SUPREME COURT OF CANADA

CITATION: Dell Computer Corp. *v.* Union des consommateurs, [2007] 2 S.C.R. 801, 2007 SCC 34

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BETWEEN:

Dell Computer Corporation
Appellant
and
Union des consommateurs and Olivier Dumoulin
Respondents
- and -
Canadian Internet Policy and Public Interest Clinic, Public Interest Advocacy Centre, ADR Chambers Inc., ADR Institute of Canada, Inc., and London Court of International Arbitration
Interveners

OFFICIAL ENGLISH TRANSLATION: Reasons of Deschamps J.

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 121)	Deschamps J. (McLachlin C.J. and Binnie, Abella, Charron and Rothstein JJ. concurring)
JOINT DISSENTING REASONS: (paras. 122 to 242)	Bastarache and LeBel JJ. (Fish J. concurring)

Dell Computer Corporation *Appellant*

v.

Union des consommateurs and Olivier Dumoulin *Respondents*

and

Canadian Internet Policy and Public Interest Clinic, Public Interest Advocacy Centre, ADR Chambers Inc., ADR Institute of Canada and London Court of International Arbitration *Interveners*

Indexed as: Dell Computer Corp. *v.* Union des consommateurs

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File No.: 31067.

2006: December 13; 2007: July 13.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for quebec

Private international law — Jurisdiction of Quebec courts — Arbitration — Sale of computer equipment over Internet — Arbitration clause contained in terms and conditions of sale — Consumer instituting class action against seller — Article of book of Civil Code on private international law providing that Quebec authority has jurisdiction to hear action involving

consumer contract if consumer has domicile or residence in Quebec, and that waiver of that jurisdiction by consumer may not be set up against consumer — Whether arbitration clause can be set up against consumer — Whether arbitration clause contains foreign element that renders rules on international jurisdiction of Quebec authorities applicable — Civil Code of Québec, S.Q. 1991, c. 64, art. 3149.

Arbitration — Review of application to refer dispute to arbitration — Whether arbitrator or court has jurisdiction to rule first on parties' arguments on validity or applicability of arbitration clause — Limits of intervention by court in case involving arbitration clause — Code of Civil Procedure, R.S.Q., c. C-25, arts. 940.1, 943.

Contracts — Consumer contract or contract of adhesion — External clause — Electronic commerce — Validity of arbitration clause — Whether arbitration clause that can be accessed by means of hyperlink in contract entered into via Internet is external clause — Civil Code of Québec, S.Q. 1991, c. 64, art. 1435.

The Dell company sells computer equipment retail over the Internet. It has its Canadian head office in Toronto and a place of business in Montreal. On April 4, 2003, the order pages on its English-language Web site indicated prices of $89 rather than $379 and of $118 rather than $549 for two models of handheld computers. On April 5, on being informed of the errors, Dell blocked access to the erroneous order pages through the usual address. D, circumventing the measures taken by Dell by using a deep link that enabled him to access the order pages without following the usual route, ordered a computer at the lower price indicated there. Dell then posted a price correction

notice and at the same time announced that it would not process orders for computers at the prices of $89 and $118. When Dell refused to honour D's order at the lower price, the Union des consommateurs and D filed a motion for authorization to institute a class action against Dell. Dell applied for referral of D's claim to arbitration pursuant to an arbitration clause contained in the terms and conditions of sale, and dismissal of the motion for authorization to institute a class action. The Superior Court and the Court of Appeal held, for different reasons, that the arbitration clause could not be set up against D.

Held (Bastarache, LeBel and Fish JJ. dissenting): The appeal should be allowed. D's claim should be referred to arbitration and the motion for authorization to institute a class action should be dismissed.

Per McLachlin C.J. and Binnie, Deschamps, Abella, Charron and Rothstein JJ.: To ensure the internal consistency of the *Civil Code of Québec*, it is necessary to adopt a contextual interpretation that limits the scope of the provisions of the title on the international jurisdiction of Quebec authorities to situations with a relevant foreign element. Since the prohibition in art. 3149 C.C.Q. against waiving the jurisdiction of Quebec authorities is found in that title, it applies only to situations with such an element. The foreign element must be a point of contact that is legally relevant to a foreign country, which means that the contact must be sufficient to play a role in determining whether a court has jurisdiction. An arbitration clause is not in itself a foreign element warranting the application of the rules of Quebec private international law. The neutrality of arbitration as an institution is one of the fundamental characteristics of this alternative dispute resolution mechanism. Unlike the foreign element, which suggests a possible connection with a

foreign state, arbitration is an institution without a forum and without a geographic basis. The parties to an arbitration agreement are free, subject to any mandatory provisions by which they are bound, to choose any place, form and procedures they consider appropriate. The choice of procedure does not alter the institution of arbitration. The rules become those of the parties, regardless of where they are taken from. As a result, an arbitration that contains no foreign element in the true sense of the word is a domestic arbitration. In the instant case, the facts that the applicable rules of the American arbitration organization provide that arbitrations will be governed by a U.S. statute and that English will be the language used in the proceedings are not relevant foreign elements for purposes of the application of Quebec private international law. [3] [26] [50-53] [56-58]

In a case involving an arbitration agreement, any challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator in accordance with the competence-competence principle, which has been incorporated into art. 943 C.C.P. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception, which is authorized by art. 940.1 C.C.P., is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record. Before departing from the

general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. In the case at bar, the parties have raised questions of law relating to the application of the provisions on Quebec private international law and to whether the class action is of public order. There are a number of other arguments, however, that require an analysis of the facts in order to apply the law to this case, such as those relating to the existence of a foreign element and to the external nature of the arbitration clause. Consequently, the matter should have been referred to arbitration. [84-88]

The arbitration clause in issue, which could be accessed by means of a hyperlink in a contract entered into via the Internet, is not an external one within the meaning of art. 1435 C.C.Q. and is valid. Analogously to paper documents, some Web documents contain several pages that can be accessed only by means of hyperlinks, whereas others can be viewed by scrolling down them on the computer's screen. The traditional test of physical separation, which is applied to determine whether contractual stipulations in paper documents are external, cannot be transposed without qualification to the context of electronic commerce. To determine whether clauses on the Internet are external clauses, therefore, it is necessary to consider another rule that is implied by art. 1435 C.C.Q.: the precondition of accessibility. This precondition is a useful tool for the analysis of an electronic document. Thus, a clause that requires operations of such complexity that its text is not reasonably accessible cannot be regarded as an integral part of the contract. Likewise, a clause contained in a document on the Internet to which a contract on the Internet refers, but for which no hyperlink is provided, will be an external clause. It is clear from the interpretation of art. 1435 C.C.Q. and from the principle of functional equivalence that underlies the *Act to establish a legal*

framework for information technology that access to the clause in electronic format must be no more difficult than access to its equivalent on paper. In the instant case, the evidence shows that the consumer could access the page of Dell's Web site containing the arbitration clause directly by clicking on the highlighted hyperlink entitled "Terms and Conditions of Sale". This link reappeared on every page the consumer accessed. When the consumer clicked on the link, a page containing the terms and conditions of sale, including the arbitration clause, appeared on the screen. From this point of view, the clause was no more difficult for the consumer to access than would have been the case had he or she been given a paper copy of the entire contract on which the terms and conditions of sale appeared on the back of the first page. [94] [96-97] [99-101]

Although the class action is of public interest, it is a procedure, and its purpose is not to create a new right. The mere fact that D decided to bring the matter before the courts by means of a class action rather than an individual action does not affect the admissibility of his action. An argument based on the class action being of public order cannot therefore be advanced to prevent the court hearing the action from referring the parties to arbitration. [105-106] [108]

Since the facts triggering the application of the arbitration clause occurred before the coming into force of s. 11.1 of the *Consumer Protection Act*, which prohibits any stipulation that obliges a consumer to refer a dispute to arbitration, that provision does not apply to the facts of this case. [111] [120]

Per Bastarache, LeBel and Fish JJ. (dissenting): One should not attach any significance to the structure of the *Civil Code of Québec* or the *Code of Civil Procedure* when interpreting the

substantive provisions under review here. The coherence of the regime is not dependent on the particular Book of the C.C.P. that deals with arbitrations, or the particular title and Book of the C.C.Q. containing art. 3149. The C.C.Q. itself constitutes an ensemble which is not meant to be parcelled out into chapters and sections that are not interrelated. [141]

Quebec's acceptance of jurisdiction clauses is rooted in the principle of primacy of the autonomy of the parties. Both art. 3148, para. 2 C.C.Q. and art. 940.1 C.P.C. can be interpreted as giving practical effect to that principle and are consistent with the international movement towards harmonizing the rules of jurisdiction. On that point, art. 940.1 C.C.P. seems clear: if the parties have an agreement to arbitrate on the matter of the dispute, on the application of either of the parties, the court "shall" refer the parties to arbitration, unless the case has been inscribed on the roll or the court finds the agreement to be null. The reference to the nullity of the agreement is clearly also meant to cover the situation where the arbitration agreement, without being null, cannot be set up against the applicant. By using the term "shall", the legislator has indicated that the court has no discretion to refuse, on the application of either of the parties, to refer the case to arbitration when the appropriate conditions are met. [142] [144] [149]

The courts below were correct to fully consider D's challenge to the validity of the arbitration agreement based on the application of art. 3149 C.C.Q. Although art. 940.1 C.C.P. is not clear regarding the extent of the analysis the court should undertake, a discretionary approach favouring resort to the arbitrator in most instances would best serve the legislator's clear intention to promote the arbitral process and its efficiency, while preserving the core supervisory jurisdiction of the Superior Court. When seized with a declinatory exception, a court should rule on the validity

of the arbitration agreement only if it is possible to do so on the basis of documents and pleadings filed by the parties without having to hear evidence or make findings about its relevance and reliability. That said, courts may still exercise some discretion when faced with a challenge to the validity of an arbitration agreement regarding the extent of the review they choose to undertake. In some circumstances, particularly in those that truly merit the label "international commercial arbitration", it may be more efficient to submit all questions regarding jurisdiction for the arbitrator to hear at first instance. In other circumstances, such as in the present case where provisions of the C.C.Q. must be interpreted, it would seem preferable for the court to fully entertain the challenge to the arbitration agreement's validity. [176] [178]

The arbitration agreement at issue here cannot be set up against D because it constitutes a waiver of the jurisdiction of the Quebec authorities under art. 3149 C.C.Q. In determining whether art. 3149 applies, it is necessary to ask whether the jurisdiction chosen in the contract through a forum selection or arbitration clause is a "Québec authority". If that jurisdiction is not a "Québec authority", art. 3149 comes into play to permit the consumer or worker to bring his or her dispute before a "Québec authority". An arbitration clause is itself sufficient to trigger the application of art. 3148, para. 2, and hence the exceptions that apply to it, including art. 3149. Forum selection and arbitration clauses constitute on their own the requisite foreign element for these rules of private international law to be engaged. A contractual arbitrator cannot be a "Québec authority" for the purposes of art. 3149. A "Québec authority" must mean a decision-maker situated in Quebec holding its authority from Quebec law. No arbitrator who is bound by U.S. law could be a "Québec authority". Moreover, one would think a "Québec authority" would be required to provide arbitration services in French, whereas here, the American arbitration body's code of procedure

provides that all arbitrations will be in English. Finally, it seems completely incongruous that in order to begin the process attributing to the purported "Québec authority" power to hear the dispute, the consumer must first contact an American institution, located in the U.S., that is in charge of organizing the arbitration. [152] [184] [200] [204] [212-216]

The argument that a consumer dispute could never be arbitrated because it would constitute an arbitration over matter of public order must be rejected. Article 2639 C.C.Q. deals with the kind of disputes that cannot be submitted to arbitration, namely "[d]isputes over the status and capacity of persons, family matters or other matters of public order". A consumer dispute does not constitute another matter of public order. Furthermore, the fact that certain *Consumer Protection Act* rules to be applied by the arbitrator are in the nature of public order does not constitute a bar for the hearing of the case by an arbitral tribunal. Finally, the fact that the *Consumer Protection Act* and the C.C.Q. are silent as to the arbitrability of a consumer dispute suggests its permissibility. An act should only be interpreted as excluding the possibility of arbitration if it is clear from it that this is what the legislator intended. No provisions of the *Consumer Protection Act* or the C.C.Q. indicate that this is the case for consumer disputes. [218-221]

The argument that the principle of the autonomy of the parties has no bearing on this case as the arbitration clause is found in a contract of adhesion must also fail as it is based on the false assumption that an adhering party does not truly consent to be bound by the obligations contained in a contract of adhesion. Therefore, it is not sufficient for the respondents to raise the fact that the arbitration clause is found in a contract of adhesion in order to demonstrate that D should not be bound by it. Moreover, an arbitration clause cannot be said to be abusive, and

therefore void, only because it is found in a consumer contract or in a contract of adhesion. [227-229]

The arbitration agreement is not null on the ground that it is found in an external clause that was not expressly brought to the attention of D as required under art. 1435 C.C.Q. While the hyperlink to the Terms and Conditions of Sale was in smaller print, located at the bottom of the Configurator Page, this is consistent with industry standards. It can therefore be concluded that the hyperlink was evident to D. Furthermore, the Configurator Page contained a notice that the sale was subject to the Terms and Conditions of Sale, available by hyperlink, thus bringing the Terms and Conditions expressly to D's attention. [152] [238]

The recent amendment to the *Consumer Protection Act* does not apply to this case as the arbitration agreement was concluded before the new provision came into force and the general presumption against retroactivity has not been rebutted. [162]

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R.J.Q. 2783; *GreCon Dimter inc. v. J.R. Normand inc.*, [2005] 2 S.C.R. 401, 2005 SCC 46; *Laurentienne-vie, compagnie d'assurance inc. v. Empire, compagnie d'assurance-vie*, [2000] R.J.Q. 1708; *Fondation M. v. Banque X.*, BGE 122 III 139 (1996); *C.C.I.C. Consultech International v. Silverman*, [1991] R.D.J. 500; *Banque Nationale du Canada v. Premdev inc.*, [1997] Q.J. No. 689 (QL); *Acier Leroux inc. v. Tremblay*, [2004] R.J.Q. 839; *Robertson Building Systems Ltd. v. Constructions de la Source inc.*, [2006] Q.J. No. 3118 (QL), 2006 QCCA 461; *Compagnie nationale algérienne de navigation v. Pegasus Lines Ltd. S.A.*, [1994] Q.J. No. 329 (QL); *Kingsway Financial Services Inc. v. 118997 Canada inc.*, [1999] Q.J. No. 5922 (QL); *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113; *Dalimpex Ltd. v. Janicki* (2003), 228 D.L.R. (4th) 179; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

By Bastarache and LeBel JJ. (dissenting)

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APPEAL from a judgment of the Quebec Court of Appeal (Mailhot and Morissette JJ.A., and Lemelin J. (*ad hoc*)), [2005] R.J.Q. 1448, [2005] Q.J. No. 7011 (QL), 2005 QCCA 570, affirming a decision of Langlois J., J.E. 2004-457, [2004] Q.J. No. 155 (QL). Appeal allowed, Bastarache, LeBel and Fish JJ. dissenting.

Mahmud Jamal, *Anne-Marie Lizotte* and *Dominic Dupoy*, for the appellant.

Ronald Bourguignon, *Yves Lauzon* and *Careen Hannouche*, for the respondents.

Mistrale Goudreau and *Philippa Lawson*, for the interveners the Canadian Internet Policy and Public Interest Clinic and the Public Interest Advocacy Centre.

J. Brian Casey, *Janet E. Mills* and *John Pirie*, for the intervener ADR Chambers Inc.

Stefan Martin and *Margaret Weltrowska*, for the intervener ADR Institute of Canada.

Pierre Bienvenu, *Frédéric Bachand* and *Azim Hussain*, for the intervener the London Court of International Arbitration.

English version of the judgment of McLachlin C.J. and Binnie, Deschamps, Abella, Charron and Rothstein JJ. delivered by

1 DESCHAMPS J. — The expansion of trade is without question spurring the development of rules governing international relations. Alternative dispute resolution mechanisms, including arbitration, are among the means the international community has adopted to increase efficiency in economic relationships. Concomitantly, in Quebec, recourse to arbitration has increased greatly owing this mechanism's flexibility when compared with the traditional justice system.

2 This appeal relates to the debate over the place of arbitration in Quebec's civil justice system. More specifically, the Court is asked to consider the validity and applicability of an arbitration agreement in the context of a domestic legal dispute under the rules of Quebec law and international law, and to determine whether the arbitrator or a court of law should rule first on these issues.

3 To ensure the internal consistency of the *Civil Code of Québec*, S.Q. 1991, c. 64

("C.C.Q."), it is necessary to adopt a contextual interpretation that limits the scope of the provisions of the title on the international jurisdiction of Quebec authorities to situations with a relevant foreign element. The prohibition in art. 3149 C.C.Q. against waiving the jurisdiction of Quebec authorities is found in that title and accordingly applies only to situations with a relevant foreign element. Since arbitration is in essence a neutral institution, it does not in itself have any foreign element. An arbitration tribunal has only those connections that the parties to the arbitration agreement intended it to have. The independence and territorial neutrality of arbitration are characteristics that must be promoted and preserved in order to foster the development of this institution. In the case at bar, the arbitration clause was not prohibited by any provision of Quebec legislation at the time it was invoked. Consequently, for the reasons that follow, I would allow the appeal, refer Mr. Dumoulin's claim to arbitration and dismiss the motion for authorization to institute a class action.

1. Facts

4 Dell Computer Corporation ("Dell") is a company that sells computer equipment retail over the Internet. It has its Canadian head office in Toronto and a place of business in Montreal. In the late afternoon of Friday, April 4, 2003, the order pages on Dell's English-language Web site indicated a price of $89 rather than $379 for the Axim X5 300 MHz handheld computer and a price of $118 rather than $549 for the Axim X5 400 MHz handheld computer. The pages of the site where the products were advertised listed the correct prices, however. On April 5, on being informed of the errors, Dell blocked access to the erroneous order pages through the usual address, although the pages were not withdrawn from the site. On the morning of April 7, Olivier Dumoulin, a Quebec consumer, was told about the prices by an acquaintance who sent him the detailed links, which the

parties described as “deep links”. These links made it possible to access the order pages without following the usual route, that is, through the home page and the advertising pages. In short, the deep links made it possible to circumvent the measures taken by Dell. Using a deep link, Mr. Dumoulin ordered a computer at the price of $89. Shortly after Mr. Dumoulin placed his order, Dell corrected the two price errors. That same day, Dell posted a price correction notice and at the same time announced that it would not process orders for computers at the prices of $89 and $118. At trial, a Dell employee testified that over the course of that weekend, 354 Quebec consumers had placed a total of 509 orders for these Axim computers, whereas on an average weekend, only one to three of them were sold in Quebec.

5 On April 17, Mr. Dumoulin put Dell in default, demanding that it honour his order at the price of $89. When Dell refused, the Union des consommateurs and Mr. Dumoulin (“Union”) filed a motion for authorization to institute a class action against Dell. Dell applied for referral of Mr. Dumoulin’s claim to arbitration pursuant to an arbitration clause contained in the terms and conditions of sale, and dismissal of the motion for authorization to institute a class action. The Union contended that the arbitration clause was null and that, in any event, it could not be set up against Mr. Dumoulin.

2. Judicial History

6 The trial judge noted that according to the arbitration clause, arbitration proceedings were to be governed by the rules of the National Arbitration Forum (“NAF”), which is [TRANSLATION] “located in the United States”. This led her to conclude that there was a foreign

element for purposes of the rules of Quebec private international law and that the prohibition under art. 3149 C.C.Q., as interpreted in *Dominion Bridge Corp. v. Knai*, [1998] R.J.Q. 321 (C.A.), should apply. In her view, the arbitration clause could not be set up against Mr. Dumoulin. She then considered the criteria for instituting a class action and authorized the action against Dell ([2004] Q.J. No. 155 (QL)).

7 The Court of Appeal dismissed Dell's appeal from that decision ([2005] R.J.Q. 1448, 2005 QCCA 570). It began by expressing its disagreement with the Superior Court's application of the rules of Quebec private international law. According to the Court of Appeal, this was not a situation in which the consumer had waived the jurisdiction of Quebec authorities. It noted that the parties had agreed that the dispute was governed by the laws applicable in Quebec and that the arbitration could take place in Quebec. In its view, the instant case could be distinguished from *Dominion Bridge*, a case in which a foreign element had triggered the application of art. 3149 C.C.Q. However, the Court of Appeal concluded that the arbitration clause was external to the contract. Since Dell had not proven that the clause had been brought to the consumer's attention, the effect of art. 1435 C.C.Q. was that the clause could not be set up against him. The Court of Appeal then briefly discussed whether an issue arising under the *Consumer Protection Act*, R.S.Q., c. P-40.1, could be referred to arbitration and held that the Quebec legislature did not intend to preclude arbitration in such matters. Finally, it discussed, but did not accept, the argument that the class action should take precedence over arbitration, mentioning that the disputes that may not be submitted to arbitration are identified in the *Civil Code of Québec* and certain specific statutes.

8 On November 9, 2006, the Quebec Minister of Justice tabled Bill 48, *An Act to amend*

the Consumer Protection Act and the Act respecting the collection of certain debts (2nd Sess., 37th Leg.) ("Bill 48"), in the National Assembly. One of the Bill's provisions prohibits obliging a consumer to refer a dispute to arbitration. Bill 48, which came into force the day after the hearing of the appeal to this Court, does not include any transitional provisions applicable to this case.

3. Positions of the Parties

9 In this Court, the parties have reiterated the arguments raised in the Superior Court and the Court of Appeal. More specifically, Dell submits that the arbitration clause is not prohibited by any provision of Quebec legislation. It therefore is not contrary to public order, is not prohibited by art. 3149 C.C.Q., and is neither external nor abusive. Dell also contends that the courts are limited to conducting a *prima facie* analysis of the validity of an arbitration clause and must leave it to the arbitrator to consider the clause on the merits. According to Dell, this approach, which is based on the "competence-competence" principle, was implicitly adopted by this Court in *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178, 2003 SCC 17, and the Superior Court should have applied it in the case at bar and referred the matter to an arbitrator to assess the validity of the clause based on the Union's submissions. The Union did not express an opinion on the degree of scrutiny to which the validity of the arbitration clause should be subject but did take a position, contrary to Dell's, on every other issue.

