ARBITRATION AND CHOICE OF LAW PROVISIONS

AS CLASS ACTION RISK MANAGEMENT TOOLS

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I. INTRODUCTION

Until the introduction of class proceedings legislation in Ontario in 1992 and British Columbia in 1995, the spectre of class actions was not of great concern to the majority of Canadian companies. However, since the early 1990's, approximately 200 class actions have been filed in Canada, almost always including at least one Canadian company as a defendant. This new, and potentially crippling exposure, has prompted many companies to consider means to limit their exposure to class proceedings and the attendant publicity, costs and damages.

Beyond typical risk management initiatives like insurance and internal controls, many companies have begun to incorporate arbitration, choice of law and forum selection clauses in contracts as a means of managing exposure to class proceedings.

Arbitration is recognized as having a number of advantages over traditional litigation which are as applicable to class proceedings as any other proceeding: parties have more control over arbitration; the decision-maker is selected by the parties permitting the selection of experts; it is often faster, has more limited discovery and can be private and confidential; and there is limited review or appeal. However, in the context of class proceedings, arbitration provisions have the additional benefit of potentially limiting recourse to a class proceeding. This will be discussed in more detail below.

In addition, many companies have also implemented choice of law and forum selection clauses to limit many of the difficulties posed by unrestrained availability of class proceedings in multiple forums.

II. ARBITRATION PROVISIONS

Most, if not all, Provinces have some form of arbitration legislation reflecting both the legislative and judicial favour accorded alternative dispute resolution. Although this legislation is quite similar in most provinces, it can differ in material ways. For simplicity, this paper will focus on the issue of arbitration provisions in the context of the law of British Columbia.

An arbitration clause is enforceable in a summary fashion pursuant to general arbitration legislation. In British Columbia, section 15 of the *Commercial Arbitration Act* (the "CAA") and section 8 of the *International Commercial Arbitration Act* (the "ICAA") require the courts to stay legal proceedings when a party to an arbitration agreement commences an action against

another party to the agreement in respect of a matter agreed to be submitted to arbitration unless the arbitration agreement is null and void, inoperative, or incapable of being performed. The courts have been quick to enforce arbitration clauses and reluctant to enquire into the validity of an arbitration clause. Generally speaking, the courts have preferred to leave this question to the arbitral tribunal unless it is very clear that there is not a valid arbitration clause.

These provisions raise an interesting issue which has only now begun to be addressed by Canadian courts: What is the effect of an arbitration provision on the availability of a class proceeding? Does the presence of an arbitration provision prevent or limit the opportunities for a class proceeding?

Until April 25, 2000, there were no Canadian decisions addressing these issues but there were many American decisions illustrating how this question might be approached. In general, American courts have concluded that enforceable arbitration provisions do prevent recourse to class proceedings and the battleground has become the enforceability of the arbitration clause itself. On April 25, 2000, Mr. Justice Cumming issued reasons in *Huras* v. *Primerica Financial Services Ltd.* which indicate that Canadian courts are likely to adopt similar principles to those developed in the United States. That decision was followed on February 22, 2002, by *Kanitz v. Rogers Cable Inc.* which is the first Canadian case in which a class proceeding was stayed because of the presence of an arbitration provision.

A. THE AMERICAN LAW

There are a number of American decisions which have granted a stay of proceedings in a proposed class action where some or all of the class is subject to an enforceable arbitration provision.

In *Champ and Perera v Siegel Trading Company Inc.*, 951 F.2d 780 appeal dismissed 55 F. 3d 269 (7th Cir, 1995) the plaintiffs sought certification of a class action claiming violations of the *Commodity Exchange Act*, RICO and various state laws. The court refused to hear the motion for certification and instead ordered the plaintiff to proceed to arbitration pursuant to the arbitration agreement contained in the contract with the Siegel Trading Company. The court held that when contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain "procedural niceties" associated with a formal trial and that one of those "procedural niceties" is the availability of a class action.

An arbitration provision in franchise agreements prevented a class action by franchisees against the franchisor in *We Hair Care Development Inc.* v. *Engen*, 180 F.3d 838. In this case a group of We Hair Care franshisees filed a class action against the franchisor and others alleging breach of fiduciary duty and of various statutes. All of the franchise agreements included a clause requiring that any disputes arising out of or relating to the franchise agreement be submitted to arbitration. We Hair Care sought to enforce the arbitration provisions and stay the class proceeding while the franchisees argued that the arbitration provision was unconscionable because:

(1) the franchisees were required to arbitrate their claims relating to the franchise agreement yet a related company to the franchisor was free to

bring eviction proceedings in court in relation to the very same matters; and

(2) requiring multiple arbitrations in multiple states was contrary to public policy as violating the goal of arbitrations to provide a speedy, informal and inexpensive procedure to resolve disputes.

The court rejected these arguments concluding that the ability of the related company to bring eviction proceedings was clearly set out in the offering documents and that multiple arbitrations and piecemeal resolution of claims may be required to give effect to an otherwise enforceable arbitration agreement. As a result, the class proceedings were stayed.

