Arbitration as an Alternative to Dispute Resolution: Class Proceedings and the Mirage of Mandatory Arbitration

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"And every fair from fair sometime declines."
William Shakespeare, Sonnet 18

I. INTRODUCTION

For thousands of years, arbitration has been understood to be a purely consensual form of dispute resolution.[1] Party autonomy was key to this concept of merchant-to-merchant arbitration. Hence the term "arbitration", based upon the Latin word *arbitrium*, meaning "free will".[2]

In truth, arbitration has not always been entirely consensual. The terms of membership in ancient guilds or trade associations often included a requirement of institutional arbitration. In addition, many royal edicts and legislative enactments have, over the ages, directed the parties to resolve their disputes by arbitration.[3] These arbitration regimes whether wholly voluntary or externally imposed had a common characteristic of providing a practical mechanism for

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1 In the fifth century B.C., Demosthenes, in his speech *Against Meidias*, described Athenian arbitration law in these terms:

> If any parties are in dispute concerning private contracts and wish to choose any arbitrator, it shall be lawful for them to choose whomsoever they wish. But when they have chosen by mutual agreement, they shall abide by his decisions and shall not transfer the same charges from him to another court, but the judgments of the arbitrator shall be final.

Online: University of Chicago, Greek Translations & Texts <http://perseus.uchicago.edu/perseus-cgi/citequery3.pl?dbname=GreekFeb2011&getid=1&query=Dem.%2021>.

2 Gerald Malynes, *The Ancient Law Merchant (1685)*; quoted by Gary Born, *International Commercial Arbitration,* 2nd ed. (Leiden, The Netherlands: Wolters Kluwer, 2014), Vol. 1 at 32.

3 Earl S. Wolaver, "The Historical Background of Commercial Arbitration" (1934), Univ. Penn. Law Rev. 132, at 133-138. Many Canadian statutes direct the parties to resolve disputes by arbitration: See, for example, *Canada Transportation Act*, S.C. 1996, c. 10; *Insurance Act*, R.S.O. 1990, c. I.8 and *Forestry Revitalization Act*, S.B.C. 2003, c. 17.

the resolution of the disputes to which they related. Arbitration was chosen or imposed because it was thought to provide a better process for resolving disputes than the alternatives, principally litigation before the courts.

All arbitration is to a greater or lesser degree intended to avoid court litigation. However, starting in the 1990s, a new category of arbitration emerged. This form of arbitration was primarily designed to preclude access to a specific type of court litigation, namely, class actions — without providing an effective alternative. As discussed below, legislation enabling class proceedings on behalf of large groups of claimants with no relationship to each other, apart from their similar or identical claims against a common defendant or defendants, was introduced in the United States in the middle of the twentieth century. Canadian jurisdictions followed suit (with important differences) over the next few decades, as did Australia. The main policy goal of class action legislation in North America was to provide a remedy for systemic wrongs where the damages suffered by individuals are uneconomic to pursue as individual claims. In addition to providing such a remedy, where for practical purposes no other remedy existed, class actions were also intended to have a quasi-regulatory, public interest and behavior modification aspect.

Before long, potential defendants in class actions found what has proven to be an effective countermeasure to class actions: contractual clauses in contracts of adhesion which mandate the arbitration of claims by their customers on an individual basis. Often such clauses are accompanied by explicit waivers of the right to participate in a class action as well as a reservation of a right in favour of the company to bring its own claims in court. This type of arbitration has been dubbed in much of the literature as "mandatory arbitration" to distinguish it from arbitration arising from negotiated agreements in normal commercial contracts.

Mandatory arbitration rests on a legally unassailable premise: arbitration agreements are contracts; contracts must be enforced. Mandatory arbitration therefore rests on centuries of jurisprudence which has, over time, established the right of commercial parties to agree to arbitration as an alternative to court proceedings. In turn, that jurisprudence has been ensconced in statutes and international conventions and norms which assure that right. However, in the case of mandatory arbitration, the result is only tenuously connected to the underlying values of arbitration as an alternative method of dispute resolution and is in direct conflict with the policy objectives which underlie class proceedings. Mandatory arbitration does no more than preserve the absence of an effective remedy which class proceedings were intended to cure. Whatever the advantages mandatory arbitration may be to the companies which include it in their mass market contracts,[4] it cannot seriously be asserted that the intent is

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[4] The desire for confidentiality has often been cited but this is in the context of

to provide a more effective remedy or a more efficient dispute resolution process with respect to the type of uneconomic claim that is typically certified in a class action.

This paper explores the interaction between the law relating to the enforcement of arbitration agreements and the law relating to class proceedings. We discuss the need for legislative action and the form such legislative action should take. In particular, we explore whether legislative action to override arbitration agreements in the context of class proceedings can be implemented consistently with existing arbitration statutes and Canada's international obligations with respect to arbitration agreements.

II. INTERNATIONAL STANDARDS FOR THE NON-ENFORCEMENT OF ARBITRATION AGREEMENTS

The basis for most modern arbitration statutes is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). Despite its name, the Convention is not limited to the enforcement of arbitration *awards*, but also includes important provisions with respect to the enforcement of arbitration *agreements*.[5]

Canada is a signatory to the Convention and many provinces, such as Ontario and British Columbia, have expressly adopted it as well. An interesting feature of the Convention is that, while it is an international legal instrument, the international character of either arbitration awards or agreements is not an essential prerequisite to the application of the Convention. In the case of awards, foreign awards are covered regardless of whether the award itself is "international". Obligations of a signatory State to enforce an arbitration agreement are not conditioned upon the agreement relating to an international transaction. However, as a practical matter, it is unlikely that any signatory to the Convention would initiate a complaint regarding limitations placed by another signatory on the enforcement of arbitration agreements that have no effect beyond its own borders.

The core principles of the Convention have subsequently been expressed in the Model Law, which has been adopted by all provinces in Canada (with some modifications) as the basis for provincial laws relating to international arbitrations and foreign award enforcement proceedings that are conducted within their borders.[6] With variations that differ widely from one province to another, the Model Law has also served as a basis for arbitration statutes

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confidentiality regarding complaints about identical products or services that are used by possibly tens of thousands, if not millions, of customers.

5 *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, Article II.

6 J. Brian Casey, *Arbitration Law of* Canada, (3d), Juris, New York, 2017 at 4. In Ontario,

relating to non-international arbitrations conducted in most provinces. In Ontario, the *Arbitration Act, 1991*, S.O. 1991 is the non-international Act.

We will focus on the provisions of the New York Convention as they have found expression in the *International Commercial Arbitration Act, 2017* and the *Arbitration Act, 1991* of Ontario. We do so for a number of reasons.

First, it is appropriate to consider international standards because they are the most categorical (*i.e.*, less subject to judicial discretion) with respect to the enforcement of arbitration agreements. In principle, a legislative solution that satisfies international standards with respect to what may be characterized as the abusive use of arbitration agreements should also satisfy non-international standards in Canada. A legislative solution that does not satisfy international standards may be implemented, but it would have to be limited to disputes which are not international. Second, the focus on the Ontario *Arbitration Act, 1991* is convenient since two of the major cases which have raised issues with respect to the issue within the past year have arisen in Ontario. Third, five other Canadian provinces have non-international arbitration statutes that are almost identical to the Ontario Act.[7] Finally, since we are focusing on possible legislative solutions, any reference to existing provincial statutes is only for purposes of illustration and problem identification.

We will also use the Ontario *Class Proceedings Act, 1992* as a primary point of reference for class proceedings in Canada. Some of our observations may need to be adjusted in relation to other provinces.

1. The New York Convention

Article II of the Convention provides for the enforcement of arbitration agreements. Specifically, Article II(3) provides:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a *subject matter capable of settlement by arbitration*.
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> . . .
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> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is *null and void, inoperative or incapable of being performed*. [emphasis added.]

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both the Convention and the Model Law have been adopted by the *International Commercial Arbitration Act, 2017*.

[7] Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia have substantially the same non-international arbitration acts. See Joel Richler, *"Commercial Arbitration from Commencement to Hearing: Practical and Legal Considerations"*, The Advocates' Quarterly, v. 47 2017 at 387 at 388.

It will be noted that the broad requirements of States and their courts to enforce arbitration agreements are subject to the following exceptions:

(a) subject matter not capable of settlement by arbitration;
(b) agreement null and void;
(c) agreement inoperative; or
(d) agreement incapable of being performed.

In the Model Law (as adopted by the *International Commercial Arbitration Act, 2017*) the "subject matter" exception is dropped with reference to the enforcement of arbitration agreements,[8] but is preserved with reference to the enforcement or setting aside of awards.[9] The other three exceptions are preserved verbatim as grounds on which a court may refuse to stay litigation with respect to a dispute covered by an arbitration agreement. In the *Arbitration Act, 1991* the stay of court proceedings may be refused if the arbitration agreement is considered to be "invalid" or if the "subject matter of the dispute is not capable of being the subject of arbitration under Ontario Law". Other possible grounds for refusing a stay under the *Arbitration Act, 1991* are discussed below. For the moment we will focus on the statement of the exceptions under the Convention.

The applicability of these exceptions to arbitration agreements that are under consideration in this paper are not clear cut. This is hardly surprising. The drafters of the Convention could not have anticipated that it would be used to enforce arbitration agreements relating to trivial or uneconomical claims, the primary objective of which is not to facilitate the resolution of claims by arbitration but to preclude access to collective redress otherwise provided by law. There can be no suggestion that the international enforcement of awards resulting from arbitration agreements covering uneconomic claims was a pressing problem that the drafters of the Convention were seeking to address. Indeed, as we shall see, it is a characteristic of such arbitration agreements that they rarely result in either arbitrations or awards.

Modern class action regimes, such as those prescribed by the introduction in 1966 of Rule 23 of the Federal Rules of Civil Procedure in the United States[10] had not yet come into existence in 1958 when the Convention was promulgated. As discussed below, the use of arbitration clauses in agreements which are apt to give rise to class actions did not become widespread until court decisions began to hold that such clauses could be used to defeat class actions.

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8 ICAA, Article 8.
9 ICAA, Article 34(i) and Article 36(1)(a)(i).
10 See discussion of Federal Rule of Civil Procedure 23 below.