10 After Bill 48 came into force, the Court asked the parties to make written submissions regarding its applicability to the instant case. Dell raised three arguments in support of its position that Bill 48 does not affect the case: that the Bill does not have retroactive effect; that the new

legislation cannot apply to disputes already before the courts; and that Dell had a vested right to the arbitration procedure provided for in the contract with Mr. Dumoulin. The Union advanced only one argument: that the provision on arbitration clauses merely confirms an existing prohibition.

11 The parties have raised many issues. In my view, the most significant one in the context of this case concerns the application of art. 3149 C.C.Q. This question is not only a potentially decisive one for the parties, but also one that involves the ordering of the rules in the *Civil Code of Québec*; the answer to it will have repercussions on the interpretation of the other provisions of the title in which this article appears and on the interpretation of the Code in general. The analysis of this issue will lead me to consider the influence of international rules on Quebec law. These rules are also relevant to another issue: whether the competence-competence principle applies to the review of the application to refer the dispute to arbitration. The conclusion I will reach is that an arbitrator has jurisdiction to assess the validity and applicability of an arbitration clause and that, although there are exceptions, the decision regarding jurisdiction should initially be left to the arbitrator. However, in light of the state of the case, I will discuss all the issues that have been raised.

4. Application of Art. 3149 C.C.Q.

12 It will be helpful to reproduce the provision in issue and discuss its context. It reads as follows:

> **3149.** A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his

> domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

This provision appears in Title Three, entitled "International Jurisdiction of Québec Authorities", which is found in Book Ten of the *Civil Code of Québec*, entitled "Private International Law". The Court must decide whether it applies in the case at bar. In my view, it is applicable only where there is a relevant foreign element that justifies resorting to the rules of Quebec private international law. I will explain why.

4.1 *Context of Application of the Rules on the International Jurisdiction of Quebec Authorities*

4.1.1 Purpose and Consequences of the Codification of Private International Law in the *Civil Code of Québec*

13 When the Quebec legislature began the reform of the civil law in the mid-twentieth century, it did so in a way that was consistent with the civil law tradition in its purest form. As Professor Crépeau writes:

> [TRANSLATION] The Civil Code is an organic, ordered, structured, harmonious and cohesive whole that contains the substantive subject matters of private law, governing, in the civil law tradition, the legal status of persons and property, relationships between persons, and relationships between persons and property.
>
> (P.-A. Crépeau, "Une certaine conception de la recodification", in *Du Code civil du Québec: Contribution à l'histoire immédiate d'une recodification réussie* (2005), 23, at p. 40)

14 The codification process therefore entailed a reflection on all the principles and on how

to organize them in one central document with a view to simplifying and clarifying the rules, and thus making them more accessible. The organization of rules is an essential feature of codification. Professors Brierley and Macdonald describe the impact of this feature on the mode of presentation and the interpretation of the *Civil Code* as follows:

> A number of assumptions as to form underpin a Civil Code. Their common character is linked to notions of rationality and systematization, nicely captured by Weber's expression — formal rationality. To say that a Civil Code is, and must be understood as, systematic and rationally organized implies that it reflects a consciously chosen, integrated design for presenting the law that has been consistently followed. . . .
>
> . . .
>
> The rational and systematic character of the Code also bears on its mode of presentation. One of the central features of the Code is its taxonomic structure. This affects both its organization and its drafting style. Just as the very existence of a Code labelled "Civil Code" presupposes a larger legal universe that can be divided and subdivided — public law, private law; and, within private law, procedure and substance; and, within substantive private law, commercial law and civil law — the same taxonomic approach is carried through into the Code itself. Its primary division is into large books — for example, persons, property, modes of acquisition of property, commercial law — each of which is subdivided into titles. Within these titles the Code is subdivided into chapters that, in turn, are divided into sections and sometimes into subsections. All the concepts relating to a given area of the law are thus logically derived from first principles, meticulously developed, and systematically ordered. . . .
>
> In this architectonic mode of presentation, the inventory of subjects selected for inclusion and the manner of their placement serve to define the range of meaning that each of the subjects so included may have. The initial organizational choices bear directly on the manner in which the Code adapts to changing circumstances. . . .
>
> (J. E. C. Brierley and R. A. Macdonald, *Quebec Civil Law: An Introduction to Quebec Private Law* (1993), at pp. 102-4)

15 In his commentaries on the *Civil Code of Québec*, Quebec's Minister of Justice confirmed that the Code [TRANSLATION] "is a structured and hierarchical statutory scheme":

Commentaires du ministre de la Justice (1993), vol. I, at p. VII. For this reason, it cannot be assumed that the jurists who took part in the reform placed the provisions of the *Civil Code of Québec* in one title or another indiscriminately or without a concern for coherence. A codification process presupposes an ordering of rules, and the provisions of the title on the international jurisdiction of Quebec authorities reflect this general philosophy of codification.

4.1.2 Private International Law

16 Private international law is the branch of a state's domestic law that governs private relationships that [TRANSLATION] "exten[d] beyond the scope of a single national legal system": É. Wyler and A. Papaux, "Extranéité de valeurs et de systèmes en droit international privé et en droit international public", in É. Wyler and A. Papaux, eds., *L'extranéité ou le dépassement de l'ordre juridique étatique* (1999), 239, at p. 241. Since every state has the power to adopt its own system of rules, the result is a variety of conceptions of private international law. Thus, in some countries, this branch of law is limited to the conflict of laws, whereas in France, private international law has a broader scope, extending also to questions concerning the status of foreign nationals and the nationality of persons. In English private international law, an intermediate approach has been adopted that generally concerns three types of questions: (i) conflict of laws, (ii) conflict of jurisdictions and (iii) the recognition and enforcement of foreign judgments: *Dicey, Morris and Collins on the Conflict of Laws* (14th ed. 2006), vol. 1, at p. 4; P. North and J. J. Fawcett, *Cheshire and North's Private International Law* (13th ed. 1999), at p. 7. What is the situation in Quebec law?

4.1.3 Legislative History of Quebec Private International Law

17 The drafters of the original rules of Quebec private international law naturally drew on French law. Like the *Code Napoléon*, the *Civil Code of Lower Canada* contained only a few articles on this subject, and until the *Civil Code of Québec* was enacted in 1991, they and a few provisions of the *Code of Civil Procedure*, R.S.Q., c. C-25 ("C.C.P."), and from specific statutes constituted the private international law of Quebec.

18 While Quebec's private international law was going through a period of relative stagnation in the nineteenth and early twentieth centuries, a growing number of states had recourse to codification, adopting increasingly comprehensive and systematic rules: B. Audit, *Droit international privé* (4th ed. 2006), at para. 37; A. N. Makarov, "Sources", in International Association of Legal Science, *International Encyclopedia of Comparative Law*, vol. III, *Private International Law* (1972), c. 2, at pp. 4-5. The subsequent project to codify Quebec's private international law was part of that trend; it was included in the mandate for the proposed general reform of the *Civil Code* that was assigned to the Civil Code Revision Office ("Office") in 1965.

19 In 1975, an initial draft codification of the rules of Quebec private international law was submitted to the Office by its private international law committee, which was chaired by Professor J.-G. Castel. The content of this report was amended slightly and was incorporated two years later into Book Nine of the *Draft Civil Code* (Civil Code Revision Office, *Report on the Québec Civil Code* (1978), vol. I, *Draft Civil Code*, at pp. 593 *et seq.*). The preliminary chapter and Chapter I of Book Nine contained general provisions. Chapter II concerned conflicts of laws, while Chapter III

dealt with conflicts of jurisdictions. Chapters IV and V dealt with the recognition and enforcement of foreign decisions and arbitration awards. Finally, Chapter VI codified the immunity from civil jurisdiction and execution enjoyed by foreign states and certain other international actors.

20 The structure of Book Nine attests to the Quebec legislature's adoption of the intermediate approach of English private international law described by Dicey, Morris and Collins and North and Fawcett (mentioned above). The Office's decision was the result of a process that stretched over many years.

21 The Office explained that Chapter III on conflicts of jurisdictions was adopted to make up for a lack of specific rules on private international law that had obliged courts to resort to the *Code of Civil Procedure*'s provisions on the judicial districts in Quebec where proceedings could be instituted:

> To remedy this state of affairs and to distinguish between international and domestic jurisdiction, it seemed necessary to provide rules applicable exclusively to situations containing a foreign element. [Emphasis added.]
>
> (Civil Code Revision Office, *Report on the Québec Civil Code* (1978), vol. II, t. 2, *Commentaries*, at p. 965)

22 In the commentaries that accompanied the final text of the *Civil Code of Québec*, the Minister of Justice mentioned a number of times that the various sections of Book Ten of the *Civil Code* apply to legal situations [TRANSLATION] "with a foreign element". He expressly repeated this in the introduction to Title Three on the international jurisdiction of Quebec authorities (*Commentaires du ministre de la Justice*, vol. II, at p. 1998). The Minister also reiterated the

Office's comments on the need for a set of jurisdictional rules for private international law distinct from the rules of the *Code of Civil Procedure* upon which the courts had relied until then:

> [TRANSLATION] Since there were no rules for determining whether Quebec authorities had jurisdiction over disputes with a foreign element, the courts had extended the domestic law rules of jurisdiction provided for in the Code of Civil Procedure to such situations.
>
> The general objective of Title Three is to remedy this deficiency by establishing specific rules for determining the international jurisdiction of Quebec authorities . . . .
>
> (*Commentaires du ministre de la Justice*, vol. II, at p. 1998)

23 These commentaries shed light on the distinction between rules of jurisdiction governing purely domestic disputes and those that, because of a foreign element, form part of private international law. Where domestic disputes are concerned, the question of adjudicative jurisdiction is governed by the *Code of Civil Procedure*. In the case at bar, arts. 31 and 1000 C.C.P. are the provisions that confer jurisdiction over class actions on the Quebec Superior Court.

24 Given that domestic disputes are governed by the general provisions of Quebec domestic law, there is no reason to apply the rules relating to the international jurisdiction of Quebec authorities to a dispute that involves no foreign element.

4.2 *Foreign Element Concept*

25 What is this foreign element that is omnipresent in the literature on private international law? Very little has been written about it. Of course, disputes in which rules of private international

law are relied on usually have an international aspect and, as a result, the courts have not needed to elaborate on the parameters of the foreign element concept. One reference to this concept can be found in *Quebecor Printing Memphis Inc. v. Regenair Inc.*, [2001] R.J.Q. 966 (C.A.), at para. 17, in which Philippon J. (*ad hoc*), dissenting on another issue, described the initial step of the analytical approach in private international law:

> [TRANSLATION] First, it had to be determined whether the dispute related to an international situation or a transnational event or had a foreign element. [Emphasis deleted.]

26 This foreign element can be defined, however. It must be "[a] point of contact which is legally relevant to a foreign country", which means that the contact must be sufficient to play a role in determining whether a court has jurisdiction: J. A. Talpis and J.-G. Castel, "Interpreting the rules of private international law", in *Reform of the Civil Code* (1993), vol. 5B, at p. 38 (emphasis added); *Castel & Walker: Canadian Conflict of Laws* (loose-leaf), vol. 1, at p. 1-1; see also Wyler and Papaux, at p. 256.

27 Since our private international law is based on English law, it will be helpful to review the state of English law on this question. North and Fawcett define private international law as follows:

> Private international law, then, is that part of law which comes into play when the issue before the court affects some fact, event or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system. [Emphasis added; p. 5.]

This definition is similar to the one adopted by Canadian authors, and it includes a notion common to many systems of private international law: the factor connecting a matter with a particular system. It follows that the foreign element and the connecting factor are overlapping notions. One author describes the connecting factor concept as follows:

> The connecting factor is the element forming one of the facts of the case which is selected in order to attach a question of law to a legal system. The connecting factor determines the applicable law or the jurisdiction of a court. For instance, if the facts of a case present a question of intestate succession to movables, the element among those facts selected for the designation of the applicable law may be the last domicile, the last habitual residence, the nationality of the deceased or the situs of the movables. Likewise, one of these connecting factors may be employed to establish the jurisdiction of the courts to deal with intestate succession to movables.
>
> (F. Vischer, "Connecting Factors", in International Association of Legal Science, *International Encyclopedia of Comparative Law*, vol. III, *Private International Law* (1999), c. 4, at p. 3)

See also Y. Loussouarn, P. Bourel and P. de Vareilles-Sommières, *Droit international privé* (8th ed. 2004), at p. 2. The connecting factor and foreign element concepts are recognized in Quebec private international law, too: Talpis and Castel, at p. 38; C. Emanuelli, *Droit international privé québécois* (2nd ed. 2006), at pp. 11-12.

28 These two concepts can, therefore, overlap. A connecting factor is a tie to either the domestic or a foreign legal system, whereas the foreign element concept refers to a possible tie to a foreign legal system. Thus, in a personal action brought in Quebec, the fact that a defendant is domiciled in Quebec is a connecting factor with respect to the Quebec legal system but not a foreign element, whereas the fact that a defendant is domiciled in England will be considered both a connecting factor with respect to English jurisdiction and a foreign element with respect to the

Quebec legal system. Certain of the connecting factors enumerated in Professor Vischer's definition above are common to most systems of private international law (see on this point the enumerations in Loussouarn, Bourel and de Vareilles-Sommières, at p. 2; North and Fawcett, at p. 5).

29 A state is free to determine what connecting factors or foreign elements it considers to be relevant. In Quebec, the legislature adopted a number of factors already found in the main Western private international law systems. In the title of the *Civil Code of Québec* on the conflict of laws, these factors are divided into four main categories, each of which is addressed in a separate chapter: (1) personal factors, with the main one being the place of domicile; (2) property-related factors; (3) factors related to obligations, such as the place where a contract is entered into; and (4) factors related to procedure, which is usually governed by the law of the court hearing the case (arts. 3083 to 3133 C.C.Q.).

30 The legislature also provided for certain connecting factors in respect of the international jurisdiction of Quebec authorities, which is the subject of a separate title. The place where one of the parties is domiciled heads the list of these factors, too. Article 3148 C.C.Q. shows this clearly:

> **3148.** In personal actions of a patrimonial nature, a Québec authority has jurisdiction where
>
> (1) the defendant has his domicile or residence in Québec;
>
> (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
>
> (3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;

> (4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;
>
> (5) the defendant submits to its jurisdiction.
>
> However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

See also arts. 3134, 3141 to 3147, 3149, 3150, and 3154, para. 2 C.C.Q. Other factors that are considered include the place where damage was suffered or an injurious act occurred (art. 3148, para. 1(3) C.C.Q.), and the place where the property in dispute is located (arts. 3152 to 3154, para. 1 C.C.Q.).

31 It can be seen that what these traditional factors have in common is a concrete connection with Quebec; if private international law is invoked, it can be assumed that there is an equally concrete foreign element that can serve as a basis for applying a foreign legal system. Despite the developments I have just mentioned, we should question the postulate that the rules of Quebec private international law apply only where there is a foreign element.

32 In the Office's *Draft Civil Code*, it was clear that a foreign element was necessary. In its commentary on the provision on the law applicable to juridical acts, the Office stated the following:

> It should be noted that the text applies to juridical acts of an international character. The parties are not free to refer to a law not related to their act unless that act contains a foreign element.

> (Civil Code Revision Office, *Report on the Québec Civil Code*, vol. II, t. 2, *Commentaries*, at p. 977 (commentary on art. 21 of Book Nine of the *Draft Civil Code*))

In discussing art. 48 of Book Nine of the *Draft Civil Code*, the predecessor of art. 3148 C.C.Q. on the international jurisdiction of Quebec authorities, the Office stated that the jurisdictional rules set out in this article "are intended to apply to situations involving a foreign element" (Civil Code Revision Office, vol. II, t. 2, at p. 988).

33 The 1988 draft bill did not substantively alter the traditional foreign element requirement (*An Act to add the reformed law of evidence and of prescription and the reformed private international law to the Civil Code of Québec*). The wording of art. 3477 of the draft bill on the designation of the applicable law was substantially similar to that of the final version of the provision in the *Civil Code of Québec* (art. 3111). It read as follows:

> **3477.** A juridical act containing a foreign element is governed by the law expressly designated in the instrument or the designation of which may be inferred with certainty from the terms of the act.
>
> A system of law may be expressly designated as applicable to the whole or a part only of a juridical act.

34 The reference in this article to the foreign element led professors Talpis and Goldstein to ask whether such a reference was necessary, since they considered the foreign element requirement to be essential:

> [TRANSLATION] It might first be asked whether it was necessary to specify that the parties may choose the applicable law only for a contract "containing a foreign

> element". It is obvious that the existence of a foreign element is the *sine qua non* of recourse to *all* the rules in Book Ten of the future Civil Code. However, since the Draft Bill does not include a specific provision on evasion of the law, this reference may have been intended to indicate that the will of the parties is not sufficient to turn a contract connected entirely with Quebec into an international one. [Underlining added.]
>
> (J. A. Talpis and G. Goldstein, "Analyse critique de l'avant-projet de loi du Québec en droit international privé" (1989), 91 *R. du N.* 456, at p. 476)

As for art. 3511 of the 1988 draft bill, which concerned the international jurisdiction of Quebec authorities, it already contained all the substantive elements of the future art. 3148 C.C.Q.

35 In Bill 125 of 1990, the *Civil Code of Québec*, however, the foreign element requirement was not retained with respect to the designation of the applicable law. The legislature incorporated a special rule into the provision. The final version of art. 3111 includes an addition to the text that was initially proposed:

> **3111.** A juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the act or the designation of which may be inferred with certainty from the terms of the act.
>
> A juridical act containing no foreign element remains, nevertheless, subject to the mandatory provisions of the law of the country which would apply if none were designated.
>
> The law of a country may be expressly designated as applicable to the whole or a part only of a juridical act.

What this addition brings to the title on the conflict of laws is to make it possible for the parties to provide that a purely domestic juridical act will be governed by the law of a foreign jurisdiction. However, immediately after recognizing the autonomy of the will of the parties where the

designation of the applicable law is concerned, the legislature hastened to limit it in the second paragraph of the provision. Thus, in the absence of a foreign element, a juridical act remains subject to the mandatory rules that would apply if no law were designated. As a result, the designation of the law of a foreign jurisdiction in an act that contains no foreign element is a special circumstance that was cautiously introduced into Quebec private international law and is confined to the rules applicable to the conflict of laws.

36 I should add that the wording of art. 3111 C.C.Q. is based on that of art. 3 of the *Convention on the Law Applicable to Contractual Obligations* (Rome Convention of 1980), which authorizes the "[choice of] a foreign law" where there is no foreign element. It is also conceivable that the determination of the law applicable to a juridical act will at times require a more complex analysis than the one to be made where adjudicative jurisdiction is in issue. Thus, a juridical act, such as a giving of security, that appears to have only domestic connections may in reality be part of an international transaction whose ramifications are not in issue in a given dispute. So there are several possible explanations for the exception provided for in Title Two on the conflict of laws.

37 In the title on the international jurisdiction of Quebec authorities, on the other hand, there is no exception to the foreign element requirement, and it is clear that a court asked to apply the rules of private international law must first determine whether the situation involves a foreign element. This position is consistent with the traditional definition of private international law and with the Office's intention. It must now be asked whether, in the case at bar, the choice of arbitration procedure gives rise to a foreign element warranting the application of art. 3149 C.C.Q. To answer this question, it will be necessary to consider how arbitration has been incorporated into

Quebec law.

4.3 *Arbitration in Quebec*

4.3.1 International Sources

38 International arbitration law is strongly influenced by two texts drafted under the auspices of the United Nations: the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 U.N.T.S. 3 ("New York Convention"), and the *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17 (1985), Annex I ("Model Law").

39 The New York Convention entered into force in 1959. Article II of the Convention provides that a court of a contracting state that is seized of an action in a matter covered by an arbitration clause must refer the parties to arbitration. At present, 142 countries are parties to the Convention. The accession of this many countries is evidence of a broad consensus in favour of the institution of arbitration. Lord Mustill wrote the following about the Convention:

> This Convention has been the most successful international instrument in the field of arbitration, and perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law.
>
> (M. J. Mustill, "Arbitration: History and Background" (1989), 6 *J. Int'l Arb.* 43, at p. 49)

Canada acceded to the New York Convention on May 12, 1986.

40 The Model Law is another fundamental text in the area of international commercial arbitration. It is a model for legislation that the UN recommends that states take into consideration in order to standardize the rules of international commercial arbitration. The Model Law was drafted in a manner that ensured consistency with the New York Convention: F. Bachand, "Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?" (2006), 22 *Arb. Int'l* 463, at p. 470; S. Kierstead, "Referral to Arbitration under Article 8 of the UNCITRAL Model Law: The Canadian Approach" (1999), 31 *Can. Bus. L.J.* 98, at pp. 100-101.

41 The final text of the Model Law was adopted on June 21, 1985 by the United Nations Commission on International Trade Law ("UNCITRAL"). In its explanatory note on the Model Law, the UNCITRAL Secretariat states that it:

> reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.
>
> ("Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration", U.N. Doc. A/40/17, Annex I, at para. 2)

In 1986, Parliament enacted the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.), which was based on the Model Law. The Quebec legislature followed suit that same year and incorporated the Model Law into its legislation. Quebec's Minister of Justice at the time, Herbert Marx, reiterated the above-quoted comment by the UNCITRAL Secretariat: National Assembly, *Journal des débats*, vol. 29, No. 46, 1st Sess., 33rd Leg., June 16, 1986, at p. 2975, and vol. 29, No. 55, October 30, 1986, at p. 3672.

