships – that is, “relationship[s] in which the parties in dispute each have a contract with a third party, but not with each other”¹⁵ – the majority saw no good reason to rule out class proceedings in the case at bar. In his opinion, Justice Grodin declares:

[...Contrary to consolidation,] an order for classwide arbitration in an adhesion context would call for considerably less intrusion upon the contractual aspects of the relationship. The members of a class subject to classwide arbitration would all be parties to an agreement with the party against whom their claim is asserted; each of those agreements would contain substantially the same arbitration provision; and if any of the members of the class were dissatisfied with the class representative, or with the choice of arbitrator, or for any other reason would prefer to arbitrate on their own, they would be free to opt out and do so. Moreover, the interests of justice that would be served by ordering classwide arbitration are likely to be even more substantial in some cases than the interests that are thought to justify consolidation.¹⁶

Simply put, class-wide proceedings are better tailored to the multiple plaintiffs involved and are clearly more flexible, allowing the parties to decide for themselves whether or not they wish to participate in the process. Elaborating on the policy reasons that support a favourable approach to class-wide arbitration, Justice Grodin states that:

Classwide arbitration, as Sir Winston Churchill said of democracy, must be evaluated, not in relation to some ideal but in relation to its alternatives. If the alternative in a case of this sort is to force hundreds of individual franchisees each to litigate its cause with Southland in a separate arbitral forum, then the prospect of classwide arbitration, for all its difficulties, may offer a better, more efficient, and fairer solution. Where that is so, and gross unfairness would result from the denial of opportunity to proceed on a classwide basis, then an order structuring arbitration on that basis would be justified.¹⁷

¹⁵ *Ibid.* at 612.

¹⁶ *Ibid.* at 612-13.

¹⁷ *Ibid.* at 613.

Interestingly, the argument put forward here is similar to the one voiced in *Langer*, cited above. It rests, in part at least, on the equitable notion that it would be unfair to compel individual parties with limited resources and minor claims to arbitrate separately with a larger corporate entity.

The majority goes on to conclude that the decision as to whether an order allowing class proceedings was warranted was one best left to the trial division. Consequently, the judgment of the Superior Court, which failed to address class-wide arbitration in the first place, was reversed and the cause remanded to the lower court for the purpose of determining this issue.

Nevertheless, the Court in *Keating* did not speak with unanimity. In a strongly worded dissenting opinion, Justice Richardson explained why he believed class-wide arbitration could not be ordered given the specifics of the case.¹⁸ In the first place, he reasoned that the majority should not have applied state legislation to the questions at bar, but rather the provisions of the *Federal Arbitration Act*, a substantive federal statute. Because the case involved franchise agreements entered into by parties from different states, and was manifestly a commercial matter, the wording of the *Act* and the jurisprudential authorities were in clear agreement that national law was applicable. What is more, Justice Richardson took issue with the fact that class-wide arbitration was never even mentioned in the arbitration clause. To read it into the contractual terms would therefore be an *ex post facto* rewording of the language expressly chosen by Southland and accepted, in turn, by the franchisees. He declares as follows:

In the present case, the contracts of the parties do not provide for class arbitration,¹⁹ nor have the parties subsequently agreed thereto. No statute authorizes a court to order arbitration on a class-wide basis. Nonetheless, the majority concludes that such a procedure is possible in order to prevent repetitive arbitration and to avoid “effectively foreclosing individual claims” in instances where the arbitration contract “may be used to insulate the drafter of an adhesion contract from any form of class proceeding.”²⁰

In this respect, Justice Richardson appears to reaffirm a fundamental principle of Anglo-American contract law. Namely, he argues that, unless a legislature decides otherwise, the contract remains the law of the parties and should not be misconstrued or distorted by courts for policy reasons.

¹⁸ *Ibid.* at para. 61 and ff.

¹⁹ Terms used to describe the proceeding vary from “class-wide arbitration” to “classwide arbitration” to “class arbitration”.

²⁰ *Keating supra* note 11 at 621.

More important, the dissenting opinion goes on to flesh out the pragmatic objections that can be raised to class-wide arbitration. Rather than envisioning a vehicle that allows for equitable results and expeditious proceedings, Justice Richardson sees a basic contradiction between the class action, on the one hand, and arbitration, on the other. This inherent contradiction can only result in bad cases and bad law. Adopting the dissenting reasons of Justice Bloom in *Coleman v. National Movie-Dine Inc.*,²¹ Justice Richardson writes that arbitration does not lend itself well to subsidiary proceedings like those used to “determine whether class action status should be granted, [provide a] definition of the class, [determine] the nature and kind of notice and by whom it should be sent, [craft] provisions for opting out, etc.” In addition, the informal nature of arbitration would probably preclude the possibility of court review and make it difficult to follow an arbitrator’s decision in respect of the many plaintiffs (given the absence of transcripts). The fact that arbitrators often lack any formal legal training is also a matter of concern. Summing up the crux of his opinion, Justice Richardson declares:

[T]he majority, in the absence of any contractual, statutory, or judicial authority or any demonstrated need, has seen fit to invent a procedure which is fundamentally contrary to the purpose of arbitration and to the public policy encouraging arbitration. Potentially, the majority holding will effectively render arbitration clauses in all adhesion contracts subject to class treatment, thus engrafting on an informal, speedy method of dispute resolution which often utilizes nonlegal arbitrators a complex legal procedure which will require close court supervision and frequent intervention antithetical to the essential informal and nonjudicial nature of the arbitration process.²²

Although an early case, *Keating* is an obvious touchstone. In addition to recognizing class-wide arbitration, it provides carefully argued opinions for and against the proceeding and is weaved into the subsequent American judgments that have dealt with the subject. In addition to elaborating the points made on both sides of the issue, however, *Keating* provides Québec’s legislators, courts, and jurists with an *aperçu* of the difficult issues they themselves may soon be called upon to weigh.

B. If the Arbitration Clause is Silent Regarding Class-Wide Arbitration, can it Nevertheless be Ordered?

The answer to this question differs according to the judiciary, and

²¹ 449 F.Supp. 945 (E.D.Pa. 1978).

²² *Keating supra* note 11 at 626.

hinges on whether it is raised before the federal circuit courts or in the state court setting. Indeed, the federal bench²³ has come down strongly against ordering class-wide arbitration where the language of the arbitration agreement is silent in this respect. Adopting the more conservative approach favoured by Justice Richardson in *Keating*,²⁴ it constructs arbitration clauses restrictively and limits itself to the express terms agreed to by the parties. A classic example of this approach is provided by the Seventh Circuit in *Alvin Champ v. Siegel Trading Company Inc.*²⁵ This appeals case dealt with a class action brought by the respondent plaintiff, Esther Perera, against the Siegel Trading Company and two other defendants. She alleged that these defendants had contravened the *Commodity Exchange Act*, the *Racketeer Influenced and Corrupt Organizations Act*, and several other statutory provisions at the state level. Despite receiving a filing for class certification, the lower court ordered that she proceed to arbitration given that her contractual relationship with the defendants was subject to an arbitration clause. Following this decision, the plaintiff successfully filed a second motion asking the Court to certify her as a class representative in a class-wide arbitration proceeding. From this point on, the procedures involved are numerous and complex. Suffice it to say that the issue of certification ultimately made its way to the Seventh Circuit. The Court determined, in the first place, that federal rules applied and therefore invoked the provisions of the *Federal Arbitration Act*. It then went on to discuss the application of section 4 of the *Act* to the contract at bar. The decision reads:

The parties' arbitration agreement makes no mention of class arbitration. For a federal court to read such a term into the parties' agreement would "disrupt[] the negotiated risk/benefit allocation and direct[]...[the parties] to proceed with a different sort of arbitration... We find no meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration. We thus adopt the rationale of several other circuits and hold that section 4²⁶ of the F.A.A. forbids

²³ More specifically, members of the Second, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits. See *Champ*, note 25 below at para. 16. A notable exception is the First Circuit Court which ruled in favour of consolidation even in the absence of any express provisions within the arbitration clause to that effect: see *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988). [*New England Energy*].

²⁴ *Supra* note 20.

²⁵ 55 F.3d 269 (7th Cir. 1995). [*Champ*].

²⁶ This section of the *Act* reads as follows:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in

federal judges from ordering class arbitration where the parties' agreement is silent on the matter.²⁷

Elaborating on the scope of section 4, the Court goes on to explain the limited powers which this provision of the *Act* actually provides. While the Seventh Circuit does not deny that class-wide proceedings can be legitimately ordered, it insists that such proceedings cannot simply be inferred by judges. Commenting on the federal statute, Justice Manion states:

[S]ection 4 [...] requires that we enforce an arbitration agreement according to its terms. Such terms conceivably could consist of consolidated or even class arbitration. The parties here did not include in their agreement an express term providing for class arbitration. Thus, one could say that through the proper application of 9 U.S.C. sec. 4 the FAA has already provided the type of procedure to be followed in this case, namely, non-class-action arbitration.²⁸

Justice Manion makes the further point that whenever parties opt for arbitration, they necessarily forego what the Fourth Circuit has termed

a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

²⁷ *Champ*, *supra* note 25 at para. 17.

²⁸ *Ibid.* at 276.

“procedural niceties”.²⁹ In effect, arbitration clauses are designed to allow the disputants to have their issues resolved in a simpler forum for reasons of celerity and cost. To achieve this end, the procedural options available in the courtroom must be sacrificed. One such “nicety” is the class action, a creature of equity which has no place in arbitration unless otherwise provided for by the contractual language of the parties.³⁰

In a case litigated before the Court of Appeal of the State of California, *Blue Cross of California v. Superior Court (Farquhar)*,³¹ a question identical to the one posed in *Champ* was at issue: does the *Federal Arbitration Act* pre-empt state legislation and prohibit class-wide arbitration in instances where the arbitration clause does not mention class proceedings? The matter arose after two named plaintiffs, Elizabeth Farquar and Laurie Winett, launched a class action suit against Blue Cross of California. The plaintiffs claimed that the defendant company had engaged in illegal practices while selling and administering its health plans. Most of the allegations centred on the presence of unconscionable exclusionary clauses and waivers within the health assurance contracts. After discussing *Keating* and approving the majority judgment, the Court proceeds to take issue with the Seventh Circuit. The opinion reasons as follows:

We decline to apply the [...] decision in *Champ* to this case. As discussed below, we conclude section 4 of the act does not preclude application of the California classwide arbitration rule. Further, we believe the First Circuit New England Energy decision is both analogous to our facts and better reasoned. We conclude that when an arbitration agreement between the parties is silent as to classwide arbitration and state law specifically authorizes it in appropriate cases, an order compelling classwide arbitration neither contradicts the contractual terms nor contravenes the policy behind the act.³²

Unlike the federal bench in *Champ*, the appeals court takes a liberal view of the *Federal Arbitration Act*, which it characterizes, like the plurality in *Keating*, as a progressive statute designed to reverse the older, more rigid rules of contract law. It declares:

Congress’s purpose in enacting the act was simple - to abolish archaic law under which courts refused to enforce arbitration agreements, and to make voluntary agreements to arbitrate disputes specifically enforceable. To that end, the act created

²⁹ *Burton v. Bush*, 614 F.2d 389, 390 (4th Circ. 1980).

³⁰ See R. Alderman, “Pre-dispute Mandatory Arbitration In Consumer Contracts: A Call for Reform” (2001) *Houston Law Review* 1237 at 1260.