(a) Subject matter not capable of settlement by arbitration

The judicial and academic debate surrounding what constitutes "subject matter capable of settlement by arbitration" initially focused on what constitutes a commercial dispute. The presumption that all commercial matters are capable of settlement by arbitration may be traced to the Geneva Protocol on Arbitration Clauses in Commercial Matters (1923), which was a precursor to the New York Convention. The Geneva Protocol provided for the enforcement of arbitration agreements "relating to commercial matters or to any other matter capable of settlement by arbitration". However, as pointed out by Gary Born, the New York Convention does not create the same presumption and allows for the possibility that both commercial and non-commercial matters may be categorized as non-arbitrable depending on national law.[11]

The consideration of national laws has usually involved a discussion as to whether rights created by statute may be the subject of private arbitration. As arbitration jurisprudence has developed, cases in the United States, Canada and elsewhere have made it clear that there is virtually no type of transaction or dispute, including disputes regarding rights created or regulated by statute, which is not capable of being settled by arbitration as between the parties, unless the statute which created the rights in question explicitly excludes recourse to arbitration.[12]

(b) Null and void, inoperative or incapable of being performed

With respect to the "null and void" exception, it has been suggested that it refers only to general contract principles and internationally recognized grounds for declaring an arbitration agreement null and void (such as duress, mistake, fraud, waiver or the contravention of fundamental policies of the forum state). Since 1925, this principle had been enshrined in the United States in § 2 of the Federal Arbitration Act ("FAA") which provides that arbitration agreements "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract". As discussed below, this principle, combined with the constitutional doctrine of pre-emption in the United States, has been a major impediment to the enactment of state laws limiting the right to arbitrate with respect to specific categories of contracts or claims, such as consumer or employment contracts.

Similarly, the meaning of "inoperative or incapable of being performed" has received mostly restrictive (although somewhat varied) judicial interpretation.[13]

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[11] Gary B. Born, *International Commercial Arbitration*, (2d) Wolters Kluwer, New York, 2014, v. 1, *supra* note 2 at 946-947.

[12] *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985); *Desputeaux c. Editions Chouette (1987) Inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178, 23 C.P.R. (4th) 417 (S.C.C.) at para. 41; *Seidel v. TELUS Communications*, 2011 SCC 15 (S.C.C.).

Generally, the inconvenience imposed by an arbitration agreement (*e.g.*, by stipulating a remote venue for the hearing) has not been found to be a ground for finding an agreement to arbitrate to be "inoperative or incapable of being performed".[14]

The principle of unconscionability as a basis for holding arbitration agreements to be void or unenforceable has received extensive judicial consideration with respect to international arbitration agreements. In the United States, the principle has received limited application in the international context based on the insistence of U.S. Courts that they are unable to determine any internationally applicable standard that defines "unconscionability". However, the validity of this restrictive approach is open to doubt. Born cites many examples of courts which have invalidated one-sided arbitration clauses which imposed unfair and unworkable burdens on the weaker party, particularly in the context of consumer and employment cases.[15] In Canada, the recent decision of the Ontario Court of Appeal in *Heller v. Uber Technologies Inc.*,[16] has given new life to this basis for invalidating arbitration agreements. In addition, the question of whether these principles (even in the international context) are open to legislative modification in relation to litigation before local courts and arbitrations cited in the same jurisdiction is very much open to discussion.

Clearly, courts on the whole have not been sympathetic to arguments against the enforcement of arbitration clauses in the international context. However, it must be noted that the Convention itself offers no guidance on these issues beyond the words themselves and does not specify what laws are to apply in making these determinations. Broadly based class actions (*i.e.*, unrestricted as to subject matter and not requiring a common relationship of class members to each other or to the defendant) are a limited international phenomenon (North America and Australia). The class action mechanism (with significant modifications to the North American Model to reduce abuses) has only recently been introduced in Europe with specific reference to consumer claims.[17] There is nothing that could be described as an international consensus as to

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[13] Marike Paulsson, *The 1958 New York Convention in Action* (Leiden, The Netherlands: Wolters Kluwer 2016) at 91-93.

[14] *Haendler & Naterman GnbH v. Mr. Janos Paczy* (Eng. Court of Appeal 1980), in Yearbook Commercial Arbitration IX (1984) (United Kingdom no. 12 at 445-447.

[15] Born, *op cit.*, at 856-866.

[16] *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 (C.A.).

[17] *"Proposal for a Directive of the European Parliament and of Council on representative actions for the protection of the collective interests of consumers."*, European Union, Brussels, November 4, 2018. The proposal would allow "qualified entities" to bring actions for collective redress in favour of consumers, including compensatory and injunctive relief. The qualified entities would be not-for-profit, but utilization of third party funding would be permitted under court supervision.

whether arbitration clauses whose primary or exclusive objective is to avoid class proceedings while not providing a practicable arbitration solution fall within any of the exceptions set out in Article II of the Convention. Canadian and American jurisprudence which addresses these issues specifically in the class action context is discussed below. To date, the issue has not arisen in Australian case law, although there has been some anticipation of the issue by legal writers.[18]

Outside North America, judicial decisions with respect to the practicality or unconscionability of arbitration clauses have been made in cases about individual claims which are viable as court actions. They relate to the unfairness of the arbitration agreement in comparison to the claimant pursuing an individual action in court. This is hardly surprising. In the absence of a class action option, the issue can only arise in a situation in which an individual claimant wishes to proceed with the claim in a court action but is met with an arbitration clause. Such cases do not typically relate to claims that are economically too small to pursue at all, whether in litigation or arbitration, as an individual claim.

2. Class Actions in Canada

In Ontario, Saskatchewan and Manitoba a class action may be certified based upon the determination by a judge that:

(a) there is a cause of action;
(b) there is an identifiable class;
(c) there are common issues;
(d) class proceeding is a preferable procedure for the resolution of the common issues; and
(e) there is an appropriate representative plaintiff[19] with a plan for the proceeding.

In British Columbia, Alberta, New Brunswick, Nova Scotia, and Newfoundland the relevant class action legislation contains the same requirements. The Acts also specify criteria for the court to consider in determining whether a class proceeding would be the preferable procedure, including:

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[18] Ross Buckley, "*Can Arbitration Clauses Prevent Class Actions? The Implications of AT&T Mobility LLC v Concepcion*", (2012) 86 ALJ 666. James Emmerig, "*Can an Australian company use a dispute resolution clause in its constitution to bar shareholder class actions*.", (2015) 33 C&SLJ 513. Richard Garnett, "*Arbitration of Cross-Border Consumer Transactions in Australia: A Way Forward*." (2017) Sydney Law Review, v. 39, 569.

[19] Consideration of defendant classes is beyond the scope of this paper.

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
(d) whether other means of resolving the claims are less practical or less efficient; and
(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

There is no subject matter restriction in any of the provincial legislation with respect to what types of claims may be certified as a class action. Nor is there any explicit reference to arbitration in terms of the preferred procedure analysis that the court is called upon to perform. Can it therefore be argued that claims that meet the tests for certification constitute a specific category of claims that may be eligible for consideration under Article II(3)1 as a "subject matter not capable of being settled by arbitration" under the law of the relevant province whose courts are being called upon to stay their own class proceedings? This raises the issue as to whether claims when aggregated in a certified class have a different characteristic than the individual claims, which could qualify the aggregated claims as a "subject matter" capable of being treated differently for Convention purposes.[20]

When considering Article II jurisprudence regarding individual claims in the context of claims that are certifiable as a class proceeding, it is important to avoid the fallacy of composition. The whole does not, in the case of class actions, only have the characteristics of each of the parts. The lack of an effective remedy in an individual case which is uneconomic to pursue may be justified on the basis of the maxim *de minimis non curat lex*. The maxim can hardly apply to an aggregation of claims maintainable by tens or hundreds of thousands of claimants where the impugned conduct has enriched the defendant to the extent of tens or hundreds of millions of dollars.

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[20] Subject to any legislative enactment of the type we propose below, current Canadian law makes it clear that class proceedings legislation is procedural in nature and does not affect substantive rights: *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666 (S.C.C.) at para. 17. Under current Canadian law a claim may not be certified for a class where an action could not be maintained against an individual member of the class in light of an agreement to arbitrate. See: *Telus Mobilité v. Comptois*, 2012 QCCA 170 (C.A.). The deeper question is what substantive rights should flow from an agreement that provides only an illusory right to arbitration. To the extent that existing case law does not address this issue, legislative reform is necessary.

Class actions are not just a method of providing redress for each of the individual claims, or potential claims, involved. They are, almost inevitably, a method of providing redress for systematic and widespread breaches of contract, or violations of applicable laws. Class proceedings are also a method of deterring similar systematic breaches in other similar circumstances. In effect, they serve a regulatory purpose of ensuring that individually small breaches that cause widespread harm are not encouraged by the absence of an effective remedy.

It can be argued that, once a class action is certified, the prosecution of the action places the claims into a different category of disputes, one having a strong public interest element which sets the disputes apart from private, individual proceedings regarding the same claims. It can be argued that the numerosity of the claims, the engagement of the public interest and the satisfaction of the criteria for certification place the claims within a distinct subject matter that the law may justifiably treat as generally not capable of being arbitrated on an individual basis.

This is not to say that the substantive basis for deciding the case will be different or that the substantive rights of the parties will be altered in a class action.[21] The distinction is only relevant for the purposes of determining whether there is legislative latitude in treating claims, once certified, as a separate category of disputes in the context of the Convention. If the distinction can be made, its only effects would be upon the arbitration agreement, and not upon the substantive rights and obligations of the parties in the underlying agreement. Far from modifying the substantive rights of the parties, such an approach would give effect to the substantive rights of the parties.

Undoubtedly, the Convention and the legislation it has inspired around the world, have served to make the enforcement of arbitration agreements a substantive, and not merely a procedural, right. Canadian courts have held that the substantive right to arbitrate trumps class proceedings legislation, which is intended to be purely procedural.[22] Be that as it may, a right to arbitrate is a "substantive right" about the process by which the substantive rights of the parties are to be enforced. Clearly it is, in substance, a procedural right or, at best, a secondary type of substantive right.

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[21] See: *Caputo et al. v. Imperial Tobacco Limited et al.* (1997), 34 O.R. (3d) 314 (Ont. Gen. Div.) per Winkler J. (as he then was): The CPA is a procedural statute, rather than substantive, and creates no new cause of action. A motion for certification under the Act deals only with whether the action ought properly to proceed by way of class action."

[22] See for example: *Muroff c. Rogers Wireless Inc.*, 2007 SCC 35, 2007 CarswellQue 6312, 2007 CarswellQue 6313, (*sub nom.* Rogers Wireless Inc. v. Muroff) [2007] 2 S.C.R. 921 (S.C.C.) to the effect that the right to arbitrate under Quebec law is a substantive right that does not yield to the procedural right to bring a claim by way of class action.

If a mandatory arbitration agreement gives rise to a substantive right, it is a substantive right to end all substantive rights. As has repeatedly been observed by the courts, the obvious objective of mandatory arbitration is to immunize the defendant from liability. From that perspective, arguing in favour of enforcing mandatory arbitration agreements on the basis that they give rise to "substantive rights" appears to be an intellectually and ethically arid exercise in semantics.

Our question is how far legislation may go in placing limits on that right. Clearly, the Convention contemplates that some limits, defined by national laws, are possible.