In several decisions relating to disputes between subway franchisees and their franchisor, courts have consistently stayed proposed class proceedings where the franchise agreements contain arbitration provisions: *Doctor's Associates Inc.* v. *Stuart*, 85 F.3d 975; *Doctor's Associates Inc.* v. *Hamilton*, 150 F.3d 157; *Doctor's Associates Inc.* v. *Jabush*, 89 F.3d 109; *Doctor's Associates Inc.* v. *Distajo*, 107 F.3d 126. The franchise relationships in these cases were similar to those in *We Hair Care*. The plaintiffs in these cases argued that:

(1) failure to disclose 1) that the arbitration organization charged as much as $5,000.00 to commence an arbitration, 2) the high cost of arbitrating in the location designated (Connecticut) including travel and lodging required the franchisees to win just to break even, 3) the franchisees were required to pay ½ the cost of the arbitrators;

(2) the dependence of the arbitration organization for repeat business from the franchisor rendered them biassed; and

(3) the arbitration provision compelled the franchisees to arbitrate any disputes with the franchisor yet permitted the franchisor the option of resolving the dispute by threatening or actually commencing court proceedings for the eviction of the franchisee from the franchise premises rather than arbitrating;

rendered the arbitration clause unconscionable. The courts rejected these arguments for several reasons. First, the arbitration provisions did disclose where the arbitration was to take place and put the franchisees on notice of their responsibility for costs which they were free to investigate before entering into the agreement. Second, there was no credible evidence of bias. Finally, the franchisor had not brought or threatened eviction proceedings against any of the franchisees. The courts concluded that the doctrine of unconscionability, which addresses questions of oppression and unfair surprise did not apply between these parties. The franchisees were "not ambushed" by the arbitration provision.

In another franchise case, the court in *Collins v. International Dairy Queen*, 169 F R.D. 690 (U.S.D.C, M.D. Georgia, 1997) again concluded that arbitration provisions in franchise agreements prevented recourse to class proceedings although the plaintiffs do not appear to have challenged the enforceability of the arbitration provisions. The court referenced the general policy favouring arbitration over litigation and stated that the court must resolve any doubt about the application of the arbitration clause in favour of arbitration. It held that franchisees who were

bound by mandatory arbitration clauses were not entitled to litigate their claims against the defendants. However, the same conclusion could not be reached with respect to those franchisees whose agreements had arbitration clauses which were merely permissive or which contained an opt out provision. As a result, the court certified a number of classes and subclasses but excluded all franchisees who were subject to mandatory arbitration provisions. In addition, the Court ordered notice of the class proceeding to be given only to those franchisees with permissive arbitration clauses in their agreements.

Zawikowski v. *Beneficial National Bank*, 1999 WL 35304 (N.D. Ill.) addressed the enforceability of arbitration provisions in contracts formed in the course of tax refund loans offered by H&R Block and Beneficial. Pursuant to a service called Refund Anticipation Loans, Beneficial would issue a cheque to the plaintiffs once their tax returns were accepted for filing by the IRS for the amount of the refund less finance charges and other fees. The plaintiffs alleged that in doing so Beneficial had breached the *Truth in Lending Act* for failing to disclose payments to H&R Block and baiting and switching the interest rates comprising the finance charges. Beneficial sought to stay the claims of some of the plaintiffs on the basis of arbitration provisions contained in the contracts with Beneficial. The plaintiffs resisted arguing, inter alia, that the provisions were unconscionable. The court concluded that the clause was enforceable. In doing so the court:

(1) rejected an argument that the arbitration clause, in prohibiting class actions, did not promote judicial economy and was, therefore, void under public policy;

(2) concluded that to be enforceable, the plaintiffs need not have had an opportunity to negotiate the intricacies of the arbitration agreement;

(3) citing the *Champ* decision, concluded that persons may contract away their right to a class action;

(4) considered the contract at issue less adhesive than others containing arbitration provisions which had been enforced in prior cases because the plaintiffs were required to sign a loan document which cautioned them not to sign it until after reading the agreement; and

(5) appears to have been influenced by the express exclusion of class proceedings in the loan agreement.

A similar result was reached in *Johnson* v. *West Suburban Bank*, another claim under the *Truth in Lending Act* relating to loan agreements containing arbitration provisions. The *Truth in Lending Act* was intended to provide statutory remedies and contained express terms addressing the damages available in class action. The plaintiff argued that since neither he nor the class could vindicate their statutory rights via the arbitral process, the arbitration provision frustrated the legislative intent and was unenforceable. The court disagreed, enforced the arbitration provision and stayed the class proceeding. The court concluded there was nothing in the *TILA* which precluded arbitration provisions and class proceedings were not necessary to provide deterrence or fulfil any of the other goals of the Act.

However, the trend has not been entirely in favour of arbitration provisions and this is amply demonstrated in relation to two decisions addressing essentially the same arbitration provision in two decisions involving Gateway 2000 Inc.

In *Hill* v. *Gateway 2000 Inc.*, 105 F.3d 1147, the court enforced arbitration provisions contained in the documents supplied with a computer that was delivered after being ordered by telephone. After ordering the computer by telephone it was delivered along with written terms and conditions which were said to govern unless the computer was returned within 30 days. The plaintiffs retained the computer for more than 30 days but later complained about its performance and brought a class action seeking damages. The defendant sought to enforce one of the terms in the documentation supplied with the computer which required that disputes be referred to arbitration. The plaintiffs alleged that the arbitration agreement did not stand out, that they did not read and it was therefore not enforceable for lack of notice.

The court, applying traditional contract formation principles, rejected these arguments. Relying on *ProCD, Inc.* v. *Zeidenberg*, 86 F.3d 1447, which held that the terms inside a box of software bound consumers who use the software after an opportunity to read the terms and reject them by returning the product, the court concluded that the arbitration clause was enforceable. There were a number of factors influencing the court in reaching this decision:

(1) commercial efficacy - the court observed that many means of commerce follow an accept or return offer to consumers where payment is made in advance of the disclosure of the terms of the contract including air transportation, insurance and many other endeavours. In these circumstances, it is impractical to expect that the terms will be disclosed prior to the payment and delivery. The court stated that enforcing terms imposed by means of accept or return offers benefits both consumers and business by speeding the transaction, avoiding the cost of ineffective oral explanations of all terms and conditions prior to purchase and eliminating the resulting inconsistency and uncertainty.