³¹ 98 C.D.O.S. 7654 (Cal. A.P. 1998) [*Blue Cross*].

³² *Ibid.* at para. 25.

federal substantive law requiring that arbitration agreements be enforced. That federal substantive law applies in both state and federal courts. However, Congress did not intend to occupy the entire field of arbitration. Rather, the act preempts state law only to the extent it stands as an obstacle to the enforcement of contractual agreements to arbitrate.³³

Whether class-wide arbitration will be allowed, even when it goes unmentioned in the contract, depends in large measure on the court trying the case. Where the panel is federal and does not sit in the First Circuit, *Champ* and a stream of other decisions have ruled strongly in the negative. Where state courts are involved, however, we have seen that there is considerably more latitude – especially in the case of California. Be this as it may, an important caveat must be added. The large and liberal approach evidenced in the *Blue Cross* decision, while it does contrast sharply with the restrictive constructive techniques of the federal circuit judges, is not simply attributable to West Coast experimentation. It stems instead from the statutory regime. Indeed, the State of California has codified the right of parties to consolidate their arbitration disputes at section 1281.3 of its *Code of Civil Procedure*.³⁴ What is more, reasoning analogically, its courts have applied the

³³ *Ibid.* at para. 32.

³⁴ *Supra* note 4, Section 1281.3 states that:

[a] party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate arbitration proceedings when: (1) Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceeding with a third party; and (2) The disputes arise from the same transactions or series of related transactions; and (3) There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators. If all of the applicable arbitration agreements name the same arbitrator, arbitration panel, or arbitration tribunal, the court, if it orders consolidation, shall order all matters to be heard before the arbitrator, panel, or tribunal agreed to by the parties. If the applicable arbitration agreements name separate arbitrators, panels, or tribunals, the court, if it orders consolidation, shall, in the absence of an agreed method of selection by all parties to the consolidated arbitration, appoint an arbitrator in accord with the procedures set forth in Section 1281.6. In the event that the arbitration agreements in consolidated proceedings contain inconsistent provisions, the court shall resolve such conflicts and determine the rights and duties of the various parties to achieve substantial justice under all the circumstances. The court may exercise its discretion under this section to deny consolidation of separate arbitration proceedings or to consolidate separate arbitration proceedings only as to certain issues, leaving other issues to be resolved in separate proceedings. This section shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

provision respecting consolidation *mutatis mutandis* to class-wide proceedings. Consequently, where no comparable state legislation exists, the courts will, understandably, be less likely to pursue the trail blazed by California judges. It is precisely the patchwork nature of legislation in the area of arbitration that helps to explain why decisions at the state level are not uniform.³⁵

C. Who Should Decide Whether Class-Wide Arbitration is Allowed in a Given Case, Courts or Arbitrators?

The decision of the Supreme Court of South Carolina in *Bazzle v. Green Tree Financial Corp.*³⁶ dovetails the ruling of the California appellate division in *Blue Cross*. In this 2002 decision, the South Carolina court had to determine whether an arbitrator was allowed to order class-wide proceedings given the absence of any language to that effect in the arbitration clause. The issue came about when Lynn and Burt Bazzle accused Green Tree of violating the *South Carolina Consumer Protection Code*.³⁷ The plaintiffs alleged, in the Court of Common Pleas, that the defendant infringed the provisions relating to attorney and insurance agency within the context of a financing agreement. They further requested, in a filed complaint, that they be granted class certification and that an order be issued compelling arbitration. The trial court proceeded to rule in favour of the plaintiffs and to allow class-wide arbitration. After hearing the parties in dispute, the arbitrator awarded the class of plaintiffs \$10,935,000 in relief, \$3,645,000 in legal fees and \$18,242 in costs. The arbitrator also awarded \$9,200,000 for similar violations alleged by another class of plaintiffs, as well as \$3,066,666 in legal fees and \$18,252 in costs. The relief granted by the arbitrator was later confirmed by the trial court. The Supreme Court of South Carolina had to decide whether or not the awards should be allowed to stand.

In his reasons, Justice Toal considers the division of opinion between the Seventh Circuit and the California courts. Ultimately, he sides with the broader equitable approach evidenced in *Blue Cross*. Applying standard rules of contractual interpretation, he writes:

[...T]his Court can rely on independent state grounds to permit class-wide arbitration, in the trial court's discretion, where the agreement is silent. First, under general principles of contract interpretation, we construe Green Tree's omission of any reference to class actions against them. "As a matter of pure contract

³⁵ This issue will be addressed further when we analyse Québec law.

³⁶ *Supra* note 1, cited to S.C.S.C.

³⁷ 37 S.C. Code Ann. (1976).

interpretation it is striking, and rather odd, that so many courts have interpreted silence in arbitration agreements to foreclose rather than to permit arbitral class actions.”

No case law or statute in South Carolina prohibits class-wide arbitration. To the contrary, this Court strongly favors arbitration and has held that a state court may order consolidation of claims subject to mandatory arbitration without any contractual or statutory directive to do so.³⁸

Justice Toal goes on to set out the policy reasons a court must take into account when deciding if a dispute can be arbitrated via class proceedings. Efficiency and equity must be emphasised by courts, he insists, especially when contracts of adhesion are involved. Justice Toal ends his opinion by reviewing the reasoning and behaviour of the arbitrator. Approving both, he explains:

[...W]e uphold the arbitrator’s awards in *Bazzle*...Green Tree did not allege any fraud, corruption, or other misconduct by the arbitrator that would warrant vacating his decision to certify the class or his award under the [justifications listed in the F.A.A.]. That leaves manifest disregard of the law as the only possible justification for overturning the arbitrator’s awards. In our opinion, the arbitrator did not act in manifest disregard of the law.³⁹

While this decision can be interpreted simply as a reaffirmation of the ideas put forward in *Keating* and *Blue Cross*, it can also be said to raise an important jurisdictional question. As the above citations suggest, the South Carolina Supreme Court, while acknowledging the legality and utility of class-wide arbitration, leaves ultimate discretionary power in the hands of the state courts. In the end, they are the ones who must decide whether or not class proceedings can be ordered in an arbitration context. It is only after such an order has been made that the arbitrator can hear the dispute and grant the remedy he considers most appropriate. The relief awards will then be allowed to stand, unless there are serious and compelling factors that vitiate the ruling.

Importantly, *Bazzle* was brought before the highest court in the land, which specifically considered the role and powers of the arbitrator in class-wide proceedings. In 2003, the Supreme Court of the United States agreed, pursuant to a writ of *certiorari*,⁴⁰ to hear the case and determine whether the holding of the South Carolina Supreme Court

³⁸ *Supra* note 36 at para. 47.

³⁹ *Ibid.* at 53.

⁴⁰ “An extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review. The U.S. Supreme Court uses

was consistent with the provisions of the *Federal Arbitration Act*. The decision of the United States Supreme Court, which has since sent a shock wave throughout the legal and business communities, is a compelling one for three reasons in particular. In the first place, it represents the first time the Court has ever addressed the legitimacy of class-wide arbitration. Although the matter came up two decades earlier in *Southland Corp. v. Keating Corp.*,⁴¹ it was left unresolved. In his reasons, Chief Justice Burger⁴² refrained from ruling on the issue, declaring instead that the question as to “whether the *Federal Arbitration Act* precludes class-action arbitration” was beyond his purview. Second, *Bazzle* split the Court rather sharply, with Justice Stevens dissenting in part, Chief Justice Renquist and Justices O’Connor and Kennedy dissenting jointly, and Justice Thomas dissenting for a separate reason. The plurality achieved was thus an extraordinarily precarious one. Thirdly and finally, the majority’s opinion, although reversing the decision of the South Carolina court, took a very liberal view of the arbitrator and construed his discretionary powers accordingly. Giving voice to the plurality view, Justice Breyer declares:

[...] [T]he relevant question here is what kind of arbitration proceeding the parties have agreed to. That question does not concern a state statute or judicial procedures...It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question. Given these considerations, along with the arbitration contracts’ sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide.⁴³

Applying this line of reasoning to the judgment of the Supreme Court of South Carolina in *Bazzle*, Justice Breyer concludes:

On balance, there is at least a strong likelihood...that the arbitrator’s decision reflected a court’s interpretation of the contracts rather than an arbitrator’s interpretation. That being so, we remand the case so that the arbitrator may decide the question of contract interpretation – thereby enforcing the parties’ arbitration agreements according to their terms.⁴⁴

Whether this decision can be described as an incremental or

certiorari to review most of the cases that it decides to hear.” (*Black’s Law Dictionary*, 7th ed. (St. Paul, Minnesota: West Group, 1999) at 220).

⁴¹ 465 U.S. 1 (1984).

⁴² As he then was.

⁴³ *Bazzle supra* note 1 at para. 16 of his opinion.

⁴⁴ *Ibid.* at para. 20.

revolutionary change in American jurisprudence depends largely on one's perspective. The proponent of an evolutionary analysis would argue that, for the greater part of the last century, legislatures and courts have demonstrated a willingness to empower arbitrators. In effect, the *Federal Arbitration Act* and comparable state legislation are an obvious crystallization of this willingness. In the wake of these statutes, the case law has traced a growing desire to resolve disputes between contracting parties outside the court system.⁴⁵ Seen from this angle, the arbitral discretion affirmed by Justice Bryer, and the majority Justices as a whole, fits into a pattern of increasing confidence in alternative dispute resolution on the part of the American bar. The proponent of a revolutionary analysis, on the other hand, would see a person with no formal knowledge of the law, the arbitrator, being entrusted with privileges that have always belonged exclusively to members of the bench. Indeed, the right of judges – and judges alone – to construe contractual undertakings has been recognized since ancient times, first by the old English courts and then by the American tribunals. Chief Justice Renquist alludes to this firmly implanted tradition when he states:

The decision of the arbitrator on matters agreed to be submitted to him is given considerable deference by the courts...The Supreme Court of South Carolina relied on this principle in deciding that the arbitrator in this case did not abuse his discretion in allowing a class action. But the decision of what to submit to the arbitrator is a matter of contractual agreement by the parties, and the interpretation of that contract is for the court, not for the arbitrator.⁴⁶

The concerns expressed by the Chief Justice, however, are not simply theoretical. It is now an established rule that arbitrators, by using their discretionary constructive powers, can decide whether or not an arbitration clause in a contract allows for class action proceedings. Practically, this means that parties to such clauses are no longer subject to the slow determinations of a court, but to the rapid decisions of arbitrators. The complex contradictions between federal and state courts have thus, to a large extent, been rendered moot. Traditional procedural issues have evaporated. Protections that defendants once took for granted have vanished. The only thing which currently stands between corporate defendants and the possibility of large monetary awards is the solitary person of the arbitrator, now paramount.⁴⁷

Of course, *Bazzle* should not be read to say that the courts of

⁴⁵ See, *inter alia*, *Major League Baseball Players Ass'n. v. Garvey*, 532 U.S. 504 (2001).

⁴⁶ *Bazzle*, *supra* note 1 at para. 3 of Renquist C.J.'s dissenting opinion.