As to an arbitration agreement being "inoperative" or "incapable of being performed", so as to qualify for an exclusion under Article II of the Convention, the Oxford English Dictionary defines "inoperative" as "Not operative; not working or taking effect in action; in Law, without practical force, invalid."[23] The issue would therefore appear to be whether the types of arbitration agreements under consideration can be said to be "not working or taking effect". Assuming that a legislative foundation is laid for overriding arbitration agreements in the context of class proceedings, it becomes obvious that arbitration agreements should be included in the preferred procedure analysis that precedes certification. In this context, we suggest that it is appropriate to consider the definition of "inoperative" in relation to the class that would be certified in the absence of any arbitration clause and not just in the theoretical context of any individual claim. In such situations, it is important to remember that the class claim is a claim which is actually being advanced while the possibility of an individual claim, independent of the class action, is almost always a phantasm.

If, for example, it is shown on the certification application that there are 10,000 potential claims for which the court determines that there is a cause of action and that none (or a statistically meaningless number of claims) have been pursued by arbitration, this may constitute some evidence that the arbitration agreement is not working or taking effect. Alternatively, if the record shows that when arbitration was attempted in one or more isolated cases, the claimant was faced with obstacles and expenses completely disproportional to the amount claimed, that may also provide evidence of an arbitration agreement that is, in practical terms, not working or is incapable of being performed. If the only use that is made of an arbitration agreement is not to facilitate arbitration but to form the basis of an application to prevent court proceedings, that may be a basis for concluding that the arbitration agreement is, as a factual matter, inoperative or even a sham.

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[23] *The Oxford English Dictionary*, 2d ed, *sub verbo* "inoperative".

Applying the plain meaning of the words of the Convention, once the representative plaintiff in a class action has demonstrated that the claims put forward in the class action are not, as a matter of practical justice, capable of being settled by the arbitration process crafted by the defendant, it is a short step to concluding that the dispute is not capable of being settled by arbitration and/or that the particular arbitration regime mandated by the defendant is incapable of being performed. This has in fact been demonstrated in virtually all cases involving mandatory arbitration.

The ability of individual class members to opt out of a class action in order to pursue the claim by other means,[24] or not at all, allows for a different treatment of those individuals who wish to pursue individual claims and who may not therefore share the characteristics of the class as a whole.

We therefore submit that, even applying international standards, States that find it necessary and appropriate to enact legislation permitting class proceedings in certain defined circumstances, with clear public policy objectives in mind, are well within their rights under the Convention to protect such legislation from being undermined unilaterally by the very category of commercial actors to which the legislation is to a large part (although not exclusively) directed.

In this regard, the effect of Article II is well summarized by Gary Born as follows:

> Article II of the Convention provides the basis for several fundamentally important rules of international law. First, Article II allocates the burden of proof of the invalidity of an international arbitration agreement to the party resisting enforcement of the agreement. Second, Article II requires that courts of Contracting States apply generally-applicable rules of contract law to the formation and validity of international arbitration agreements, without *singling out* such agreements for discriminatory requirements or burdens. *Third, Article II(1) permits Contracting States to treat particular categories of disputes as "nonarbitrable" (or "not capable of settlement by arbitration"), but requires that they do so exceptionally, and only where necessary to achieve specific and articulated policies*. Taken together, these uniform international rules have provided a highly effective and robust "pro-enforcement" legal framework for international arbitration agreements. [emphasis added]

The validity of this observation is amply demonstrated by the widespread restrictions which have been placed on the use of arbitration agreements in consumer contracts.[25] However, there is no reason, in principle, why such

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[24] All Canadian class action statutes allow for individual class members to choose to opt out of a class proceeding. Until September 30, 2018, the British Columbia *Class Proceedings Act* provided for members of the class who were not resident in B.C. to opt into the class.

[25] All Canadian provinces have enacted legislation that makes pre-dispute arbitration clauses in consumer contracts unenforceable. European Union, Council Directive 93/

restrictions should not be extended to other cases where the effect of an arbitration clause is to prevent, not provide, recourse to one contracting party, particularly where large numbers of individuals or entities are likely to be affected by the same breach.[26]

Applying these principles, there is no reason why the certification of a class action cannot override an arbitration agreement. An exception might be made if the court is satisfied that the arbitration agreement is in fact able to provide an effective process. If there is any doubt that the court may exercise that discretion in the context of class actions, there is no reason, in principle, why the legislation cannot be amended to give the courts that authority.

3. The Policy Objectives of the *Class Proceedings Act, 1992*

The *Class Proceedings Act, 1992* in Ontario was the result of almost 20 years of work, continuously and actively pursued over the terms of five governments, which included at least one government led by each of the three major political parties in Ontario and one coalition government.[27] Consultation with all major stakeholders and representative organizations was intense and highly structured. The negotiations canvassed virtually all possible variations of major components of proposed legislation, including opt in/opt out approaches,[28] variations on normal cost rules, the financing of class proceedings, use of aggregate damages, treatment of unclaimed amounts, and a host of other issues. The resulting legislation was a major policy choice of the Ontario government, representing a broad and insistent political consensus that such legislation was necessary. The main objectives of the resulting legislation were clearly

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13/EEC is to the same effect and implementing legislation has been passed in most member states. See also the Chartered Institute of Arbitrators, "*Practice Guideline 17: Guidelines for Arbitrators dealing with cases involving consumers and parties with significant differences of resources*": online < https://www.ciarb.org/media/4216/2011-consumers-and-parties-with-significant-differences-of-resources.pdf > . In Ontario, strict limitations have also been placed on the use of arbitration in family disputes.

[26] See below for discussion of recently proposed legislation in the United States to restrict the use of mandatory arbitration in consumer, employment, anti-trust and human rights cases.

[27] Suzanne Chiodo, "*Class Roots: The Genesis of the Ontario Class Proceedings Act, 1966-1993*", Thesis submitted to the Faculty of Graduate Studies for the Degree of Master of Laws, York University, November 16. Most references to the history of the *Class Proceedings Act, 1992* in Ontario have been derived from this superb and extremely well-researched and documented review. Ms. Chiodo is currently a stipendiary lecturer and doctoral candidate at Oriel College in Oxford University.

[28] Ms. Chiodo has informed the authors that, in the course of her review of the extensive discussions and negotiations leading up to the enactment of the *Class Proceedings Act, 1992*, she found no reference to the possibility of defendants being able to opt out (or contract out) of the act, or to be able to do so by using arbitration agreements.

articulated to be: judicial economy, access to justice and behaviour modification.

As was stated in the final report of the Attorney General's Advisory Committee on Class Action Reform (1990):[29]

> In summary, the case for reform hinges on three general propositions:
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> i. class actions may lead to more efficient judicial handling of potentially complex cases of mass wrong;
> ii. *class actions may provide improved access to justice for those whose actions might not otherwise be asserted*, and:
> iii. *class actions may inhibit misconduct by those who might be tempted to ignore their obligations to the public because claims by the injured were too small or too difficult to assert*. [emphasis added]

Once class proceedings were established in a number of Canadian provinces, it was determined by the Supreme Court of Canada that class proceedings provide such an essential tool for access to justice that in those provinces that did not have class actions statutes, the courts must fill the void under their inherent power to set rules of practice and procedure.[30] Thus, the availability of access to class proceedings was affirmed in Canada as an underlying procedural right, independent of the particular statutes which provide that mechanism.

In terms of the relationship between arbitration and class proceedings, the most relevant criteria for certification of a class action in Canada, against which these three policy objectives for the statutes themselves might be addressed, are those relating to access to justice and preferable procedure.

In principle, the preferable procedure criterion is not limited to a consideration of court-based alternatives. On this point, one can do no better than to quote from the Supreme Court of Canada in *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949 (S.C.C.):

> This is a comparative exercise. The court has to consider the extent to which the proposed class action may achieve the three goals of the *CPA*, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals. This point is well expressed in one U.S. Federal Court of Appeals judgment and it applies equally to *CPA* proceedings: "*Our focus is not on the convenience or burden of a class action suit per se, but on the relative advantages of a class action suit over whatever other forms of litigation [and, I would add, dispute resolution] might be realistically available to the plaintiffs*".
>
> . . .
>
> The motions court must identify alternatives to the proposed class proceedings. As McLachlin C.J. held in *Hollick*, "*the preferability analysis requires the court to look to*

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[29] *Report of the Attorney General's Advisory Committee on Class Action Reform*, by Michael George Cochrane, Toronto, 1990 (available online at: < https://archive.org/details/ont-attorneygen-reports >).

[30] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.).

> *all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions" (emphasis added). Here, the court considers both other potential court procedures (such as joinder, test cases, consolidation and so on) and non-court proceedings.*
>
> The motions court must *look at all the alternatives globally in order to determine to what extent they address the barriers to access to justice posed by the particular claim*. In some cases, non-litigation means of redress will be considered in conjunction with individual actions. In other cases, for example where there is no viable litigation alternative to a class action, the non-litigation means of redress will have to be considered on its own as a potential alternative to the class action. The nature of the comparison analysis will vary, depending on the nature of the alternatives available for consideration.
>
> . . .
>
> The focus at this stage of the analysis is on whether, if the alternative or alternatives were to be pursued, some or all of the access to justice barriers that would be addressed by means of a class action would be left in place. At the end of the day, the motions court must determine whether, on the record before it, the class action has been shown to be the preferable procedure to address the specific procedural and substantive access to justice concerns in a case. As set out in *Hollick*, the court must also, to the extent possible within the proper scope of the certification hearing, consider the costs as well as the benefits of the proposed class proceeding in relation to those of the proposed alternative procedure.[31]

Given the policy objectives of the *Class Proceedings Act*, *1992*, the question then arises whether any exceptions to the three general principles outlined above are justified in the context of arbitration clauses. If so, are the exceptions justified universally in all cases, or only in certain circumstances? Finally, is the approach in current legislation to the stays of court proceedings with respect to disputes covered by arbitration agreements justified and workable, or are changes required?

To answer these questions, we now turn to a brief overview of the issues as they have arisen in the United States and Canada.

III. MANDATORY ARBITRATION IN THE UNITED STATES

In order to consider the enforcement of arbitration agreements in the specific context of class actions, it is useful to consider the experience in the United States, the country in which class actions (in the modern sense) were first adopted and in which they have been most extensively used to date.[32] The issue

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[31] *AIC Limited v. Fischer*, 2013 SCC 69 (S.C.C.) at paras. 23, 35-36 and 38 [emphasis added, citations omitted, internal square brackets are in the original].

[32] In considering the American experience of class actions, we must also allow for significant differences in legal culture generally and class action practice specifically. In many provinces (*e.g.*, Ontario and Alberta), normal cost shifting rules apply to class

in the United States has been driven by the particular history of the Federal Arbitration Act[33] (the "FAA") which was enacted in 1925, and by applicable U.S. constitutional law.