(2) reasonable opportunity to discover and reject the terms - although there is no express statement to this effect, the court appears to have concluded that the nature of the transaction afforded a reasonable opportunity to discover and review the contract terms given the manner in which the contract documents were to be found within the box in which the computer was packed. Further, it was not unreasonable to expect that consumers would return the product if they were not satisfied with the terms.

(3) fairness - the plaintiffs in this case, who had ample opportunity to read the contract documents if they wished, who could have requested the terms in advance or researched them via public sources of information, sought to rely on the warranty provisions of those documents yet avoid the arbitration provisions.

Of interest, however, is the court's speculation that the result may have been different had there been no reasonable opportunity to reject the terms. For example, where the expense of returning the product was so great as to dissuade returns. This comment appears to be a faint allusion to principles of unconscionability which, as we will now see, can result in the refusal to enforce arbitration provisions.

The court in *Brower* v. *Gateway 2000 Inc.* 676 N.Y.S. 2d 569, reached many of the same conclusions as in *Hill* but refused to enforce the arbitration provision for reasons not addressed in *Hill*. In this decision the court considered the arbitration provision enforceable in all respects, for the same reasons as in the *Hill* decision, except with respect to the designated arbitration organization and its procedures and cost. The arbitration provision designated the International Chamber of Commerce as the arbitral body. The evidence suggested that this organization was very difficult to contact and that its filing fees were $4,000.00, more than the cost of most Gateway products. The court concluded that claims before the ICC were financially prohibitive, consumers were thereby denied any means of pursuing their claims and the clause was, therefore, unconscionable. However, in the meantime, Gateway had offered revised arbitration agreements to all its customers which permitted a choice between the ICC and the American Arbitration Organization (which had lower fees), provided phone numbers for both organizations and permitted alternate sites for the arbitration. Gateway sought order directing that arbitration proceed before the AAA. Although the court refused to do so in the absence of evidence regarding the costs of AAA proceedings it remitted the issue to the trial court for determination.

Badie v. *Bank of America* illustrates some of the problems and pitfalls in seeking to enforce an arbitration clause in the consumer context. In *Badie*, the Bank of America had delivered a "change-in-terms" notice by mail to its deposit account and credit card account customers in monthly billing statements. Each of the account agreements contained a change of terms provision which in most cases stated:

> We may change any terms, condition, service or feature of your Account at any time. We will provide you with notice of the change to the extent required by law.

An action was brought by a number of consumers and consumer oriented organizations seeking a declaration that the arbitration clause was unenforceable. The plaintiffs alleged that the clause was unconscionable and that there had been inadequate notification of the change in terms. The appeal court agreed. It stated that the policy favouring arbitration was only applicable if the parties had entered an enforceable agreement to arbitrate. In assessing that question the court was to apply the ordinary rules of contract formation to determine whether the bank's customers had agreed to some form of ADR to resolve disputes. The determination of whether the ADR clause became part of the account agreement required an assessment of the meaning and scope of the change of terms provision. The Bank argued that the change of terms provision of the original contract permitted it to add the arbitration clause without any further consent or consideration. The Appeal court disagreed. It stated that a change of terms provision does not afford a party with the unilateral right to modify a contract carte blanche to make any kind of change as long as the specified procedure is followed. Rather, the court held that it must interpret the meaning of the specific clause and, in particular, determine what was meant by the word "terms" in the change of terms provision to determine the scope of provisions which the Bank could purport to change.

The court reviewed the terms of the account agreements which dealt with purchases, cash advances, credit limits, finance charges, membership fees, late charges and other fees, calculation of balances and finance charges, payments and the procedures for notifying the bank of suspected errors on the bill. Importantly, no "term, condition, service or feature" of the original account agreement addressed the method or forum for resolving legal claims arising

under the agreements nor did the change of terms provision state that provisions regarding dispute resolution could subsequently be added. The court concluded that there was nothing about the agreement which alerted customers to the possibility that the bank might one day invoke the change of terms clause to add a provision that would allow it to impose ADR on a customer. As a result, the court concluded that it was not the intention of the parties when the contracts were formed that an entirely new provision relating to dispute resolution could later be imposed via the change of terms provisions and the arbitration provisions was held unenforceable.

However, the court came to a different conclusion in *Williams v. Direct Cable TV,* No- 97-C-1 645-W (N-D, Ala. Sept. 10, 1991). In this case, the Court upheld the right of Beneficial National Bank USA to add an arbitration clause to its cardholder agreement by mailing a change-in-terms notice to the cardholders in their monthly billing statements. In doing so, the court relied primarily on the terms of the cardholder agreement which provided that its terms could be altered upon written mailed notice. The court noted that interest rates and other provisions of credit card agreements historically have been changed under similar credit card agreements. To hold that the mail out change was ineffective would be to place arbitration contracts in an inferior position to other contracts.

Another decision refusing to enforce an arbitration provisions on grounds of unconscionability is *Crawford* v. *Caviler Homes* (Unreported), No. 98-V-641 (Ga., Carroll Cnty, July 1999). The plaintiff purchased a defective mobile home from the defendant and signed two sales documents, which, unbeknownst to the plaintiff, contained a mandatory arbitration provision. In order to commence an arbitration, the plaintiff was required to pay $1,250 in filing fees and an administrative fee of $150.00 per day and might be responsible for some or all of the arbitrator's fees of $1,400.00 per day. Although the contract was made in Georgia, with a Georgia resident and the defendant distributed its products there, the arbitration was required to be held at the defendant's principal place of business, Addison, Alabama. In contrast, the court filing fees were only $65.00. Under the contracts the defendants had reserved their right to sue the plaintiff in court to enforce his obligations to pay. The court concluded that these provisions could not be enforced.