⁴⁷ The ruling of the U.S. Supreme Court has since been applied by the Fifth Circuit

inherent jurisdiction are altogether powerless. In the first place, they can intervene in cases where the decision of an arbitrator, upon review, is found to be patently unreasonable. Moreover, according to federal law, United States tribunals have the power to vacate arbitration awards when certain basic criteria have not been met. Under the *Federal Arbitration Act*, these courts can also modify or correct an award in instances where a material error has been committed, an order has been made with respect to a matter that has not been submitted to the arbitrator, or an award is “imperfect in matter of form not affecting the merits of the controversy.”⁴⁸ What the ruling has done, however, is give significantly greater weight, and accord greater respect, to arbitral decision makers. The neat distinction between the mechanics of arbitration and outlying contractual considerations has therefore been eroded. Moreover, an *en banc* decision rendered by the Ninth Circuit Court in *Kyocera* declared that the vacation section of the *Federal Arbitration Act*, which has historically been limited to instances of corruption, undue means, and fraud, cannot be contractually expanded by parties to include erroneous conclusions of law. In other words, the oversight and interpretative functions of the court, although legally enshrined, are receiving a restrictive construction. In cases where an issue impinges directly upon arbitration – even if a matter seems to fall within the sphere of contract interpretation – the better view, according to *Bazzle*, is to defer to the specialized authority of the arbitrator.

D. *The American Arbitration Association Guidelines*

A further indication of the important role played by class-wide proceedings is the body of regulations newly adopted by the American Arbitration Association. Entitled the “Supplementary Rules for Class Arbitration”,⁴⁹ and put into effect on October 8, 2003, it constitutes a response by the Association to the *Bazzle* ruling recently handed down by the U.S. Supreme Court. According to section 1(a), the guidelines apply whenever the arbitration clause incorporates American Arbitration Association rules by reference, whenever a court refers a matter pleaded as a class action to the Association for administration, and whenever a party with pending American Arbitration Association arbitration asserts new claims respecting a class. The Rules are too numerous to be described in any detail. Broadly speaking, they consist

in *Pedcor Management Company, Inc. v. North American Indemnity, NV*, No. 343 F.3d 555 (5th Cir. 2003).

⁴⁸ The relevant sections of the *Act*, *supra* note 7 are s. 10 and 11 respectively. Note that these provisions must now be read in light of *Kyocera Corp. v. Prudential-Bache Trade Services* 341 F.3d 987 (9th Cir. 2003), [*Kyocera*], and *Little v. Auto Stiegler, Inc.* (2003), 29 Cal. 4th 1064 (C.S.C. 2003).

⁴⁹ [“Rules”] or [“guidelines”].

inter alia of provisions regarding: (i) the composition of the class arbitration roster;⁵⁰ (ii) the method of class-wide certification;⁵¹ (iii) the determination of class awards;⁵² (iv) the notice of class determination;⁵³ (v) the contents of the final award, which must be reasoned and specific;⁵⁴ (vi) the settlement or voluntary dismissal of arbitral matters, or any compromise involving same;⁵⁵ (v) confidentiality and the maintenance of an electronic docket system;⁵⁶ and (vi) the form and publication of class-wide arbitration awards.⁵⁷

Most interesting for our purposes is Section 3 of the Rules, which explains how the arbitrator should go about construing the arbitration clause. In this respect particularly, the American Arbitration Association can be said to pick up precisely where Justice Breyer left off. The provision reads:

Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the “Clause Construction Award”). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other A.A.A. rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

The supplemental guidelines are reminiscent of the dissenting view expressed by Justice Richardson in *Keating*. To some extent they are a rebuttal of the arguments that he puts forward. By setting out some

⁵⁰ *Ibid.*, Section 2.

⁵¹ *Ibid.*, Section 4.

⁵² *Ibid.*, Section 5.

⁵³ *Ibid.*, Section 6.

⁵⁴ *Ibid.*, Section 7.

⁵⁵ *Ibid.*, Section 8.

⁵⁶ *Ibid.*, Section 9.

⁵⁷ *Ibid.*, Section 10.

clearly articulated regulations regarding the construction of arbitration clauses, and the procedures that must be followed in a class-wide setting, the American Arbitration Association is providing valuable guidance to arbitrators and helping to compensate for their lack of legal training. At the same time, however, the Rules add a gloss of analysis and procedural considerations that are more akin to the court system than they are to traditional arbitration. In this respect, they seem to fulfil, in some part, Justice Richardson's prophecy that a recognition of class-wide arbitration would "[enraft] on an informal, speedy method of dispute resolution...a complex legal procedure which will require close court supervision and frequent intervention..."⁵⁸

E. Synopsis

In summary, the American jurisprudence on class-wide arbitration is very rich. By posing the questions we listed at the beginning of our discussion, and attempting to answer those questions, we have been able to sift through the basic case law and make some fundamental observations. First, we were able to assert that class arbitral proceedings, largely unheard of in Québec, have been discussed in the U.S. for some time. Moreover, such proceedings have been legitimated by the American courts since the 1980s. Second, we saw that the issue of "silent" arbitration clauses – in other words, clauses that fail to address class certification – has been a particularly contentious one. The state courts of California, and the Seventh Circuit in particular, have adopted different approaches. While the California judiciary has evidenced flexibility and openness to the idea, the federal bench has been more restrictive in its analysis of contractual language. Third, we took note of the sea of change introduced by the U.S. Supreme Court in *Bazzele*. By declaring that it is up to arbitrators to decide if an arbitration clause allows for class proceedings, the plurality of the Court invested these key participants with new discretionary powers. Fourth, we noted that, pursuant to this important decision by the nation's highest federal court, the American Arbitration Association has developed a set of Rules to better guide arbitrators in the matter of class-wide arbitration.

IV. Canadian Law

A. Ontario

While the American case law on class-wide arbitration can be characterized as rich and contentious, the Canadian jurisprudence is, by contrast, extremely sparse. In part, this may be due to the general observation that American society is more complex, diverse, and

⁵⁸ *Supra* note 22.

litigious, and hence that its courts hear a wider variety of cases. A more likely explanation, however, is that the class action is a relatively new feature of our common and civil law. Unlike the United States, which has a long tradition of class action litigation stretching back close to seven decades, Canada's body of case law in this area is only now beginning to take shape. It comes as little surprise then that class-wide arbitration, a hybrid of the recently introduced procedure, would go virtually unnoticed by our courts and doctrinal authorities.

Nonetheless, the Canadian authorities, although quiet, are not altogether silent. While no Ontario decision has yet addressed the question of whether class-wide arbitration is permissible, the Superior Court has come extremely close in *Kanitz et al. v. Rogers Cable Inc.*,⁵⁹ a 2002 judgment. The case involved various plaintiffs who were customers of the defendant, Rogers Cable. The company provided these customers with cable modem technology in order to access the Internet. The user agreement governing the contractual relations between the parties contained, among other things, a provision which enabled the defendants to amend the agreement, provided that sufficient notice was given to its customers. According to the terms of the provision, such notice could be made via a posting on the Rogers Cable web site, electronic mail, or postal mail. In November of 2000, the defendant amended the user agreement by introducing an arbitration clause and implementing various other changes. Availing itself of the language set out in the amending formula, Rogers Cable posted a notice on its web site with a view to informing its customers of the alterations. Subsequently, several of the customers complained and commenced class action proceedings, alleging that the notice was buried in the web site and was too difficult for an average person to access.

In his decision, Justice Nordheimer of the Superior Court found that sufficient notice was given pursuant with the terms specified in the user agreement. Although he acknowledges that the defendant could have gone to greater lengths, he rejects the notion that the notice was hidden in the web site or unreasonably difficult to access. It is the responsibility of customers to check the web site routinely in order to keep track of the contents of their user agreements, and it would be unfairly burdensome to place more obligations onto the defendant company than it contracted for in the first place. As important as this finding is for the realm of electronic commerce and evidence, it is the reasoning of Justice Nordheimer with respect to the interplay between class actions and arbitration that is most salient. In his opinion he declares:

⁵⁹ (2002), 58 O.R. (3d) 299 (Sup. Ct. J.).

Again, I have no evidence as to why the defendant chose to adopt the arbitration/no class action clause or why it chose to do so at the time that it did. It is not appropriate for the court to speculate on why it was done nor for the court to be asked to do so. In addition, if the arbitration clause is valid and effective, as I have found it to be, then it would have the effect of precluding any action, including a class action. The inclusion of that portion of the clause expressly dealing with class actions is therefore to a large extent superfluous.⁶⁰

There is nothing particularly surprising about this assertion. In deciding that the arbitration clause is valid, the Court naturally rules that it will prevail over any other legal proceedings, including a standard class action suit. After discussing class actions and arbitration further, and the legislation that has been adopted in respect of each, Justice Nordheimer makes the following statement:

Without deciding the matter, it would appear that section 20(1) [of the Ontario Arbitration Act, 1991] would permit an arbitrator, at the very least, to consolidate a number of arbitrations which raise the same issue. Therefore, it appears at least arguable that if each of the five named representative plaintiffs here chose to seek arbitrations of their claims, an arbitrator might well decide that those arbitrations could be dealt with together thereby saving time and expense for all parties. Such possibilities serve to militate against the central assertion of the plaintiffs that the arbitration clause operates so as to erect an economic wall barring customers of the defendant from effectively seeking relief.⁶¹

Before rashly concluding that *Kanitz* affirms the validity of class-wide arbitration, some observations must first be made. In the first place, Justice Nordheimer's comments are not dispositive and cannot be said to establish any firm legal principle. The opening words of the paragraph, "[w]ithout deciding the issue", make clear that the remarks are *obiter dicta* and therefore not part of the Court's reasons in any strict sense. Moreover, Justice Nordheimer does not speak of class proceedings as such, but rather of consolidation. Although related, they are two separate procedures that should not be conflated. Indeed, as the Supreme Court of California points out in *Keating*, consolidation is not a voluntary opt-in proceeding, but allows instead for coordinated arbitration in "a dispute with a party with whom [the disputant] has no agreement, before an arbitrator he had no voice in selecting and by a procedure he did not agree to."⁶² This being said, *Kanitz* should not be dismissed. While it cannot be said to lay open the gates of class-wide arbitration, it does leave them temptingly ajar. Although *obiter*, the

⁶⁰ *Ibid.* at para. 49.

⁶¹ *Ibid.* at para. 55.

⁶² *Supra* note 11 at para. 54.

statement that section 20(1) of the arbitration statute would, “at the very least”, allow for consolidation is an implicit way of saying that it could allow for even more. In addition, *Blue Cross* makes it clear that consolidation rules can be applied by analogy to class proceedings.⁶³ As we saw, class-wide arbitration was construed in light of section 1281.3 of California’s *Code of Civil Procedure*. The majority also relied on *New England Energy* as an authority, even though that case dealt with consolidated, rather than class-wide, arbitration.⁶⁴ Lastly, one could even argue that *Kanitz* goes a little bit further than *Keating* and *Blue Cross* given that the Ontario statute is completely silent regarding the joining, in one form or another, of multiple arbitration claims.

B. British Columbia

More recently still, the Supreme Court of British Columbia examined the difficult relationship between class actions and arbitration within the context of its province’s own statutory framework. In *MacKinnon v. National Money Mart Company et al.*,⁶⁵ a case decided in 2004, the issue arose as to whether the inclusion of an arbitration clause in a consumer loan agreement prevented the adhering parties from bringing a class action. The plaintiff, Kurt MacKinnon, was a client of some of the defendant firms. These firms, or so-called “pay-day loan companies”, had loaned modest sums of money to the plaintiff, as well as to other cash-strapped clients, at a high rate of interest. According to Mr. MacKinnon, the amounts charged by the defendant companies in interest fees were unlawfully elevated. He further alleged that similar fees had been charged in identical loan agreements and asked that the Court allow him to act as a representative for the aggrieved adherents in class-wide proceedings. Since a significant number of the defendants had included an arbitration clause within their contracts, however, they insisted that class actions had been voluntarily excluded by the parties and that the only available remedies were those awarded by an arbitrator.