In 2018, the U.S. Supreme Court reiterated its position that, "In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms . . ."[34] This is a broad federal policy favouring arbitration that has been held to require rigorous enforcement of arbitration agreements.[35] The FAA governs commerce. The concept of "commerce" requires an understanding of federalism under the U.S. Constitution.

The U.S. federal government is a government of limited and enumerated powers.[36] Specifically, Article I, § 8 of the U.S. Constitution sets out its 18 powers. Especially since Roosevelt's New Deal, § 8 Clause [3], the Commerce Clause, has been the most important, since it permits the U.S. federal government to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes . . ."[37] The concept of interstate commerce has been applied broadly. Section 1 of the FAA, defines commerce as it applies to arbitration agreements even more broadly than that found in the Commerce Clause.[38]

Consequently, federal law makes arbitration agreements enforceable,[39] while state law governs their formation and interpretation.[40] For example, if parties enter into an arbitration agreement in New York, then New York contract law—*e.g.*, statutes, case law, and regulations—concerning the formation and interpretation of the contract apply. But New York law only applies to arbitration agreements covered by the FAA to the extent that these contract principles apply to all New York State contracts. This is true for all states.

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actions. In a number of cases, substantial costs have been awarded against unsuccessful class plaintiffs. Even in provinces which do not apply cost shifting (B.C., Saskatchewan, Manitoba and Newfoundland) there is no evidence that the incidence of non-meritorious claims is higher. In Canada, class actions also enjoy the favourable reputation of having been used to resolve many significant cases of mass tort (*e.g.*, distribution of tainted blood) and abuses of rights (residential schools for indigenous children) which may not otherwise have produced as effective remedies for the groups involved.

33 Federal Arbitration Act, 9 U.S.C., §§ 1, *et seq*.

34 *Epic Systems Corp. v. Lewis*, 584 U.S. ___ (2018).

35 *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

36 *McCulloch v. Maryland*, 17 U.S. 316 (1819); *U.S. v. Lopez*, 514 U.S. 549 (1995).

37 U.S. Const. art I, § 8, cl. 3.

38 Federal Arbitration Act, 9 U.S.C. § 1; Thomas H Oehmke & Joan M Brovins, *Commercial Arbitration* (Minneapolis, MN: Thomson Reuters/West, 2012) at § 3:1.

39 Thomas H. Oehmke & Joan M. Brovins, *Commercial Arbitration* (Minneapolis, MN: Thomson Reuters/West, 2012) at § 3:16.

40 *Ibid.*

Under the doctrine of preemption, state law may not undermine the FAA's policy of enforcing arbitration agreements. As one leading text put it: "Congress meant to displace conflicting state law without exclusively dominating the entire legislative field of arbitration. Therefore, state laws which do not limit arbitration are compatible with the FAA."[41] This means that state legislatures cannot single out arbitration agreements to be treated any differently than other contracts.[42] Where state law conflicts with the FAA, the broad federal policy in favour of arbitration preempts the states' abilities to legislate.

To illustrate, in the 1980s California passed legislation that gave employees the right to sue for wages, regardless of whether there was an agreement to arbitrate. The U.S. Supreme Court struck down California's law because under the U.S. Constitution's Supremacy Clause (Article VI, Clause 2) the federal policy to enforce arbitration agreements preempts California state law.[43] Although this concept of U.S. federalism was once thought dubious,[44] such critiques have become the stuff of dissent.[45]

As in Canada, American arbitration agreements often contain class action waivers, forum selection clauses, and choice-of-law provisions. The practical reality is that states are limited in their ability to legislate with respect to arbitration, even indirectly. Florida voided arbitration agreements that required the hearing to be held outside of that state. This was held to violate the U.S. Constitution's Supremacy Clause, mandating that such state laws must yield to the FAA.[46]

It is still open for state substantive law to apply to the arbitration. This means that general state laws concerning tort, contract, or awards of damages will apply to the dispute.

1. The FAA's Historical Development

The broad federal policy favouring arbitration was not always clear. In fact, even though the FAA was passed in 1925, it lingered in obscurity for about 60 years.

Despite a few minor developments, the U.S. Supreme Court's FAA case law did not become important until the mid-1980s. By then, several other factors had come to the fore in America's legal landscape.

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41 *Ibid.*
42 *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).
43 *Perry v. Thomas*, 482 U.S. 483 (1987).
44 *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (O'Connor and Rehnquist JJ. dissenting).
45 *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (Scalia and Thomas JJ. dissenting); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2010) (Breyer J. dissenting).
46 *Trojan Horse v. Lakeside Games*, 526 So.2d 194 (Fla. App., 3d Dist., 1988).

During the 1937 October term, the U.S. Supreme Court promulgated the Federal Rules of Civil Procedure to combine law and equity;[47] the Rules started being used the next year. The goal was to establish one form of civil action and procedure for cases in equity and actions at law, and thereby increase the speed and efficiency of federal litigation.[48] Initially, the class actions rule, Rule 23, was a substantial restatement of former Equity Rule 38 (Representatives of a Class).[49] The 1938 version of Rule 23 suffered from various deficiencies, most notable of which was the difficulty reconciling the Rule with the U.S. Supreme Court's 1938 landmark decision in *Erie Railroad Co. v. Tompkins*—a choice-of-law case.[50] Consequently, it languished for nearly three decades. In 1966, the Federal Rules Committee introduced a completely rewritten version of the Rule,[51] and the modern class action was born.

By the 1980s class actions had started to impact corporate America with the spectre of "blackmail" class actions cases.[52] At the same time, trials, were declining in number and were coming to be seen as problematic failures for a system that was being redesigned to produce settlements.[53] Other factors were also at play. As one academic observed in the 1990s: "Not coincidentally, the Court's enunciation of a preference for arbitration coincided with the Court's growing concern that dockets were overloaded and with a wider, general societal acceptance of alternative dispute resolution."[54]

The FAA's broad policy came into focus as a result of U.S. Supreme Court decisions in *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.* (1983),[55] *Southland Corp. v. Keating* (1984),[56] *Perry v. Thomas* (1987),[57] and *Shearson/American Exp., Inc. v. McMahon* (1987)[58] though possibly the great watershed

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47 James Wm. Moore, *et al.*, *Moore's Federal Practice*, 3d ed. (Newark, NJ: LexisNexis, 2008) at li-liii (Preface to First Edition by Hon. Martin T. Manton, Forward to First Addition by James Wm. Moore and Joseph Friedman).

48 Fed. R. Civ. P. 23, advisory committee's note.

49 *Ibid.*

50 *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (Federal courts in diversity jurisdiction cases brought under 28 U.S.C. § 1332 are to apply the substantive law of the forum state. Admittedly, without an American legal background, this description is incomprehensible jargon with no Canadian equivalent.).

51 Fed. R. Civ. P. 23, advisory committee's note.

52 David Horton, "Arbitration as Delegation" (2011) 86 NYUL Rev 437 at 461.

53 Judith Resnik, "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights" (2015) 124 Yale LJ 2804 at 2816.

54 Jean R. Sternlight, "Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration" (1996) 74:3 Wash ULQ 637 at 642.

55 *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1 (1983).

56 *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

57 *Perry v. Thomas*, 482 U.S. 483 (1987).

58 *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

came in 1991 with an employment case, *Gilmer v. Interstate/Johnson Lane Corp*.[59]

Following these cases, corporate America quickly saw how it could use now-rigorously-enforced arbitration clauses to its advantage. Many mass market consumer contracts permitted corporations to make unilateral amendments.[60] Major corporations used this power to add arbitration clauses to hundreds of millions, if not billions, of contracts through what have been described as "bill stuffers."[61] For example, Bank of America and Wells Fargo put notices in the monthly statements of a combined 25.5 million checking and credit card customers informing them that "any controversy with us will be decided . . . by arbitration."[62] This rapid growth is the same for nonunion private sector workers. In 1992, the year after *Gilmer* was decided, about 2 percent of America's nonunion workers had mandatory arbitration agreements;[63] by the early 2000s, this increased to about a quarter; as of 2017, 53.9 percent of all nonunion workers were subject to individual arbitration, while in companies of over 1,000, the rate was 65.1 percent. This means that around 60 million workers are now subject to mandatory arbitration.[64]

The rise of mandatory arbitration coincided with the U.S. Supreme Court's 1991 decision to enforce forum-selection clauses in *Carnival Cruise Lines v. Shute*.[65] The clause in *Shute* required the litigants to travel across the country to advance their claim in the forum designated by the contract. Such provisions are now common, and an obstacle to those with low-value claims. By the mid-1990s, companies started using arbitration agreements to shorten limitation periods, restrict discovery, impose confidentiality, make proceedings prohibitively expensive, select which claims could be arbitrated, waive plaintiffs' rights to recover attorneys' fees,[66] and waive rights to participate in class actions. Many

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[59] *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991).

[60] David Horton, "Arbitration as Delegation" (2011) 86 NYUL Rev 437 at 457. A grim low point was the 'Cheerios arbitration'. In 2014, General Mills, the cereal manufacturer and maker of Cheerios, put an arbitration clause on its website for its online community, requiring arbitration for any disputes involving its coupons, sweepstakes, or the purchase of its products. This was too much for American consumers, and the company was forced to retract due to criticism. See Judith Resnik, "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights" (2015) 124 Yale LJ 2804 at 2863-74, "From Waffles to Cheerios: Employees, Consumers, and Obligations to Arbitrate".

[61] David Horton, "Arbitration as Delegation" (2011) 86 NYUL Rev 437 at 456.

[62] *Ibid.*

[63] It is probably reasonable to assume that pre-*Gilmer* this 2% figure was likely limited to high-income earners who had negotiated their contracts and had freely chosen arbitration.

[64] Alexander J.S. Colvin, "The Growing Use of Mandatory Arbitration" (2017), Economic Policy Institute, online: <epi.org/135056>.