Under the federal Arbitration Act, arbitration agreements will be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Under the laws of Georgia, the question of unconscionability requires an examination of the procedural elements of the contract and then its substantive components. The procedural aspect of the test looks to oppression (inequality of bargaining power which results in no real negotiation and an absence of real choice) and surprise (the extent to which supposedly agreed terms were hidden in a prolix printed form). The substantive inquiry examines the contract for terms that are one-sided.

The court concluded that the provision was unconscionable because of: (a) the absence of disclosure of the potentially prohibitive costs of arbitration, including the responsibility of the plaintiff for costs, obscured the true meaning of the arbitration clause; (b) the plaintiff had no choice but to accept or reject the terms; and (c) the arbitration provision barred all recourse to judicial proceedings by the plaintiff yet reserved them for the defendant.

It is interesting to contrast the result in this case with those in *We Hair Care*, *International Dairy Queen* and *Doctor's Associates*. Virtually the same type of complaints about notice, cost, location of arbitration and reservation of rights to proceed in court were made in each of these cases. The different results can be explained primarily by the are nature of the transactions and the relative sophistication of the parties in each case. The courts exhibit a greater willingness to enforce arbitration provisions arising in business dealings between sophisticated parties than they do in consumer transactions.

The question of the enforceability of arbitration provisions in consumer contracts continues to attract much attention in the United States from consumer and public interest advocacy groups like Trial Lawyers for Public Justice. There are many cases in the United States where the question of the enforceability of arbitration provisions in consumer contracts continues to be fought.

B. THE CANADIAN CASE LAW

The American case law demonstrates that arbitration provisions may prevent recourse to class proceedings. The courts quite uniformly apply traditional contract formation principles to determine whether the parties agreed to arbitration but are willing to refuse to enforce arbitration provisions where they can be described as unconscionable.

This is now reflected in Canadian case law in the *Huras* and *Kanitz* decisions which both illustrate the importance of a carefully drafted and implemented arbitration agreement.

1) *Huras*

In *Huras* the plaintiff brought a class action for the employees of the defendant who were required to undergo training without pay prior to commencing employment, contrary to *Employment Standards Act*. The defendant sought an order staying the proceeding on the basis of an arbitration provision in the contract between it and the plaintiff. The Judge refused the motion on the basis that the arbitration provision did not apply because it was contained in the employment contract which was entered when the class members began full-time employment with the defendant after their training. However, the court went on to consider the plaintiff's argument that the arbitration clause was unconscionable. Mr. Justice Cumming concluded that is was unconscionable, relying on the following factors:

(a) the contract was a standard form;

(b) there was no equality of bargaining power;

(c) the arbitration provision was one-sided - Primerica could exercise its rights under the agreement without submitting them to arbitration;

(d) the claims were small relative to the cost of three arbitrators and the risk of a substantial costs award in the event of failure so that it was unlikely the plaintiffs could proceed with arbitration but had no recourse to court proceedings

(e) the provision inhibits and effectively frustrates aggrieved individuals from being able to obtain any resolution of disputes through a neutral independent adjudicator;

(f) enforcing the arbitration provision would defeat the policy goals of the *Class Proceedings Act* of facilitating access to justice, judicial efficiency and deterrence of wrongdoers;

(g) the class members had a common grievance yet counsel for Primerica had refused to agree to a single class arbitration.

The Judge concluded that the sole purpose of the arbitration clause was to prevent the resolution of disputes other than on terms dictated by Primerica and hence the clause was unconscionable. In the event there is any doubt, the Reasons exhibit much greater hostility to arbitration provisions than in the United States.

This decision was not what prospective Defendants might have hoped for and raised the question whether Canadian courts would continue to exhibit the same hostility in other cases or other more balanced arbitration clauses. The answer was "No".

2) Kanitz

Kanitz is interesting for several reasons. Most importantly, the arbitration provision at issue gave rise to a successful application for a stay of the proposed class proceeding. Second, it was held to have this effect despite the fact that arbitration clause not in the original user agreement but was added pursuant to a change in terms provisions in the original agreement. Third, in assessing the effectiveness of the notice of the amendments, which were made via a notice on Rogers' website, the court took account of the fact that the subject of the user agreement was a mode of doing business that had previously not generally been the subject of consideration and concluded that the analysis of the legal incidents of the relationship should bear in mind this new mode of business.

In *Kanitz*, subscribers for cable internet services brought a class action although the exact nature of the causes of action are not described in the decision. Rogers brought a motion to stay the class action on the basis of an arbitration provision. The history relating to that clause factored prominently in the assertion that to enforce it would be unconscionable.

The judgment does not disclose whether the forms of user agreement originally contained an arbitration provision. However, those agreements did contain a provision which permitted Rogers to amend the user agreement from time to time and established the process for doing including the form of notice of the amendment that Rogers was required to provide. It read:

> Amendment. We may change, modify, add or remove portions of this Agreement at any time. We will notify you of any changes to this Agreement by posting notice of such changes on the Rogers@Home web site, or sending notice via email or postal mail. Your continued use of the Service following notice of such change means that you agree to and accept the Agreement as amended. If you do

> not agree to any modification of this Agreement, you must immediately stop using Rogers@Home and notify us that you are terminating this Agreement.