⁶³ *Supra* note 31 at para. 14 and following.

⁶⁴ *Ibid.* at paras. 8, 9.

⁶⁵ [2004] B.C.J. No. 175 (S.C.), [*MacKinnon*]. See also *Ezer v. Yorkton Securities Inc.*, [2004] B.C.J. No. 727 (S.C.). This case dealt with a contract that included an exclusive jurisdiction clause. The plaintiff argued that the clause, which required all disputes to be heard in Ontario, should not be applied since the class action regime of BC, where the contractual breach allegedly occurred, was a more favourable jurisdiction in which to institute a claim. The Court rejected this argument and ruled that class actions were ordinary litigation and insufficient, in themselves, to warrant a stay of legal proceedings. This goes against the class action preference doctrine of Madam Justice Brown.

After concluding that there is a conflict between the *Class Proceedings Act*⁶⁶ of British Columbia (which sets out the procedures respecting class certification) and the *Commercial Arbitration Act*⁶⁷(which requires a stay of proceedings in instances where a contract contains an arbitration clause) Madam Justice Brown turns to the policy considerations that underpin the legislation. Given the small amounts involved in the individual claims and the limited funds available to the potential plaintiffs, she reasons that arbitration would not be a fair means of dispute resolution. She writes:

A stay in these circumstances does not serve the policy objectives of the *Commercial Arbitration Act* or the *Class Proceedings Act*. It does not expedite resolution of the dispute or save costs that would be incurred in a court action. Rather, it effectively bars resolution of the dispute by placing an insuperable hurdle before the claimants.⁶⁸

Madam Justice Brown uses stronger language in her characterization of the arbitration provisions included in the loan agreements. Coming down heavily against the methods employed by the pay-day loan companies, she declares:

The existence of the arbitration clause in Primerica's contractual documents gives a superficial appearance of fairness to the unsophisticated. In reality, the arbitration clause serves to prevent, any resolution of a dispute other than upon the terms dictated by Primerica...

The arbitration clause in the case at hand, if enforceable, would defeat the public policy inherent in the *CPA*.

This, to my mind, is an absurd result: a case otherwise suited to class proceedings will be stayed; the stay will not fulfill the policy objectives of either act; the claimants will be denied access to effective justice.⁶⁹

As a result, the Court rules that in instances where the requirements for class certification are met, class-wide procedures must be ordered. Even if the contractual language includes an arbitration provision, the clause will be held to be inoperative. According to Madam Justice Brown, this will allow the arbitral and class action legislation of British Columbia to be read together harmoniously and obviate any further

⁶⁶ R.S.B.C. 1996, c. 50

⁶⁷ R.S.B.C. 1996, c. 55.

⁶⁸ *Supra* note 65 at para. 24.

⁶⁹ *Ibid.* at paras. 25, 26, quoting in part Cumming J. in *Huras v. Primerica Financial Services* (2000), 13 C.P.C. (5th) 114 (Ont. S.C.J.).

statutory controversy. In short, the approach proposed by Justice Nordheimer is rejected, as is any notion of class-wide arbitration as we have come to understand that term. Rather than extending the traditional boundaries of arbitration, or allowing class proceedings within the framework of an arbitral forum, the Supreme Court of British Columbia has chosen to go in the opposite direction. Simply put, class procedure in its classic form is preferred to arbitration in its classic form. For reasons of legislative consistency and policy, Madam Justice Brown has implicitly closed the door on any kind of legal hybridity or experimentation. To what extent her doctrine of class action preference is specific to British Columbia's statutes, and will thus be limited to that jurisdiction only, remains to be seen. It does, however, afford a striking contrast to the consolidation model that is suggested in *Kanitz* and that has already been applied by civilian magistrates in several Québec cases.

C. Québec

Just as arbitration can be said to constitute a bulwark of American law, it has become a key component of Québec's legal regime and that of other provincial jurisdictions. Unlike the U.S. and other Canadian provinces, however, arbitration was not introduced into Québec by way of a free-standing statute, but has instead been codified at articles 940 to 952 of the *Code of Civil Procedure*.⁷⁰ More important still, arbitration agreements have also been recognized and enshrined in the *Civil Code*.⁷¹ Consequently, arbitration is an integral part of the basic legal architecture.⁷² In effect, the *Code of Civil Procedure* provides a comprehensive body of principles⁷³ and procedures in respect of arbitration, and was modernized by the National Assembly of Québec in 1986. Its provisions, broadly speaking, address the appointment of arbitrators,⁷⁴ the cessation of an arbitrator's appointment,⁷⁵ the competency of arbitrators,⁷⁶ the order of arbitration proceedings,⁷⁷ and

⁷⁰ *Supra* note 4.

⁷¹ *Supra* note 2, Articles 2638-2643. Note as well that *An Act Respecting the Class Action*, R.S.Q., c. R-2.1 provides for the creation of a special fund to assist certain plaintiffs in bringing a class action. A request for assistance must be made pursuant to the *Regulation Respecting the Application for Assistance for a Class Action*, R.Q., c. R-2, r.1.

⁷² See Brierley note 82 below at 59, 60.

⁷³ Note that the general provisions are contained in *C.C.P.*, *supra* note 4, Chapter I of Title I of Book VII (art. 940-940.6).

⁷⁴ *Ibid.*, Chapter II.

⁷⁵ *Ibid.*, Chapter III.

⁷⁶ *Ibid.*, Chapter IV.

⁷⁷ *Ibid.*, Chapter V.

the granting of arbitration awards,⁷⁸ as well as the homologation⁷⁹ or annulment of same.⁸⁰ Today, these articles govern arbitration clauses in contracts that deal with everything from labour relations to credit cards to franchise agreements, and have become a familiar landmark of the contemporary legal terrain.

Whereas United States and Canadian common law can trace their arbitral legislation back to the 1920s, and to the growing dissatisfaction of legislatures with the restrictive outlook of conservative judges, Québec draws from different, older, and more continental sources. It must always be remembered that, as important as the common law cases are, this Province has a civilian tradition which colours all of its legal institutions. This point was fleshed out by

⁷⁸ *Ibid.*, Chapter VI.

⁷⁹ Chapter VII. The rule on homologation articulated at Article 946.4 of the *C.C.P.* is particularly crucial since it specifies the criteria for the contestation of arbitration agreements and proceedings. Note, however, that only those rulings that decide all the issues raised by the dispute can be homologated (*Grunbaum v. Grunbaum*, JE 2002-721 (S.C.). According to the courts, this provision must receive a restrictive interpretation and the burden of proof rests squarely on the shoulders of the party who invokes it. The specified criteria constitute the pool of arguments from which a litigant can draw. The other bases for a contestation, which spring from the inherent right of the Superior Court to raise objections *ex officio* or from the ambiguous or unenforceable nature of a judgment, rarely come into play. Also, homologation is not to be confused with the superintending, reviewing, or reforming powers of the Superior Court, codified at Articles 33 and 846 of the *C.C.P.* (*Éditions Desputeaux (1987) Inc. v. Chouette* [2003] 1 S.C.R. 178). For a more comprehensive discussion of Article 946.4 see service de la formation permanente, Barreau du Québec, *Développements récents en arbitrage civil et commercial (1997)* (Cowansville: Les Éditions Yvon Blais, 1997) at 134-153 and D. Ferland, & B. Emery, *Précis de procédure civile du Québec*, Vol. 2, 4th ed. (Cowansville: Les Éditions Yvon Blais, 2003) at 828-836. The provision reads:

The court cannot refuse homologation except on proof that [new par.] 1) one of the parties was not qualified to enter into the arbitration agreement; [new par.] 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; [new par.] 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; [new par.] 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 [new par.] 5) the mode of appointment of arbitrators or the applicable arbitration procedure was not observed. [new par.] 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.

See, as well, Chapter VII of the Uncitral Model Law On International Commercial Arbitration, 1985 (U.N. Doc. A/40/17, Annex I) and Article V of the *United Nations Foreign Arbitral Awards Convention Act*, R.S., 1985, c.16 (2nd Supp.).

⁸⁰ *Ibid.*, Chapter VIII.

Professor Brierley⁸¹ in a learned discussion of his on the then newly adopted amendments to Québec's arbitration rules. In his analysis, he observes as follows:

[I]n an historical sense, and upon general principle, the source of Québec arbitration law lies in...French law as adapted locally prior to the original codification of the law of procedure in 1867. Theoretically, at least, a suppletive source of law for the parties to an arbitration agreement is therefore "old French law", a foreign national legal system applicable in Québec save as modified there.⁸²

Professor Brierley's conclusions were reaffirmed by the Supreme Court of Canada in *Sport Maska Inc. v. Zittreer*.⁸³ In that case, which explores the difference between arbitration and expert opinion, Madam Justice L'Heureux-Dubé stresses the continental provenance of Québec's arbitration provisions, which she is careful to distinguish from the common law authorities.⁸⁴ This being said, the qualification should not be overemphasised. Practically, there are no longer any significant differences between Québec's regime and those of most other Western jurisdictions. As Professor Brierley himself points out, "[t]hose continental... 'sources' are...among the more obscure of those upon which the two Codes [of civil procedure] were based".⁸⁵ As he explains more fully in his concluding remarks:

Québec is now equipped with a modern law on arbitration in respect of both the structure of the arbitration agreement and the enforcement of the award. Its adherence to the vision of arbitration as propounded by the UNCITRAL Model Law and the U.N. Convention of 1958 testifies to a clear intention to bring Québec law into harmony with current thinking on the subject. In doing so it has moved in concert with other Canadian jurisdictions in an almost instantaneous – and seemingly spontaneous – new legal ordering of this ancient mode of dispute resolution. But Québec has achieved this new ordering in its own distinctive manner and style, in other words by dealing with it in terms of civilian legal thought.⁸⁶

Given their kinship with other normative regimes, the rules on arbitral proceedings in Québec are also meant to receive full application. Indeed, the principal tenet governing interpretation is that arbitration clauses should be read in as large and liberal a manner as the

⁸¹ At that time Sir William Macdonald, Professor of Law, McGill University.

⁸² John E.C. Brierley, "Québec's new arbitration law" (1987-88) 13 C.B.L.J. 58 at 61.

⁸³ [1988] 1 R.C.S. 564.

⁸⁴ *Ibid.* at 578, 579.

⁸⁵ Brierley, *supra* note 82 at 61.