[65] *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

arbitration schemes that were imposed by these agreements also raised issues of arbitrator bias or skewed selection due to the influence or prospect of repeat arbitrator appointments.[67]

2. The Effects of Mandatory Arbitration in the United States

Given America's reputation for being a litigious culture, one would assume that the last 20 to 30 years have been a boomtime for mandatory arbitration. But the opposite is true. The data show that cases subject to mandatory arbitration are not pursued. As the *North Carolina Law Review* described the conclusion to be drawn from the data:

> It is one thing to know that mandatory arbitration draws a thick veil of secrecy over cases that are subject to that process. It is quite another to find that almost nothing lies behind that veil. Mandatory arbitration is less of an "alternative dispute resolution" mechanism than it is a magician's disappearing trick or a mirage.[68]

3. Impact on Consumer Cases

The American Arbitration Association (AAA) distinguishes itself among American arbitration institutions by providing transparent data about their caseloads. Note that the AAA is AT&T's arbitration provider, and AT&T has approximately 85–120 million customers at any given point. Consider that each contract may give rise to many different kinds of disputes regarding various aspects of the relationship. The following table from the *Yale Law Journal*[69] sets out the AAA's information about consumer arbitrations:

Sources	Types	Estimates of Number of Customers	Average Per Year	Total Over Years Analyzed
	AAA-defined Consumer claims		1,460	7,303
AAA Data *Provider Organization Report* (June 2009–July 2014)	including: AAA claims involving AT&T	85–120 million consumers	27	134*
Consumer Financial Protection Bureau, *2015 Arbi-*	AAA claims in credit card, prepaid card, checking account, payday,	including: 80 million credit-card consumers	616**	1,847

[66] David Horton, "Arbitration as Delegation" (2011) 86 NYUL Rev 437 at 460.

[67] Cynthia Estlund, "The Black Hole of Mandatory Arbitration" (2018) 96 NCL Rev 679 at 700. In mandatory arbitration, the defendant is the common denominator in any arbitrations which do take place. Arbitrators are unlikely to do any repeat work (and certainly not on the same issue) if they decide against the defendant.

[68] *Ibid* at 681.

[69] Judith Resnik, "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights" (2015) 124 Yale LJ 2804 at 2908.

Sources	Types	Estimates of Number of Customers	Average Per Year	Total Over Years Analyzed
tration Study (January 2010–December 2012)	private student, and auto loan markets			

* Consumers filed all 134 of the consumer claims involving AT&T.

** Consumers filed approximately two thirds, and companies about one third, of the 616 claims per year.

The fact that 85–120 million AT&T customers bring an average of 27 arbitrations a year strongly suggests that arbitration is being used to suppress claims.[70] By contrast, in the 2010 U.S. Supreme Court case of *AT&T Mobility LLC v. Concepcion*, AT&T customers attempted a class arbitration against the telecom provider in the face of a class-arbitration waiver in AT&T's contracts. The plaintiffs brought the claim under a California law that prohibited class-arbitration waivers in consumer contracts. Each class member's claim was for $30.22.[71] However, a 5–4 majority held that the FAA pre-empted California's prohibition on class-arbitration waivers, meaning California's law was struck down. Consequently, the class members were left to pursue their $30.22 claims individually.[72]

Ironically, in 2014, with class actions no longer an option for AT&T subscribers, the Federal Trade Commission (FTC) found that AT&T had overcharged its customers $9.99 each a month for unauthorized third-party subscriptions. In the previous year, AT&T had netted $160 million in revenue from these unauthorized charges; some subscribers had been refunded when they complained. Four days after the filing, AT&T settled with the FTC.[73] Aside

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[70] A similar pattern of "missing" cases is seen in employment contracts subject to mandatory arbitration. In 2018, New York University law professor Cynthia Estlund estimated that based on average employment litigation rates there are around 315,000 to 722,000 "missing" arbitration cases, leading to the conclusion: "All in all, the available evidence suggests that the overwhelming majority of claims that would have been litigated but for the presence of a [mandatory arbitration agreement] are simply dropped without being filed in any forum at all." See Cynthia Estlund, "The Black Hole of Mandatory Arbitration" (2018) 96 NCL Rev 679 at 697-698.

[71] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2010) (Breyer, J., dissenting) ("What rational lawyer would have signed on to represent the Concepcion in litigation for the possibility of fees stemming from a $30.22 claim?").

[72] Justice Breyer's dissent in *Conception* cites Judge Richard Posner's famous quip: "The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household International, Inc.*, 376 F.3d 656 (7th Cir., 2004) at 660-661.

[73] Judith Resnik, "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights" (2015) 124 Yale LJ 2804 at 2909.

from highlighting the market impact of low-value, widespread wrongs,[74] the example might also demonstrate how regulators depend on class actions to uncover these issues. About two-thirds of American class actions result in government investigations.[75] And yet in 2013 mandatory arbitration agreements dealt a further blow to class-actions with the U.S. Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*[76] to the effect that the Federal Arbitration Act does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

As the above table demonstrates, these claims are not arbitrated in meaningful numbers relative to the class of affected customers, the behaviour modification benefits of class actions are easily circumvented, and the quasi-regulatory, public interest aspect of class actions is lost. Effectively, the U.S. Supreme Court has closed the courthouse door to consumers, leaving it for Congress to provide a legislative remedy.

Congress' attempts to amend the FAA have been slow and, so far, unsuccessful. Starting in 2000, Senator Jeff Sessions (Republican, Alabama), tabled legislation to regulate mandatory arbitration.[77] In 2007, the Arbitration Fairness Act (AFA) was tabled, seeking to prohibit employers from mandating that their employees resolve their employment claims through arbitration.[78] Twelve years later, arbitration reform is still working its way through Congress.[79] Democratic senators recently introduced a bill entitled "The Forced Arbitration Injustice Repeal Act of 2019" which would bar pre-dispute arbitration agreements and class action waivers in consumer, employment, anti-trust, and civil rights disputes.

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[74] See also the more recent example in the case of *New Prime v. Oliveira*, 586 U.S. ___ (2019), in which a decision of the Supreme Court of the United States to the effect that the FAA did not protect employers of interstate transportation workers from class action litigation resulted in an almost immediate settlement of the case for $100 million, online: < https://www.lexology.com/library/detail.aspx?g = 55dde085-996d-4ffd-87bc-7260c36ff6c0 > . Similar to the *Heller v. Uber* case, discussed below, *New Prime v. Oliveira* was a "mis-classification" case which raised the issue as to whether the members of the class were employees.

[75] *Ibid.* 2910.

[76] *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013).

[77] Jean R. Sternlight, "Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection" (2015) 80:4 Brook L Rev 1309 at 1355.

[78] *Ibid.* at 1354.

[79] National Law Review & online: < https://www.congress.gov/bill/115th-congress/senate-bill/2591 > .

IV. MANDATORY ARBITRATION IN CANADA

Canada's mandatory arbitration case law started with a class certification motion in *Huras v. Primerica Financial Services Ltd.*[80] The Ontario Superior Court certified the class action because the claims fell outside the scope of the mandatory arbitration agreement. In *obiter dicta*, the Superior Court also noted that the mandatory arbitration agreement was unconscionable because it "effectively frustrates aggrieved individuals from being able to obtain any resolution of disputes" and "gives a superficial appearance of fairness to the unsophisticated."[81] These observations were neither affirmed nor denied on appeal.[82] They also did not persuade the Superior Court in the 2002 proposed class action, *Kanitz v. Rogers Cable Inc.*[83]

In *Kanitz,* the defendant Rogers, a cable and Internet provider, followed the American example. A provision in Rogers's Internet contract permitted the company to amend their subscriber contacts unilaterally, so they added an arbitration agreement and class action waiver. These amendments were then put in the online copy of their form contracts.[84] The Court held that the contractual amendment adding mandatory arbitration was valid, and the claim fell within the scope of the arbitration agreement.[85] The class action was stayed.

Two class actions against National Money Mart, one in B.C. and the other in Ontario, changed the dynamic of consumer class actions.[86] In B.C., the Superior Court, influenced by the *obiter dicta* in *Huras*, found that staying the class action and referring the claims to arbitration would be 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."[87] Similarly, in Ontario, the Superior Court found that Money Mart's

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[80] *Huras v. Primerica Financial Services Ltd.* (2000), 13 C.P.C. (5th) 114 (Ont. S.C.J.), affirmed 2001 CarswellOnt 2848 (Ont. C.A.).

[81] *Ibid.* at paras 43-44.

[82] *Huras v. Primerica Financial Services Ltd.* (2001), 55 O.R. (3d) 449 (Ont. C.A.) at para. 20.

[83] *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299 (Ont. S.C.J.) (Nordheimer, J., as he then was, authored this decision. He is also the justice who authored the decision of the Ontario Court of Appeal in the *Heller v. Uber* case which is mentioned later in this paper.).

[84] *Ibid.* at paras. 9, 21.

[85] *Ibid.* at para 15.

[86] *MacKinnon v. National Money Mart Company, et al.*, 2004 BCSC 136 (S.C.), reversed *MacKinnon v. National Money Mart Co.*, 2004 CarswellBC 2253 (B.C. C.A.); *Smith v. National Money Mart Co.* (2005), 8 B.L.R. (4th) 159 (Ont. S.C.J.), affirmed 2005 CarswellOnt 4882 (Ont. C.A.), leave to appeal refused 2006 CarswellOnt 1202 (S.C.C.), affirmed 2006 CarswellOnt 2774 (Ont. C.A.), leave to appeal refused 2006 CarswellOnt 6318 (S.C.C.).

[87] *MacKinnon v. National Money Mart Company, et al.*, 2004 BCSC 136 (S.C.) at para. 26, reversed *MacKinnon v. National Money Mart Co.*, 2004 CarswellBC 2253 (B.C. C.A.).

mandatory arbitration agreements were "an attempt . . . to immunize itself from the *Class Proceedings Act, 1992*, and more generally, the jurisdiction of the Superior Court."[88] The analysis focused on the purposes of the *Class Proceedings Act, 1992*, namely, promotion of judicial economy, improved access to justice and behaviour modification.[89] Arbitration would defeat the goals of the *Class Proceedings Act, 1992*.

Both cases later had complicated procedural histories, and both ultimately proceeded as class actions. But the essence was the refusal of a stay of proceedings with reference to claims which qualified for certification as a class action.

Meanwhile, mandatory arbitration provisions in Quebec made their way to the Supreme Court of Canada in 2007.[90] The mandatory arbitration agreements were accompanied by class action waivers. The Supreme Court of Canada held that participation in a class action is a procedural right, which, applying Quebec's *Code of Civil Procedure*, is trumped by the substantive right to arbitrate. In *Dell Computer Corp. v. Union des consommateurs*, ("*Dell v UdC*") the Supreme Court referred to the core arbitration principle of competence-competence which requires "systematic referral to arbitration", unless the court finds the arbitration agreement to be invalid as a matter of law, or as a matter of mixed fact and law where only a superficial consideration of the factual record is required.[91] In the course of a highly complex decision, relating in large part to the specifics of Quebec law, the Court approached the issue as a question of the jurisdiction of the arbitration tribunal and whether that question should be decided first by the tribunal, or by the court on a motion to stay the class proceeding. No consideration appears to have been given to the question as to whether an agreement that is designed solely, for all practical purposes, to preclude redress provided by class proceeding legislation should be considered to be invalid or inoperative for that reason alone.