4.3.2 Nature and Scope of the 1986 Legislative Amendments to the *Civil Code of Lower Canada* and the *Code of Civil Procedure*

42 In 1986, the *Act to amend the Civil Code and the Code of Civil Procedure in respect of arbitration*, S.Q. 1986, c. 73 ("Bill 91"), which established a scheme for promoting arbitration in Quebec, was tabled in the legislature. Bill 91 added a new title on arbitration agreements to the *Civil Code of Lower Canada*. This title consisted of only six provisions setting out a few general principles relating to the validity and applicability of such agreements. The legislature's decision to place arbitration agreements among the nominate contracts in the *Civil Code of Lower Canada* is significant. After that, there was no longer any reason to regard arbitration agreements as being outside the sphere of the general law; on the contrary, they were now an integral part of it: *Condominiums Mont St-Sauveur inc. v. Constructions Serge Sauvé ltée*, [1990] R.J.Q. 2783 (C.A.), at p. 2785; J. E. C. Brierley, "Arbitration Agreements: Articles 2638-2643", in *Reform of the Civil Code* (1993), vol. 3B, at p. 1. The provisions added by Bill 91 would be restated without any major changes in the chapter of the *Civil Code of Québec* on arbitration agreements.

43 Bill 91 also had a considerable impact on the *Code of Civil Procedure*. Substantial additions were made to Book VII on arbitrations, which was divided into two titles. Title I is a veritable code of arbitral procedure that regulates every step of an arbitration proceeding subject to Quebec law, from the appointment of the arbitrator to the order of the proceeding to the award and homologation. Most of these rules apply only "where the parties have not made stipulations to the contrary" (art. 940 C.C.P.). Title II sets out a system of rules applicable to the recognition and execution of arbitration awards made outside Quebec.

44 Although Bill 91 was the Quebec legislature's response to Canada's accession to the New York Convention and to UNCITRAL's adoption of the Model Law, it is not identical to those two instruments. As the Quebec Minister of Justice noted, Bill 91 was [TRANSLATION] "inspired" by the Model Law and [TRANSLATION] "implement[ed]" the New York Convention: *Journal des débats*, October 30, 1986, at p. 3672. For this reason, it is important to consider the interplay between Quebec's domestic law and private international law before interpreting the provisions of Bill 91.

45 This Court analysed the interplay between the New York Convention and Bill 91 in *GreCon Dimter inc. v. J.R. Normand inc.*, [2005] 2 S.C.R. 401, 2005 SCC 46, at paras. 39 *et seq*. After noting that there is a recognized presumption of conformity with international law, the Court mentioned that Bill 91 "incorporate[s] the principles of the *New York Convention*" and concluded that the Convention is a formal source for interpreting the provisions of Quebec law governing the enforcement of arbitration agreements: para. 41. This conclusion is confirmed by art. 948, para. 2 C.C.P., which provides that the interpretation of Title II on the recognition and execution of arbitration awards made outside Quebec (arts. 948 to 951.2 C.C.P.) "shall take into account, where applicable, the [New York] Convention".

46 The same is not true of the Model Law. Unlike an instrument of conventional international law, the Model Law is a non-binding document that the United Nations General Assembly has recommended that states take into consideration. Thus, Canada has made no commitment to the international community to implement the Model Law as it did in the case of the New York Convention. Nevertheless, art. 940.6 C.C.P. attaches considerable interpretive weight

to the Model Law in international arbitration cases:

> **940.6** Where matters of extraprovincial or international trade are at issue in an arbitration, the interpretation of this Title, where applicable, shall take into consideration:
>
> (1) the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985;
>
> (2) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session held in Vienna from the third to the twenty-first day of June 1985;
>
> (3) the Analytical Commentary on the draft text of a model law on international commercial arbitration contained in the report of the Secretary-General to the eighteenth session of the United Nations Commission on International Trade Law.

47 In short, to quote Professor Brierley, Bill 91 opened Quebec arbitration law to "international thinking" in this area; this international thinking "has become a formal source of Quebec positive law": J. E. C. Brierley, "Quebec's New (1986) Arbitration Law" (1987-88), 13 *Can. Bus. L.J.* 58, at pp. 63 and 68-69.

4.3.3 Status of Arbitration in Quebec Private International Law

48 Bill 91 established the legal framework applicable to arbitration. Not all arbitration proceedings are subject to the same rules. First, Title I on arbitration proceedings applies only if the parties have not stipulated that they intend to opt out of it. In addition, the facts of the case must call for application of the *Code of Civil Procedure* either because the foreign parties have chosen it in accordance with a provision authorizing them to do so in a law that would otherwise govern this proceeding or because the circumstances of the proceeding necessitate the application of Quebec

law. Second, Title II of Book VII of the *Code of Civil Procedure* contains special provisions on the recognition and execution of arbitration awards made outside Quebec. Third, art. 940.6 C.C.P. provides that Title I on arbitration proceedings is to be interpreted in light, where applicable, of the Model Law and certain documents related to it "[w]here matters of extraprovincial or international trade are at issue in an arbitration". As Professor Marquis notes, the words "*mettant en cause des intérêts du commerce*" in the French version of art. 940.6 have an [TRANSLATION] "unfamiliar sound in Quebec law": L. Marquis, "Le droit français et le droit québécois de l'arbitrage conventionnel", in H. P. Glenn, ed., *Droit québécois et droit français: communauté, autonomie, concordance* (1993), 447, at p. 483. In fact, they were taken straight from the French *Code de procédure civile*:

> [TRANSLATION] **1492.** Arbitration is international where matters of international trade are at issue.

Because the same words are used, Quebec authors agree that art. 940.6 C.C.P. has imported the concept of international arbitration from French law: S. Guillemard, *Le droit international privé face au contrat de vente cyberspatial* (2006), at pp. 73-74; S. Thuilleaux, *L'arbitrage commercial au Québec: Droit interne — Droit international privé* (1991), at p. 129; L. Marquis, "La notion d'arbitrage commercial international en droit québécois" (1991-1992), 37 *McGill L.J.* 448, at pp. 465 and 469.

49 The matter of international trade test is different from connecting factors such as the parties' place of residence or the place where the obligations are performed. Thus, a contractual legal situation may have foreign elements without involving any matters of extraprovincial or international trade; in such a case, although the resulting arbitration will not be considered an

international arbitration, it will nonetheless be subject to the rules of private international law. Since the case at bar does not involve international commercial arbitration, this explanation is intended merely to highlight the fact that the test under art. 940.6 C.C.P. is clearly distinct from the foreign element requirement. Where the Quebec legislature intended different rules to apply, it has made this clear.

50 The rules on arbitration proceedings set out in Title I of Book VII of the *Code of Civil Procedure* apply, to the extent provided for, to any arbitration proceeding subject to Quebec law. The parties are free to attribute foreign connections to an arbitration process, in which case the rules of private international law may be applicable. However, an arbitration clause is not in itself a foreign element warranting the application of the rules of Quebec private international law. The commentators are unanimous on this point:

> [TRANSLATION] It is clear that if an arbitration process is considered to be purely internal to Quebec, the law of Quebec will be applied to it. The rules of private international law will not be applicable. It is Quebec's Code of Civil Procedure (rules on arbitration) that will be applied.
>
> (J. Béguin, *L'arbitrage commercial international* (1987), at p. 67)

See also to the same effect, in respect of comparative law, E. Gaillard and J. Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), at p. 47.

51 The neutrality of arbitration as an institution is one of the fundamental characteristics of this alternative dispute resolution mechanism. Unlike the foreign element, which suggests a possible connection with a foreign state, arbitration is an institution without a forum and without a

geographic basis: Guillemard, at p. 77; Thuilleaux, at p. 145. Arbitration is part of no state's judicial system: *Desputeaux*, at para. 41. The arbitrator has no allegiance or connection to any single country: M. Lehmann, "A Plea for a Transnational Approach to Arbitrability in Arbitral Practice" (2003-2004), 42 *Colum. J. Transnat'l L.* 753, at p. 755. In short, arbitration is a creature that owes its existence to the will of the parties alone: *Laurentienne-vie, compagnie d'assurance inc. v. Empire, compagnie d'assurance-vie*, [2000] R.J.Q. 1708 (C.A.), at paras. 13 and 16.

52 To say that the choice of arbitration as a dispute resolution mechanism gives rise to a foreign element would be tantamount to saying that arbitration itself establishes a connection to a given territory, and this would be in outright contradiction to the very essence of the institution of arbitration: its neutrality. This institution is territorially neutral; it contains no foreign element. Furthermore, the parties to an arbitration agreement are free, subject to any mandatory provisions by which they are bound, to choose any place, form and procedures they consider appropriate. They can choose cyberspace and establish their own rules. It was open to the parties in the instant case to refer to the *Code of Civil Procedure*, to base their procedure on a Quebec or U.S. arbitration guide or to choose rules drawn up by a recognized organization, such as the International Chamber of Commerce, the Canadian Commercial Arbitration Centre or the NAF. The choice of procedure does not alter the institution of arbitration in any of these cases. The rules become those of the parties, regardless of where they are taken from.

53 I cannot therefore see how the parties' choice of arbitration can in itself create a foreign element. Such an interpretation would empty the foreign element concept of all meaning. An arbitration that contains no foreign element in the true sense of the word is a domestic arbitration.

The rules on the international jurisdiction of Quebec authorities will apply only to an arbitration containing a foreign element, such as where a defendant in a case involving a personal claim is domiciled in another country.

54 It must now be determined whether the facts of the present case contain a foreign element.

4.4 *Seeking to Identify a Foreign Element in the Facts of the Case at Bar*

55 The trial judge saw a foreign element in the fact that [TRANSLATION] "[t]he NAF is located in the United States" (para. 32). The Court of Appeal rejected this conclusion, and the Union has abandoned this argument. Like other organizations, such as the International Chamber of Commerce and the Canadian Commercial Arbitration Centre, the NAF offers arbitration services. The place where decisions concerning arbitration services are made or where the employees of these organizations work has no impact on the disputes in which their rules are used.

56 Thus, the location of the NAF's head office is not a relevant foreign element for purposes of the application of Quebec private international law. Moreover, Dell having conceded that the arbitration proceeding will take place in Quebec should put an end to the debate regarding the place of arbitration.

57 Another potential foreign element is found in the NAF's Code of Procedure (*National Arbitration Forum Code of Procedure*). Rules 5O and 48B of the NAF Code provide that, unless

the parties agree otherwise, arbitrations and arbitration procedures are governed by the U.S. *Federal Arbitration Act*. In Quebec, designation of the applicable law is governed by Title Two of Book Ten of the *Civil Code of Québec* on the conflict of laws. The parties' designation of the applicable law under this title is not ordinarily recognized as a foreign element in the subsequent title on the international jurisdiction of Quebec authorities. In any event, since art. 3111 C.C.Q., which I discussed above, refers to designation of the law applicable to a juridical act containing no foreign element, the designation itself does not produce such an element.

58 The Union raised a final element: the language of the proceedings. According to the NAF Code, English is the language used in NAF proceedings, although the parties may choose another language, in which case the NAF or the arbitrator may order the parties to provide any necessary translation and interpretation services at their own cost (rules 11D and 35G of the NAF Code).

59 In my view, the language argument must fail. Although I agree that the use of a language with which the consumer is not familiar may cause difficulties, neither the French nor the English language can be characterized as a foreign element in Canada.

60 My colleagues Bastarache and LeBel JJ. nonetheless consider it logical to accept that an arbitration clause in itself constitutes a foreign element that can result in application of the provisions on the international jurisdiction of Quebec authorities. Their interpretation has consequences for agreements other than consumer contracts. Thus, it would also be impossible to set up against a Quebec worker *any* undertaking to submit to an arbitrator any future disputes with

his or her Quebec employer relating to an individual contract of employment. Furthermore, *any* arbitration agreement concerning damage suffered as a result of exposure to raw materials originating in Quebec would be null (see arts. 3151 and 3129 C.C.Q.), even an agreement between a Quebec supplier and a Quebec producer. This interpretation is hard to accept. It implies that the codifiers failed to achieve their objective of ordering the rules in both Book Ten on private international law and Chapter XVIII on arbitration agreements in Book Five. This is an important point, and it is not strictly confined to the foreign element argument. I will therefore consider it separately.

4.5 *Ordering of the Rules on Arbitration*

61 The chapter on arbitration is found in the important Book Five of the *Civil Code of Québec* on obligations. Book Five is divided into two titles, the first of which concerns obligations in general, while the second concerns nominate contracts. Chapter XVIII is the final chapter of the title on nominate contracts. It incorporates the provisions of Bill 91 enacted in 1986, which I have already discussed. It contains a general provision, art. 2638 C.C.Q., which is based on the recognition that an arbitration agreement is valid and can be set up against a party:

> **2638.** An arbitration agreement is a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts.

In his commentary on this provision, the Minister of Justice stated that the essential purpose of the arbitration agreement is [TRANSLATION] "to displace judicial intervention" and that "by conferring

jurisdiction on arbitrators, [one] ousts the usual jurisdiction of the judiciary": *Commentaires du ministre de la Justice*, vol. II, at p. 1649.

62 Chapter XVIII also contains a provision that enumerates the cases in which the jurisdiction of the Quebec courts cannot be ousted by the parties. This provision reads as follows:

> **2639.** Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration.
>
> An arbitration agreement may not be opposed on the ground that the rules applicable to settlement of the dispute are in the nature of rules of public order.

63 Thus, the codifiers laid down, for disputes containing no foreign element, specific rules dealing, on the one hand, with the effect of the arbitration agreement and, on the other, with cases in which arbitration is not available under domestic law. They therefore considered what matters should be arbitrable. Where disputes not involving private international law issues are concerned, these matters are set out in the provisions governing arbitration. Article 3148, para. 2 C.C.Q. does not simply restate the text of art. 2638 C.C.Q. Rather, it lays down the same rule as it applies to an arbitration agreement containing a foreign element. To give arts. 3149 and 3151 C.C.Q. general application, it would be necessary to infer that the codifiers were inconsistent in not including, in the chapter on arbitration, the exceptions relating to consumer contracts, contracts of employment and claims regarding exposure to raw materials.

64 Furthermore, to view art. 3149 C.C.Q. as being limited to private international law is consistent with the legislature's objective. This provision is one of the new measures the legislature

inserted into the title on the international jurisdiction of Quebec authorities to protect certain more vulnerable groups: *Commentaires du ministre de la Justice*, vol. II, at p. 2011. Article 3149 C.C.Q. refers to two of these groups, Quebec consumers and workers, who cannot waive the jurisdiction of a Quebec authority. I agree with the following comment by Beauregard J.A. of the Quebec Court of Appeal in *Dominion Bridge* with regard to the legislature's general objective in enacting art. 3149 C.C.Q.:

> [TRANSLATION] In my view, it is clear that the legislature intended to ensure that employees could not be required to go abroad to assert rights under a contract of employment. [p. 325]

Thus, the reason why an arbitration clause cannot be set up against a consumer under the title on the international jurisdiction of Quebec authorities is clearly to protect a consumer in a situation with a foreign element.

65 In enacting art. 3149 C.C.Q., the legislature could not have intended to take an obscure approach requiring a decontextualized reading of the title on the international jurisdiction of Quebec authorities. The interpretation of art. 3149 C.C.Q. must be consistent with the legislature's objective of protecting vulnerable groups and must be harmonized not only with the title on the international jurisdiction of Quebec authorities, but also with the entire book of the C.C.Q. on private international law and Chapter XVIII on arbitration (in Title Two of Book Five), and with Book VII of the *Code of Civil Procedure* on arbitration. This brings out the internal consistency of these rules, which interact harmoniously and without redundancy. The general provisions on arbitration are grouped together in the books, titles and chapters of the *Civil Code of Québec* and the *Code of Civil*

Procedure, and specific exceptions are set out in these provisions. It would not be appropriate to shatter the consistency of the rules on arbitration and those on the international jurisdiction of Quebec authorities by placing all disputes concerning an arbitrator's jurisdiction within the scope of the rules on the jurisdiction of Quebec authorities regardless of whether there is a foreign element.

4.6 *Conclusion on the Application of Art. 3149 C.C.Q.*

66 The legal experts who worked on the reform of the *Civil Code*, the Minister of Justice who was in office at the time of the enactment of the *Civil Code of Québec*, and many Canadian and foreign authors recognized that a foreign element was a prerequisite for applying the rules on the international jurisdiction of Quebec authorities. The ordering effected in a codification process and the rule that a provision must be interpreted in light of its context require an interpretation of art. 3149 C.C.Q. that limits it to cases with a foreign element.

67 I will now discuss the other issues before this Court. They concern the degree of scrutiny of an arbitration clause by the Superior Court, and the validity and applicability of the arbitration clause.

5. Degree of Scrutiny of an Arbitration Clause by the Superior Court in Considering a Referral Application

68 The objective of this part is to determine whether it is the arbitrator or a court that should rule first on the parties' arguments on the validity or applicability of an arbitration agreement. I will accordingly consider the limits of intervention by the courts in cases involving arbitration

agreements.

5.1 *Competence of Arbitrators to Rule on Their Own Jurisdiction in International Law*

69 There are two opposing schools of thought in the debate over the degree of judicial scrutiny of an arbitrator's jurisdiction under an arbitration agreement. Under one, it is the court that must rule first on the arbitrator's jurisdiction; this view is based on a concern to avoid a duplication of proceedings. Since the court has the power to review the arbitrator's decision regarding his or her jurisdiction, why should the arbitrator be allowed to make an initial ruling on this issue? According to this view, it would be preferable to have the court settle any challenge to the arbitrator's jurisdiction immediately. This first school of thought thus favours an interventionist judicial approach to questions relating to the jurisdiction of arbitrators.

70 The other school of thought gives precedence to the arbitration process. It is concerned with preventing delaying tactics and is associated with the principle commonly known as the "competence-competence" principle. According to it, arbitrators should be allowed to exercise their power to rule first on their own jurisdiction (Gaillard and Savage, at p. 401).

71 The New York Convention does not expressly require the adoption of either of these schools of thought. Article II(3) reads as follows:

> 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.

72 According to some authors, this provision means that referral is the general rule: Gaillard and Savage, at pp. 402-4; F. Bachand, *L'intervention du juge canadien avant et durant un arbitrage commercial international* (2005), at pp. 178-79 and 183. Its wording indicates that the court must not rule on the arbitrator's jurisdiction unless the clause is clearly null and void, inoperative or incapable of being performed.

73 The fact that art. II(3) of the New York Convention provides that the court can rule on whether an agreement is null and void, inoperative or incapable of being performed does not mean that it is required to do so before the arbitrator does, however.

74 The Model Law, which, as I mentioned above, was drafted consistently with the New York Convention, is clearer. First of all, the wording of art. 8(1) of the Model Law is almost identical to that of art. II(3) of the New York Convention. What is more, art. 16 of the Model Law expressly recognizes the competence-competence principle. It reads as follows:

> *Article 16. Competence of arbitral tribunal to rule on its jurisdiction*
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ispo jure* the invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

75 Some authors argue that the competence-competence principle requires the court to limit itself to a *prima facie* analysis of the application and to refer the parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or inapplicable: F. Bachand, "Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?" According to Professor Bachand, this interpretation is confirmed by the legislative history of the Model Law. This approach has also been adopted in a number of countries; France, for example, has formally incorporated the approach in art. 1458 of its *Code de procédure civile*. The *prima facie* test has also been adopted in Switzerland by way of judicial interpretation: decision of the 1st Civil Court dated April 29, 1996 in *Fondation M. v. Banque X.*, BGE 122 III 139 (1996), cited by Gaillard and Savage, at p. 409.

76 The manifest nullity test is a fairly strict one:

> [TRANSLATION] The nullity of an arbitration agreement will be manifest if it is incontestable. . . . As soon as a serious debate arises about the validity of the arbitration agreement, only the arbitrator can validly conduct the review. . . . An apparently valid arbitration clause will never be considered to be manifestly null.
>
> (É. Loquin, "Compétence arbitrale", *Juris-classeur Procédure civile*, fasc. 1034 (1994), No. 105)

77 Despite the lack of consensus in the international community, the *prima facie* analysis

test is gaining acceptance and has the support of many authors: Gaillard and Savage, at pp. 407-13; Bachand, "Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?" This test is indicative of a deferential approach to the jurisdiction of arbitrators.

78 Having completed this review of international law, I will now consider the state of Quebec law on this issue.

5.2 *Quebec Test for Judicial Intervention in a Case Involving an Arbitration Agreement*

79 The legal framework governing referral to arbitration is set out in the *Code of Civil Procedure.* The relevant provisions read as follows:

> **940.1** Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null.
>
> The arbitration proceedings may nevertheless be commenced or pursued and an award made at any time while the case is pending before the court.
>
> . . .
>
> **943.** The arbitrators may decide the matter of their own competence.
>
> **943.1** If the arbitrators declare themselves competent during the arbitration proceedings, a party may within thirty days of being notified thereof apply to the court for a decision on that matter.
>
> While such a case is pending, the arbitrators may pursue the arbitration proceedings and make their award.
>
> **943.2** A decision of the court during the arbitration proceedings recognizing the

competence of the arbitrators is final and without appeal.

80 It should be noted from the outset that art. 940.1 C.C.P. incorporates the essence of art. II(3) of the New York Convention and of its counterpart in the Model Law, art. 8. Furthermore, art. 943 C.C.P. confers on arbitrators the competence to rule on their own jurisdiction. This article clearly indicates acceptance of the competence-competence principle incorporated into art. 16 of the Model Law.

81 A review of the case law on arbitration reveals that Quebec courts have often accepted or refused to give effect to arbitration clauses without reflecting on the degree of scrutiny required of them: *C.C.I.C. Consultech International v. Silverman*, [1991] R.D.J. 500 (C.A.); *Banque Nationale du Canada v. Premdev inc.*, [1997] Q.J. No. 689 (QL) (C.A.); *Acier Leroux inc. v. Tremblay*, [2004] R.J.Q. 839 (C.A.); *Robertson Building Systems Ltd. v. Constructions de la Source inc.*, [2006] Q.J. No. 3118 (QL),
2006 QCCA 461; *Compagnie nationale algérienne de navigation v. Pegasus Lines Ltd. S.A.*, [1994] Q.J. No. 329 (QL) (C.A.). However, it can be seen that where the analysis of a clause requires an assessment of contradictory factual evidence, Quebec courts can be reluctant to engage in a review on the merits. For example, in *Kingsway Financial Services Inc. v. 118997 Canada inc.*, [1999] Q.J. No. 5922 (QL) (C.A.), the buyer sued the seller on the basis of error induced by fraud. The court hearing the case had to decide whether the seller had made false representations to the buyer. The Court of Appeal simply referred the case to arbitration.