⁸⁶ *Ibid.* at 68.

law, and modern notions of equity and natural justice, permit. This golden rule of arbitration was laid down unequivocally in *Zodiak International Productions Inc. v. Poland (Republic)*,⁸⁷ *Condominiums Mont Saint-Sauveur Inc. c. Constructions Serge Sauvé Ltée*,⁸⁸ and *CJMF-FM Ltée c. Paré*.⁸⁹ In this last case, the Superior Court was called upon to review the decision of an arbitrator who had declared himself competent to hear the matter presented before him. It involved a contract signed between a radio station, the petitioner, and a group of radio personalities and workers, the respondents. The petitioner company sent a notice to the respondents informing them that it was putting an end to their employment contract. The agreement at bar included arbitration clauses. In construing these clauses, the arbitrator determined that he had the right to hear, decide, and rule upon the dispute. The petitioner contested this finding, arguing that the arbitrator was incompetent given the circumstances and that the Court should exercise its right of judicial review. In his reasons, Justice Lebrun declined to do so, stating:

As Me Brierley writes, “A new basis for the interpretation of the [arbitration] agreement has ...been established: there is no longer any reason for viewing it as somehow exceptional and as derogatory to general principle and thus to be made subject to a strict construction.”

Subject as it is to a generous interpretation, the arbitration agreement is a separate agreement, and this to so great an extent that the nullity of the contract does not automatically result in the nullity of the arbitration agreement.⁹⁰

This broad approach to arbitration is in keeping with the views expressed by the United States Congress back when the *Federal Arbitration Act* was first enacted. This is hardly surprising, since legislation in the area of arbitration has always marked a clean break from the older restrictive case law. Like the American legislature, the National Assembly wanted to establish a modern corpus of arbitration provisions that would strongly favour alternative dispute resolution in

⁸⁷ [1983] 1 R.C.S. 529.

⁸⁸ [1990] R.J.Q. 2783.

⁸⁹ DTE 92T-6 (C.S.).

⁹⁰ *Ibid.* at 16 [translated by author]. In those instances where such a translation is included, the footnote will provide the French citation in full with the designation “original quote”. Comme l’écrit Me Brierley “Le législateur québécois a pris soin, en sa nouvelle loi, de faire passer le message que l’arbitrage n’a plus à être considéré comme une institution dérogatoire et donc, assujettie dans ses principes mêmes à une interprétation restrictive”. [new par.] Sujette donc à une interprétation large, la convention d’arbitrage est une convention distincte à telle enseigne que la nullité du contrat n’entraîne pas de plein droit la nullité de la convention d’arbitrage.

instances where the parties had contracted for such proceedings. The decision in *Paré* also reflects the words of Chief Justice Renquist in *Bazzle*, cited earlier. In his dissenting opinion, he remarks laconically that the “decision of the arbitrator on matters agreed to be submitted to him is given considerable deference by the courts”.⁹¹ On this point, at least, conservative and progressive jurists, as well as American, Canadian, and Québec courts, are in full agreement.

If arbitration can trace its legal ancestry back to the old French law, the class action is a late comer on the Québec scene. Introduced in 1978 and ultimately codified at articles 999 and following of the *Code of Civil Procedure*, it was integrated into the *Code* for the same reasons set out in the American jurisprudence. Unlike the United States, however, where class actions were engineered by the federal judiciary for equitable and procedural purposes, Québec’s provisions respecting the joining of claims were legislated into existence by the National Assembly. Despite this difference, little of substance has changed since the U.S. Supreme Court ruled in *Langer*. Commenting on the Québec class action, Ducharme and Lauzon write:

*The class action is a new procedural method that is more akin to equity than it is to law in the strict sense. It allows parties to affirm rights that they would otherwise abandon given the more advantageous position of the defendants and the financial implications of bringing suit.*⁹²

What is more, like arbitration, the class action is not an unusual or extraordinary procedure. Nor should it be treated restrictively. A long line of cases, including *Québec (Curateur Public) c. Syndicat national des employés de l’Hôpital St-Ferdinand*,⁹³ *Corbeil v. Société immobilière J.M. Veilleux inc.*,⁹⁴ and *Lasalle v. Kaplan*,⁹⁵ stand for this firmly rooted principle. As Ducharme and Lauzon point out, “when dealing with a class action it is preferable to put formalism aside given the nature of the proceeding, which was introduced in order to facilitate the exercise of rights that were hitherto unknown or neglected.”⁹⁶

⁹¹ *Supra* note 46.

⁹² Louise Ducharme & Yves Lauzon, *Le Recours Collectif Québécois* (Cowansville: Les Éditions Yvon Blais, 1988) at 8. Original quote: *[L]e recours collectif constitue un moyen de procédure nouveau qui s’apparente plus à l’équité qu’au droit strict* et qui doit avoir pour effet de permettre aux justiciables de faire valoir des droits qu’ils auraient tendance à abandonner en raison des forces en présence ou des implications financières.

⁹³ [1994] R.J.Q. 2761 (C.A.).

⁹⁴ JE 92-1684 (C.S.).

⁹⁵ [1988] R.D.J. 112 (C.A.).

⁹⁶ *Supra* note 92 at 8. Original quote: “[f]ace [au recours collectif] il est

Clearly, any detailed discussion about the class action process in Québec would also have to address timing issues, which are critical to the launching of proceedings, as well as the rules governing the preliminary filing, stay, and dismissal of motions. In light of the stated objectives of this paper, however, these issues fall outside the narrow ambit of class-wide arbitration. In effect, the aim is not to inform the reader on the specifics of Québec's arbitration or class action regimes, but rather to determine whether these regimes allow for the innovative procedural developments that have been evolved in the United States.

Unfortunately, despite the comprehensive treatment of arbitration and class actions in Québec law, no provision of the *Code of Civil Procedure* addresses the possibility of class-wide arbitration as such. This gap in the legislation is not unusual in that it parallels the silence of many other arbitration and class action statutes. Most likely, it seems that the National Assembly never even conceived of the possibility. Alternatively, it was unwilling to address an issue that was as yet unresolved by the courts. Interestingly, there have been a number of cases in which the two institutions have been weighed and considered in light of one another.⁹⁷ This arises, almost inevitably, in the context of a contractual dispute. One of the parties, alleging a class-wide breach, launches a class action suit in order to join various similar claims together into a single procedure. The other party, invoking the terms of the contract, seeks to avail itself of the arbitration clause which it argues should preclude any other legal action. Consistently, Québec judges have upheld the application of the arbitration clause, especially when arbitration is specified in a given piece of legislation or in a collective bargaining agreement. In *Syndicat canadien de la fonction publique, section locale 2601 v. Ville de Mont-Royal*,⁹⁸ for instance, a collective agreement had been struck between the City of Mount Royal and its firemen. Petitioning the Superior Court to allow a class action suit, counsel for the firemen accused the respondent of several class-wide breaches. The City of Mount Royal contested the petition and argued instead that the matter had to be resolved in an arbitral forum. In his opinion, Justice Barbeau declares:

The respondent CITY contests the allegations of the petitioner Union: its motion contains: a) a DECLINATORY PLEA *ratione materiae* to the effect that this Superior Court does not have the required jurisdiction to hear the case, and further

souhaitable de mettre le formalisme de côté vu la nature même de ce recours qui a été introduit pour faciliter l'exercice d'un droit qui était auparavant ignoré ou délaissé".

⁹⁷ See Yves Lauzon, *Le Recours Collectif* (Cowansville: Éditions Yvon Blais, 2001) at 148-50 and 173, 174.

⁹⁸ JE 98-2165. Settled out-of-court on September 26, 2000 (500-09-007284-987 (C.A.)).

submits that the only appropriate forum in which to deal with a dispute respecting the collective bargaining agreement between the City and its firemen is an arbitration proceeding.

According to the relevant terms of the Agreement and the provisions contained in the Labour Code, the arbitrator who hears a grievance has the exclusive jurisdiction to decide whether said grievance results from the violation of the collective agreement, or a misunderstanding, misinterpretation, or misapplication of same.⁹⁹

The decisions of the courts are consonant with the principles underlying arbitration. Instead of compelling parties to litigate their disputes, thereby incurring significant private and public costs, the National Assembly wants them to find an easier way to deal with their contractual disagreements. Consequently, when the parties to a contract show a willingness to have contentious matters arbitrated, a court will not intervene unless there are very compelling jurisdictional or equitable reasons for doing so. Simply put, the legislature does not want courts to compete with arbitrators.

While *Syndicat canadien* and cases like it deal with arbitration and class actions, theirs can be described as an “either/or” approach: either the matter is covered by the arbitration clause, and therefore ought to be arbitrated, or there is no arbitration provision and a class proceeding should be allowed. This jurisprudence is valuable because it shows just how potent arbitration is, and how fully empowered arbitrators are to hear the matters entrusted to their objective analysis. It demonstrates that the National Assembly has not been cautious, but bold, comprehensive, and liberal in its codification of the arbitral regime. This should be kept in mind when speculating on how class-wide arbitration might be perceived by Québec courts.¹⁰⁰

Although arbitration does receive some degree of preferential treatment, an arbitration clause alone will not always be sufficient to exclude the jurisdiction of the Superior Court. Sometimes, the facts of a particular case are such that a formal court setting will be considered

⁹⁹ *Ibid.* at paras. 4, 7. Cited by Lauzon, *supra* note 98 at 173, 174. Original quote: La VILLE intimée conteste les prétentions du Syndicat requérant: sa requête soulève: a) une EXCEPTION DÉCLINATOIRE *ratione materiae* à l'effet que la présente Cour supérieure n'aurait pas juridiction pour entendre le présent litige; que seul la procédure d'arbitrage à la convention collective régissant la Ville et ses pompiers requérants serait l'unique forum autorisé; [...] Aux termes de la Convention collective et du *Code du travail* qui nous occupent l'arbitre saisi d'un grief a la compétence exclusive d'en décider si celui-ci découle d'une violation, d'une mésentente, d'une interprétation ou application de celle-ci.

¹⁰⁰ *Ibid.* Note, however, that all decisions are not as favourable to arbitration. See *Guns 'N Roses*, note 107 below.

the most appropriate forum for resolving a contractual dispute. A good example of this is provided by the recently decided case of *Union des consommateurs v. Dell Computer Corp.*¹⁰¹ The respondent, a firm involved in the retail sale of computer-based technologies, posted erroneous information on its web site stating that two of its products could be purchased for \$89 and \$118 respectively. The mistaken figures, which were far lower than the actual retail price of the items (\$379 and \$549), were due to a program calculation error and were only corrected three days after the original electronic posting. A correction notice was subsequently published on the Dell web site and special messages were issued to the clients who had placed an electronic order for the products in question. It informed them of the mistake and advised them that the order, such as it was, would not be processed. One of the customers notified by Dell, Olivier Dumoulin, insisted that Dell was responsible for the error and should fulfil its obligations according to the terms originally set out on its web site. In light of Dell's refusal to do so, Dumoulin, with the assistance of a consumer rights association, asked to bring a class action against the firm and wished to represent those customers whose orders were revoked. The respondent company, for its part, argued that the contract at issue contained an arbitration clause and could therefore only be disputed in the context of an arbitral proceeding.

In a decision handed down by Madam Justice H el ene Langlois, the Superior Court rejected the argument put forward by the respondent. While the Superior Court recognized that the contract did contain an arbitration clause, it pointed to the fact that the arbitral panel mentioned in that clause would sit in the United States and would be subject to the rules laid out by the National Arbitration Forum. In the opinion of the Court, by withdrawing the proceeding from Qu ebec, the arbitration provision has the pernicious effect of circumventing provincial consumer protection legislation, and stripping the petitioner and other prospective claimants of guaranties which the legislature considers to be of public order. In her ruling, Madam Justice Langlois writes:

Dell argues that *Qu ebec Consumer Protection Act* does not prevent litigation arising from a consumer contract from being arbitrated. *Prima facie*, Dumoulin validly consented to submit all contested matters to arbitration; as a result, the Superior Court does not have jurisdiction. This dispute should be resolved by the arbitral process. Ultimately, it will be up to the arbitrator to decide whether or not he has jurisdiction.