While these cases were going to the Supreme Court of Canada, legislative changes (which occurred too late in Quebec for the consumers in the *Dell v. UdC* case) occurred in Ontario and British Columbia. These provinces passed consumer protection legislation that permits consumers to participate in class actions regardless of whether or not there is a mandatory arbitration agreement or class action waiver.[92] The legislation did not apply to non-consumer claims,

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88 *Smith v. National Money Mart Co.* (2005), 8 B.L.R. (4th) 159 (Ont. S.C.J.) at para. 24, affirmed 2005 CarswellOnt 4882 (Ont. C.A.), leave to appeal refused 2006 CarswellOnt 1202 (S.C.C.), affirmed 2006 CarswellOnt 2774 (Ont. C.A.), leave to appeal refused 2006 CarswellOnt 6318 (S.C.C.).

89 *Ibid.* at para. 25.

90 *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 (S.C.C.); *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35 (S.C.C.).

91 *Ibid.* at para. 84.

92 *Consumer Protection Act*, R.S.O. 1990, c. C.31.

thus raising the inference that arbitration agreements do override class proceedings in other types of cases.

The non-consumer gap was the subject of the Ontario Court of Appeal's 2010 decision in *Griffin v. Dell Computers Inc.* ("*Griffin*").[93] The case concerned the same arbitration and class action waiver clause that the Supreme Court of Canada analyzed three years earlier in *Dell v. UdC*. The proposed class included both consumers and non-consumers. Ontario's *Consumer Protection Act, 2002* permitted the consumer class actions to proceed notwithstanding the arbitration clause. But Dell argued that since business purchasers were not "consumers", their claims should be stayed and referred to arbitration. A five-member panel of the Court held that it would be unreasonable under the *Class Proceedings Act, 1992* to separate the consumer claims from the non-consumer claims.[94] Importantly, the Court further observed that regarding the non-consumer claims:

> There will be no arbitration. The choice is not between arbitration and class proceeding; the real choice is between clothing Dell with immunity from liability for defective goods sold to non-consumers and giving those purchasers the same day in court afforded to consumers by way of the class proceeding.[95]

Justice Blair went on to state:

> The seller's stated preference for arbitration is often nothing more than a guise to avoid liability for widespread low-value wrongs that cannot be litigated individually but when aggregated form the subject of a viable class proceeding.[. . .] When consumer disputes are in fact arbitrated through bodies such as NAF that sell their services to corporate suppliers, consumers are often disadvantaged by arbitrator bias in favour of the dominant and repeat-player corporate client.

Notwithstanding these general observations, the Court of Appeal did not base its decision upon these criticisms of drafters of the clause or upon any resulting infirmity in the clause itself but on a particular provision of s. 7(5) of the *Arbitration Act, 1991* which provides as follows:

> The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
>
> (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
>
> (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

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[93] *Griffin v. Dell Computers Inc.*, 2010 ONCA 29 (C.A.), additional reasons 2010 CarswellOnt 1192 (Ont. C.A.), leave to appeal refused 2010 CarswellOnt 3417 (S.C.C.).

[94] *Ibid.* at paras. 46-47.

[95] *Ibid.* at para. 57.

It will be noted that s. 7(5), on its face, speaks of a single arbitration agreement that deals with only some of the matters raised by the litigation. It does not address the situation in which claims are made under multiple arbitration agreements, where some of the agreements are specifically rendered unenforceable by legislation and others are not. Furthermore, there is nothing in the express wording of the section which provides that the court may refuse to stay matters which are covered by a valid arbitration agreement. From a broad arbitration perspective, *Griffin* provided a troubling solution to the problem. From a class action perspective, the solution is a half-measure at best.

By treating s. 7(5) of the Act as conferring on the Court, by implication, a discretion *not* to stay court proceedings with respect to matters which are covered by a valid arbitration agreement, the decision in *Griffin* raises genuine concerns that such a discretion may be used in a non-class action context to refuse to stay an action with respect to claims which are covered by a valid arbitration agreement.[96] Furthermore, while the Court in *Griffin* was animated by the abusive nature of the use of the arbitration agreements as a guise to avoid liability, the solution it provided was based not upon that observation but upon a debatable interpretation of the *Arbitration Act, 1991*. It is an interpretation that only provides access to justice to non-consumer plaintiffs if they can attach themselves, parasitically, to a consumer class action. But the policy objectives of the *Class Proceedings Act*, which is not limited as to subject matter, would not be met in either case if the class action were stayed.

In this sense, *Griffin* sounded the alarm that in attempting to reach a just result in the class action context, there is a real danger that the courts may weaken or undermine core principles relating to commercial arbitration as a whole, without providing a principled solution to the underlying problem.

The Supreme Court of Canada refused leave to appeal the decision in *Griffin*.

In 2011, the issue was litigated before the Supreme Court of Canada in *Seidel v. TELUS Communications Inc.*[97] The case involved a class action claim against Telus and the application of British Columbia's *Business Practices and Consumer Protection Act* (the "*BPCPA*").[98] The representative plaintiff was

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[96] It must be acknowledged that, some Ontario cases have interpreted s. 7(5) as providing a discretion *not* to stay the court litigation even with respect to claims admittedly covered by a single arbitration agreement where the court action includes claims or parties not covered by that arbitration agreement. This interpretation has been criticized on the basis that, properly interpreted, the *Arbitration Act* provides no discretion to refuse to stay an action with reference to claims covered by an arbitration agreement, only to stay other claims in the court action which cannot reasonably be separated from the matters to be arbitrated: *Casey*, *op. cit.* p. 346 *et seq.* In any case, it is noted by Casey that the discretion that may be found in s. 7(5) does not exist under Ontario's *International Commercial Arbitration Act, 2017*.

[97] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 (S.C.C.).

[98] *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2.

advancing the same claims (relating to a billing issue) both as a consumer under one contract and as a non-consumer under another. British Columbia arbitration legislation has no counterpart to s. 7(5) of the Ontario *Arbitration Act, 1991*.

The majority in *Seidel* acknowledged the quasi-regulatory aspect of the *Class Proceedings Act* provisions authorizing a representative action:

> The clear intention of the legislature is to supplement and multiply the efforts of the Director under the *BPCPA* to implement province-wide standards of fair consumer practices by enlisting the efforts of a whole host of self-appointed private enforcers. In an era of tight government budgets and increasingly sophisticated supplier contracts, this is understandable legislative policy. An action in the Supreme Court will generate a measure of notoriety and, where successful, public denunciation, neither of which would be achieved to nearly the same extent by "private, confidential and binding arbitration".[99]

However, the Court went on to say:

> The choice to restrict or not to restrict arbitration clauses in consumer contracts is a matter for the legislature. Absent legislative intervention, the courts will *generally* give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause.[100] [emphasis added]

The Supreme Court of Canada held that Ms. Seidel's claim against Telus could only proceed to the extent that s. 172 of the *BPCPA* created a legislative override. The Court held this conclusion to be "consistent with the legislative choice made by British Columbia in drawing the boundaries of s. 172 as narrowly as it did"[101] The decision in Telus infers from the absolute, legislative restriction on pre-dispute arbitration contracts in consumer contracts, that there is no absolute restriction in other cases. [102] No doubt this is true. However, the *Seidel* decision does not address the circumstances in which the courts may decide not to give effect to a non-consumer arbitration agreement on the types of grounds discussed in this paper. It appears that the points were not argued, and perhaps the facts did not support such a submission. However, there is no reason to suppose that the enactment of an absolute restriction in the case of consumer contracts eliminates a consideration of other grounds for invalidation in other cases.

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[99] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 (S.C.C.) at para. 6.
[100] *Ibid.* at para. 2.
[101] *Ibid.* at para. 50.
[102] *Ibid.* at para. 31.

V. *WELLMAN v. TELUS*: STATUTORY INTERPRETATION AS A SOLUTION

The Supreme Court of Canada's recent decision in *Wellman* illustrates the urgent need for legislative reform.[103]

This telecom class action involved about two million subscribers who alleged that in the early 2000s, TELUS systematically overcharged them by rounding up minutes. The average claim was about $1,000. The company's contracts had arbitration clauses, but these could not be enforced against consumers who could invoke the legislative override found in the *Consumer Protection Act, 2002*. The class action could therefore go forward on behalf of customers of Telus who were consumers.

However, of the two million subscribers in the class action, about 30 percent were estimated to be businesses.[104] As businesses, these subscribers do not qualify for shelter under the legislative override available to the rest of the class. With the *Consumer Protection Act, 2002* unavailable to the non-consumers, they argued that s. 7(5) of the *Arbitration Act, 1991* grants the court the discretion to allow their claims to proceed, "piggybacking" on the consumer claims. This argument was based on *Griffin*.

The Superior Court of Ontario had declined to stay the class action with respect to the non-consumers. On appeal, the Ontario Court of Appeal had to determine whether *Griffin* was "overtaken" by the Supreme Court's subsequent holding in *Seidel* that courts are generally to give effect to arbitration agreements, unless there is a legislative override.[105]

The Court of Appeal found that *Seidel* had not overtaken *Griffin*, due to differences in the relevant legislation in Ontario and British Columbia.[106] Specifically, s. 7(5) of the Ontario *Arbitration Act* has no equivalent in B.C.'s *Commercial Arbitration Act* which only incorporates the non-discretionary language of the Model Law.

Justice van Rensberg, writing for the majority in the Court of Appeal in *Wellman* held: "Section 7(5) of the *Arbitration Act* is an extension of the court's discretion and operates where an action has been commenced and the arbitration agreement covers, some, but not all, claims."[107] Therefore, it was held that the motions judge had discretion under s. 7(5) to decide whether it was reasonable to bifurcate the consumer claims from the non-consumer claims "where some claims are subject to an arbitration agreement and some are not".

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[103] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 (S.C.C.).
[104] *Ibid.* at para. 13.
[105] *Wellman v. TELUS Communications Company*, 2017 ONCA 433 (C.A.) at para. 20, reversed *TELUS Communications Inc. v. Wellman*, 2019 CarswellOnt 4913 (S.C.C.).
[106] *Ibid.* at paras. 60-62.
[107] *Ibid.* at para. 72.

Thus, the decision of the Ontario Court of Appeal in *Wellman* is based upon the same analysis as *Griffin* and is subject to the same doubts and criticisms having regard to the actual language of the section.

Interestingly, the Court expressly rejected any suggestion that, by deciding in favour of not staying the action it was in any way "addressing the effect of the procedural device of a class proceeding on the substantive rights conferred by an arbitration clause". Justice van Rensberg states:

> I therefore reject the appellants' submission that the Arbitration Agreement ousts the jurisdiction of the court, the suggestion that one must look for a specific provision to confer jurisdiction before the Arbitration Agreement will not be given effect, and the argument that the substantive right to arbitrate must be given primacy over the procedural vehicle of a class proceeding. The question of whether the substantive right to arbitrate must be given effect is governed by the domestic legislation of Ontario and cannot be determined in a legislative vacuum as the appellants would have us do. Under the Ontario *Arbitration Act*, jurisdiction is specifically retained in the situations covered by s. 7(5) and the present situation is governed by this provision.