82 One author suggests that Quebec courts are more deferential as regards the jurisdiction

of arbitrators when hearing cases that simply concern the applicability of an arbitration clause, whereas if it is the validity of the same clause that is an issue, the rule they seem to observe is to dispose of the issue immediately: F. Bachand, *L'intervention du juge canadien avant et durant un arbitrage commercial international*, at pp. 190-91. Although I agree that a distinction can be made between a case concerning validity and one concerning applicability, it cannot be said that the Quebec courts have uniformly used or identified this distinction as a criterion for intervening. Nor has it been adopted in the rest of Canada, where the *prima facie* analysis has also been extended to cases concerning the applicability of an arbitration clause: *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.); *Dalimpex Ltd. v. Janicki* (2003), 228 D.L.R. (4th) 179 (Ont. C.A.). I therefore consider it necessary to pursue the analysis beyond this distinction.

83 Article 940.1 C.C.P. refers only to cases where the arbitration agreement is null. However, since this provision was adopted in the context of the implementation of the New York Convention (the words of which, in art. II(3), are "null and void, inoperative or incapable of being performed"), I do not consider a literal interpretation to be appropriate. It is possible to develop, in a manner consistent with the empirical data from the Quebec case law, a test for reviewing an application to refer a dispute to arbitration that is faithful to art. 943 C.C.P. and to the *prima facie* analysis test that is increasingly gaining acceptance around the world.

84 First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the

arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.

85 If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.

86 Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process.

87 Thus, the general rule of the Quebec test is consistent with the competence- competence principle set out in art. 16 of the Model Law, which has been incorporated into art. 943 C.C.P. As

for the exception under which a court may rule first on questions of law relating to the arbitrator's jurisdiction, this power is provided for in art. 940.1 C.C.P., which in fact recognizes that a court can itself find that the agreement is null rather than referring this issue to arbitration.

88 In the case at bar, the parties have raised questions of law relating to the application of the provisions on Quebec private international law and to whether the class action is of public order. There are a number of other arguments, however, that require an analysis of the facts in order to apply the law to this case. This is true of the attempt to identify a foreign element in the circumstances of the case. Likewise, the external nature of the arbitration clause requires not only an interpretation of the law, but also a review of the documentary and testimonial evidence introduced by the parties. According to the test discussed above, the matter should have been referred to arbitration.

89 Considering the status of the case, it would be counterproductive for this Court to refer it to arbitration, thereby exposing the parties to a new round of proceedings. It would therefore be preferable to deal with all the questions here. I have already discussed the application of art. 3149 C.C.Q. and the question of the foreign element. I will now consider the external clause issue.

6. External Nature of the Arbitration Clause

90 In 1994, the legislature introduced arts. 1435 to 1437 C.C.Q. — which lay down special rules on the validity of certain clauses typically found in contracts of adhesion or consumer contracts — into the law of contractual obligations. Although all these rules share a general purpose of

protecting the weakest and most vulnerable contracting parties, they concern different types of clauses (external, illegible, incomprehensible and abusive) and are accordingly aimed at different types of abuse. For example, whereas the notion of the external clause (art. 1435 C.C.Q.) traditionally concerns contract clauses that are physically separate from the main document, that of the illegible clause (art. 1436 C.C.Q.) concerns clauses that are not separate from the main document but are, owing to their physical presentation, illegible for a reasonable person. Thus, a clause that is [TRANSLATION] "buried among a large number of other clauses" because of its location in the contract is characterized as illegible: D. Lluelles and B. Moore, *Droit des obligations* (2006), at p. 897; B. Lefebvre, "Le contrat d'adhésion" (2003), 105 *R. du N.* 439, at p. 479. An incomprehensible clause (art. 1436 C.C.Q.) is one that is drafted so poorly that its content is unintelligible or excessively ambiguous.

91 In the case at bar, the Union argues that, pursuant to art. 1435 C.C.Q., the arbitration clause is null because it is an external clause and because it has not been proven that Mr. Dumoulin knew of its existence. Article 1435 reads as follows:

> **1435.** An external clause referred to in a contract is binding on the parties.
>
> In a consumer contract or a contract of adhesion, however, an external clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer or adhering party, unless the other party proves that the consumer or adhering party otherwise knew of it.

92 This provision begins with a recognition that an external clause referred to in a contract is valid. However, its purpose is to remedy abuses resulting from the inclusion by reference of clauses that one of the parties is unaware of: Civil Code Revision Office, vol. II, t. 2, at pp. 601-2;

Commentaires du ministre de la Justice, vol. I, at pp. 870-71. A party wishing to apply a clause that is external to a consumer contract or a contract of adhesion must prove that it was expressly brought to the attention of the consumer or adhering party, or that the consumer or adhering party otherwise knew of it.

93 In the absence of a statutory definition, the authors have undertaken to define the external clause concept. An external clause is a contractual stipulation [TRANSLATION] "set out in a document that is separate from the agreement or instrument but that, according to a clause of this agreement, is deemed to be an integral part of it": *Baudouin et Jobin: Les obligations* (6th ed. 2005), at p. 267. A clause is external if it is physically separate from the contract: Lluelles and Moore, at p. 748. A clause found on the back of a contract or in a schedule at the end of it is not an external clause, because it is an integral part of the contract; art. 1435 C.C.Q. does not apply to such a clause.

94 The case at bar is the first in which the Quebec Court of Appeal has had to consider whether a contract clause that can be accessed by means of a hyperlink in a contract entered into via the Internet can be considered to be an external clause. Previous disputes concerning the external nature of contractual stipulations have concerned paper documents.

95 Some aspects of electronic documents are covered by the law. In light of the growing number of juridical acts entered into via the Internet, the Quebec legislature has intervened and laid down rules relating to this new environment. Thus, the *Act to establish a legal framework for information technology*, R.S.Q., c. C-1.1, provides that documents have the same legal value

whether they are paper or technology-based documents (s. 5). A contract may therefore be entered into using either an electronic medium — by, for example, filling out a form on a Web page — or paper: V. Gautrais, *Know your law: Guide respecting the management of technology-based documents* (2005), at p. 23.

96 Despite the efforts to harmonize the rules via legislation, there are legal rules that are not always easy to apply in the context of the Internet. This is true, for example, in the case of external clauses, since the traditional test of physical separation cannot be transposed without qualification to the context of electronic commerce.

97 A Web page may contain many links, each of which leads in turn to a new Web page that may itself contain many more links, and so on. Obviously, it cannot be argued that all these different but interlinked pages constitute a single document, or that the entire Web, as it scrolls down a user's screen, is just one document. However, it is difficult to accept that the need for a single command by the user would be sufficient for a finding that the provision governing external clauses is applicable. Such an interpretation would be inconsistent with the reality of the Internet environment, where no real distinction is made between scrolling through a document and using a hyperlink. Analogously to paper documents, some Web documents contain several pages that can be accessed only by means of hyperlinks, whereas others can be viewed by scrolling down them on the computer's screen. There is no reason to favour one configuration over the other. To determine whether clauses on the Internet are external clauses, therefore, it is necessary to consider another rule that, although not expressly mentioned in art. 1435 C.C.Q., is implied by it.

98 Thus, a number of authors have stressed that, for an external clause to be binding on the parties, it must be reasonably accessible: Lluelles and Moore, at p. 753; *Baudouin et Jobin: Les obligations*, at p. 268. A contracting party cannot argue that a contract clause is binding unless the other party had a reasonable opportunity to read it. For this, the other party must have had access to it. Where a contract has been negotiated and all its terms and conditions are set out in the contract itself, the problem of accessibility does not arise, since all the clauses are part of a single document. Where the contract refers to an external document, however, accessibility is an implied precondition for setting up the clause against the other party.

99 The implied precondition of accessibility is a useful tool for the analysis of an electronic document. Thus, a clause that requires operations of such complexity that its text is not reasonably accessible cannot be regarded as an integral part of the contract. Likewise, a clause contained in a document on the Internet to which a contract on the Internet refers, but for which no hyperlink is provided, will be an external clause. Access to the clause in electronic format should be no more difficult than access to its equivalent on paper. This proposition flows both from the interpretation of art. 1435 C.C.Q. and from the principle of functional equivalence that underlies the *Act to establish a legal framework for information technology*.

100 The evidence in the record shows that the consumer could access the page of Dell's Web site containing the arbitration clause directly by clicking on the highlighted hyperlink entitled "Terms and Conditions of Sale". This link reappeared on every page the consumer accessed. When the consumer clicked on the link, a page containing the terms and conditions of sale, including the arbitration clause, appeared on the screen. From this point of view, the clause was no more difficult

for the consumer to access than would have been the case had he or she been given a paper copy of the entire contract on which the terms and conditions of sale appeared on the back of the first page.

101 In my view, the consumer's access to the arbitration clause was not impeded by the configuration of the clause; to read it, he or she needed only to click once on the hyperlink to the terms and conditions of sale. The clause is therefore not an external one within the meaning of the *Civil Code of Québec*.

102 The Union submits that the NAF Code, too, is an external document and cannot be set up against Mr. Dumoulin, the consumer in the instant case. According to the Union, the hyperlink merely led to the home page of the NAF's Web site, and to access the NAF Code, consumers had to pursue their searches beyond the home page. At first glance, the need to pursue a search beyond the home page seems to me to be insufficient to support a finding that the NAF Code is an external document. Without further evidence regarding access problems, I find that the argument must be rejected. Furthermore, even if the NAF Code were an external document, this argument would not be sufficient to decide the issue of the arbitrator's jurisdiction. If the NAF Code were in fact an external clause and therefore null pursuant to art. 1435 C.C.Q., that would not affect the validity of the arbitration clause. The arbitration procedure would then simply be governed by the C.C.P.

103 In concluding, I would like to point out, relying only on the facts in the record and having heard no specific arguments on the issue of an illegible or incomprehensible arbitration clause, that I would have reached the same conclusion even if the Union had also argued that the clause was illegible or incomprehensible within the meaning of art. 1436 C.C.Q. As was mentioned

above, the highlighted hyperlink appeared on every page the consumer accessed, and no evidence was adduced that could lead to the conclusion that the text was difficult to find in the document, or that it was hard to read or to understand.

104 I would also note that in this Court, the Union argued generally that the arbitration clause was abusive. This argument is based on the prohibition under art. 1437 C.C.Q. However, since no submissions were made in support of this allegation, I will simply find that the Union has not demonstrated its merits.

7. Availability of the Class Action Where There is an Arbitration Clause

105 As a separate ground in support of the argument that the arbitration clause cannot be set up against Mr. Dumoulin's motion, the Union relies on art. 2639 C.C.Q. and submits that because this is a class action, the dispute is of public order and therefore cannot be submitted to arbitration. Thus, Dell is not entitled to request that the dispute be referred to arbitration, and the class action must be heard on the merits. In my opinion, the Union's argument must be rejected. The class action is a procedure, and its purpose is not to create a new right.

106 The procedural framework for the class action was added to the *Code of Civil Procedure* in 1979. It is accepted that the class action has a social dimension: "Its purpose is to facilitate access to justice for citizens who share common problems and would otherwise have little incentive to apply to the courts on an individual basis to assert their rights" (*Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666, 2006 SCC 19, at para. 16) or might lack the financial means to do so. From

this perspective, the class action is clearly of public interest. However, the first introductory provision of Book IX of the *Code of Civil Procedure* — Class Action — reminds us that, as important as it may be, the class action is only a legal procedure:

> **999.** . . .
>
> (*d*) "class action" means the procedure which enables one member to sue without a mandate on behalf of all the members.
>
> . . .

107 This position was already accepted at the time Book IX was enacted:

> [TRANSLATION] The class action is not a right (*jus*); it is a procedure. It is not, in itself, even a means to exercise a right, a remedy in the sense of the maxim *ubi jus, ibi remedium*. It is merely a special mechanism that is applied to an existing means to exercise an existing right in order to "collectivize" it.
>
> (M. Bouchard, "L'autorisation d'exercer le recours collectif" (1980), 21 *C. de D.* 855, at p. 864)

The notion that the class action procedure does not create new rights has been reiterated on numerous occasions, including recently by this Court in *Bisaillon*, at paras. 17 and 22.

108 In the case at bar, the parties agreed to submit their disputes to binding arbitration. The effect of an arbitration agreement is recognized in Quebec law: art. 2638 C.C.Q. Obviously, if Mr. Dumoulin had brought the same action solely as an individual, the Union's argument based on the class action being of public order could not have been advanced to prevent the court hearing the action from referring the parties to arbitration. Does the mere fact that Mr. Dumoulin instead

decided to bring the matter before the courts by instituting a class action affect the admissibility of his action? In light of the reasons of LeBel J., writing for the majority in *Bisaillon*, at para. 17, the answer is no: "[the class action] cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so".

109 Moreover, the Union's argument that the class action is a matter of public order that may not be submitted to arbitration has lost its force as a result of this Court's decision in *Desputeaux*. In that case, one of the parties had invoked the same provision, art. 2639 C.C.Q., to argue that the dispute over ownership of the copyright in a fictitious character, Caillou, was a question of public order that could not be submitted to arbitration. The Court held that the concept of public order referred to in art. 2639 C.C.Q. must be interpreted narrowly and is limited to matters analogous to those enumerated in that provision: paras. 53-55. In the case at bar, neither Mr. Dumoulin's hypothetical individual action nor the class action is a dispute over the status and capacity of persons, family law matters or analogous matters.

110 Consequently, the Union's argument relating to the public order nature of the class action must fail. I must now rule on the application of Bill 48, which came into force after this appeal was heard.

8. Application of the *Act to amend the Consumer Protection Act and the Act respecting the collection of certain debts*

111 Bill 48 was enacted on December 14, 2006 (S.Q. 2006, c. 56). It introduces a number of measures, only one of which is relevant to the case at bar: the addition to the *Consumer Protection Act* of a provision on arbitration clauses. This provision reads as follows:

> **2.** The Act is amended by inserting the following section after section 11:
>
> "**11.1.** Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.
>
> If a dispute arises after a contract has been entered into, the consumer may then agree to refer the dispute to arbitration."

The question that arises is whether this new provision applies to the facts of the instant case.

112 Pursuant to s. 18 of Bill 48, s. 2 came into force on December 14, 2006. Section 18 reads as follows:

> **18.** The provisions of this Act come into force on 14 December 2006, except section 1, which comes into force on 1 April 2007, and sections 3, 5, 9 and 10, which come into force on the date or dates to be set by the Government, but not later than 15 December 2007.

Bill 48 has only one transitional provision, s. 17, which provides that the new ss. 54.8 to 54.16 of the *Consumer Protection Act* do not apply to contracts entered into before the coming into force of

the Bill. The instant case is not one in which s. 17 is applicable. However, if ss. 17 and 18 are read together, it would seem at first glance that, aside from the provisions referred to in s. 17, Bill 48 applies to contracts entered into before its coming into force. Is this true? And is Bill 48 applicable in the case at bar?

113 Professor P.-A. Côté writes in *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 169, that "retroactive operation of a statute is highly exceptional, whereas prospective operation is the rule". He adds that "[a] statute has immediate effect when it applies to a legal situation that is ongoing at the moment of its commencement: the new statute governs the future developments of this situation" (p. 152). A legal situation is ongoing if the facts or effects are occurring at the time the law is being modified (p. 153). A statute of immediate effect can therefore modify the future effects of a fact that occurred before the statute came into force without affecting the prior legal situation of that fact.

114 To make it clear what is meant by an ongoing situation and one whose facts and effects have occurred in their entirety, it will be helpful to consider the example of the obligation to warrant against latent defects cited by professors P.-A. Côté and D. Jutras in *Le droit transitoire civil: Sources annotées* (loose-leaf), at p. 2-36. This obligation comes into existence upon the conclusion of the sale, but the warranty clause does not produce tangible effects unless a problem arises with the property sold. The warranty comes into play either when the vendor is put in default or when a claim is made. Once all the effects of the warranty have occurred, the situation is no longer ongoing and the new legislation will not apply to the situation unless it is retroactive.

115 Can the facts of the case at bar be characterized as those of an ongoing legal situation? If they can, the new legislation applies. If all the effects of the situation have occurred, the new legislation will not apply to the facts.

116 The only condition for application of Dell's arbitration clause is that a claim against Dell, or a dispute or controversy between the customer and Dell, must arise (clause 13C of the Terms and Conditions of Sale). All the facts of the legal situation had therefore occurred once Mr. Dumoulin notified Dell of his claim. Thus, all the facts giving rise to the application of the binding arbitration clause had occurred in their entirety before Bill 48 came into force.

117 Since there is nothing in Bill 48 that might lead to the conclusion that it applies retroactively, there is no reason to give it such a scope.

118 Moreover, to interpret Bill 48 as having retroactive effect would be problematic. First, retroactive operation is exceptional: Côté, at pp. 114-15; R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 553-54. Where a law is ambiguous and admits of two possible interpretations, an interpretation according to which it does not have retroactive effect will be preferred: *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 742-45.

119 Second, I find it highly unlikely that the legislature intended that s. 2 should apply to *all* arbitration clauses in force before December 14, 2006. For example, neither a consumer who is a party to an arbitration that is under way nor a consumer whose claims have already been rejected by an arbitrator should be able to rely on s. 2 and argue that the arbitration clause binding him or her

and the merchant is invalid in order to request a stay of proceedings or to have the unfavourable arbitration award set aside. Failing a clear indication to the contrary, when a dispute is submitted for a decision, the decision maker must apply the law as it stands at the time the facts giving rise to the right occurred.

120 I accordingly conclude that since the facts triggering the application of the arbitration clause had already occurred before s. 2 of Bill 48 came into force, this provision does not apply to the facts of the case at bar.

9. Disposition

121 For these reasons, I would allow the appeal, reverse the Court of Appeal's judgment, refer Mr. Dumoulin's claim to arbitration and dismiss the motion for authorization to institute a class action, with costs.

The reasons of Bastarache, LeBel and Fish JJ. were delivered by

BASTARACHE AND LEBEL JJ. (dissenting) —

I. Introduction

122 In this appeal, our Court must decide whether an arbitration clause in an Internet consumer contract bars access to a class action procedure in the province of Quebec. For the reasons

which follow, we hold that the clause at issue is of no effect and cannot be set up against the consumer who seeks the authorization to initiate a class action. As a result, we would dismiss the appeal.

II. Background

123 Over the weekend between April 4, 2003 and April 7, 2003, Dell showed some erroneous prices on one page of its Web site, the "shopping page" for its Axim X5 line of handheld computers. On this specific page, the Axim X5 300 MHz and 400 MHz were announced at a price of $89 and $118 respectively. It appears that the actual pricing should have read $379 and $549 respectively and that the error was due to a technical problem with one of Dell's database systems.

124 The error was discovered by Dell on Saturday, April 5th. Dell immediately tried to correct it by erecting an electronic barrier to block access to the faulty page through the generally publicized homepage www.Dell.ca. However, Dell overlooked the fact that it was still possible to access the blocked page through a "deep-link", a direct hyperlink that permits Web users to have access to a particular page without having to go through the Web site's homepage. It appears that many people were able to access the faulty page through this means and that an unusually high number of Axim X5 handheld computers were ordered at the erroneous prices over the weekend. The respondent Dumoulin is one of the persons who placed an order in this way, having ordered, on April 7th, an Axim X5 300 MHz at the erroneous price of $89 after having accessed the shopping page of the Axim X5 handheld computers through its deep-link.

125 On Monday, April 7th, at 9:30 a.m., the technical problem with the shopping page was fixed and access through the homepage was re-established at 2:30 p.m. Later that day, Dell published a correction notice on its Web site informing customers of the pricing error and of the fact that all orders for the Axim X5 handheld computers with incorrect pricing would not be processed.

126 The following day, Dumoulin received an e-mail informing him of the pricing error and also that his order would not be processed. He answered by putting Dell on notice to honour its advertised sale price. His request having been denied, Union des consommateurs, on behalf of Dumoulin, decided to file a motion in the Superior Court to be authorized to institute a class action.

127 Dell contested the motion by raising a declinatory exception to the Quebec Superior Court's jurisdiction based on the fact that the terms and conditions of the sale contained the following arbitration agreement:

> **Arbitration.** ANY CLAIM, DISPUTE, OR CONTROVERSY (WHETHER IN CONTRACT, TORT, OR OTHERWISE, WHETHER PREEXISTING, PRESENT OR FUTURE, AND INCLUDING STATUTORY, COMMON LAW, INTENTIONAL TORT AND EQUITABLE CLAIMS CAPABLE IN LAW OF BEING SUBMITTED TO BINDING ARBITRATION) AGAINST DELL, its agents, employees, officers, directors, successors, assigns or affiliates (collectively for purposes of this paragraph, "Dell") arising from or relating to this Agreement, its interpretation, or the breach, termination or validity thereof, the relationships between the parties, whether pre-existing, present or future, (including, to the full extent permitted by applicable law, relationships with third parties who are not signatories to this Agreement), Dell's advertising, or any related purchase SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM ("NAF") under its Code of Procedure and any specific procedures for the resolution of small claims and/or consumer disputes then in effect (available via the Internet at http://www.arb-forum.com/, or via telephone at 1-800-474-2371). The arbitration will be limited solely to the dispute or controversy between Customer and Dell. Any award of the arbitrator(s) shall be final and binding on each of the parties, and may be entered as a judgment in any court of competent

> jurisdiction. Information may be obtained and claims may be filed with the NAF at P.O. Box 50191, Minneapolis, MN 55405, or by e-mail at file@arb-forum.com, or by online filing at http://www.arb-forum.com/.
>
> (Appellant's Record, vol. III, at p. 384, *Dell's Online Policies*, Terms and Conditions of Sale (Canada), clause 13C)

Dell argued that on account of this clause, Dumoulin's dispute had to be submitted to compulsory arbitration.