The Association argues that the arbitration clause contravenes the *Act* and the *Civil Code of Qu ebec*, and cannot be invoked.

¹⁰¹ JE 2004-457 (500-06-000199-030 (S.C.) (Handed down on 16 January 2004).

[...] This case requires that we apply Article 3149 of the C.C.Q., which 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.

[...] In the case at bar, the arbitration clause at issue has the effect of precluding the jurisdiction of Québec authorities with respect to any litigation relating to consumer contracts struck between Dell and Dumoulin, something which cannot be upheld.

Consequently, the declinatory plea submitted by Dell in order to have this matter decided by way of arbitration must be rejected.¹⁰²

Although this case seems to call into question the arbitration-friendly animus of the courts, it should be underlined that the judgment can be distinguished from many of the cases that have been cited. Indeed, unlike most of the jurisprudence, *Dell* involves an arbitration clause that has the effect of exporting the arbitration proceeding and subjecting it to the rules and requirements of a foreign system. Moreover, it potentially undermines the well-established principles of Québec's consumer protection law, legislation whose reason for being is the safeguarding and promotion of consumer rights. Both the National Assembly and the courts have placed particular emphasis on the importance of this legislation, which is arguably more in the public

¹⁰² *Ibid.* at paras. 23, 24, 33, 36, and 37. Original quote:

Dell plaide que cette Loi n'empêche pas qu'un litige en matière de droit de consommation puisse être arbitral. *Prima facie*, Dumoulin a valablement consenti à soumettre tout litige à l'arbitrage et, en conséquence, la Cour supérieure n'a pas juridiction. Il y a lieu de référer la présente affaire à l'arbitrage et il reviendra, le cas échéant, à l'arbitre de décider de sa compétence, puisqu'il a l'autorité pour en décider. [new par.] L'Union plaide que la clause d'arbitrage contrevient aux dispositions de la Loi et du Code civil du Québec et ne peut lui être opposée [...]. La situation en l'espèce provoque l'application de l'article 3149 C.c.Q. qui énonce: « Les autorités québécoises sont, en outre, compétentes pour connaître d'une action fondée sur un contrat de consommation ou sur un contrat de travail si le consommateur ou le travailleur a son domicile ou sa résidence au Québec; la renonciation du consommateur ou du travailleur à cette compétence ne peut lui être opposée. » [...] En l'espèce, la clause d'arbitrage concernée a pour effet de soustraire de la compétence des autorités québécoises tout litige relié au contrat de consommation, dont il est question, intervenu avec Dell et cela ne peut être opposable à Dumoulin. [new par.] En conséquence, le moyen déclinatoire présenté par Dell afin de référer la procédure à l'arbitrage sera rejeté.

interest than arbitration itself. These specifics are crucial and make *Dell* somewhat *sui generis*, a noteworthy exception to the rule.¹⁰³

Another exception was articulated by the Québec Court of Appeal in *Camirand c. Rossi*.¹⁰⁴ The case involved an appeal of a Superior Court decision which had remanded an action respecting shareholder oppression to arbitration. The appellant, Claude Camirand, alleged that the respondents had engaged in behaviour that contravened section 241 of the *Canada Business Corporations Act*, and argued that he should be allowed to seek an oppression remedy before the Superior Court. Respondents maintained that since their shareholder agreement contained an arbitration clause, the jurisdiction of the Court had been voluntarily set aside by the parties. Reversing the ruling of Crépeau, J.S.C., the Court of Appeal ruled in favour of the appellant. In his decision, Justice Fish¹⁰⁵ writes:

Nothing in the shareholders' agreement, I repeat, can be read as an explicit or *even implicit* renunciation by the parties of their right, under section 241 of the *CBCA*, to apply to a court of competent jurisdiction for a remedy against oppression by the other shareholders. Accordingly, it is unnecessary for present purposes to determine whether they could have validly done so.

I would in any event think it most unlikely that shareholders would forego such an important statutory safeguard without vesting in the arbitrator a comparable power of redress.¹⁰⁶

Like *Dell*, the *Camirand* case involves a very specific set of facts that end up being determinative. At the same time, it demonstrates clearly that courts will not blindly enforce arbitration clauses when other rights, be they consumer rights or protections afforded by other statutes like the *Canada Business Corporations Act*, are jeopardized. Always, the courts will weigh arbitration in the scales of the public interest and with a view to competing legal imperatives. It would therefore be a mistake to assume that the mere inclusion of an arbitration clause – regardless of its wording, contents, or implications – will necessarily result in the application of that clause at the expense of the traditional competency of the Superior Court.

While no decisions have yet been rendered on class-wide

¹⁰³ Although Madam Justice Langlois rejected the motion brought by the respondent and allowed the class action to proceed, she did not decide the contractual issues at the heart of the litigation.

¹⁰⁴ [2003] R.J.Q. 1081 (C.A) (Handed down on 7 April 2003) [*Camirand*].

¹⁰⁵ Then Justice of the Québec Court of Appeal.

¹⁰⁶ *Ibid.* at paras. 30 and 31 [emphasis added].

arbitration specifically, some judgments have gone further than the “either/or” jurisprudence. In these other cases, we see a tendency to blur the line somewhat between arbitration and the class action. An example of this is provided in *Clavel c. Productions Musicales Donald K. Donald Inc.*¹⁰⁷ Well-known to aficionados of the Montreal rock scene, the suit arose in 1992 when the California-based band Guns ‘N Roses agreed to perform a seven-hour concert at the Olympic Stadium. Donald K. Donald set up the concert and sold tickets to a crowd of approximately 54,000. Midway through the show, allegedly at the request of Axl Rose, the concert was brought to a sudden halt. After uttering an expletive, Mr. Rose is alleged to have informed the fans that they would be refunded and told them “We’re out of here!” Initially, the litigation involved a class action suit launched against Donald K. Donald and the *Régie des installations Olympiques* (the Olympic Installations Board). Maryse Clavel, who acted as the class representative, instituted a claim on behalf of all ticket holders for a share of the ticket price amounting to \$23.67 (two-thirds of the original price). For its part, Donald K. Donald brought a warranty action against Guns ‘N Roses, arguing that they were responsible for the damages and had breached their contract. Counsel for Guns ‘N Roses contested this argument and presented an exception to dismiss under Article 165 paragraph 4 of the *Code of Civil Procedure*. They maintained that the Superior Court was unable to rule on the issue because the contract contained a valid arbitration clause. It read as follows (at para. 13 of the judgment):

Any claim or dispute arising out of or relating to this agreement or the breach thereof shall be settled by arbitration in accordance with the rules and regulations then obtaining of the American Arbitration Association governing three-member panels. The parties hereto agree to be bound by the award of such arbitration and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

Rejecting the exception to dismiss, the Superior Court ruled that it had the jurisdiction to hear the warranty proceedings brought against the band. The Québec Court of Appeal was called upon to decide whether or not the lower court had erred in arriving at this conclusion. After reaffirming the positive and purposeful approach that must be adopted when construing arbitration agreements, Justice Rothman makes a series of determinations. In the first place, he acknowledges that the arbitration clause is sufficiently broad in its language to apply to the “wilful, gross and reckless act” of the lead singer, Axl Rose. Second, and far more significantly, he declares that arbitration clauses

¹⁰⁷ [1994] R.J.Q. 1183 (C.A.) [*Guns ‘N Roses*].

agreed upon by two parties should not become inapplicable for the simple reason that the dispute also happens to involve a third party. Indeed, we must bear in mind that the centrepiece of the litigation, the original class action suit, was brought by Ms. Clavel on behalf of ticket holders who were never parties to the contract between Donald K. Donald and Guns ‘N Roses. In his reasons, Justice Rothman writes:

I do not believe that the presence of a third party in the dispute, or even the fact that a third party has initiated proceedings, should, in itself, render the arbitration clause inapplicable and deprive the parties of a forum for the settlement of their disputes which they have chosen in their contract. It is not difficult to imagine any number of commercial disputes where it would be entirely appropriate to proceed to arbitration under the arbitration clause agreed upon between the parties notwithstanding a claim against one of the parties by a third party.¹⁰⁸

This part of the ruling is particularly relevant because it demonstrates the more or less elastic nature of arbitration clauses. Rather than reading them strictly, the Court of Appeal sees them as reasonably flexible and able to contend with the realities of commercial life. To employ a restrictive approach would be to naively ignore that litigation in a business setting often extends beyond the immediate parties to an agreement and can involve a wider range of stakeholders. While it would be impossible to speak of *Guns ‘N Roses* as an affirmation of the legitimacy of class-wide arbitration, it is fair to say that it promotes a form of consolidation. Simply put, where parties have a legitimate interest in the obligations created by a contract, even when they are not directly bound by its terms, it is acceptable to include them within the arbitral proceeding which that contract mandates.

In spite of the applicability of the arbitration clause and the fact that it can accommodate third parties, the Court of Appeal concluded that the Superior Court should be allowed to hear the case. In his ruling, Justice Rothman makes it plain that his judgment rests on the particular circumstances surrounding the case. In effect, because the class action was brought in the Superior Court, and because the true cause of the damages claimed by the ticket holders was the reckless behaviour of Axl Rose, it would be manifestly unfair to “deprive Donald K. Donald of its right of exercising warranty proceedings” as it would “deprive it of a complete solution to the question involved in the principal action...and...its normal right to have both actions heard jointly and decided by the same judgment...”.¹⁰⁹

*Concordia Management Project Ltd. c. Décarel Inc.*¹¹⁰ adopts a

¹⁰⁸ *Ibid.* at para. 24.

¹⁰⁹ *Ibid.* at para. 40.

line of reasoning similar to the one exemplified in *Guns 'N Roses*. Although the case does not involve a class action, it does relate to litigation arising out of a contractual dispute, to the applicability of an arbitration clause, and to the procedural validity of consolidation. Here, a contractual agreement bound two legal persons, Décarel, the defendant, and Corcordia Management Project, the plaintiff. The agreement contained an arbitration clause which compelled the parties alleging a contractual breach to bring their dispute before an arbitrator for resolution. The plaintiff wanted to call the defendant company, as well as two natural persons (i.e., the principal owners of Décarel's share capital) before an arbitral forum. Although the plaintiff's motion was allowed by the Superior Court, the decision was subsequently appealed. In his opinion, Justice Vallerand of the Québec Court of Appeal opts for a flexible conception of arbitration proceedings. Rejecting an exclusionary approach, he declares:

To put aside the arbitration clause in this instance simply because it relates to legal persons would, at least in my opinion, be nonsensical in that the decision would be based on a technical approach that wilfully disregards the specific circumstances surrounding the case, and this in spite of any arguments regarding the corporate veil...

I consider that the circumstances of the case make it necessary to bring all of the relevant parties before the arbitrator and to apply the arbitration clause to those who originally crafted it, but who now want to avoid its effects. I am therefore of the opinion that the appeal should be denied with costs. ¹¹¹

This ruling by Justice Vallerand can be interpreted as an example of consolidation. Instead of construing the arbitration clause in an orthodox manner or limiting it, in a strict way, to the parties to the agreement, he suggests that it is malleable enough to encompass other related persons. To disallow such a consolidation would, in his opinion, deny the obvious connection between the parties and enable a technicality to get in the way of a complete, pragmatic, and sensible

¹¹⁰ [1996] R.D.J. 484 (C.A.) at 487. [*Décarel*]. For a brief discussion of the significance of the case see *Ghanotakis v. Imprimerie régionale a.r.l. ltée* (Tribunal d'arbitrage No 0120 2002).