The circularity of this analysis is striking and is perhaps best interpreted as a cry for legislative help.

Similarly, the majority in the Court of Appeal in *Wellman* rejected the idea that they or the motion judge were applying the preferability analysis under the *Class Proceedings Act, 1992* in order to override the arbitration agreements. While this position may be formally correct, it is belied by the majority's earlier summary of the reasons for the motion judge's conclusion that it would be unreasonable to separate the two categories of claims:

> The motions judge concluded that the consumer claims represented 70 percent of the total number of claims, that the liability and damages issues for both consumer and non-consumers would be the same, that there was no group arbitration permitted for the non-consumer claims, and that separating the two proceedings could lead to inefficiency, risk inconsistent results and create a multiplicity of proceedings (at para. 90). As a result, she determined that it would be unreasonable to separate the consumer and non-consumer claims, and therefore she declined to stay the non-consumer claims.

Exactly how this analysis differs from the preferability analysis under the *Class Proceedings Act, 1992* is a matter for conjecture.

In his concurring reasons in *Wellman*, Justice Blair (the author of the Court's decision in *Griffin*) expressed second thoughts about whether the application of s. 7(5) in the multiple arbitration agreement context is correct. He doubted whether *Griffin* was correctly decided in that respect, purely as a matter of statutory interpretation. He also questioned whether the procedural rights created by the *Class Proceedings Act, 1992* override the substantive rights of the *Arbitration Act, 1991* just because the non-consumer claims are brought in the

same action as the permitted consumer claims. That said, he also agreed that *Griffin* was binding despite *Seidel* due to the different statutory context.

The Supreme Court of Canada, having granted leave to appeal, was faced with two distasteful choices: on the one hand it could effectively dismiss 600,000 claims, leaving the businesses to pursue individual arbitrations; on the other, they could stretch the plain language of s. 7(5) beyond its clear meaning, thereby enshrining *Griffin*.

The Supreme Court split 5–4, with the Chief Justice joining in the dissent. The reasons of the majority and minority were unusually contentious. Writing for the majority, Justice Moldaver cites the *Arbitration Act, 1991*'s policy that parties to a valid arbitration agreement should abide by that agreement. He also emphasizes that the legislative gap is for the Legislature to remedy, being beyond the power of the courts.[108] The majority relied on the same reasoning that it applied in *Seidel*, namely: the Legislature chose not to protect non-consumers from mandatory arbitration agreements.[109] Furthermore, Justice Moldaver opined that allowing the non-consumers to "piggyback" on the consumers' legislative override would reduce the degree of certainty and predictability of arbitration agreements.[110]

The dissent's reasons are compelling from the perspective of the public policy behind both class action and arbitration legislation. For example:

> TELUS's individualized arbitration clause effectively precludes access to justice for business clients when a low-value claim does not justify the expense. And its mandatory nature, in turn, illustrates that the animating rationales of party autonomy and freedom of contract are nowhere to be seen.
>
> . . .
>
> This [arbitration agreement] operates as an invisible but formidable barrier to a remedy and presumptively immunizes wrongdoing from accountability contrary to our most fundamental notions of civil justice.[111]

In summary, the majority chose to adhere to the literal meaning of the words, and to blame the legislature for the problem.

The minority of four judges would have adopted the solution in *Griffin* of stretching the meaning of the words using familiar statutory interpretation

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[108] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 (S.C.C.) at paras. 79-83 and 89.

[109] *Ibid.* at para. 80 ("The legislature made a careful policy choice to exempt consumers—and only consumers—from the ordinary enforcement of arbitration agreements. That choice must be respected, not undermined by reading s. 7(5) in a way that permits courts to treat consumers and non-consumers as one and the same.").

[110] *Ibid.* at para. 88. This is a difficult argument to accept given that it was evident that the process of distinguishing consumers from non-consumers in the class would present considerable logistical difficulties — particularly given that many customers used their phones for both business and personal purposes.

[111] *Ibid.* at paras. 165, 167.

principles. Had the minority prevailed, their reasoning would have substantially compromised the future effectiveness of arbitration in the non-class action context. Essentially, they would have recognized a discretion under s. 7(5) of the *Arbitration Act not to stay* a lawsuit with respect to claims *covered by an arbitration agreement*, even though that section literally only provides a discretion *to stay* the action with respect to matters *not* covered *by an arbitration agreement*. The minority's reasoning would have been a very serious step backward in arbitration jurisprudence.

What appears to be missed in the analysis of both the Supreme Court and the Court of Appeal decisions is the consideration of why, quite apart from s. 7(5), parties who are able to impose terms in a contract of adhesion should be able to sidestep the clear policy objectives of class action legislation relating to access to justice and behavior modification by the simple expedient of including an arbitration clause which, as a practical matter, will never be used to conduct an arbitration.

VI. *HELLER v. UBER*: ARBITRABILITY AND UNCONSCIONABILITY

Mandatory arbitration in the context of the gig economy was argued before the Ontario Court of Appeal in *Heller*.

Heller is an UberEATS driver resident in Ontario. He signed up as an Uber driver using Uber's on-line Driver App. He earns around $400 to $600 a week from delivering food 40 to 50 hours, driving his own vehicle. In his proposed class action, Heller seeks a declaration that drivers in Ontario, who have used the Driver App to provide food delivery and/or personal transportation services to customers, are employees of Uber and governed by the provisions of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "*ESA*").[112] The claim seeks declarations that Uber violated the provisions of the *ESA* with respect to such matters as minimum wage, overtime and vacation pay and that the arbitration provisions of the services agreements entered into between the parties were void and unenforceable. The action also claims damages of $400 million.

Uber's contracts with its drivers include provisions regarding governing law and dispute resolution. The governing law is stated to be the laws of the Netherlands. The dispute resolution terms require claims to be mediated under the rules of the International Chamber of Commerce (ICC), before proceeding to ICC arbitration with the place of arbitration being specified as Amsterdam in the Netherlands. The Court of Appeal summarized the financial impact of these provisions as follows:

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[112] Heller's status as an employee is highly debatable and would no doubt be seriously disputed in any proceeding however constituted.

> Accordingly, the up-front administrative/filing-related costs for a driver to participate in the mediation-arbitration process in the Netherlands prescribed in the Arbitration Clause is US $14,500. As an UberEATS driver, the appellant earns about $20,800—$31,200 per year, before taxes and expenses.

These expenses do not include the cost of legal representation, travel or accommodation, should any of those costs be incurred.

The motion judge in Superior Court had granted Uber's stay of the class action. The Court of Appeal reversed on two grounds. First it found that the dispute resolution clause was an impermissible contracting out of the protections of the *ESA*. The reasoning is rather tortured.

The Court did not rely on case law relating to contracting out of legislation (in this case the Class Proceedings Act) where that would be contrary to the public policy behind the act in question.[113] Rather, the Court held that the arbitral clause constitutes a contracting out of the *ESA*, because it eliminates the right of the appellant to make a complaint to the Minister of Labour. However, as the Court acknowledged, the right to make a complaint is eliminated only when the complainant also commences a proceeding on the same issue. But, as the Court explains at considerable length, an arbitration is not a "proceeding" within the meaning of the *ESA*. Therefore, the Court could just as easily have held that the arbitration did not preclude the right to make a complaint to the Ministry, and, therefore, did not represent a contracting out.[114]

In addressing Uber's argument that any such issue regarding the arbitrability of the dispute should, under the competence-competence principle, first be submitted to the arbitral tribunal for decision because it involves questions of

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[113] Contracts may be void as a matter of public policy where the contract tries to avoid legislated, minimum protections. See *e.g.*, *Deluce Holdings Inc. v. Air Canada*, 1992 CarswellOnt 154, 12 O.R. (3d) 131, 8 B.L.R. (2d) 294, 13 C.P.C. (3d) 72 (Ont. Gen. Div. [Commercial List]) to the effect that an arbitration agreement cannot be used oppressively to exclude a minority shareholder's access to the statutory oppression remedy; *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 150, 21 D.L.R. (4th) 14 at para. 19 (McIntyre J. held that a municipality could not enforce contracts that violated *The Ontario Human Rights Code*); *Niedermeyer v. Charlton*, 2014 BCCA 165 (C.A.), leave to appeal refused 2014 CarswellBC 3453 (S.C.C.) (the B.C. Court of Appeal found that under B.C.'s mandatory auto insurance, the owner/operator of a bus could not enforce a waiver to avoid liability to a passenger injured in a motor vehicle accident); *Fleming v. Massey, et al.*, 2016 ONCA 70 (C.A.), leave to appeal refused *Massey v. Fleming*, 2016 CarswellOnt 9353 (S.C.C.) (a worker's waiver of Ontario's *Workplace Safety Insurance Act, 1997* is void, meaning the worker is entitled to protection under the Act). But see: *1146845 Ontario Inc. v. Pillar to Post Inc.*, 2014 ONSC 7400, 2014 CarswellOnt 18211, 36 B.L.R. (5th) 230, 65 C.P.C. (7th) 282 (S.C.J.), additional reasons 2015 ONSC 1115, 2015 CarswellOnt 2305, 71 C.P.C. (7th) 174 (S.C.J.).

[114] Of course, this too would likely have been an undesirable outcome from Uber's perspective.

both fact and law (as the motion judge had held),[115] Justice Nordheimer writing for the Court stated:

> I do not agree with Uber's position because, in my view, this issue is not about jurisdiction. I am aware of the general approach that any dispute over an arbitrator's jurisdiction should first be determined by the arbitrator but that addresses situations where the scope of the arbitration is at issue. That is not this case. There does not appear to be any dispute that, if the Arbitration Clause is valid, the appellant's claim would fall within it. Rather, the issue here is the validity of the Arbitration Clause. The answer to that question is one for the court to determine as s. 7(2) of the *Arbitration Act, 1991* makes clear.

While Justice Nordheimer acknowledged that the application of the *ESA* to Heller depended on the factually contentious question as to whether Heller is an employee of Uber, he resolved that issue for the purposes of the motion by assuming as true Heller's allegation that he held that status.

From an arbitration perspective, assuming as true the allegations of a claimant who is denying arbitral jurisdiction is not correct. A partial justification for this departure may be found in the following comment:

> I reiterate that, in addressing this issue, we are dealing not just with the appellant but with all persons who might be in the same position as the appellant. The interpretative process must take that into account.

In other words, in the class action context, the issue of jurisdiction should not be judged purely in relation to the representative plaintiff but in relation to the common cause of action put forward on behalf of the class. So cast, the issue can more easily be viewed as an issue of law, or at least an issue that may require no more than a superficial consideration of the facts.