III. Judicial History

128 The Superior Court dismissed the declinatory exception (J.E. 2004-457, [2004] Q.J. No. 155 (QL)). Langlois J. found that the arbitration agreement provided for an arbitration administered by the National Arbitration Forum ("NAF"), a U.S. based institute governed by American law, and that the agreement purported to derogate from art. 3149 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), which provides that the waiver of the jurisdiction of Quebec authorities cannot be set up against a consumer. In reaching this decision, Langlois J. followed an earlier decision of the Court of Appeal in *Dominion Bridge Corp. v. Knai*, [1998] R.J.Q. 321, where it was held that an agreement to arbitrate an employment dispute in a foreign jurisdiction could not be set up against the worker under art. 3149 C.C.Q.

129 The Quebec Court of Appeal dismissed the appeal, but on different grounds ([2005] R.J.Q. 1448, 2005 QCCA 570). Writing for a unanimous bench, Lemelin J. (*ad hoc*) overturned Langlois J. on the basis that, pursuant to Rule 32A of the *National Arbitration Forum Code of Procedure* ("NAF Code"), the seat of the arbitration could have been located in Quebec and that the

factual situation was on that basis distinguishable from the one in *Dominion Bridge*. However, Lemelin J. did conclude that the arbitration agreement was null on another basis. Having found that the "Terms and Conditions of Sale" in which the agreement was included was itself an external clause pursuant to art. 1435 C.C.Q., she further found that the arbitration agreement and its rules of procedure were not expressly brought to the attention of Dumoulin and that Dell had not established that the consumer had otherwise gained knowledge of it. She thus concluded that the arbitration agreement was null and that the Superior Court had not lost its jurisdiction over the class action proceedings.

IV. Analysis

A. *Introduction*

130 In this case, we are dealing with an arbitration clause inserted into a consumer contract of adhesion. The primary question raised by this appeal can be stated in the following terms: did the courts below err in law by refusing to refer the parties to arbitration? Before analysing this question, however, it is helpful to first discuss the nature of exclusive contractual arbitration clauses, the history of their recognition in Quebec law, and the principles that inform the interpretation of the rules relating to arbitration.

(1) The Nature of Exclusive Contractual Arbitration Clauses: a Jurisdiction Clause

131 There are two types of contractual arbitration clauses. A complete undertaking to arbitrate, or an "exclusive arbitration clause", is that by which the parties undertake in advance to

submit to arbitration any dispute which may arise regarding their contract, and which specifies that the award made will be final and binding on the parties. This may be contrasted with an arbitration clause that is purely optional (see *Zodiak International Productions Inc. v. Polish People's Republic*, [1983] 1 S.C.R. 529, at p. 533).

132 Exclusive arbitration clauses operate to create a "private jurisdiction" that implicates the loss of jurisdiction of state-appointed forums for dispute resolution, such as ordinary courts and administrative tribunals, rendering contractual arbitration both different and exclusive of the later entities (see J. E. C. Brierley, "Arbitration Agreements Articles 2638-2643", in *Reform of the Civil Code* (1993), vol. 3B, at pp. 1-3 and 10). Contractual arbitration has also been described as creating a "private justice system" for the parties: [TRANSLATION] "From a theoretical standpoint, arbitration is a private justice system that ordinarily arises out of an agreement. Thus, it has a contractual source and an adjudicative function" (see S. Thuilleaux in *L'arbitrage commercial au Québec: Droit interne — Droit international privé* (1991), at p. 5 (footnotes omitted)).

133 What makes contractual arbitration a "private jurisdiction" or "private justice system" is the degree of freedom the parties have in choosing the manner in which their dispute will be resolved:

> Arbitration is therefore the settling of disputes between parties who agree not to go before the courts, but to accept as final the decision of experts of their choice, in a place of their choice, usually subject to laws agreed upon in advance and usually under rules which avoid much of the formality, niceties, proof and procedure required by the courts.
>
> (W. Tetley, *International Conflict of Laws: Common, Civil and Maritime* (1994), at p. 390)

Parties to contractual arbitration are free to choose the laws governing their agreement to arbitrate, the law of the arbitral proceedings, the law of the subject matter under dispute, as well as the rules of conflict applicable to all of the above. In addition, the above four laws need not be the same and may differ from the law of the place of arbitration. Thus, contractual arbitration proceedings can be seen to be *delocalized* from the jurisdiction where the arbitration is held (see Tetley, at pp. 391-92).

134 One of the major differences between courts and arbitration is that contractual arbitrators are not representatives of the state, but, rather, are privately appointed. On account of this, whether an arbitration is situated in Quebec or not, in order for an arbitral award to be legally enforceable, the laws of Quebec require the decision to first be recognized by Quebec courts. There is no difference here with how judgments from foreign courts must first be recognized before having force of law in the province. This is noted by R. Tremblay in "La nature du différend et la fonction de l'arbitre consensuel" (1988), 91 *R. du N.* 246, at p. 252:

> [TRANSLATION] However, care must be taken not to confuse the judicial function with the arbitration function. Judges derive their jurisdiction from a state's foundational institutions. Arbitrators, on the other hand, derive their jurisdiction from the mutual agreement of the parties. The difference is an important one. An arbitrator is chosen and appointed by the parties and is not a representative of the state. Arbitrators may rule on disputes, but their decisions are not enforceable unless they are homologated; unlike a judgment, an arbitrator's decision is not enforceable on its own.

135 Exclusive arbitration and forum selection clauses operate very similarly. The effect of both is to derogate from the jurisdiction of ordinary courts, who would otherwise have jurisdiction to hear the matter. Many authors of conflict of laws' textbooks simply refer to these clauses, without

distinguishing between them, as "jurisdiction clauses": see for example J. G. Collier, *Conflict of Laws* (3rd ed. 2001), at p. 96. In the common law provinces, courts will stay their jurisdiction in the presence of either a valid forum selection or arbitration clause. The power to do so stems from the courts' inherent jurisdiction; however, different statutes provide for certain factors that should be taken into account in determining whether to grant the stay depending on whether the court is faced with a forum selection or a domestic or international arbitration clause. Quebec has also tended to treat exclusive arbitration and forum selection clauses analogously, the history of which we will now turn to.

(2) Recognition of Jurisdiction Clauses in Quebec Law

136 Prior to the coming into force of the C.C.Q., the rules on jurisdiction of Quebec courts were not codified. Quebec courts relied on art. 27 of the *Civil Code of Lower Canada* ("C.C.L.C.") and art. 68 of the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25 ("C.C.P."), to delineate their jurisdiction in cases where it was challenged: see *Masson v. Thompson*, [1994] R.J.Q. 1032 (Sup. Ct.). Article 27 C.C.L.C. provided that aliens although not resident in Lower Canada could be sued in Quebec courts "for the fulfilment of obligations contracted by them in foreign countries". Article 68 C.C.P., which is still in force today, provides the domestic rules for determining in which judicial district of Quebec a personal action can be started. Relying on the general principles set out in this section, and art. 27 C.C.L.C., Quebec courts have delineated a body of jurisprudential rules deciding when Quebec courts have jurisdiction to hear an action.

137 Prior to its amendment in 1992, the opening phrase of art. 68 C.C.P. stated: "Subject to

the provisions of articles 70, 71, 74 and 75, and notwithstanding any agreement to the contrary, a purely personal action may be instituted . . .". This was interpreted by Quebec courts to be a prohibition against intentional derogation through contract from the jurisdiction of Quebec courts through forum selection and arbitration clauses: see S. Thuilleaux and D. M. Proctor, "L'application des conventions d'arbitrage au Canada: une difficile coexistence entre les compétences judiciaire et arbitrale" (1992), 37 *McGill L.J.* 470, at pp. 477-78.

138 Then came the 1983 decision of this Court in *Zodiak International Productions*, where a party to a contract submitted to arbitration in Warsaw, but having lost, commenced a fresh action in the Quebec Superior Court against his co-contractor. Noting the tension between art. 68 C.C.P. and contractual arbitration clauses, the Court held that the Quebec legislator had nonetheless clearly intended to permit such clauses by introducing art. 951 C.C.P., which states: "An undertaking to arbitrate must be set out in writing." Faced with this provision, Chouinard J., for the Court, cited with approval the words of Pratte J. in *Syndicat de Normandin Lumber Ltd. v. The "Angelic Power"*, [1971] F.C. 263 (T.D.), who stated: ". . . I do not see how the Quebec legislator could have regulated the form and effect of an agreement whose validity he does not admit" (p. 539). Shortly after this decision, in 1986, the Quebec legislator introduced amendments to the C.C.L.C. and the C.C.P. providing detailed rules on the validity, form and procedure governing contractual arbitration. (Today, these rules can be found in the specific chapter on arbitration in the Book of Obligations of the C.C.Q., these being arts. 2638 to 2643, and in Book VII (on Arbitrations) of the C.C.P.)

139 Following these changes, an inconsistency could be noted in the Quebec legislator's

approach to forum selection clauses and arbitration clauses. By operation of art. 68 C.C.P., the former were still held to be invalid: see Thuilleaux and Proctor, at pp. 477-78. It would seem that this difference was accidental rather than intentional. Draft bills from as early as 1977 assimilated forum selection and arbitration clauses. For example, art. 67 of Book Nine of the *Draft Civil Code* of 1977 provided the following situations where Quebec authorities could refuse to recognize foreign decisions:

> **67** On application by the defendant, the jurisdiction of the court of origin is not recognized by the courts of Québec when:
>
> 1. the law of Québec, either because of the subject matter or by virtue of an agreement between the parties, gives exclusive jurisdiction to its courts to hear the claim which gave rise to the foreign decision;
>
> 2. the law of Québec, either because of the subject matter or by virtue of an agreement between the parties, recognizes the exclusive jurisdiction of another court; or
>
> 3. the law of Québec recognizes an agreement by which exclusive jurisdiction is conferred upon arbitrators.

This oversight was corrected, however, through the introduction of art. 3148 in Book Ten of the new C.C.Q. The second paragraph of this provision clarifies the intention of the Quebec legislator to assimilate the effect of forum selection and arbitration clauses. It provides that "a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator . . .". Simultaneously to this provision being passed, the opening phrase of art. 68 C.C.P. was amended to remove the prohibition on contractual derogation from the jurisdiction of Quebec courts and to direct matters concerning the international jurisdiction of Quebec authorities to Book

Ten of the C.C.Q. It now reads: "Subject to the provisions of this Chapter and the provisions of Book Ten of the Civil Code of Québec . . .".

140 Perhaps owing more to inadvertence than intention, some minor differences remain in the treatment of these two types of jurisdiction clauses in Quebec law. For example, there is no parallel provision to art. 940.1 C.C.P. for forum selection clauses, as there is for arbitration clauses, which permits parties to contest the validity of such clauses. This provision was introduced in the 1986 amendments to the C.C.P. and it provides that Quebec courts shall refer the parties to arbitration unless the case has been inscribed on the roll or it finds the agreement null, of which more will be said further below. Article 3148, para. 2 alone does not provide for challenging the validity of jurisdiction clauses. This has led to some criticism of the current set up of the rules on jurisdiction in the doctrine. For example, G. Saumier, in "Les objections à la compétence internationale des tribunaux québécois: nature et procédure" (1998), 58 *R. du B.* 145, criticizes the discrepancies between the rules applicable to forum selection clauses and arbitration clauses: [TRANSLATION] "there is no justification, where the parties have agreed in advance on the appropriate forum for settling their disputes, for making a distinction between an arbitral tribunal and a state court" (p. 161). Saumier advocates uniform rules between the two, and in this respect, urges an overhaul of the rules on international competence of Quebec authorities in one comprehensive set of rules:

> [TRANSLATION] The fundamental reform of the rules of private international law brought about by the adoption of the Civil Code of Québec did not include a revision of the procedural rules applicable in matters of international jurisdiction. Thus, a party wanting to object to the international jurisdiction of a Quebec court must deal with a multitude of statutory schemes relating to time limits and waiver and with precedents that are not easily reconciled. . . . It is therefore imperative to adopt rules tailored to the

> international context that reflect the interests both of the parties and of the state judicial system and the arbitration system. [pp. 164-65]

See also the 2000 report of the Comité de révision de la procédure civile which similarly advocates the creation of one coherent and comprehensive chapter on private international law to be situated in the C.C.P., which would include, among other things, the rules on Arbitrations currently located in Book VII of the C.C.P. (see Comité de révision de la procédure civile, *La révision de la procédure civile* (février 2000), Document de consultation, at pp. 113-14).

141 This short historical overview demonstrates, in our view, that one should not attach any significance to the structure of the C.C.Q. or the C.C.P. when interpreting the substantive provisions under review in this appeal. The coherence of the regime is not dependent on the particular Book of the C.C.P. that deals with arbitrations, or the particular title and Book of the C.C.Q. in which is found art. 3149. The *Civil Code* constitutes itself an *ensemble* which is not meant to be parcelled out into chapters and sections that are not interrelated. The way in which the law is presented in the Code corresponds to a methodology and a logic; it is not meant to insulate one substantive provision from all others. As pointed out by J. E. C. Brierley and R. A. Macdonald in *Quebec Civil Law: An Introduction to Quebec Private Law* (1993), at p. 25, "the codification of the private law of Lower Canada was, primarily, a technical reordering of a complex body of norms that was intended to make this private law more accessible in both its language and substance to legal professionals . . .". From its very inception, the Code's interpretation depended not on this reordering but on its place in the legal order and its relation to the theory of sources it presupposes (p. 97). Indeed, Brierley and Macdonald write, after having noted the assumptions as to form that underpin the Code: "[t]o assume that codal provisions are non-redundant is to assume that they are to be mutually cross-

referenced within the Code and that each article must be read in conjunction with all others, regardless of their placement in the Code" (pp. 102-3). The Code is of course taxonomic; this invites to conceptual characterization, to "identifying the extensions of which a concept is susceptible, all the more so since these headings are themselves part of the enacted law" (p. 104). Moreover, "the best guide to ascertaining the legislative intention will still be the Code itself, read as a whole . . ." (p. 139). This is why headings will be considered indicators of scope and meaning and other codal articles will help fix the meaning of any given text (p. 139).

(3) The Principle of Primacy of the Autonomy of the Parties

142 Quebec's acceptance of jurisdiction clauses over the past two decades is rooted in the principle of primacy of the autonomy of the parties. This has recently been confirmed by our Court in *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178, 2003 SCC 17, with respect to agreements to submit a dispute to an arbitral tribunal, and *GreCon Dimter inc. v. J.R. Normand inc.*, [2005] 2 S.C.R. 401, 2005 SCC 46, with respect to agreements to submit it to a foreign authority.

143 In *Desputeaux*, our Court recognized that the limits to the autonomy of the contracting parties to choose to submit a dispute to arbitration had to be given a restrictive interpretation. More specifically, as will be discussed in further detail below, we held that the notion of "public order" at art. 2639, para. 1 C.C.Q. had to be given a narrow interpretation. Furthermore, we held that legislation merely identifying the courts which, within the judicial system, will have jurisdiction over a particular subject matter should not be interpreted as excluding the possibility of arbitration, except if it was clearly the legislator's intention to do so. In reaching these conclusions, we notably

had regard to the legislative policy that now accepts arbitration as a valid form of dispute resolution and, moreover, seeks to promote its use.

144 Both art. 3148, para. 2 C.C.Q. and art. 940.1 C.C.P. can be interpreted as giving practical effect to the principle of primacy of the autonomy of the parties that has characterized the development of the law of arbitration in Quebec in the last two decades. The provisions purport most notably to promote legal certainty for the parties by enabling them to provide in advance for the forum to which their disputes will have to be submitted. They are also consistent with the international movement towards harmonizing the rules of jurisdiction.

145 This movement towards harmonization can be explained by the importance of legal certainty for commercial and international transactions. As noted by J. A. Talpis in "Choice of Law and Forum Selection Clauses under the New *Civil Code of Quebec*" (1994), 96 *R. du N.* 183, at pp. 188-89:

> Th[e] essential goal of predictability was surely on the mind of the drafters of the new *Civil Code of Quebec*, as it reaffirmed and extended the theory of party autonomy, a theory clearly among the foremost general principles of law recognized by civilized nations. It is a principle which makes the express or implied intention of the parties determinative of the legal system by which even the essential validity of a contract should be governed. In Quebec, it has a lengthy history and a great deal of current vitality.
>
> The fact is that considerations of commercial convenience and of conflicts theory weigh heavily in favor of this theory which rests mainly upon the interest of the parties to the contract, but is supported by those of the commercial community and of the courts as well. Consequently, it was considered by the legislature to be in the general social interest to provide a legal system favorable to the predictable resolution of the conflict of laws.

This clear intention of the Quebec legislator was acknowledged by our Court in *GreCon Dimter*, where we concluded that the fact that an action was incidental to a principal action heard by a Quebec court was not sufficient to trump an agreement to submit any claim arising from the contract to a foreign authority. More specifically, we concluded that art. 3148, para. 2 C.C.Q. was to be given primacy over art. 3139 C.C.Q.

(4) The Limits on the Autonomy of the Parties

146 Naturally, the primacy of the autonomy of contracting parties permitting them to choose in advance the forum for resolving their disputes is not without limits. The Quebec legislator has restricted it in many different ways.

147 We noted the limits on the expression of the autonomy of the parties to submit their disputes to a foreign authority in *GreCon Dimter*, pursuant to art. 3148, para. 2. First, art. 3151 C.C.Q. confers to the Quebec authorities *exclusive* jurisdiction to hear in first instance all actions founded on civil liability for damage suffered as a result of exposure to or the use of raw materials originating in Quebec. Second, art. 3149 C.C.Q., which confers jurisdiction to the Quebec authorities to hear an action involving a consumer contract or an employment contract if the consumer or worker has his domicile or residence in Quebec, states that the waiver of such jurisdiction by the consumer or worker may not be set up against him. The language of both provisions is clear with regard to the intention of the legislature to limit the autonomy of the parties.

148 Given the various location of rules relating to arbitration in the C.C.Q., the definition

of the limits on the autonomy of the parties to submit their disputes to an arbitral tribunal gives rise to some uncertainty, as illustrated by this case. The general provision is art. 2639 C.C.Q. which states that "[d]isputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration". While it is the only exception created in the chapter on "Arbitrations", art. 2639 C.C.Q. is not the only legislative exception to arbitrability. This was recognized by Brierley when writing on the new chapter on arbitration in the *Civil Code*:

> It is possible that an implicit legislative intention to exclude arbitration can be detected, even if it has not been expressly forbidden (for example, when the matter is reserved for resolution to the courts or quasi-judicial state agencies). An imperative attribution of competence in certain areas might in fact contain a rule of public order which excludes arbitration. [Emphasis added.]
>
> (Brierley, *Reform of the Civil Code*, at p. 4)

Furthermore, in order to be enforceable, an arbitration agreement has to be evidenced in writing under art. 2640 C.C.Q. and must otherwise be in compliance with all the conditions of formation of a contract. This latter point is true even when the arbitration agreement is contained in a contract since it is then considered to be a separate agreement pursuant to art. 2642 C.C.Q. The comments of the Minister of Justice on this article specifically recognize that an arbitration agreement is subject to the general rules of contract and can be challenged before the courts on the same basis as any other contract (*Commentaires du ministre de la Justice* (1993), vol. II). As well, since arbitration clauses raise primarily a question of jurisdiction, there is the additional problem of which jurisdiction (the arbitrator or Quebec courts) ought to decide whether any of these limits apply in a given case. This brings us back to the primary issue raised by this case.

B. *Issues Raised by this Case*

149 On the primary question of whether the lower courts erred in refusing to refer the parties to arbitration, it is not contested by the respondents that, if the arbitration agreement is valid and applicable to the dispute, the courts have no discretion and must not refuse to refer the parties to arbitration. On that point, art. 940.1 C.C.P. seems clear: if the parties have an agreement to arbitrate on the matter of the dispute, on the application of either of the parties, the court *shall* refer the parties to arbitration, unless the case has been inscribed on the roll or the court finds the agreement to be null. It is well established that, by using the term "shall", the legislator has indicated that the court has no discretion to refuse, on the application of either of the parties, to refer the case to arbitration when the appropriate conditions are met (see *GreCon Dimter*, at para. 44; *La Sarre (Ville de) v. Gabriel Aubé inc.*, [1992] R.D.J. 273 (C.A.), at p. 277). On a plain reading of art. 940.1 C.C.P., these conditions appear to be threefold: (i) the parties must have an arbitration agreement on the matter of the dispute; (ii) the case must not have been inscribed on the roll; and (iii) the court must not find the agreement to be null. Regarding the latter condition, it appears obvious to us that the reference to the nullity of the agreement is also meant to cover the situation where the arbitration agreement cannot, without being null, be set up against the applicant.

150 It is also well established that the effect of a valid undertaking to arbitrate is to remove the dispute from the jurisdiction of the ordinary courts of law (per *Zodiak International Productions,* art. 940.1 C.C.P. and art. 3148, para. 2 C.C.Q.). It is also accepted that jurisdiction over the individual actions that form the basis of a class action is a prerequisite to the exercise of jurisdiction over the proceedings (*Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666, 2006 SCC 19). There

is consequently no question that, if the arbitration agreement is valid and relates to the dispute, the Superior Court has no jurisdiction to hear the case and must refer the parties to arbitration.

151 In the case at bar, it is not contested by the respondents that the first two conditions for the application of art. 940.1 are met. What is at issue, though, is whether the Court of Appeal erred in law by refusing to refer the parties to arbitration on the basis that the arbitration agreement was null or cannot otherwise be set up against Dumoulin.

152 Many different grounds have been raised in order to demonstrate that the arbitration clause in the case at bar is null or otherwise cannot be set up against Dumoulin. It has notably been argued: (1) that the arbitration agreement cannot be set up against Dumoulin, a consumer, because it constitutes a waiver of the jurisdiction of the Quebec authorities under art. 3149 C.C.Q.; and (2) that it is null, (a) because it is over a consumer dispute which is in and of itself a matter of public order under art. 2639 C.C.Q.; (b) because it constitutes a waiver of the jurisdiction of the Superior Court over class actions and that such a waiver is contrary to public order under art. 2639 C.C.Q.; (c) because Dumoulin did not really consent to it as it was imposed on him through a contract of adhesion; (d) because it is abusive and offends art. 1437 C.C.Q.; and (e) because it is found in an external clause that was not expressly brought to the attention of Dumoulin as required under art. 1435 C.C.Q. Each of these arguments represents a sub-issue in this case and will be dealt with separately in section D below. But before we turn to the study of these sub-issues of the case, it is necessary to address two preliminary questions.