¹¹¹*Ibid.* at paras. 13-14. Original quote:

Écarter l'application de la clause compromissoire en pareilles circonstances au motif qu'elle ne concerne que les personnes morales serait, du moins à mon avis, un non-sens fondé sur une technicité aveugle et sciemment ignorante des circonstances particulières de l'affaire et cela, quoi qu'il en soit du voile corporatif en d'autres contextes. [...] [J]'estime que les circonstances du cas imposent que tous les intéressés se retrouvent devant l'arbitre, en application de la clause compromissoire à laquelle ont présidé ceux qui cherchent aujourd'hui à s'y soustraire et je suis donc d'avis de rejeter le pourvoi, avec dépens.

determination of the matter.

In a partly dissenting opinion, Justice Chamberland cautions against the progressive approach taken by his colleague. However well-established arbitration might be, and however much the legislature might encourage a broad jurisdiction for arbitrators, terms cannot be read into the agreement which are simply not there. Like Justices Richardson and Renquist, his Lordship asserts that courts can only construe what is written and is therefore subject to construction. To consolidate actions involving persons who are not specified in the arbitration agreement is to usurp the role of the contracting parties, as well as that of the National Assembly itself. He declares:

The principles that this Court applies when referring matters to arbitration do not, in my opinion, allow us to order an individual to subject himself personally to an arbitral forum mentioned in a contract, or to an arbitration clause, when he is not bound personally to do so.¹¹²

Commenting more specifically on the facts of the case, Justice Chamberland goes on to state:

In my view, it would be a mistake to submit two individuals who are not parties to the arbitration agreement to the jurisdiction of an arbitrator. While Messrs Chiniara and Salicco are the primary shareholders and managers of Décarel Inc., and while they have signed contractual instruments in the name of their company, this does not alter the fact that they are not bound personally by the arbitration clause.¹¹³

In a sense, *Décarel* encapsulates some of the broader concerns and contradictions evidenced in *Keating*. To be sure, it rests on different facts and addresses consolidation rather than class-wide arbitration *per se*, but it deals with a similar kind of legal, and indeed conceptual, confrontation. The majority gives voice to a purposeful attitude in respect of arbitration, while the dissenting opinion articulates a more cautious perspective. To label these approaches as “liberal” and

¹¹² *Ibid.* at para. 18. Original quote: Les principes que cette Cour applique en matière de renvoi à l'arbitrage ne vont pas, à mon avis, jusqu'à permettre que nous ordonnions à un individu de se soumettre personnellement à une juridiction d'arbitrage qui prend naissance dans un contrat, et une clause compromissoire, auxquels il n'est pas personnellement lié.

¹¹³ *Ibid.* at para. 21. Original quote: Ce serait une erreur, à mon avis, que de soumettre à la juridiction de l'arbitre deux personnes qui ne sont pas personnellement parties à la convention d'arbitrage. Bien que messieurs Chiniara et Salicco soient les principaux actionnaires et dirigeants de Décarel Inc., et qu'ils aient signé les documents contractuels au nom de leur entreprise, il n'en demeure pas moins qu'ils ne sont pas personnellement liés par la clause compromissoire.

“conservative” would be an oversimplification. It would misrepresent the position of the jurists by politicizing them. This being said, in the briefer and more guarded language of Justices Vallerand and Chamberland, we can discern the echo of Justices Grodin and Richardson.

An even more compelling example of consolidation was provided by the Superior Court in 2001. The case, *Ronald Bourque c. Laboratoires Abbott Ltée*,¹¹⁴ arose in the context of a labour dispute. The plaintiff represented a group of workers who were servants of the defendant company. Some of the employees, including the representative, were party to a collective agreement. The majority of workers, however, had not signed the agreement and were therefore not subject to its provisions. Consequently, the plaintiff asked the Superior Court to allow him to bring a class action in order to litigate on behalf of all of the employees collectively. The defendant, Abbott Laboratories, argued on the contrary that since the plaintiff representative was party to a collective agreement, the arbitration clause in that agreement compelled him to arbitrate the dispute and precluded him from launching any judicial proceedings, including a class action. Basing itself on the Supreme Court decision *Dayco (Canada) Ltd. v. C.A.W. Canada*,¹¹⁵ which had taken a large and liberal approach to collective agreements and their applicability to retired employees, the Court ruled in favour of the plaintiff. It decided that the claims of workers subject to the agreement and those of the majority could be consolidated into a single arbitral procedure. In her reasons, Justice Laberge writes:

The true issue that this Court must resolve is to determine whether or not the matter that has been submitted to it can be dealt with via the arbitration process. If the issue can be arbitrated, the arbitrator will be deemed to possess the requisite competency [...]

What about the active and retired participants that are not included within the collective bargaining agreement? In principle, these individuals do not have the right to institute a grievance.

Even if *Dayco* does not go so far as to recognize the right of persons in no way mentioned by any collective bargaining agreement to institute grievances, the Court believes that one must examine the issue from the point of view of the “essence” [or substance] of the litigation. The purpose of the case at bar is to determine if there are any illegalities in respect of the amendments that have been brought to the plan, in respect of the contribution scheme adopted by the employer and, should the matter

¹¹⁴ REJB 2001-25120. [*Abbott*].

¹¹⁵ [1993] 2 S.C.R. 230 S.C.C. [*Dayco*].

arise, the additional contributions that he may be ordered to make. The arbitrator has the competency to hear the issue, and the answer he provides will be to the advantage of all the various categories of beneficiaries, without distinction.¹¹⁶

The decision in *Abbott* is even more relevant for our purposes. In the first place, it can truly be said to involve a class of plaintiffs, rather than a couple of additional parties. Indeed, the case at bar included 167 workers who had signed the collective agreement and 229 who had not. These numbers reflect the multiplicity of claims that usually arises in class-wide proceedings. Moreover, the majority of the persons involved were not signatories to the agreement and were not, properly speaking, bound by its arbitration clause. None the less, the Court saw fit, for pragmatic reasons, to extend the clause in order to encompass them. This flexibility is far more considerable than that promoted by Justices Rothman and Vallerand. It demonstrates persuasively just how generous courts can be in applying arbitration clauses to disputes involving employees and just how vast can be the powers conferred to the arbitrator. While the volunteerism characteristic of class-wide arbitration is still absent,¹¹⁷ and while we can still describe the joining of the claims as consolidation, this case is situated on the cusp of the American jurisprudence. It is the realization of the hypothetical set forth by Justice Nordheimer in *Kanitz*.

The Superior Court revisited *Abbott* in April of 2003. In *Bisaillon v. Concordia University*,¹¹⁸ Justice Crépeau had to contend with a similar set of facts and consider, *in limine litis*, whether his Court had the requisite competency to hear a case involving claims made by employees of the defendant university. Some of the workers were governed by a particular collective bargaining agreement while others

¹¹⁶ *Supra* note 114 at paras. 7 and 80-81. Original quote:

La véritable question que doit se poser le Tribunal est de savoir si le problème soumis peut faire l'objet d'un arbitrage. Si la question est arbitrabile, alors l'arbitre est compétent. [...] Qu'en est-il des participants actifs et retraités non visés par une convention collective. Ceux-ci, en principe, n'ont pas droit à la procédure de griefs. [new par.] Même si l'arrêt *Dayco* ne vas pas aussi loin que de reconnaître le droit à des personnes non visées par une quelconque convention collective de recourir à l'arbitrage de griefs, le Tribunal estime qu'il faut examiner la question du point de vue de l'"essence" du litige. L'objet du litige est de déterminer s'il y a illégalité dans les amendements au régime, s'il y a illégalité dans les congés de contribution que s'est accordé l'employeur et le cas échéant de déterminer le montant de la contribution additionnelle qui doit être versée par celui-ci. L'arbitre est compétent à entendre cette question et la réponse qu'il sera appelé à donner va profiter à toutes les catégories de bénéficiaires, sans distinction.

¹¹⁷ The joining of claims is imposed by the court rather than expressly opted for by the various claimants.

¹¹⁸ JE 2003-1294 (S.C.), (Handed down 25 April 2003), rev'd J.E. 2004-853 (C.A.) (Handed down 31 March 2004).

were not. The representative of the employees, alleging breaches involving their pension plan, wanted to bring a class action against the defendant. Counsel for Concordia University, however, argued that the Superior Court did not have jurisdiction¹¹⁹ to hear the matter because the collective agreement included an arbitration clause. Relying in part on the reasoning in *Abbott*, Justice Crépeau ruled that the arbitration clause had to be enforced and that his Court was unable hear the dispute. Although he does not make a determination with respect to the joining of claims, as the question went beyond the ambit of the motion, he does mention the consolidation formula put forward by Justice LaBerge. This decision was later reversed by the Court of Appeal.¹²⁰ In their joint ruling, Justices Baudouin, Morin, and Rochon concluded that the substance of the class action litigation did not relate to a collective bargaining agreement, as the lower court had indicated, but rather to an independent employee pension plan.¹²¹ What is more, they noted that the beneficiaries of this plan were not only the union members of the petitioner, but members of eight other labour unions, as well as approximately 300 non-unionized employees. Because the pension plan was not a matter governed by the provisions of the collective bargaining agreement, and because of the heterogeneous character of the plaintiffs, the Court of Appeal determined that the claim could not be decided by an arbitrator. Consequently, in spite of the flexibility evidenced in *Abbott*, consolidation does know certain limits. These limits are traced in part by the contents of labour agreements, in the employer-employee context, and the diversity of the claimants. In short, the liberal approach of the courts is not tantamount to a full licence.

The fundamental question remains: is class-wide arbitration permissible in Québec? On the negative side, one could point to the fact that no article of the *Code of Civil Procedure* foresees the possibility of class proceedings within the arbitration context. To allow for a joint procedure would be to outstrip the legislature, which has historically played the seminal role of reforming the law by elaborating and expanding the Province's legal institutions. In effect, if California is blazing the trail of class-wide arbitration, it is because its own *Code of Civil Procedure* has codified the right of courts to consolidate arbitral proceedings. In the absence of any such provision,¹²² the California state judiciary would have shown considerably more restraint than it has. As we have seen, however, this objection is not as solid as it might appear. The Court in *Kanitz* acknowledged, albeit in *obiter dictum*, that

¹¹⁹ That is, the necessary *ratione materiae*.

¹²⁰ *Supra* note 118 (C.A.).

¹²¹ *Ibid.* at paras. 10-16.

¹²² *Supra* note 34.

consolidation could be allowed by an arbitrator, even in the absence of any statutory language to that effect. More important still, Québec courts have consolidated arbitration claims in instances where they determined it was useful and reasonable to do so. If Canadian tribunals are comfortable with the notion of consolidation, which is not expressly mentioned by the relevant legislation, the possibility of class-wide proceedings, which is also unmentioned, is not as unlikely or distant as one might think. The analogy between the two has long been recognized by the California courts and may influence the judicial reasoning of our own judges.