With respect to the applicability of Dutch Law, Justice Nordheimer observed:

> In other words, as an Ontario resident [Heller] is statutorily entitled to the minimum benefits and protections of Ontario's laws. He should not be left in a situation where those benefits and protections are set by the laws of another country.

As a second and independent ground, the Court of Appeal held that Uber's mandatory arbitration agreement was unconscionable and therefore invalid under s. 7(2)(2.) of the *Arbitration Act, 1991*. Writing for a unanimous panel, Justice Nordheimer held that requiring an Ontario driver to submit to a dispute process in which he or she must advance an amount approaching his or her annual earnings in order to pursue a claim in arbitration in a process based in the Netherlands was unconscionable. In doing so, he analogized the application of the unconscionability principle to forum selection clauses. He noted that the arbitration clause in this case contained more than just a submission to arbitration. It also contained provisions regarding venue and applicable law that

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[115] See *Dell v. UdC*, paras. 69-79.

were susceptible to an unconscionability analysis. In applying the test to the facts of the *Heller* case, Justice Nordheimer held as follows:

1. The Arbitration Clause represents a substantially improvident or unfair bargain. It requires an individual with a small claim to incur the significant costs of arbitrating that claim under the provisions of the ICC Rules, the fees for which are out of all proportion to the amount that may be involved. And the individual has to incur those costs up-front. . . .
2. There is no evidence that the appellant had any legal or other advice prior to entering into the services agreement nor is it realistic to expect that he would have. In addition, there is the reality that the appellant has no reasonable prospect of being able to negotiate any of the terms of the services agreement.
3. There is a significant inequality of bargaining power between the appellant and Uber—a fact that Uber acknowledges.
4. Given the answers to the first three elements, I believe that it can be safely concluded that Uber chose this Arbitration Clause in order to favour itself and thus take advantage of its drivers, who are clearly vulnerable to the market strength of Uber. It is a reasonable inference that Uber did so knowingly and intentionally. . . .

The analysis of the Court of Appeal will, no doubt, be subject to criticism. The Court's avoidance of the competence-competence principle by assuming the truth of facts in contention arguably represents a serious departure from the principle that the court will, on motions to stay, only base its decision on pure questions of law, or on questions of mixed fact and law which can be decided only on a superficial review of the record. Nordheimer J.A. relied upon a *dictum* of Binnie J. in *Seidel v. Telus* to the effect that: "Ms. Seidel's complaints against TELUS are taken to be capable of proof only for the purposes of this application."[116] However, in *Seidel*, the Court found in favour of arbitral jurisdiction by assuming the claimant's allegations in the court action were true. If followed in other cases, Nordheimer J.'s finding of a lack of arbitral jurisdiction based upon an assumption that allegations of the claimant in the court action are true could lead to the potential erosion of an important bulwark of commercial arbitration. Also, the failure of the Court to recognize that discretion is more limited in international cases than in non-international cases will be criticized. So too will its decision to apply highly discretionary forum selection principles to arbitration agreements on the basis that the arbitration agreement also specifies a venue and an applicable law that is different from the law of one of the parties. These aspects of the decision are potentially damaging

[116] *Seidel v. TELUS* para. 8.

if applied outside the specific context of contracts of adhesion in mass market transactions.

The Court's holdings on unconscionability also represent significant modifications of existing legal principles. The irrationality of seeking legal advice appears to have been equated with the absence of an opportunity to obtain legal advice. An imbalance of bargaining power, *simpliciter*, appears to have satisfied that branch of the legal test for unconscionability without any requirement that the imbalance was caused by other exacerbating circumstances such as business ignorance, illiteracy or physical or mental disability.

On each of these points, counter arguments can also be raised that the approach of the Court is appropriate applied within the limited context of the facts of the case. For example, if arbitral jurisdiction depends on the answer to the factual question of whether Heller is an employee, as Nordheimer J.A. appeared to assume, the principle of competence-competence is clearly violated since that issue would arguably require more than a cursory review of the record on the motion.[117] However, if arbitral jurisdiction depends on whether any claims under the *Employment Standards Act* are arbitrable under a pre-dispute agreement to arbitrate, or under the particular agreement to arbitrate in this case, that is much more like a question of law which courts can decide on a stay application with no violation of the competence-competence principle.[118] This is the real basis of Nordheimer J.A.'s decision.

Similarly, on the issue of unconscionability, it is quite clear that the Court's findings are strongly informed by particular features of the arbitration agreement in question which it found to be offensive. The ESA is a statute that is designed to protect members of the workforce who rely for their protection on the minimum standards imposed by the Act on employers. They are the most vulnerable members of the workforce who are unable to protect themselves from exploitive practices. The question as to whether those rights can be taken away by an arbitration clause, imposed by an employer, that presents a barrier to the enforcement of those protections is very much a question of law, and a matter of conscience.

The foregoing arguments relate only to the arbitrability of claims (which, in this case, are made under the ESA, and only under the ESA) and to the validity of the particular arbitration agreement put in place by the defendant. It is not necessary to consider the facts of the individual cases for the Court to determine, as a matter of law, that such claims cannot be effectively avoided by an

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[117] See *Dell v. UdC*, paras. 85–86.

[118] *Ibid.* See also: *Briones v. National Money Mart Co. et al.*, 2014 MBCA 57 (C.A.) at para. 36, leave to appeal refused *Briones v. National Money Mart Co.*, 2014 CarswellMan 690 (S.C.C.) in which the Manitoba Court of Appeal held that a claim under the *Unconscionable Transactions Relief Act* was "not capable of being the subject of arbitration under Manitoba law" given the purpose and history of the legislation.

impossibly onerous arbitration clause. The fact that some or all members of the class may not be employees is a matter that goes to the merits, and it is entirely possible that the claims may ultimately fail on that point.

An even more fundamental question is whether unconscionability analysis is needed to overturn an arbitration clause that is designed to prevent disputes from being arbitrated (or in any event has that effect). In other words, is an arbitration clause that is such in name only entitled to the receive the same treatment as a bona fide clause that has some reasonable probability of providing for redress. If normal principles relating to the enforcement of arbitration agreements applied to the clause in *Heller*, a claimant would have to spend well over half of her annual income under the agreement in question just to challenge the jurisdiction of the tribunal to hear the case.

Within less than a month of *Heller*'s release, another case demonstrated the risk that mandatory arbitration case law creates with mainstream commercial arbitration cases. The arbitration agreement in *Belnor Engineering Inc. v. Strobic Air Corporation, et al.* has all the hallmarks of a negotiated, business-to-business contract, freely entered into by parties of roughly equal bargaining power. The plaintiff unsuccessfully tried to apply *Heller*'s unconscionability analysis, and the motions judge was appropriately dismissive of this argument.[119] *Belnor*, however, highlights how an analysis appropriate to mandatory arbitration can confuse and disrupt true merchant-to-merchant commercial arbitration case law, and why the two must be separated in any way possible for the health and vigor of both arbitration law and class proceedings.

VII. THE REAL ISSUE

In *Wellman* and *Heller*, and the numerous other cases cited above, courts attempt to use whatever tools are available to achieve access to justice in mandatory arbitration cases. This is what courts do, and arguably should do, when faced with an affront to the efficacy of the justice system as a whole. This is how the law develops. Courts rise to the challenge of bridging gaps within the legislative means by which access to justice has been provided. They rightly view it as their role to make the system work to produce fairness and accountability within the framework of the rule of law.

Mandatory arbitration clauses, such as those under discussion, hold the body of commercial arbitration law hostage to the unworthy end of defeating substantive contractual rights and sterilizing the protection of law. Such clauses lack the defining characteristics of party autonomy and free will that have been so central to arbitration through the ages. The systematic enforcement of arbitration clauses assumes the clauses are *bona fide* in the first place. But as can

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[119] *Belnor Engineering Inc. v. Strobic Air Corporation, et al.*, 2019 ONSC 664 (S.C.J.) at paras. 31-35.

be seen from the American example, mandatory arbitration, far from being a form of alternative dispute resolution, has become an alternative to dispute resolution.

Those of us who wish to support arbitration as the best method for resolving commercial disputes should disavow such attempts to turn arbitration agreements into gimmicks for the suppression of claims. If we do not do so, we run the risk of seeing the hard-won foundations of judicial and public support for arbitration undermined.[120] We also risk the adulteration of key principles of arbitration jurisprudence. Should that occur, the arbitration community has only itself to blame.

VIII. THE OBVIOUS SOLUTION

The obvious solution is for the legislature to provide a clear statutory basis for the courts to address this issue.

We submit that all that is necessary, and what surely must have been intended in the first place, is for the *Class Proceedings Act, 1992* to be amended to say:

1. The court shall not give effect to any agreement that purports to take away or limit the right to participate in a class action, or that would have that effect.
2. Notwithstanding (1), the court may give effect to any alternative form of dispute resolution, including an agreement to arbitrate or mediate, which it finds to be a useful method for resolving some or all of the claims in the action.

Such a provision would:

1. provide the courts with a clear basis for overriding arbitration agreements in the class action context where they prevent access to justice;
2. clearly co-ordinate the certification process under the *Class Proceedings Act, 1992* and the application to stay process under the arbitration acts;
3. limit the overriding of arbitration agreements to situations in which the criteria for class certification has been met;

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[120] See George A. Bermann, *"What does it mean to be 'pro-arbitration'?"*, Arbitration International v. 34, no.3, at 341 September 2018, LCIA, London at 353: " Too often missing from the criteria for determining whether a policy or practice is or is not pro-arbitration is consideration of values that are largely extrinsic to arbitration itself. In fact, acknowledging legitimacy — measured in terms of extrinsic values — as in itself a pro-arbitration attribute may be among the most arbitration-friendly moves one can make. The present time, in which the arbitration enterprise, rightly or wrongly, is coming under attack as just about never before, is an especially apt moment for expanding our notion of what is and what is not pro-arbitration."

4. avoid any need for the court to interfere with established principles of arbitration law which apply to arbitration agreements in non-class action contexts, including with respect to contracts of adhesion;
5. comply with all international requirements regarding the enforcement of arbitration agreements; and
6. make it possible to strengthen existing arbitration legislation to clearly remove some of the discretionary elements with respect to the enforcement of *bona fide* arbitration agreements which have unfortunately, but for good reason, been introduced by the *Heller* case.

The second half of the proposed provision would not prevent companies that legitimately seek to provide fair, objective and efficient methods of dispute resolution to their customers and employees, outside the court system, from doing so, for example, by providing for class arbitration schemes. However, such schemes, affecting as they do the rights of very large segments of the population, would be subject to satisfying a court that they do, in fact, provide a better remedy.

We urge the adoption of such legislation.