153 First, we have to decide whether the amendments the Quebec legislator recently brought

to the *Consumer Protection Act*, R.S.Q., c. P-40.1 ("C.P.A."), apply to this case. Bill 48, *An Act to amend the Consumer Protection Act and the Act respecting the collection of certain debts*, 2nd Sess., 37th Leg. (now S.Q. 2006, c. 56), was assented to on December 14, 2006, the day after the hearing of this case before our Court. Section 2 of Bill 48 reads as follow:

> **2.** The Act [the *Consumer Protection Act*] is amended by inserting the following section after section 11:
>
> "**11.1.** Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.
>
> If a dispute arises after a contract has been entered into, the consumer may then agree to refer the dispute to arbitration."

It is not disputed that, if this amendment applies to the case at bar, there would be no need to address the other sub-issues as the third condition for the application of art. 940.1 C.C.P. would clearly not be met.

154 Second, we have to determine the scope of the analysis a court should conduct under art. 940.1 C.C.P. in order to "find" whether the arbitration agreement is null. The appellant argues that this analysis should only be *prima facie*; the respondents argue it should be comprehensive. Depending on the answer to be given to this question, it is possible that only *some* of the grounds of nullity invoked by the respondents can be properly raised at the stage of a referral application, whereas the other grounds should be more appropriately left to the arbitrator to decide, subject to subsequent review by the courts.

C. *Preliminary Questions*

(1) The Impact of Bill 48 on the Case at Bar

155 The main provision in Bill 48 relevant to this appeal is s. 2. It amends the C.P.A. by prohibiting and voiding any contractual clauses which oblige a consumer to submit a dispute to arbitration. Pursuant to the C.P.A. as amended, an arbitration agreement can validly be concluded by a merchant and a consumer only after a dispute has arisen. It is conceded that, if this amendment applies to the case at bar, the appeal should be dismissed as the arbitration agreement on which the appellant's declinatory exception is founded would clearly be of no effect. It should be noted that our interpretation of art. 3149 C.C.Q. achieves the same result as Bill 48. It might be argued that the introduction of Bill 48 is an indication that the Legislative Assembly did not share our view of art. 3149. Our response to this is that it is much more likely that the misinterpretation of art. 3149 in *obiter* in *Dominion Bridge*, and in the Court of Appeal in this case, caused the legislator to act swiftly in order to ensure the protection of consumers in the province.

156 Section 18 of Bill 48 provides that its provisions come into force on December 14, 2006, except for certain specific provisions that come into force at later dates (between April 1, 2007 and December 15, 2007). Since s. 2 of Bill 48 is now in force, the question before us is whether it has any effect on the pending case.

157 Under well-established principles of statutory interpretation, in general, new laws affecting *substantive* matters do not apply to pending cases. It is also well recognized that a new law will be applicable to a pending case if it clearly expresses an intent to retroactively modify the substantive rights at issue. Professor Côté states the applicable principles in the following manner:

> In general, new statutes affecting substantive matters do not apply to pending cases, even those under appeal. Since the judicial process is generally declaratory of rights, the judge declares the rights of the parties as they existed when the cause of action arose: the day of the tort, of the conclusion of the contract, the commission of the crime, etc. However, a new statute bringing substantive modification is applicable to a pending case if it retroactively modifies the law applicable on the day of the tort, the contract, the crime, etc. A pending case, even under appeal, can therefore be affected by a retroactive statute, and even by one enacted while proceedings are pending in appeal.
>
> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 179)

158 The rule is different for new laws affecting *procedural* matters. Such laws have immediate effect and apply to pending cases. As Professor Côté notes, this does not mean that such laws have retroactive effect:

> Because procedural provisions apply to pending cases, the term "retroactivity" has been used by analogy with the effect of statutes affecting substantive rights. But procedural enactments do not govern the law that the judge declares to have existed: they only deal with the procedures used to assert a right, and with the rules for conduct of the hearing. It is normal that a statute dealing with trial procedure will govern the future conduct of all trials carried out under its authority. This is not retroactivity but simply immediate and prospective application. [pp. 179-80]

159 We therefore have to decide whether s. 2 of Bill 48 is a provision affecting substantive or procedural matters. If it affects substantive matters, we will further have to decide whether it has retroactive effects.

160 In our view, s. 2 of Bill 48 is a provision dealing with substantive matters as it affects a contractual right of the parties: the right of a party to have his claim referred to arbitration, to the

exclusion of the courts. It is true that, in some respects, this right resembles a procedural right: it determines how a right will be asserted. That said, it is obviously more than just a procedural right. It affects the jurisdiction of the courts and "it is well established that jurisdiction is not a procedural matter" (*Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1971] S.C.R. 1038, at p. 1040; see also Côté, at p. 183).

161 Furthermore, we are of the view that s. 2 of Bill 48 has no retroactive effect. Unless a statute provides otherwise, expressly or by necessary implication, it is not to be construed as having such effect. Wright J.'s dictum in *In re Athlumney*, [1898] 2 Q.B. 547, at pp. 551-52, still adequately reflects the law on this issue:

> Perhaps no rule of construction is more firmly established than this — that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.
>
> (See also *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at p. 279.)

162 Nothing in Bill 48 leads us to think that its s. 2 should be read as having retroactive effect. The transitional provisions do not state it and cannot be interpreted in such a way. Therefore, the general presumption against the retroactivity of the statute has not been rebutted and s. 2 of Bill 48 should not be interpreted as having the effect of rendering null the arbitration agreement at bar as this agreement was concluded before the coming into force of the provision.

(2) The Scope of the Analysis Under Art. 940.1 C.C.P.

163 The appellant relies on the competence-competence principle in arguing that the extent of the review that a court should conduct under art. 940.1 C.C.P. should be limited to a *prima facie* investigation. This principle has been described as having two components (see e.g., E. Gaillard and J. Savage, eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), at p. 401). First, the competence-competence principle stands for the proposition that the arbitrators have the power to rule on their own jurisdiction. This principle is well established in our law and has received legislative recognition in art. 943 C.C.P. More importantly for present purposes, it is a rule of chronological priority under which the arbitrators must have the first opportunity to rule on their jurisdiction, subject to subsequent review by the courts. This aspect of the competence-competence principle is still subject to disagreement and gives rise to different applications.

164 In trying to determine the scope of this principle, one has to keep in mind the difference between the types of challenges that can be brought against an arbitrator's jurisdiction. They fall into two main categories. The first category encompasses the challenges regarding the *validity* of the arbitration agreement involving the parties. The second category encompasses the challenges regarding the *applicability* of the arbitration agreement to the specific dispute.

165 It is relatively well accepted that the competence-competence principle applies to the jurisdictional challenges regarding the *applicability* of the arbitration agreement (see e.g., *Kingsway Financial Services Inc. v. 118997 Canada inc.*, [1999] Q.J. No. 5922 (QL) (C.A.)). In any challenge to arbitral jurisdiction alleging that the dispute does not fall within the scope of the arbitration

clause, it has been established that courts ought to send the matter to arbitration and allow the arbitrator to decide the question, unless it is obvious that the dispute is not within the arbitrator's jurisdiction. (See L. Y. Fortier, "Delimiting the Spheres of Judicial and Arbitral Power: 'Beware, My Lord, of Jealousy'" (2001), 80 *Can. Bar Rev.* 143, at p. 146; P. Bienvenu, "The Enforcement of International Arbitration Agreements and Referral Applications in the NAFTA Region" (1999), 59 *R. du B.* 705, at p. 721; J. B. Casey and J. Mills, *Arbitration Law of Canada: Practice and Procedure* (2005), at p. 64; L. Marquis, "La compétence arbitrale: une place au soleil ou à l'ombre du pouvoir judiciaire" (1990), 21 *R.D.U.S.* 303, at pp. 318-19.) However, whether courts ought to generally send the matter to arbitration when the validity of the arbitration agreement itself is challenged, is more controversial.

166 In some cases, the courts have recognized that the arbitrators should be the first to rule on the validity of the arbitration agreement and have referred the parties to arbitration (see e.g., *World LLC v. Parenteau & Parenteau Int'l Inc.*, [1998] Q.J. No. 736 (QL) (Sup. Ct.); *Automobiles Duclos inc. v. Ford du Canada ltée*, [2001] R.J.Q. 173 (Sup. Ct.); *Simbol Test Systems Inc. v. Gnubi Communications Inc.*, [2002] Q.J. No. 437 (QL) (Sup. Ct.); *Sonox Sia v. Albury Grain Sales Inc.*, [2005] Q.J. No. 9998 (QL) (Sup. Ct.)). In other cases, the courts have undertaken a comprehensive review of the validity of the arbitration clause before referring, or refusing to refer, the case to arbitration (see e.g., *Martineau v. Verreault*, [2001] Q.J. No. 3103 (QL) (Sup. Ct.); *Chassé v. Union canadienne, compagnie d'assurance*, [1999] R.R.A. 165 (Sup. Ct.); *Lemieux v. 9110-9595 Québec inc.*, [2004] Q.J. No. 9489 (QL) (C.Q.); *Joseph v. Assurances générales des Caisses Desjardins inc.*, SOQUIJ AZ-99036669 (C.Q.); *Bureau v. Beauce Société mutuelle d'assurance générale*, SOQUIJ AZ-96035006 (C.Q.); *Richard-Gagné v. Poiré*, [2006] Q.J. No. 9350 (QL), 2006 QCCS 4980).

167 The difficulties caused by the lack of clarity in the drafting of the C.C.P. now confirms the need for a full review of the matter in order to determine the appropriate approach to the exercise of the supervisory power of the Superior Court.

168 The appellant argues for what has been called the "*prima facie* approach" following which a court seized of a referral application should refer the matter to arbitration upon being satisfied on a *prima facie* basis that the action was not commenced in breach of a valid arbitration agreement. The appellant, and the doctrine to which it refers, never gives a precise definition of the expression "*prima facie*" in this context. We interpret its submissions as meaning that the court seized of a referral application would have to decide if the arbitration agreement *appears* to be valid and applicable to the dispute only on the basis of the documents produced to support the motion, presuming that they are true, without hearing any testimonial evidence. The ruling of the court on the issue would not have the authority of a final judgment and the arbitral tribunal could conduct its own comprehensive review of the validity of the arbitration, subject to subsequent review by the courts.

169 On the contrary, the respondents argue for what has been called the "comprehensive approach" following which the objections to the validity of the arbitration agreement should be dealt with comprehensively before the matter is referred (or not) to arbitration. The court seized of a referral application could thus, for example, hear testimonial evidence before ruling on the validity of the arbitration agreement. Furthermore, its ruling would have the authority of a final judgment (*res judicata*) on the matter. As the intervener London Court of International Arbitration notes in

its factum, the advocates of both approaches share a common objective, that is to promote the efficiency of the dispute resolution mechanisms. Where they disagree is on how best to achieve this objective.

170 The advocates of a comprehensive judicial review of the validity of the arbitration agreement under art. 940.1 C.C.P. rely on an "economy-of-means" rationale. They argue that it is a waste of time and money to refer the question of the validity of an agreement to an arbitral tribunal, whose very jurisdiction is challenged by one of the parties, in order to allow it to first rule on the question, as the parties will almost invariably have to return to the court either for a decision on the validity of the arbitration agreement pursuant to art. 943.1 C.C.P. (if the arbitral tribunal has declared itself competent) or to continue the proceedings that were interrupted by the referral application (if the arbitral tribunal has declared itself incompetent). They also argue that, as the jurisdiction of the arbitral tribunal depends entirely on the validity of the arbitration, it is illogical to ask the arbitral tribunal to first rule on the validity of the arbitration agreement.

171 Those who are in favour of limiting the review of the courts to a *prima facie* review focus on the prevention of dilatory tactics. They argue that a comprehensive review of the validity of an agreement, based on testimonial as well as documentary evidence, can take many months to decide, and that allowing such a review at the referral stage would afford a recalcitrant party the opportunity to delay unduly the commencement or progress of the arbitration. They further argue that the validity of the arbitration agreement should be presumed and that limiting its comprehensive review by the court only to the motions brought pursuant to art. 943.1 C.C.P. does not entail the same problems as this provision explicitly provides that the arbitral tribunal may pursue the

proceedings and make its award while such a motion is pending.

172 It is particularly significant to note that art. 940.1 C.C.P. clearly provides that a preliminary question be answered by the court concerning the agreement's validity; the provision does not specify that only a "*prima facie*" review be undertaken. The Quebec Superior Court, as a court designated by s. 96 of the *Constitution Act, 1867*, possesses inherent jurisdiction and has original jurisdiction in any matter unless jurisdiction is taken away by statute, according to arts. 31 and 33 C.C.P. (see also T. A. Cromwell in "Aspects of Constitutional Judicial Review in Canada" (1995), 46 *S.C. L. Rev.* 1027, at pp. 1030-31, cited to *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at para. 32). In matters involving an exclusive arbitration clause, the Quebec legislator has seen fit to divest Quebec courts of their jurisdiction pursuant to art. 3148, para. 2 C.C.Q., subject to those exceptions discussed above, and subject to art. 940.1 C.C.P. which, on its face, clearly gives the Superior Court the power to consider the validity of the arbitration agreement.

173 According to contextual argument based on the French version of art. 940.1 C.C.P., the word "*constate*" effectively means that courts can only undertake a *prima facie* review of the nullity of the arbitration agreement. But then art. 2642 C.C.Q. uses the same language with regard to the arbitrator's review of the arbitration clause: "*la constatation de la nullité du contrat par les arbitres ne rend pas nulle pour autant la convention d'arbitrage*". Applying the reasoning that "*constate*" in art. 940.1 C.C.P. signifies a *prima facie* review pursuant to art. 2642 C.C.Q., an arbitrator would be limited to a *prima facie* analysis of the validity of the contract containing the arbitration clause and would be unable to conduct any in-depth analysis or hear proof as to the alleged nullity of a contract. Such a result would confirm that the argument is flawed and illogical. Moreover, the verb

"*constate*", in a legal context, does not appear to imply a superficial review. It may just as well indicate a review on the merits of an issue of fact and law. See G. Cornu, *Vocabulaire juridique* (8th ed. 2000), at p. 208.

174 Furthermore, the Minister of Justice's comments on art. 2642 C.C.Q. support the proposition that a full review of nullity can be undertaken by the courts when the validity of the arbitration agreement is challenged. This article provides that an arbitration agreement contained in a contract is a separate agreement from the other clauses of the contract in which it is contained. As a consequence, the arbitration agreement must be subject to all of the general grounds for invalidating a contract at civil law, including those applying specifically to consumer or adhesion contracts. The comment of the Minister of Justice specifically recognizes that an arbitration agreement is subject to the general rules of contract and can be challenged before the courts on the same basis as any other contract:

> [TRANSLATION] This rule [art. 2642 C.C.Q.] does not preclude a party from asking the court to rule on the nullity of the arbitration agreement if, for example, he or she did not give free and informed consent or did not have the capacity to contract. The general rules of the law of obligations apply to an arbitration agreement as to any contract.
>
> (*Commentaires du ministre de la Justice*, vol. II, at p. 1651)

175 An argument was also presented on the basis of the *UNCITRAL Model Law on International Commercial Arbitration* of June 21, 1985 ("*Model Law*"), U.N. Doc. A/40/17, Annex I, and the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 U.N.T.S. 3 ("*New York Convention*"), international documents the Quebec rules on arbitration are based on and which can be used to interpret the C.C.P. rules (see *GreCon Dimter*, at paras. 39-43,

and art. 940.6 C.C.P.). It was argued that these provisions mandate that only a *prima facie* review of nullity be undertaken by courts. A review of these provisions has convinced us that the drafters of the *Model Law* and the *New York Convention* intended that courts and arbitrators have concurrent jurisdiction over such questions. In our view, the Quebec legislator, basing the Quebec rules on these international documents, adopted the same approach. The Report of the Working Group preparing the *Model Law* specifically states that it opted not to take a "manifestly" null and void approach:

> 77. A suggestion was made that [article 8 of the *Model Law*] should not be understood as requiring the court to examine in detail the validity of an arbitration agreement and that this idea could be expressed by requiring only a *prima facie* finding or by rephrasing the closing words as follows: "unless it finds that the agreement is *manifestly* null and void". In support of that idea it was pointed out that it would correspond with the principle to let the arbitral tribunal make the first ruling on its competence, subject to later control by a court. However, the prevailing view was that, in the cases envisaged under paragraph (1) where the parties differed on the existence of a valid arbitration agreement, that issue should be settled by the court, without first referring the issue to an arbitral tribunal, which allegedly lacked jurisdiction. The Working Group, after deliberation, decided to retain the text of paragraph (1).
>
> (*Report of the Working Group on International Contract Practices on the work of its fifth session* (New York, 22 February - 4 March 1983), A/CN.9/233)

The finding is confirmed by P. Binder in *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (2nd ed. 2005), at p. 91.

176 Endorsing a concurrent jurisdiction approach to questions concerning the validity of the agreement is defendable on an "economy-of-means" rationale and consistent with the general policy favouring the autonomy of the parties. Although art. 940.1 C.C.P. is not clear regarding the extent of the analysis the court should undergo, we think that a discretionary approach favouring resort to

the arbitrator in most instances would best serve the legislator's clear intention to promote the arbitral process and its efficiency, while preserving the core supervisory jurisdiction of the Superior Court. When seized with a declinatory exception, a court should rule on the validity of the arbitration only if it is possible to do it on the basis of documents and pleadings filed by the parties without having to hear evidence or make findings about its relevance and reliability.

177 This approach appears to be more consistent with the legislative framework which favours an *a posteriori* control of the arbitral process and sentences. As we have noted above, the affirmative ruling of an arbitrator on jurisdiction will always be subject to the comprehensive review of a court seized of the question pursuant to art. 943.1 C.C.P. Furthermore, art. 946.4, para. 1(2) C.C.P. expressly provides, *inter alia*, that a court can refuse the homologation of an arbitration award on proof that the arbitration agreement that led to it was invalid. Both these means of exercising *a posteriori* control do not impede the efficiency of the arbitration proceeding since the latter takes place after the arbitral proceeding has been completed and the former does not suspend it.

178 That said, we believe courts may still exercise some discretion when faced with a challenge to the validity of an arbitration agreement regarding the extent of the review they choose to undertake. In some circumstances, particularly in those that truly merit the label "international commercial arbitration", it may be more efficient to submit all questions regarding jurisdiction for the arbitrator to hear at first instance. In other circumstances, such as in the present case where we are faced with the need to interpret provisions of the *Civil Code*, it would seem preferable for the court to fully entertain the challenge to the arbitration agreement's validity. In our view, the courts

below were correct to fully consider Dumoulin's challenge to the validity of the arbitration agreement based on the application of art. 3149 C.C.Q.

D. *Possible Grounds of Nullity of the Arbitration Agreement*

> (1) Does the Arbitration Clause Constitute a Waiver of the International Jurisdiction of the Quebec Authorities that Cannot Be Set Up Against Dumoulin?

179 Here, we are faced with the task of interpreting art. 3149 C.C.Q. which is located in Section II, "Personal Actions of a Patrimonial Nature" included in Chapter II, "Special Provisions" of Title Three, "International Jurisdiction of Québec Authorities" in Book Ten of the *Civil Code*, entitled "Private International Law". There are four provisions in Section II. First, there is art. 3148, para. 1(1) to (5) of which set out the general rules on when a Quebec authority has jurisdiction to hear a dispute. As discussed above, the second paragraph sets out when a Quebec authority loses jurisdiction to hear a dispute it would otherwise be competent to hear. Then arts. 3149 to 3151, as mentioned earlier, appear as legislated limits on the autonomy of the parties.

180 For ease of reference, we set out arts. 3148, para. 2 and 3149 C.C.Q.:

> **3148.** In personal actions of a patrimonial nature, a Québec authority has jurisdiction where
>
> . . .
>
> However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

> **3149.** A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

181 The first phrase of art. 3149 confers jurisdiction on a "Québec authority" to hear an action involving a consumer or employment contract so long as the consumer or worker has his or her residence or domicile in Quebec. This phrase must be seen as giving additional protection to consumers and workers by conferring jurisdiction to Quebec authorities when these persons act as plaintiffs, since Quebec authorities already have jurisdiction where the consumer or worker is named as the defendant (per art. 3148, para. 1(1)).

182 The second phrase of art. 3149 provides that the waiver of the jurisdiction of Quebec authorities by the consumer or worker cannot be set up against him or her. A consumer or worker waives the jurisdiction of Quebec authorities precisely through entering the type of agreement contemplated in art. 3148, para. 2, whereby parties ". . . have chosen to submit all existing or future disputes between themselves . . . to a foreign authority or to an arbitrator". The effect of the second phrase is that a defending party cannot, in response to an action brought before a Quebec authority, the Superior Court for example, argue that the court has no jurisdiction to hear the matter by operation of a forum selection or arbitration clause.

183 Here, Dumoulin has his domicile in Quebec and the Superior Court is clearly a Quebec authority. It would seem that, for Dell to maintain that the Superior Court has no jurisdiction in this matter, it would have to argue that the arbitrator presiding over the NAF arbitration proceeding is a Quebec authority. It is only if this is the case that Dumoulin cannot be said to have waived the

jurisdiction of a Quebec authority through the arbitration clause.

184 Thus, in determining whether art. 3149 C.C.Q. applies, the language invites us to ask whether the jurisdiction chosen in the contract through a forum selection or arbitration clause is a "Québec authority". If that jurisdiction is not a "Québec authority", art. 3149 comes into play to permit the consumer or worker to bring his or her dispute before a "Québec authority". The issue, then, is who is a "Québec authority"?