In November, 2000, Rogers amended the user agreement to add the arbitration clause at issue. That clause provided:

> Arbitration. Any claim, dispute or controversy (whether in contract or tort, pursuant to statute or regulation, or otherwise, and whether pre-existing, present or future) arising out of or relating to: (a) this Agreement; (b) Rogers@Home; (c) oral or written statements, advertisements or promotions relating to this Agreement or to Rogers@Home or (d) the relationships which result from this Agreement (including relationships with third parties who are not signatories to this Agreement) (collectively the "Claim"), will be referred to and determined by arbitration (to the exclusion of the courts). You agree to waive any right you may have to commence or participate in any class action against us related to any Claim and, where applicable, you also agree to opt out of any class proceedings against us.
>
> If you have a Claim you should give written notice to arbitrate to us at the address specified in Section 6. If we have a claim we will give you notice to arbitrate at your address. Arbitration of Claims will be conducted in such forum and pursuant to such rules as you and we agree upon, and failing agreement will be conducted by one arbitrator pursuant to the laws and rules relating to commercial arbitration in the province in which you reside that are in effect on the date of the notice to arbitrate.

The amended version of the user agreement was then posted on the Rogers website and a notice of the fact that the user agreement had been amended was noted on the main page of the customer support site in the “News and Highlights” section. Further, in June 2001, an “iToolbox” it was sent to all subscribers which included a CD containing a copy of the customer support website which linked to the amended form of user agreement.

The Plaintiffs argued that there was no enforceable arbitration agreement because they had not agreed to submit their disputes to arbitration when they originally obtained the service and the purported amendments were ineffective because they were made without sufficient notice. Alternatively, they argued that certain exceptions in section 7 of Ontario’s *Arbitration Act* applied and that the stay should be refused because: (a) the arbitration agreement was unconscionable, (b) the subject matter of the action was not capable of arbitration under Ontario law and (c)

Although the court agreed that Rogers could have done more to bring the amendments to the attention of its customers, the issue was whether it had satisfied the notice requirements under the amendment clause. The Plaintiffs had argued, relying on *Tilden Rent-A-Car v. Clendenning*, that the structure of the website was cumbersome and effectively hid the amendments. The court rejected these arguments. The court concluded that the form of the amending provision placed an obligation on the customer to check the website from time to time for any amendments. The fact that there was no express notice of the amendments on the first page one viewed when visiting

the Rogers' website and that one might have to follow a link to the internet services section of the website to see the notice of the amendments and then further links to the actual text of the amendments and potentially follow a process of trial and error to find the relevant material was no objection. In reaching this conclusion the judge was cognizant that he was dealing with a different mode of doing business than has previously been considered by the courts. Given that the customers wished to avail themselves of an electronic environment and the associated goods, services, products and information, it is not unreasonable to have the legal attributes of their relationship with the entity providing that access defined and communicated through that electronic format.

The court also rejected an argument that the arbitration provision itself was hidden in the agreement. The clause was a separate defined clause, distinct from the other provisions, with its own heading in bold print and was displayed just like all the other provisions.

The Plaintiffs argued that the three tests of unconscionability were met because there was an inequality of bargaining power, some taking advantage of or preying upon a weaker party by a stronger party and a resulting improvident agreement. While the court agreed that there was an inequality of bargaining power, it rejected the other two aspects of the test.

The plaintiffs seem to have argued that these aspects of the test were satisfied because:

(a) the clause itself, including the reference to class actions, were evidence that it was implemented and intended to defeat class actions and that the defendant took advantage of the plaintiffs;

(b) no customer would arbitrate their claims because of the costs involved; and

(c) the prohibition against class actions defeats the public policy inherent in the *Class Proceedings Act.*

The court rejected each of these arguments.

The court did not accept that the mere presence of the clause was proof that the defendant had taken advantage of the plaintiffs. There was no evidence that the defendant preyed upon or took advantage of the plaintiffs in deciding to add the arbitration provision. Further, the Plaintiffs' assertion is problematic. In the United States, it is often exactly the opposite argument that is made. Plaintiffs often argue that the absence of any reference to the effect of the arbitration provision on recourse to class proceedings is what renders the clause unconscionable.

While the conclusion on the evidence was fortunate for the defendant in this case, it leaves unanswered a number of interesting questions: (a) how far will plaintiffs be permitted to go via cross-examination or other discovery processes in attempting to prove that the arbitration provision was implemented for this purpose? (b) what is the threshhold for satisfying this test? In other words, to what extent does the defeat of class actions have to be the motivation in the implementation of the clause? (c) what type of evidence would be required?

The state of the evidence was also the basis for rejecting the argument that the arbitration provision effectively precludes any remedy at all because no one would arbitrate such small claims. The court concluded there was no evidence to support that proposition. The court clearly accepted that significant arbitration costs might satisfy this test. However, there was no evidence any customer had tried to arbitrate and had been put off from doing so by reason of the expense nor any evidence of the expenses involved. Again, this raises interesting questions about how one might prove this fact.

In summary, the court concluded that the various concerns raised by the Plaintiffs could not be elevated to the level necessary to conclude that the arbitration clause in the user agreement was "sufficiently divergent from community standards of commercial morality" as to be unconscionable and therefore unenforceable.