A second and more difficult objection to the prospect of class-wide arbitration relates to instances in which consolidation has thus far been allowed. Yes, *de facto* consolidation has been ordered by Québec courts. But they have done so where the arbitration clause was found in a collective bargaining agreement or specified in a piece of legislation. As we have seen, there are special public policy reasons for doing so. But can the large and liberal spirit, which the legislature has breathed into these specific types of arbitration clauses, and which the courts have reaffirmed, be said to animate similar clauses that are found in contracts of adhesion – say in a consumer contract, for example (credit card, franchise, etc.)? While it is true that collective agreements and legislation are accorded special status, the point should not be overstated. *Guns 'N Roses* and *Décarel*, which did not involve a dispute between employees and an employer, suggest that Québec courts have not limited consolidation to watertight categories of cases. Instead of focusing on the type of contract involved, they have instead centred their analysis on practical considerations. Would it make more sense and lead to a fairer result, they ask, if arbitration were allowed, even if other claims made by other parties must be joined to the dispute? Moreover, the *Civil Code* has codified a provision in its book on obligations¹²³ that expressly advantages adhering parties. Article 1432 of the *Civil Code* reads as follows:

1432. In case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against the person who stipulated it. In all cases, it is interpreted in favour of the adhering party or the consumer.

Applying this article to the realm of arbitration, one could argue that where a contract of adhesion contains an arbitration clause, and where it is unclear whether that clause allows for a given form of consolidation, a court should make its decision on the basis of what would be to the greatest advantage of the adhering parties. Where

¹²³ *C.C.Q.*, *supra* note 2, Book V, Title One, Chapter I.

consolidation would be to their benefit, it should be ordered. Where it would be to their disadvantage, however, the court should not allow the various claims to be joined into a single proceeding. The same logic could be applied *mutatis mutandis* to class-wide arbitral procedures.

Lastly and perhaps most persuasively of all, one could object that the structure of the *Civil Code* itself points to the fact that arbitration and the class action are separate institutions, and are governed by a distinct set of provisions and policy concerns. The arbitral regime, already firmly established in our law, exists in order to simplify dispute resolution. All the provisions of the *Civil Code* relating to arbitration must be read in this light. The liberal interpretation provided by our courts is a reflection of the National Assembly's willingness to reduce costs and lessen the timeframe usually borne by disputants. Judges are consequently able to read the provisions respecting arbitration generously, but are not empowered to change the nature of the institution altogether. The class action, a newcomer to the civil law, is less familiar. While it is not an exceptional proceeding, it is subject to a specific set of rules. In particular, Article 1000 of the *Civil Code* sets out the exclusive jurisdiction of the Superior Court to hear all class proceedings. Consequently, by attempting to blend together arbitration and class procedure, it can be argued, one will bring together two legal regimes which the legislature has decided to create separately, for distinct reasons. Moreover, allowing arbitrators to decide class-wide matters thwarts the National Assembly's clearly articulated desire to subject such actions to the sole discretion and oversight of the Superior Court. In response, one could point to the broad powers which the *C.C.P.* grants arbitrators in respect of their competency¹²⁴ and the wide scope of their jurisdiction. This has been underlined by an ample body of case law, including *Réal Leduc v. René Houle*,¹²⁵ *Cliche c. Québec (Commission administrative des régimes de retraite et d'assurances)*,¹²⁶ and *Carrier c. Québec*.¹²⁷

It is this tension between the jurisdiction of the Superior Court over class-wide claims, on the one hand, and the arbitrator's right to determine his competency and conduct the arbitral proceeding, on the other, that is the most difficult to resolve. Although Québec's judges have shown themselves prepared to adopt a compromise position in the

¹²⁴ *C.C.Q.*, *supra* note 4, Art. 943.

¹²⁵ JE 96-1657 (S.C.). Note, however, that the arbitral forum must be duly mandated by the parties in order for the arbitrator to affirm his competence.

¹²⁶ [1997] A.Q. no. 2420 (S.C.); appeal dismissed, REJB 1998-19349, October 30, 1998, C.A.Q. 200-09-001543-971.

¹²⁷ JE 99-400 (S.C.), confirmed by JE 2000-1807 (C.A.), leave to appeal denied by the Supreme Court of Canada, [2000] C.S.C.R. no.576 (23 August 2001).

form of consolidation, it is unclear, as of yet, whether they are prepared to integrate more fully the arbitration and class action regimes, and allow for the kind of class-wide arbitration that currently exists in the United States. There is no doubt that the possibility is visible on the horizon and audible in the jurisprudential discourse. Arguably, it is already there, in embryo, in the *Abbott* decision. It would not be such a stretch for courts to take that one crucial step and expressly confirm its applicability. However, there are two factors that mitigate against this happening. The first, as we have noted, is that Canada and Québec have followed the lead of the United States in the matter of the class action. They have been cautious. Rather than stress experimentation, they have placed greater weight on progressive but carefully crafted legislation that seeks to avoid the litigious excesses, whether real or imagined, of the American legal system. It seems unlikely that in an area that remains hotly contested at the highest level, provincial jurisdictions would attempt to boldly and immediately harmonize their arbitration rules with those of their more adventuresome neighbour. Secondly, class-wide arbitration in the U.S. is still in a state of flux. A change in the composition of the U.S. Supreme Court could see a reversal of the principle set out in *Bazzle*. What is more, the social and economic consequences of the ruling have yet to play themselves out fully. Canadian and Québec courts may thus wish to study the ramifications of class-wide arbitration before wholeheartedly embracing it.

V. Conclusion

While our courts have historically always followed the American jurisprudence at a cautious distance, preferring to model their decisions on British case law, they have shown themselves remarkably open to a full and flexible view of arbitration. As we have seen, the Ontario decision in *Kanitz* favoured the idea that the consolidation of arbitral proceedings was permissible in certain instances. More important, Québec decisions like *Guns 'N Roses* and *Abbott* demonstrate that courts are willing to combine arbitration claims into a single, comprehensive procedure – namely, where it is in the interest of fairness and good sense to do so. Whether Québec can be said to allow for class-wide arbitration is another matter altogether. There are persuasive arguments for and against. That arbitration is a conspicuous feature of our law is beyond dispute. That arbitrators are critical figures, and that their discretionary powers and jurisdictional ambit should be construed liberally, is also undeniable. Whether the American case law and the United States Supreme Court's recent decision in *Bazzle* can be imported here, however, and rooted in the rich but distinctive soil of our civil law tradition, is more difficult to say. Given this key decision and

the impact it is having in the United States, it would be wise for the provincial legislature to think more carefully about the issue of class-wide arbitration. Rather than allow courts to decide the matter, the National Assembly should weigh the policy considerations involved and speak authoritatively by codifying its opinion. In arriving at this decision, it will probably rehearse many of the arguments voiced in *Keating*, *Champ*, *Blue Cross*, and even *Bazzle*. The points canvassed in approbation and dissent will be invoked once more, as they deserve to be. In the end, it will be up to the legislators to decide, in light of our codes, our case law, and our best interests, whether class-wide arbitration should be received into the civil law and under what circumstances.

In the interim, potential defendants who wish to avoid the possibility of consolidation or class-wide procedures should specifically exclude them in their arbitration clauses. By doing so, they can pre-empt the National Assembly and the courts, and escape the crippling effects of large damage awards. Whether such exclusionary clauses could be viewed as unconscionable depends, ultimately, upon the jurisdiction in question.¹²⁸ In Québec, the contractual language will have to be considered with a view to the interpretative provisions of the *Civil Code's* book on obligations,¹²⁹ Article 1437¹³⁰ which deals with abusive clauses, and Article 1375, which specifies that “parties shall conduct themselves in good faith” throughout the life-cycle of the contract. Indeed, unlike the common law world, Québec has instituted multiple good faith provisions in its legal codex.¹³¹ This goes beyond the standard of care concept familiar to practitioners of Anglo-American and Anglo-Canadian law, and imposes a universal obligation of reasonableness and fair dealing in all aspects of civil life. In this respect, the distinctiveness of our jurisdiction is just as noteworthy

¹²⁸*Keating* suggests that such an exclusion would be perfectly legitimate, but the California Court of Appeals held otherwise in the more recent case of *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (Ct. App. 2002). California's federal district court concurred with this appellate ruling in *ACORN v. Household International, Inc.*, 211 F.Supp. 2d 1160 (N.D. Cal. 2002).

¹²⁹ *Supra* note 4, Book V, Title One, Section IV.

¹³⁰ The provision reads:

An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced. [new paragraph] An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause.

Compare with California common law definition, *supra* note 2.

¹³¹ See *C.C.Q.*, *supra* note 2, Articles 6, 7, 1375, and 2805.

today as it was when Professor Brierley was writing in the 1980s, and will continue to play an important role in analysing contractual relationships, arbitral clauses, and arbitration legislation. As a result, although class-wide arbitration may well be transplanted to our soil, it will be influenced by the particularities of that soil, grow differently, and bear different fruit.

Post-Script Re: MacKinnon

Since this article was submitted for publication, the Court of Appeal for British Columbia has heard and ruled upon the *MacKinnon*¹³² case. In an opinion written by the Honourable Madam Justice Levine, the judgment of the Supreme Court of British Columbia was reversed. According to the Court of Appeal, the decision on the part of Madam Justice Brown in refusing to stay class action proceedings was premature. In order to decide whether an arbitration clause is rendered inoperative by class procedure, certification must first be granted. In the case at bar, however, no certification order was issued. As a result, the judge of first instance skipped a crucial step. To find the arbitration clause inoperative, she had first to decide whether a class action should be allowed to proceed. For this reason, the Court of Appeal remanded to the case management judge the critical issue of determining the outcome of the certification application.

It is worth emphasising that the appellate decision in *MacKinnon* turns on a question of legal procedure rather than policy. In other words, the Court of Appeal does not reject the doctrine of strict incompatibility put forward by Madam Justice Brown. On the contrary, the Court seems to endorse this view in *obiter dictum*. In her opinion, Madam Justice Levine states:

I take no issue with the case management judge's analysis of the competing policy objectives of both statutes in the circumstances of this case. She had before her the evidence of Mr. MacKinnon and other individuals who have obtained payday loans from some of the defendants that they would not be able to pursue their claims if they had to proceed with individual actions. She considered the cost-saving objectives of both arbitration and class proceedings, and concluded that individual actions or arbitrations would likely create an economic bar to the resolution of the individual claims, while a class proceeding would allow the claimants economic access to justice. This is a proper approach to a preliminary or *prima facie* analysis of whether a class proceeding is the preferable procedure¹³³.

¹³² *MacKinnon v. Instalozans Financial Solution Centres (Kelowna) Ltd.*, 2004 B.C.C.A. 2004 473, reversing [2004] B.C.J. No. 175 (S.C.). See section B on British Columbia Law.

¹³³ *Ibid* para. 47.

In effect, rather than disavow the approach taken by Madam Justice Brown, the Court of Appeal simply adds an additional step. In theory, a class proceeding in British Columbia will render a competing arbitration clause inoperative. A finding of inoperability cannot be arrived at, however, until the class action has been duly certified. Once this basic procedural hurdle has been overcome, nothing should (again, in theory) prevent a judge from applying the same legal analysis as that put forward by Madam Justice Brown. In short, the Court of Appeal only identifies a gap in her reasoning, it does not undermine the foundation of her principled approach to legislative incompatibility.