185 The respondents argue that art. 3149 must be read in light of the distinction made in the second paragraph of art. 3148 between a "Québec authority", a "foreign authority" and "an arbitrator", such that a "Québec authority" in art. 3149 cannot be a "foreign authority" or "an arbitrator". This is challenged by the appellant who argues that if the arbitration is to take place in Quebec, then art. 3149 does not apply at all. The argument being made is that the arbitration is not "international" since it was found that it would take place in Quebec. In such a case, the rules of private international law in Book Ten of the C.C.Q. do not come into play. This submission raises a new question that has become a central issue in this case: faced with an exclusive arbitration clause agreed on by the parties, to what extent — if any — must the facts disclose "foreign" elements, or be "international" for the rules of private international law to be engaged? The question calls for a detailed examination.

(a) *Must the Arbitration Agreement Contain a "Foreign Element" in Order for Articles 3148, Para. 2 and 3149 — Rules of Private International Law — to Be Engaged?*

186 The introduction to any private international law (or "conflict of laws" as it is more

commonly referred to in common law jurisdictions) textbook will state that this area of law comes into play in legal disputes involving foreign elements. But what does this general assertion mean? Is any foreign element sufficient to invoke private international law? In order to answer these questions, it is helpful to first explain the nature, purpose and structure of private international law.

187 Despite what its name might connote, and the existence of international agreements on various aspects of private international law, the latter is not international in the "public international law" sense. It is not "international" or universal norms that determine when such rules apply; rather, these are domestic laws created by the judiciary or the legislature within a given territory. J.-G. Castel, in *Canadian Conflict of Laws* (4th ed. 1997), at pp. 4-5, describes the character of the conflict of laws:

> Principles and rules of the conflict of laws are not international, they are essentially national in character. Since they are part of the local law, they are formulated by the legislative bodies of the different legal units or are to be found in the decisions of their courts.

188 At their core, the rules of private international law/conflict of laws are local laws designed to provide answers in legal situations where two or more systems of law are capable of applying. Unfortunately, as discussed by Collier, at pp. 5-6, the names given to this area of law can be misleading with respect to its purpose:

> Two names for the subject ["private international law" and "conflict of laws"] are in common use; however, they are interchangeable. Neither is wholly accurate or properly descriptive. The name "conflict of laws" is somewhat misleading, since the object of this branch of the law is to eliminate any conflict between two or more systems of law (including [domestic] law) which have competing claims to govern the issue which is

before the court, rather than to provoke such a conflict, as the words may appear to suggest. However, it was the name given to the subject by A. V. Dicey, when he published his treatise, the first coherent account by an English lawyer of its rules and principles, in 1896 and it has been hallowed by use ever since.

Another name is "private international law", which is in common use in Europe. This is even more misleading than "conflict of laws", and each of its three words requires comment. "Private" distinguishes the subject from "public" international law, or international law *simpliciter*. The latter is the name for the body of rules and principles which governs states and international organisations in their mutual relations. It is administered through the International Court of Justice, other international courts and arbitral tribunals, international organisations and foreign offices, although, as part of a state's municipal or domestic law, it is also applied by that state's courts. Its sources are primarily to be found in international treaties, the practice of states in their relations (or custom) and the general principles of municipal legal systems. Private international law is concerned with the legal relations between private individuals and corporations, though also with the relations between states and governments so far as their relationships with other entities are governed by municipal law, an example being a government which contracts with individuals and corporations by raising a loan from them. Its sources are the same as those of any other branch of municipal law, which is to say that [domestic] private international law is derived from legislation and decisions of [domestic] courts.

"International" is used to indicate that the subject is concerned not only with the application by [domestic] courts of [domestic] law but of rules of foreign law also. The word is inapt, however, in so far as it might suggest that it is in some way concerned with the relations between states (it is even more inapt if it suggests "nations" rather than states). . . .

The word "law" must be understood in a special sense. The application of the rules of [a country's or province's] private international law does not by itself decide a case, as does that of the rules of the law of contract or tort. Private international law is not substantive law in this sense, for, as we have seen, it merely provides a body of rules which determine whether the [domestic] court has jurisdiction to hear and decide a case, and if it has, what system of law, [domestic] or foreign, will be employed to decide it, or whether a judgment of a foreign court will be recognised and enforced by [a domestic] court.

189 As this last paragraph suggests, the rules of private international law specifically involve the three following areas: (1) choice of law; (2) choice of jurisdiction; and (3) recognition of foreign judgments (see also Tetley, at p. 791).

190 “Choice of law” rules attempt to resolve the issue of which law governs a legal dispute when it becomes possible for the laws from more than one legal system to apply. A classic example would be a car accident occurring in Quebec, involving a resident of Ontario and a resident of Quebec. Rules developed to determine whether Ontario or Quebec substantive law should govern the dispute (i.e., the *lex loci delicti* rule adopted in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, if Ontario authorities are seized of the question, and art. 3126 of Book Ten of the C.C.Q. if Quebec authorities are seized of the question) fall under the “choice of law” category of private international law.

191 “Choice of jurisdiction” rules attempt to resolve the issue of which jurisdiction can hear a dispute when it becomes possible for more than one jurisdiction to be seized of the matter. The issues raised by this area are logically considered prior to those raised under “choice of law”. Consider the example given above. Which choice of law rule will be applied is not the first question to be addressed. A court hearing the dispute must first decide whether it can properly exercise jurisdiction over the dispute. Could the Alberta courts hear the dispute between the Quebec and Ontario motorists? Would the Ontario courts be better situated to hear the dispute? These are the types of questions “choice of jurisdiction” rules help to determine.

192 “Recognition of foreign judgments” rules operate to do just what the name suggests: they provide guidance on when the domestic jurisdiction can recognize and give force of law to foreign judgments.

193 A word should be said about the general structure of traditional private international law rules. Within each of the three areas discussed, different factors are identified to help resolve the issue at hand. The relevant factors to be considered are called "connecting factors". Connecting factors are defined by Tetley as facts which tend to connect a transaction or occurrence with a particular law or jurisdiction. These can be domicile, residence, nationality or place of incorporation of the parties; the place(s) of conclusion or performance of the contract; the place(s) where the tort or delict was committed or where its harm was felt; the flag or country of registry of the ship; the shipowner's base of operation, etc. (see Tetley, at pp. 41 and 195-96). Since private international law rules are domestic rules, as discussed above, it is the domestic courts or the legislature that determine what the relevant connecting factors will be. As well, the relevant connecting factors can vary depending on the area of private law under scrutiny. For example, in "choice of law" the factors one looks to in order to determine which law should apply in a family dispute may be different from the factors one looks at to determine which laws apply in torts or contracts.

194 The general claim is that the rules of private international law are engaged once a legal dispute presents foreign elements. The above discussion should bring to light the obvious link between this assertion and the connecting factors that will be considered in applying private international law rules. The connecting factors are indicators of the legally relevant foreign elements that can bring private international law rules into operation; they include such factors as different domiciles, residency or nationality of the parties, jurisdiction where legal proceedings were brought as compared to where the tort occurred, or where the contract was concluded, etc. For example, the choice of law rule set out at art. 3094 C.C.Q. reads:

> **3094.** The obligation of support is governed by the law of the domicile of the creditor. However, where the creditor cannot obtain support from the debtor under that law, the applicable law is that of the domicile of the debtor.

This rule implies that the relevant foreign element would be a difference in domicile between creditor and debtor of support obligations; a wife domiciled in Quebec and a husband domiciled in New Brunswick, for example. That the parties might have been married in a jurisdiction other than Quebec would be an irrelevant foreign element in applying this rule. Thus, not all foreign elements will be relevant. The relevant foreign elements will be those raised by the applicable private international law rule.

195 Must there always be a foreign element to engage the rules of private international law? Since these are domestic laws, it is certainly possible for legislators to craft private international rules that can be engaged absent foreign elements. It is not as if there were any constitutional or international laws prohibiting the legislator from adopting such rules. One example is found in art. 3111 C.C.Q., which acknowledges the capacity of parties to choose the rules that will govern their contractual relationship, whether they be domestic or foreign. The first paragraph of art. 3111 states:

> **3111.** A juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the act or the designation of which may be inferred with certainty from the terms of the act.

The stated purpose of this particular rule of private international law, one that comes into operation absent any foreign element, is to respect the principle primacy of the autonomy of the parties:

> [TRANSLATION] The principle of autonomy of the will of the parties is firmly rooted in

> Quebec's legal traditions, and the proposed article confirms it.
>
> . . . [T]he parties may choose the law applicable to their contract not only if the contract contains a foreign element, but also if it does not.
>
> (Projet de loi 125: Code civil du Québec, *Commentaires détaillés sur les dispositions du projet*, Livre X: Du droit international privé et disposition finale (Art. 3053 à 3144) (1991). Titre deuxième: *Des conflits de lois* (Art. 3059 à 3110), Chapitre troisième: Du statut des obligations (Art. 3085 à 3108), at p. 53)

As discussed earlier, this principle had significant influence in the crafting of the new private international rules in Book Ten of the C.C.Q. See Talpis, at p. 189:

> [T]he New Code adopts a very subjective approach to party autonomy. Going well beyond the Rome Convention on the *Law Applicable to Contractual Relations* of June 19, 1980 and the *Swiss Code of Private International Law* of December 18, 1987, from which many of the rules on contractual obligations were drawn, party autonomy under the new Code allows for an unrestricted choice of law, even in the absence of a foreign element (Paragraph 2 of Art. 3111), for the severance of the contract (Paragraph 3 of Art. 3111), extension to succession (Paragraph 2 of Art. 3098), to certain aspects of civil responsibility (Art. 3127), and even to the external relationships of conventional representation (Art. 3116). [Emphasis added.]

196 This brings us to art. 3148, para. 2 C.C.Q. which Talpis also argues allows for unrestricted choice (p. 218). It has been the subject of some debate whether, in order to claim the application of art. 3148, para. 2, a foreign element need be shown to exist. Aside from the presence of an exclusive forum selection clause, or an arbitration clause, no other factor is mentioned in the provision as being necessary for its operation.

197 Two theories have been offered on whether the application of art. 3148, para. 2 requires the presence of a foreign element. The first is that, like in the case of art. 3111 C.C.Q., the legislator

intended that no foreign element be present for its operation; this would be consistent with the desire to give primacy to the autonomy of the parties. See S. Rochette, "Commentaire sur la décision *United European Bank and Trust Nassau Ltd. c. Duchesneau* — Le tribunal québécois doit-il examiner le caractère abusif d'une clause d'élection de for incluse dans un contrat d'adhésion?", in *Repères*, EYB 2006REP504, September 2006, who, writing on the subject of forum selection clauses, states: [TRANSLATION] "[A]rticles 3111 and 3148, para. 2 C.C.Q. in no way require that a contract contain a foreign element for effect to be given to a forum selection clause in favour of a foreign authority."

198 This would also be consistent with a global trend occurring within the area of private international law with which we are dealing — choice of jurisdiction. In modern times, when it is recognized that respecting parties' jurisdiction clauses promotes commercial certainty, it is generally accepted that the rules and principles which confer jurisdiction in private international law fall within at least two categories: (i) consensual jurisdiction; and (ii) "connected" jurisdiction (some authors also point to a potential third area of jurisdiction, "exclusive jurisdiction", on which it is not necessary to elaborate here): see J. Hill "The Exercise of Jurisdiction in Private International Law", in *Asserting Jurisdiction: International and European Legal Perspectives* (2003), at p. 39; S. Guillemard and A. Prujiner in "La codification internationale du droit international privé: un échec?" (2005), 46 *C. de D.* 175; and G. Saumier. Consensual jurisdiction rules are those permitting the parties to determine by agreement the jurisdiction to govern their dispute. Hill, at p. 49, describes it as follows:

> According to the submission principle, a court is competent — notwithstanding the fact that neither the events giving rise to the dispute nor the parties have any connection with

> the forum — if parties voluntarily submit to the court's jurisdiction. Such a submission may take the form of a voluntary appearance to defend the claim without challenging the court's jurisdiction or a contractual agreement, typically a jurisdiction clause forming part of a wider agreement. [Emphasis added.]

Under the second category, the "connected" jurisdiction rules employ connecting factors to assist in determining whether the jurisdiction seized can hear the matter. Thus, only the second category of jurisdiction is concerned with an examination of factual links to geographical territories.

199 On the other hand, it has been pointed out that unlike art. 3111, which specifically stipulates that the provision applies even in the absence of a "foreign element", art. 3148, para. 2 makes no such concession and that this silence should not be construed as a mere oversight. See S. Guillemard, "Liberté contractuelle et rattachement juridictionnel: le droit québécois face aux droits français et européen", *E.J.C.L.*, vol. 8.2, June 2004, at pp. 25-26, online:

> [TRANSLATION] Must a case be intrinsically international for the designation of a foreign court or tribunal to be permissible, or can the designation of a foreign authority constitute in itself the foreign element required to make a dispute an international one? . . .
>
> The *Civil Code of Québec* does not expressly indicate how this question should be answered, but merely allows the parties to agree to a forum "[with respect] to a specified legal relationship". This statement merits special attention, since Quebec's codifiers were more specific where the normative connection is concerned. Under article 3111 C.C.Q., the parties may designate the law applicable to "[a] juridical act, whether or not it contains any foreign element". How should the silence of the provisions on the jurisdiction of courts be interpreted? Pierre-André Côté, a Quebec expert on statutory interpretation, gives the following warning: "Assuming a statute to be well drafted, an interpretation which adds to the terms . . . is suspect". He cites the recommendation of Lord Mersey: "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do". In other words, if, as the saying goes, the legislature "does not speak gratuitously", it certainly does not remain silent for no reason either. Since a comparison of the two provisions — on choice of law and on choice of forum — is perplexing because of the precision of one

> and the silence of the other, it must be concluded that selecting a forum is permitted in Quebec law only in a case with a foreign element. [Footnotes omitted.]

The author goes on to theorize, however, that the forum selection clause in itself may be the requisite foreign element since any other conclusion would fail to respect the principle of the primacy of the autonomy of the parties:

> [TRANSLATION] Is it possible that the designation by the parties of a court of a state with no other connection whatsoever to the contract would not in itself constitute a sufficiently significant connection?
>
> . . .
>
> In our opinion, to require that one of the elements of the case be "objectively" foreign would be inconsistent with the principle of freedom of contract. This would amount to viewing the jurisdictional connection solely within the framework — if not the straitjacket — of the elements of the contract itself, as is the case with other connecting factors in this area. Moreover, this reasoning is illogical. As we have seen, there is generally no requirement of a connection between the court and a contract otherwise characterized as an international one. [pp. 26 and 28]

Guillemard similarly recognizes that the same conclusion can be reached in the case of arbitration clauses:

> [TRANSLATION] [W]e have observed that where the choice of forum is concerned, in Quebec law at least, the "artificial" internationality that results uniquely from the fact that the authority belongs to another legal system does not appear necessarily to be precluded. It would seem to us to be illogical if the same were not true in the arbitration sphere. [p. 50]

200 In our view, the proposition that forum selection and arbitration clauses constitute on their own the requisite foreign element such that their presence alone brings art. 3148, para. 2 into

operation seems quite logical. In the case of forum selection clauses, the *effect* of such clauses will be to divest Quebec authorities of their jurisdiction to hear the matter in order for the dispute to be sent to another country or province to be heard under the laws of that jurisdiction. Similarly, the *effect* of exclusive arbitration clauses is to create a "private jurisdiction" that implicates the loss of jurisdiction of state-appointed authorities for dispute resolution, such as domestic courts and administrative tribunals.

201 We see no principled basis to distinguish between forum selection and arbitration clauses with regard to the question of whether they represent in and of themselves a foreign element. The fact that contractual arbitration may take place within the geographic territory of Quebec is not determinative of anything in that respect. First and foremost, the effect of both is to derogate from the jurisdiction of Quebec authorities and vest jurisdiction in some other entity. It seems to us that the rules in Title Three of Book Ten of the C.C.Q. are concerned with "jurisdiction" with respect to judicial and quasi-judicial powers, not so much "jurisdiction" in the geographical sense (though the notions can obviously overlap). Jurisdiction can mean a number of things, depending on the context. In *Lipohar v. The Queen* (1999), 200 C.L.R. 485, [1999] HCA 65, at p. 516, it was said of "jurisdiction": "It is used in a variety of senses, some relating to geography, some to persons and procedures, others to constitutional and judicial structures and powers."

202 The fact that Title Three is entitled "International Jurisdiction of Quebec Authorities" does not, in our view, mandate another conclusion. We do not take the reference to "international jurisdiction" to necessarily connote that questions of jurisdiction arise only when faced with geographical extra-territoriality. Private arbitration proceedings, even those located in Quebec, are

just as removed from Quebec's judicial and quasi-judicial systems — and hence "international" — as legal proceedings taking place in another province or country. One should avoid placing undue emphasis on the reference to "international" in Title Three for the same reasons discussed earlier concerning how one should not be mislead by the reference to "international" in the expression "private international law". Indeed, earlier draft versions of Title Three used the title "Conflicts of Jurisdiction" (see J. A. Talpis and G. Goldstein, "Analyse critique de l'avant-projet de loi du Québec en droit international privé" (1988), 91 *R. du N.* 606, at p. 608). As well, "International Jurisdiction of Quebec Authorities" may be somewhat of a misnomer since Quebec authorities must exercise their adjudicative jurisdiction within the territorial limits of the province — hence the holding in *Morguard Properties Ltd. v. City of Winnipeg*, [1983] 2 S.C.R. 493, that to be constitutional, assertions of jurisdiction over a legal dispute must have a real and substantial connection to the province.

203 As a final point, it should be noted that unlike many of the other provinces, Quebec has adopted arbitration rules that make no distinction between domestic and international arbitration. The Book on Arbitration in the C.C.P. covers both "domestic" and "international" arbitration; the rules are essentially identical. The purpose of this approach was to show deference to the parties' choice to arbitrate. In the common law provinces, some distinctions are made between "domestic" and "international" arbitrations for the purposes of court intervention and recognition of arbitral awards. The trend appears to be that court intervention is more tightly constrained in "international" arbitration than "domestic" arbitration. Courts are given more freedom to intervene and hear domestic arbitrations. (It would be an odd thing indeed if, in the face of this trend, this Court were to interpret Quebec law to permit greater court intervention in "international" arbitration only.) If

Quebec does not make the distinction in the C.C.P. rules, it stands to reason that one should not distinguish for the purpose of Book Ten of the C.C.Q. This is especially so when it seems that the only reason the word "arbitrator" was included in art. 3148, para. 2 (which substantially duplicates the effects of art. 940.1 C.C.P.) was to make available the exceptions to art. 3148, para. 2 at arts. 3149 to 3151.

204 For these reasons, we would conclude that an arbitration clause is itself sufficient to trigger the application of art. 3148, para. 2, and hence the exceptions that apply to it, including art. 3149.

(b) *The Quebec Court of Appeal's Decision in Dominion Bridge*

205 The appellant has relied on the decision in *Dominion Bridge*, in support of its position. There, the Court of Appeal, *in obiter*, interpreted art. 3149 such that it would permit workers or consumers to be bound to arbitration through an exclusive arbitration clause, so long as the arbitration occurs inside Quebec. Quebec courts have since followed this precedent, including Lemelin J. for the Court of Appeal below, although its wisdom has been questioned: see G. Goldstein and E. Groffier, *Droit international privé* (2003), t. II, *Règles spécifiques*, at p. 640.

206 It is clear that the decision in *Dominion Bridge*, was based on a mistaken belief that the intent of the legislator in enacting art. 3149 was to protect consumers and workers from moving their disputes outside Quebec. Explaining the basis of his conclusion, Beauregard J.A. speculates: [TRANSLATION] "The legislature's main intention was probably to protect a worker's right to sue his or her employer in Quebec" (p. 324). In fact, an examination of the comments made by the Minister

of Justice when enacting this legislation reveals that the intent was to preserve consumer and worker access to Quebec courts and other state-appointed dispute resolution forums, not merely to keep them within the geographic territory of Quebec. The comments of the Minister of Justice on art. 3149 are as follows:

> [TRANSLATION] This article is new law and is based on Switzerland's 1987 *Loi fédérale sur le droit international privé* and on the third paragraph of article 85 C.C.L.C. It confers jurisdiction over a consumer contract or a contract of employment on a Quebec authority where the consumer or worker is resident or domiciled in Quebec; this jurisdiction is in addition to the jurisdiction based on the criteria set out in article 3148.
>
> The article provides consumers and workers with enhanced protection.
>
> (*Commentaires du ministre de la Justice*, vol. II, at pp. 2010-11)

207 It is instructive to examine the provisions that art. 3149 is purportedly modelled upon. First, there is art. 85 C.C.L.C. which provides:

> **85.** When the parties to a deed have for the purpose of such deed, made election of domicile in any other place than their real domicile, all notifications, demands and suits relating thereto may be made at the elected domicile, and before the judge of such domicile.
>
> . . .
>
> Save in the case of a notarial deed, an election of domicile shall be without effect as regards the jurisdiction of any court, when it is signed by a non-trader within the boundaries of the district in which he resides.

208 Then, there is s. 114 of the Swiss legislation on private international law (*Loi fédérale sur le droit international privé* (December 18, 1987), RO 1988 1776), which provides:

[TRANSLATION]

Art. 114 Contracts with consumers

1. Where a consumer brings an action relating to a contract that satisfies the conditions set out in art. 120, para. 1, he may elect to do so in the Swiss court:

a. of his domicile or of his habitual place of residence, or

b. of the supplier's domicile or, in the absence of such domicile, of the supplier's habitual place of residence.