C. LESSONS FOR AN EFFECTIVE ARBITRATION CLAUSE

Although both the legislative and judicial policy favours arbitration it is evident that the origin of the clause and its specific terms and effect will be very significant. It would be very easy to draft an arbitration clause which implements a process so illusory to the consumer that it might be considered unconscionable. A thorough review of the various issues regarding drafting a binding arbitration clause is beyond the scope of this paper. However, a review of the clauses at issue in *Huras* and *Kanitz* along with a sample arbitration provision suggested by two American authors reveal some of the issues. In “Drafting and Implementing of a Consumer Loan Arbitration Clause” (1999) 1113 PLI/Corp 655, Kaplinsky and Levin suggest the following language (which will be seen is very detailed):

> Arbitration Disclosure: By applying for [an account/credit/financing] with us, you agree that if a dispute of any kind arises out of your [account/credit/financing] Agreement or application for your account, either you or we or third parties involved can choose to have *659 that dispute resolved by binding arbitration as set forth in the Arbitration Provision below. If arbitration is chosen, it will be conducted pursuant to the Code of Procedure of the Arbitration Organization. If you have any questions concerning the Arbitration Organization, or wish to obtain a copy of their rules and forms, you may call (800) XXX-XXXX. IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, DISPUTE OR CONTROVERSY, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM, OR TO ENGAGE IN PRE-ARBITRATION DISCOVERY EXCEPT AS PROVIDED FOR IN THE ARBITRATION RULES. FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR’S DECISION WILL GENERALLY BE FINAL AND BINDING. OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION. IT IS IMPORTANT THAT YOU READ THE ENTIRE ARBITRATION PROVISION CAREFULLY BEFORE SIGNING THIS APPLICATION.

> Arbitration Provision: Any claim, dispute or controversy (whether in contract, regulatory, tort, or otherwise, whether pre-existing, present or future and including constitutional, statutory, common law, intentional tort and equitable claims) arising from or relating to this [account/credit/financing] Agreement or application for your account or advertisements, promotions, or oral or written statements related to the account, goods or services financed under the account or the terms of financing, the relationships which result from this Agreement (including, to the full extent permitted by applicable law, relationships with third parties who are not signatories to this Agreement or this Arbitration Provision) or the validity, enforceability or scope of this Arbitration Provision or the entire Agreement (collectively "Claim"), shall be resolved, upon the election of you or us or said third parties, by binding arbitration pursuant to this Arbitration Provision and the Code of Procedure of the Arbitration Organization in effect at the time the Claim is filed. A party who has asserted a claim in a lawsuit in court may elect arbitration with respect to any claim(s) subsequently asserted in that lawsuit by any other party or parties. The Code of Procedure, rules and forms of the Arbitration Organization may be obtained by calling (800) XXX- XXXX and all Claims shall be filed at any Arbitration Organization office. (Provided, however, that if for any reason the Arbitration Organization is unable or unwilling or ceases to serve as arbitration administrator, an equivalent national arbitration organization utilizing a similar code of procedure will be substituted by us.) There shall be no authority for any claims to be arbitrated on a class action basis. Further, an arbitration can only decide our or your Claim and may not consolidate or join the claims of other persons who may have similar claims. Any participatory arbitration hearing that you attend will take place in the federal judicial district of your residence. At your request, we will advance the first $____ of the filing and hearing fees for any Claim which you may file against us. The arbitrator will decide whether we or you will ultimately be responsible for paying any fees in connection with the arbitration. Unless inconsistent with applicable law, each party shall bear the expense of their respective attorneys', experts' and witness fees, regardless of which party prevails in the arbitration. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. Sections 1-16. The arbitrator shall apply applicable substantive law consistent with the FAA and applicable statutes of limitations and shall honor claims of privilege recognized at law. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. This Arbitration Provision shall survive repayment of your loan or extension of credit and termination of your account. If any portion of this Arbitration Provision is deemed invalid or unenforceable under the FAA, it should not invalidate the remaining portions of this Arbitration Provision.

Although the legislation in Canada is different and the specific wording of this provision is geared to the United States, many of the same drafting considerations would apply in Canada. From this clause and the United States and Canadian case law one can identify the following as relevant factors:

(1) the nature of the transaction;

(2) when and how the arbitration provision is included in a contract;

(3) the extent to which notice of the arbitration provision is given particularly if it is imposed via a change in terms notice;

(4) whether there is notice that by agreeing to arbitration one is giving up the right to a jury trial, to class actions, to full discovery and to appeal;

(5) the expense involved in the arbitration process selected, whether the expense and other cost implications of arbitration are disclosed and whether the consumer is required to bear these costs;

(5) where the arbitration is to take place;

(6) whether the arbitration organization is identified; and

(7) the ease of obtaining the rules of the arbitration organization and commencing an arbitration.

For example, a mandatory arbitration clause, imposed pursuant to a narrow change in terms provision, without sufficient notice of the change, which fails to set out the procedures for commencing arbitration, imposes substantial costs and fees to commence a proceeding, requires the arbitration to take place at a location far from the residence of the consumer, and otherwise making the process obscure and difficult, will likely be viewed as frustrating the dispute resolution process (as in *Huras*) and, therefore, unenforceable.

Notwithstanding the favourable climate in Canada for arbitration, care should be taken in drafting an arbitration clause to insure that the terms are not so onerous, or, on the other hand, so unspecific that a consumer could not reasonably invoke it.

One interesting question which appears to have been of great concern to American courts is whether the elimination of recourse to a class proceeding in and of itself is sufficient for a court to refuse to enforce an arbitration provision. In normal circumstances, recourse to arbitration does not prejudice a consumer's rights. However, if a mandatory arbitration agreement precludes resort to the *Class Proceedings Act*, then the consumer will have given up a potentially very valuable procedural tool for addressing small wrongs. This was a consideration which influenced the Court in *Huras* but was discounted somewhat in *Kanitz*. Future courts may also be prepared to release consumers from binding arbitration agreements in order to facilitate access to justice by way of a class proceeding.

D. CLASS ARBITRATIONS

In the United States, in addition to opposing the enforcement of arbitration provisions in consumer contracts, some plaintiffs have attempted to pursue class arbitrations or to consolidate

arbitrations where there are many arbitrations commenced between parties to an arbitration agreement with a single defendant. As is common in many areas of American law, the state courts are divided on this issue bu the division seems to turn largely on the presence or absence of local state rules permitting class arbitration. Several courts have concluded one may not compel class arbitration in the absence of an express provision in the arbitration agreement permitting class treatment: *Champ* v. *Siegel Trading Co.* 55 F.3d 269, *Randolph* v. *Green Tree Financial Corp.*, 991 F. Supp. 1410, *Howard* v. *Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, *Gammaro v. Thorp Consumer Discount Co.*, 828 F. Supp 673. However, in each of these cases there does not appear to have been state rules permitting class arbitration. In contrast, other courts have concluded that one may order class arbitration: *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F 2d. 1 (1st Cir. 1988), cert. den. 499 U.S. 1077 (1989); *Blue Cross of California* v. *Superior Court*, 67 Cal. App 4th 42. In these decisions, the forum states had rules which permitted class arbitration. The cases examined whether the application of the *Federal Arbitration Act* to the disputes and the absence of arbitration provisions in the agreements prevented the application of the local rules permitting class arbitration and concluded they did not. Finally, in *Merril Lynch, Pierce, Fenner & Smith* v. *Barchman*, 916 F. Supp. 845, the court refused to decide whether the arbitration rules applicable to the arbitrations of eight claimants permitted consolidation of their claims into a single proceeding, leaving that question as one within the jurisdiction of the arbitrators themselves.

In the result, the question of whether there may be class arbitrations turns largely on whether the agreement between the parties expressly excludes class arbitrations, an interpretation of the specific rules applicable to the arbitration and any other local laws which might be said to permit class or consolidated arbitrations. American writers have suggested that to avoid consolidation or class arbitration, it would be prudent to include a clause in the arbitration agreement which expressly excludes class actions. In addition, it might also be prudent to include a choice of law provision that does not permit consolidation or class arbitrations.

Although there has been no express consideration of this issue, the court in *Kanitz*, suggested, without deciding that a "soft" class action of sorts might be available via consolidation of arbitrations. This was unfortunate given the lack of a proper factual foundation and full argument on the issue. The nature and extent to which this might be possible will have to await a case in which it is squarely raised.

E. ARE ARBITRATION PROVISIONS ALWAYS WARRANTED?

The foregoing discussion has in some ways avoided an important threshold question: is an arbitration provision necessary or desirable? It is conceivable that in some situations one might prefer to resolve a dispute with a large number of consumers by way of a global determination ie. by way of a class action, summary judgment motion or a determination of a point of law. In the face of a mandatory arbitration clause, these options would be difficult without a further agreement with the customers involved. In addition, there may disputes which for tactical or procedural reasons one would prefer to battle in court. The point is that there must be careful consideration of the nature of the relationship and the disputes most likely to arise, followed by an assessment of the preferred means of resolving those disputes given the costs and benefits of the alternatives, prior to the wholesale adoption of a broad and all encompassing arbitration provision.

III. CHOICE OF FORUM AND LAW

Another intriguing prospect in limiting one's exposure to class proceedings is suggested by the decision of Mr. Justice Winkler in *Rudder* v. *Microsoft Corp.* in which it was held that a provision in the agreements accepted by subscribers to the Microsoft Network that the law to be applied was that of Washington State and that the parties consented to the exclusive jurisdiction and venue of courts in King County, Washington, precluded a class proceeding in Ontario.

In *Rudder*, the plaintiff sought damages on behalf of all Canadian residents who subscribed for the provision of Internet access or information or services from or through The Microsoft Network since September 1, 1995 for breach of contract, breach of fiduciary duty, misappropriation and punitive damages for allegedly rendering and collecting charges in breach of contract.

Potential members of The Microsoft Network are required to electronically execute a Member Agreement prior to receiving services. Each Member Agreement contained the following term:

> 15.1 This Agreement is governed by the laws of the State of Washington, U.S.A., and you consent to the exclusive jurisdiction and venue of courts in King County, Washington, in all disputes arising out of or relating to your use of your MSN membership.

Relying on this clause, the defendant applied for a permanent stay. As noted by the Court, although the plaintiffs relied on the Member Agreement as the basis of their cause of action, they argued that the court ought not to enforce that clause because it had not been read and thus had no notice of the clause and that Washington courts were not appropriate for the conduct of the lawsuit.

Mr. Justice Winkler enforced the forum selection clause and issued the stay of proceedings. The two principle reasons in this conclusion was the general favour the law accords forum selection clauses and the absence of any strong cause to override the agreement. These elements were taken from the judgment of Madam Justice Huddart in *Sabaria* v. "*Oceanic Mindoro*" (1996), 26 B.C.L.R. (3d) 143 at 152 - 154 (C.A.), leave to appeal denied [1997] S.C.C.A. No. 69.

The plaintiff made a number of arguments akin to those made in the ticket cases of which *Tilden* v. *Clendenning* is one of the most familiar. The plaintiff complained that the format of the Member Agreement when viewed on a computer rendered the forum selection clause "small print" which should not be enforced. The specific complaint was that the agreement could not be viewed in its entirety on the computer screen but that one must scroll down to see the remaining terms including the forum selection clause. Mr. Justice Winkler concluded that the contract was readable, the terms were all presented in the same format (though some provisions were all capitalized) and no more difficult to read than any other, plain language was used, the terms were presented twice during the sign-up process and subscribers were required to indicate their acceptance of the terms. The fact that one must scroll to see all the terms was no different than an agreement comprised of more than one page which requires one to turn the page to see the entire document.

Mr. Justice Winkler stated:

> It is plain and obvious that there is no factual foundation for the plaintiff's assertion that any term of the Membership Agreement was analogous to "fine print" in a written contract. What is equally clear is that the plaintiffs seek to avoid the consequences of specific terms of their agreement while at the same time seeking to have others enforced. Neither the form of this contract not its manner of presentation to potential members are so aberrant as to lead to such an anomalous result. To give effect to the plaintiffs' argument would, rather than advancing the goal of "commercial certainty", to adopt the words of Huddart J.A. in Sarabia, move this type of electronic transaction into the realm of commercial absurdity.

Having found that the allegations that the forum selection was not "fine print" and could not be avoided on that basis, Mr. Justice Winkler went on to consider whether he should nevertheless exercise his discretion to refuse to enforce the forum selection clause. In doing so, he summarized the factors a court will consider as including:

(1) in which jurisdiction is the evidence on issues of fact situated, and the effect of that on the convenience and expense of trial in either jurisdiction;
(2) whether the law of the foreign country applies and its differences from the domestic law in any respect;
(3) the strength of the jurisdictional connections to the parties;
(4) whether the defendants desire to enforce the forum selection clause is genuine or merely an attempt to obtain a procedural advantage;
(5) whether the plaintiffs will suffer prejudice by bringing their claim in a foreign court because they will be
    (a) deprived of security for the claim; or
    (b) be unable to enforce any judgment obtained; or
    (c) be faced with a time-bar not applicable in the domestic court; or
    (d) unlikely to receive a fair trial.

The plaintiffs could not establish "good cause" here because:

(1) most of the activities in relation to the provision of the services at issue were carried out in King County, Washington including the business management of accounts, member authentication, policy-making, billing and customer service;
(2) the computers to provide the service were located in King County;
(3) the documents required as evidence were likely in King County;
(4) the MSN witnesses were located in King County;
(5) there was no obvious connection of the class to Ontario;
(6) the law to be applied regardless of where the action was tried was the law of Washington;
(7) class proceedings were available in the state and federal courts in Washington; and
(8) no suggestion the plaintiffs could not get a fair trial in Washington.

In the result, the choice of forum clause was enforced and the proceedings in Ontario stayed.

This judgment raises a number of interesting issues.

The first is the difficulties posed in a class proceeding by standard form consumer contracts where the plaintiff seeks to avoid the provisions contained therein. The plaintiff in *Rudder* sought first to avoid the choice of forum clause on the basis that it was "fine print" and not enforceable. Apart from the difficulty evident in *Rudder* in demonstrating that the clause is "fine print", an attempt to avoid contractual provisions might prevent certification of a class proceeding in any event as was the case in *Koo* v. *Canadian Airlines International*.

In the *Koo* case (in which the author acted for Canadian), the plaintiff was seeking damages for all persons who had been denied boarding on a Canadian Airlines flight for the prior six years. For reasons which I will not detail, the plaintiff argued that certain terms incorporated by reference into the contract of carriage by the wording contained on the ticket stock used by Canadian was unenforceable and relied on a number of ticket cases like *Tilden* v. *Clendenning*. One of the reasons the court refused certification was the fact that the determination of whether a clause may be avoided by virtue of the ticket cases requires an individual assessment of the circumstances of the making of the contract including the knowledge and experience of the plaintiff. As a result, the very same contractual provision may be enforced in some circumstances and not in others.

The same difficulty likely arises in this context. If one wishes to avoid a choice of forum clause on the basis of the ticket or "fine print" cases, it likely raises individual inquiries as to the very nature of the contract which preclude certification. It is interesting that this does not seem to have been raised in any of the American decisions where plaintiffs have sought to avoid the effect of mandatory arbitration provisions to pursue a class action.

The second issue is the potential availability of choice of forum clauses in other areas given the discretion to refuse to enforce them where there is a "strong cause".

As tempting as it might be for defendants to rush out and draw choice of forum provisions for all their contracts, there are clearly some limits to their application and they may not be desirable in all circumstances.

It is evident that there was a compelling rationale for Microsoft to include the term that it did in relation to the MSN services - the submission to the courts of King County had a rational connection (for lack of a better term) with the contract between the parties. However, the question is how much farther may one get from the circumstances of *Rudder* and still remain on the enforceable side of the "strong cause" test? For example, would a choice of forum clause be enforceable:

(1) if the facts were the same as in Rudder but class actions were not available under the rules of the forum court? or

(2) if the operation of the MSN services were not as centralized?

It must also be recognized that it is not necessarily preferable to insert a choice of forum clause in all cases for reasons similar to those in the discussion of arbitration provisions. Defendants in class proceedings are often faced with multiple class actions in multiple jurisdictions. In some cases this would be preferable to one or more class actions in a single jurisdiction.

The effect of choice of forum clauses in class proceedings is obviously not settled. It is clear that the decision in *Rudder* is not a wholesale invitation to forum selection clauses designating the least favourable forum regardless of its connection to the relationship between the parties. It is equally clear however that in appropriate circumstances, potential defendants may be able to exert greater control over where they are sued and need not necessarily be subjected to multiple class proceedings in multiple jurisdictions with the attendant costs and inconvenience.

IV. CONCLUSIONS

Although not suited to all circumstances, carefully worded and implemented arbitration, choice of law or forum selection clauses can form part of an overall risk management strategy to manage exposure to class actions.