2. A consumer may not waive in advance the forum of his domicile or habitual place of residence.

209 Both provisions specifically maintain the jurisdiction of the courts to hear consumer disputes. As well, it should be noted the Minister of Justice's comments on arts. 3117 and 3118, which are rules that also seek to protect the consumer and worker when it comes to choice of law, end with the following statements, respectively:

> [TRANSLATION] It should be noted that the consumer contract is defined in article 1384 and that article 3149 confers jurisdiction on the Quebec courts in certain circumstances where consumer contracts are in issue.
>
> . . .
>
> It should also be noted here that article 3149 confers jurisdiction on the Quebec courts in certain circumstances where contracts of employment are in issue. [Emphasis added.]
>
> (*Commentaires du ministre de la Justice*, vol. II, at pp. 1987-88)

210 There appears from the above to be an intention on the part of the Quebec legislator to safeguard consumer and worker access to the courts. It is interesting to note that in a more recent decision, *Rees v. Convergia*, [2005] Q.J. No. 3248 (QL), 2005 QCCA 353, the Court of Appeal

seems to recognize that this was the purpose of art. 3149 C.C.Q.: [TRANSLATION] "Evidently, the legislature intended, in adopting article 3149 C.C.Q., to confer a separate and full jurisdiction on the Quebec courts in two areas of economic activity where one of the contracting parties is particularly vulnerable" (para. 37 (emphasis added)).

211 A further problem with the interpretation of art. 3149 in *Dominion Bridge* is that it essentially equates a contractual arbitrator seated in Quebec with a "Québec authority". Applying this notion in most situations demonstrates the flaws in this approach. Assuming that being a decision-maker situated in Quebec is sufficient to make one a "Québec authority", it ignores the issue of whether the arbitrator must be from Québec. In this case, as we read the provisions on appointment of arbitrators in NAF's Code, Rules 20-24, there is no guarantee that an arbitrator will be from the complainant's jurisdiction. If the parties do not select an arbitrator on mutually agreeable terms, NAF chooses, permitting the parties to strike out one candidate each from the short list. The only provision that touches on what jurisdiction the arbitrator may be from is Rule 21E. It reads as follows:

> E. Unless the Parties agree otherwise, in cases involving citizens of different countries, the Forum may designate an Arbitrator or Arbitrator candidate based, in part, on the nationality and residence of the Arbitrator or Arbitrator candidate, but may not exclude an Arbitrator solely because the person is a citizen of the same country of a Party.

It is nothing short of puzzling how an arbitrator not from Quebec, even though located in Quebec, could be a "Québec authority".

212 This approach also ignores another important issue: where does the arbitrator hold his

authority from? Here, the arbitrator and arbitration proceedings under NAF are ultimately subject to U.S. law. We note that in this respect Rule 5O of NAF's Code stipulates that "Arbitrations under the Code are governed by the Federal Arbitration Act in accord with Rule 48B." Rule 48B stipulates that: "Unless the Parties agree otherwise, any Arbitration Agreement as described in Rules 1 and 2E and all arbitration proceedings, Hearings, Awards, and Orders are to be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16." No arbitrator who is bound by U.S. law could be a "Québec authority". The respondents also rightly raise the fact that Rule 11D provides that all arbitrations will be in English. One would think a "Québec authority" would be required to provide arbitration services in French. Finally, it seems completely incongruous how, in this case, in order to begin the process attributing to the purported "Québec authority" power to hear the dispute, the consumer must first contact an American institution, located in Minneapolis, who is in charge of organizing the arbitration.

213 It should be noted, as well, that assigning the status of "Québec authority" to a contractual arbitrator seated in Quebec would have unwanted consequences when applied to the other exceptions to art. 3148, para. 2, especially art. 3151. It surely could not have been intended that in reserving jurisdiction to "Québec authorities" to hear all "matters of civil liability for damage suffered in or outside Québec as a result of exposure to or the use of raw materials", that private arbitrators could be selected by the parties to hear such disputes before they arise. This is evident from the earlier version of this provision, art. 21.1 C.C.P., assented to June 21, 1989, which reserves the exclusive jurisdiction to hear disputes over raw materials to Quebec courts:

Civil Code of Lower Canada

> **8.1** The application of the rules of this Code is imperative in matters of liability for damage suffered in or outside Québec as a result of exposure to or use of raw materials, whether processed or not, originating in Québec.
>
> *Code of Civil Procedure*
>
> **21.1** The courts of Québec have exclusive jurisdiction to hear in first instance all demands or actions founded on liability under article 8.1 of the Civil Code of Lower Canada.

In presenting these provisions, the Minister of Justice made the following declarations:

> [TRANSLATION] Mr. Speaker, the purpose of the bill is to ensure that Quebec legal rules applicable to certain matters are also mandatory for foreigners.
>
> . . .
>
> Since the damage in question is suffered as a result of the use of or exposure to raw materials originating in Quebec, it seemed important that all litigants, be they Quebecers, other Canadians or foreigners, be treated equally and that a single legal scheme governing liability, namely that of Quebec . . . should apply to all of them.
>
> (Quebec, National Assembly, *Journal des débats*, vol. 30, No. 134, 2nd Sess., 33rd Leg., June 21, 1989, at pp. 6941 and 6970)

It is clear that in introducing these provisions, the National Assembly wanted all litigants in this area to be subject to one single legal system — Quebec's — which of course includes Quebec courts.

(c) *Conclusion on the Interpretation of Art. 3149*

214 As identified at the outset of this section, the application of art. 3149 hinges on the question "Who is a Quebec authority?" and, in our view, on this question only. It is obvious from the above discussion that a "Québec authority" must mean a decision-maker situated in Quebec holding its authority from Quebec law. This is consistent with the meaning of "Québec authority"

discussed in Quebec doctrine. C. Emanuelli, in *Droit international privé québécois* (2nd ed. 2006), defines the terms as encompassing: [TRANSLATION] "Quebec courts and notaries and other Quebec authorities, such as the Director of Youth Protection and the Registrar of Civil Status" (p. 70). H. P. Glenn notes that [TRANSLATION] "[b]y simply referring to 'Québec authorities' without further clarification, Title Three establishes the rules respecting the international jurisdiction of Quebec judicial and administrative authorities" ("Droit international privé", in *La Réforme du Code civil* (1993), vol. 3, 669, at p. 743 (emphasis added)). See also G. Goldstein and E. Groffier, who state: [TRANSLATION] "The new Code refers to Quebec or foreign 'authorities' rather than to courts. The intention is to include administrative authorities whose decisions may concern private law matters . . . . However, (non-state) arbitral tribunals do not appear to be regarded as 'authorities' for purposes of this Code" (*Droit international privé*, t. I, *Théorie générale*, at p. 287). This is completely consistent with the distinction made between "Québec authorities", "foreign authorities" and "arbitrators" in art. 3148, para. 2.

215 While little has been written on the interpretation of art. 3149 itself, there is academic support for our position. In "Commentaire sur la décision Dell Computer Corporation c. Union des consommateurs — Quand 'browsewrap' rime avec 'arbitrabilité'" in *Repères*, EYB 2005REP375, August 2005, N. W. Vermeys argues:

> [TRANSLATION] Article 3148 C.C.Q. seems to preclude compulsory arbitration where consumer contracts are concerned. . . . The effect of this article is that the "arbitrator" concept is expressly excluded from that of the "Quebec authority". Since the Code prevents a consumer from waiving the jurisdiction of Quebec authorities, it would necessarily be impossible to set up an arbitration clause against the consumer.

Vermeys further rejects the argument that an arbitrator could fit within the word "court" in the C.P.A., s. 271, para. 3, in order to qualify as a "Québec authority" for the purposes of arts. 3148 and 3149:

> [TRANSLATION] For this purpose, some may be tempted to argue that the definition of "court" in the CPA includes an arbitrator. However, to interpret the word "courts" this broadly would appear to me to be inconsistent with the current state of the law. As the Court [of Appeal] quite correctly stated, "the [Consumer Protection] Act does not define this term, so it is necessary to turn to article 4 C.C.P.: 'court' means one of the courts of justice enumerated in article 22 or a judge presiding in a courtroom." (Para. 51 of the decision in question). . . . [B]efore even consulting the *Code of Civil Procedure*, it should be determined whether the legislation is internally consistent. Several provisions of the Act, including sections 142, 143, 267 and 271, seem to imply that only courts within the meaning of the *Code of Civil Procedure* were contemplated by the legislature in drafting the CPA. [Footnote No. 20]

216 All of this leads to the conclusion that a contractual arbitrator cannot be a "Québec authority" for the purposes of art. 3149. Therefore, Dell cannot succeed here in trying to set up the exclusive arbitration against Dumoulin. This interpretation does not affect labour arbitrators, nor other forms of arbitration made available under Quebec statutes, because such arbitrators would qualify as "Québec authorities": see Tremblay, at p. 252: [TRANSLATION] "A distinction must also be made between civil or commercial arbitration and other types of arbitration, such as grievance arbitration in labour law. In grievance arbitration, even though the parties can choose the third party, arbitration is compulsory by law" (emphasis added). This explains why this Court's decisions in *Bisaillon*, and *Desputeaux* do not dictate our conclusion here. The former involved an arbitrator whose authority stemmed from Quebec's *Labour Code*, and the latter involved an arbitrator designated by s. 37 of the *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters*. Nor does our interpretation signify that

arbitration clauses in consumer and worker contracts are always invalid. It simply means that the agreement to arbitrate in advance of the dispute, which is the effect of an arbitration clause included in a contract of adhesion, could not be set up against the consumer or worker. The consumer or worker could well decide they want to arbitrate; in that case recourse to art. 3149 is unnecessary. This is explained very well by Goldstein and Groffier:

> [TRANSLATION] All that article 3149 C.C.Q. says is that the party contracting with the weaker party cannot impose such a clause on him or her regardless of what the weaker party intended and perhaps even though . . . the weaker party originally opted for arbitration but subsequently changed his or her mind. While it is true that workers or consumers cannot waive the forum of their residence or domicile *in advance*, they can nevertheless waive it if they believe that would be in their interest in the circumstances. To say the contrary would be tantamount to saying that in international situations, nothing relating to a contract of employment or a consumer contract is arbitrable. [Emphasis in original.]
>
> (*Droit international privé*, t. II, at p. 640)

217 Our conclusion on art. 3149 C.C.Q. is alone sufficient to dismiss the appellant's motion to refer the dispute to arbitration and it is therefore not strictly necessary to study the other possible grounds of nullity of the arbitration agreement. That said, we are of the view that the other questions raised by this appeal are sufficiently important to make it necessary for our Court to state its views on their respective merits.

(2) Is the Arbitration Agreement Null Because a Consumer Dispute Is a Matter of Public Order?

218 Although the respondents did not specifically argue that a consumer dispute could never be arbitrated because it would constitute an arbitration over a matter of public order, we need to

briefly state our position on the subject, as the question was discussed by the Court of Appeal. In our view, the Court of Appeal was correct in concluding that a consumer dispute can be arbitrated. Such a conclusion inevitably flows from the application of the reasoning we have adopted in *Desputeaux*, and is in accordance with the requirements of public policy, subject to the effect of art. 3149 C.C.Q.

219 Article 2639 C.C.Q. deals with the kind of disputes that cannot be submitted to arbitration. These are the "[d]isputes over the status and capacity of persons, family matters or other matters of public order". The question is therefore whether a consumer dispute constitutes such another matter of public order. We believe that it does not. As we held in *Desputeaux*, the concept of public order in art. 2639, para. 1 C.C.Q. must be interpreted restrictively so as to respect the parties' autonomy to choose arbitration, as well as the clear legislative intention to respect such a choice. As there was no compelling reason to consider copyright disputes as analogous to disputes regarding the status and capacity of persons or family matters in *Desputeaux*, there is no such compelling reason regarding consumer disputes in the case at bar.

220 Furthermore, the fact that certain C.P.A. rules to be applied by the arbitrator are in the nature of public order does not constitute a bar for the hearing of the case by an arbitral tribunal. The second paragraph of art. 2639 C.C.Q. makes this clear. This was also recognized by our Court in *Desputeaux*:

> A broad interpretation of the concept of public order in art. 2639, para. 1 *C.C.Q.* has been expressly rejected by the legislature, which has specified that the fact that the rules applied by an arbitrator are in the nature of rules of public order is not a ground for opposing an arbitration agreement (art. 2639, para. 2 *C.C.Q.*). The purpose of enacting

> art. 2639, para. 2 *C.C.Q.* was clearly to put an end to an earlier tendency by the courts to exclude any matter relating to public order from arbitral jurisdiction. (See *Condominiums Mont St-Sauveur inc. v. Constructions Serge Sauvé ltée*, [1990] R.J.Q. 2783, at p. 2789, in which the Quebec Court of Appeal in fact stated its disagreement with the earlier decision in *Procon (Great Britain) Ltd. v. Golden Eagle Co.*, [1976] C.A. 565; see also *Mousseau* [*v. Société de gestion Paquin ltée*, [1994] R.J.Q. 2004 (Sup. Ct.)], at p. 2009.) Except in certain fundamental matters, relating, for example, strictly to the status of persons, as was found by the Quebec Superior Court to be the case in *Mousseau*, *supra*, an arbitrator may dispose of questions relating to rules of public order, since they may be the subject matter of the arbitration agreement. The arbitrator is not compelled to stay his or her proceedings the moment a matter that might be characterized as a rule or principle of public order arises in the course of the arbitration. [para. 53]

221 Finally, the fact that the C.P.A. and the C.C.Q. are silent as to the arbitrability of a consumer dispute suggests its permissibility. An act should only be interpreted as excluding the possibility of arbitration if it is clear from it that the legislator purported to exclude the possibility of arbitration. No provisions of the C.P.A. or the C.C.Q. lead us to think that it is the case for consumer disputes. More specifically, we think the Court of Appeal was correct in finding that art. 271, para. 3 C.P.A. merely defines the jurisdiction *ratione materiae* of the courts and in concluding that, as we held in *Desputeaux*, such an article should not be interpreted as excluding the possibility of arbitration.

222 The Quebec legislature has never given any clear indications that consumer disputes are not arbitrable. No general rule to that effect can be found anywhere. The legislature adopted another approach. The C.C.Q. and the C.P.A. contain certain rules which govern the validity, applicability and enforceability of arbitration agreements in respect of consumers.

223 The respondents seem to argue that a consumer dispute can never be arbitrated because

arbitration proceedings should be considered *inherently* unfair for the consumer. We are not convinced that this is the case. On the contrary, we think that under certain circumstances, arbitration may actually be an appropriate or preferable forum for the adjudication of consumer disputes.

(3) Is the Arbitration Agreement Void Because It Constitutes a Waiver of the Jurisdiction of the Superior Court Over Class Actions Contrary to Public Order?

224 The respondents also argue that access to class actions is a matter of public order and therefore cannot be subject to arbitration under art. 2639. This argument must fail, because, as discussed above, art. 2639, para. 1 seeks to insulate only certain types of "matters" or disputes of public order from arbitration. Access to class actions is a procedural right and not a type of "matter" or dispute analogous to status and capacity of persons, or family law disputes.

225 The respondents alternatively argue that this Court should apply its decision in *Garcia Transport Ltée v. Royal Trust Co.*, [1992] 2 S.C.R. 499, to find that the rules on class actions are rules of public order, with the consequence that contractual provisions preventing the consumer from accessing class actions are of no effect. In *Garcia Transport*, the Court concluded that a provision in the C.C.L.C. was a rule of public order absent an explicit statement within the provision indicating this status. Finding that such status could be implied, the Court identified a number of factors that indicated legislative intent to accord the provision this status. The decision leaves no doubt, however, that it is the Quebec legislature that decides which laws apply as a matter of public order, not the courts. The role of courts in this regard is to determine whether sufficient legislative intent is present to clearly indicate that a law is intended to be one of public order, and this will occur only in those rare cases where the legislator has been less than explicit about its status. The

following excerpt from J.-L. Baudouin, *Les obligations* (3rd ed. 1989), at p. 81 (cited in *Garcia Transport*, at p. 525), accurately sets out the law:

> [TRANSLATION] Most of the time, the legislature intervenes directly to establish what is a matter of public order. Sometimes there is even an explicit statement in the statutory or regulatory provision that it is of public order; sometimes it indicates that there can be no contractual derogation from the rule, and that any such derogation will be null. Sometimes, on the contrary, the legislature clearly indicates that it is left to the parties themselves to settle the question and that the rule that is set out will apply only to supplement their agreement. . . . In other cases, finally, the formula used does not directly suggest that the statute is truly imperative. It is then for the courts to determine the legislative intention and to decide whether the provisions should be treated as being of public order, that is, to determine whether they are *imperative* provisions or merely *supplement* the will of the parties. [Emphasis in original.]

226 In this case, there is no indication of a legislative intent to give the rules in Book IX on "Class Action" of the C.C.P. public order status. While art. 1051 C.C.P. states that the provisions of the other books of the C.C.P. that are inconsistent with the rules of Book IX do not apply, this rule merely intends to remedy practical difficulties in applying procedures that would be unfeasible in the class action context, such as strictly applying the rules on cross-claims and joinder. It does not elevate the right to institute class actions to the status of a rule of public order that cannot be waived. Furthermore, this Court's recent decision in *Bisaillon*, is clear authority that the class action, while having an important social dimension, is only a "procedural vehicle whose use neither modifies nor creates substantive rights" and can generally be waived (para. 17). It is the legislature, and not the courts, that can create exceptions to this.

(4) Is the Arbitration Agreement Null Because Dumoulin Did Not Consent to It as It Was Imposed on Him Through a Contract of Adhesion?

227 The respondents also argue that the principle of the autonomy of the parties has no

bearing on this case as the arbitration clause is found in a contract of adhesion. In other words, the respondents seem to argue that Dumoulin should not be bound by the arbitration agreement because he did not give a true consent to the contract in which it is contained, this contract being of adhesion. This argument must also fail. It is based on the false assumption that an adhering party does not truly consent to be bound by the obligations contained in a contract of adhesion. The notion of a contract of adhesion is only meant to describe the contract in which the essential stipulations were imposed or drawn up by one of the parties and were not negotiable (see art. 1379 C.C.Q.). This does not mean that the adhering party cannot give a true consent to it and be bound by each one of its clauses, subject to the possibility that some might be void or without effect pursuant to some other provisions of the law. As stated by J.-L. Baudouin and P.-G. Jobin:

> [TRANSLATION] Since the adhering party's only choice is between entering into the contract on the terms imposed by the other party and not entering into it, the question that arises is whether this is a true contract, that is, an *agreement of the wills* of the parties. Some authors argue that a contract of adhesion is more akin to a unilateral juridical act, whereas a contract is a bilateral juridical act. However, most authors consider a contract of adhesion to be a true contract even though the role of the will of the adhering party is reduced to a minimum. Support for this position can be found in the variety of mechanisms that have been developed at law to correct the inequities and problems of consent that result from the adhering party's inability to negotiate . . . . [Emphasis in original.]
>
> (*Baudouin et Jobin: Les obligations* (6th ed. 2005), at p. 79)

228 We agree with the position defended by the majority of the doctrine and think it is therefore not sufficient for the respondents to raise the fact that the arbitration clause is found in a contract of adhesion in order to demonstrate that Dumoulin should not be bound by it. Reliance on some other provisions of the law is necessary.

(5) Is the Arbitration Clause Void Because It Is Abusive?

229 Article 1437 C.C.Q. and s. 8 C.P.A. provide the basis for a judicial declaration of the nullity of an abusive clause. However, as was noted above, we are of the view that an arbitration clause cannot be said to be abusive only because it is found in a consumer contract or in a contract of adhesion. The agreement to arbitrate a consumer dispute is not inherently unfair and abusive for the consumer. On the contrary, it may well facilitate the consumer's access to justice. Therefore, the consumer that raises this ground of nullity must prove that, given the particular facts of his case, the arbitration agreement should be considered abusive. Most of the time, such proof will require testimonial evidence. If that is the case, the question will have to be dealt with by the arbitral tribunal, subject to the possibility for the consumer to ask for a revision of the arbitral tribunal's decision under art. 943.1 C.C.P. Such would have been the situation in the case at bar if it had not been for our conclusion regarding the applicability of art. 3149 C.C.Q.

(6) Is the Arbitration Agreement Null Because It Is an External Clause that Was Not Expressly Brought to the Attention of Dumoulin?

230 Generally, the question of whether the arbitration agreement is null pursuant to art. 1435, para. 2 C.C.Q. will be more appropriately left to the arbitral tribunal to decide. Although it will often be possible for a court to decide on examination of the material supporting the referral application if the arbitration agreement was contained in an external clause, it will generally not be possible to determine, on such a review, if this external clause was expressly brought to the attention of the consumer or adhering party, or if the consumer or adhering party otherwise knew of it. For that reason, a review involving testimonial evidence will often be necessary and this review is better

left to the arbitral tribunal. Such would have been the situation in the case at bar if it had not been for our conclusion regarding the applicability of art. 3149 C.C.Q. *in fine*.

231 That said, the finding of the Court of Appeal that the arbitration clause was external because the Terms and Conditions were external is significant, given the growing frequency with which on-line contracts are made and the impact such a finding could have on e-commerce. As the position adopted by the Court of Appeal is not free from doubts, we feel compelled to state our view on the matter.

232 The context of e-commerce requires courts to be sensitive to a number of considerations. First, we are dealing with a different means of doing business than has heretofore been generally considered by the courts, with terminology and concepts that may not easily, though nevertheless must be fit within the existing body of contract law. Second, as e-commerce increasingly gains a greater foothold within our society, courts must be mindful of advancing the goal of commercial certainty (see *Rudder v. Microsoft Corp.* (1999), 2 C.P.R. (4th) 474 (Ont. S.C.J.)). Finally, the context demands that a certain level of computer competence be attributed to those who choose to engage in e-commerce. As noted by the Ontario Superior Court of Justice in *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299:

> We are here dealing with people who wish to avail themselves of an electronic environment and the electronic services that are available through it. It does not seem unreasonable for persons who are seeking electronic access to all manner of goods, services and products, along with information, communication, entertainment and other resources, to have the legal attributes of their relationship with the very entity that is providing such electronic access, defined and communicated to them through that electronic format. [para. 32]

233 As a preliminary matter, the appellant raised the objection that the Court of Appeal made its own factual findings by reviewing the transcripts and appeal record in order to find that art. 1435 C.C.Q. applied. The appellant submits that the Court of Appeal erred by not remitting the case to the court below for the necessary evidentiary findings to be made since the Superior Court made no finding of fact on this issue. This submission must be rejected. The power of the Court of Appeal to make a fresh assessment of facts on the record and offer a substituted verdict can be implied from s. 10 of the *Courts of Justice Act*, R.S.Q., c. T-16, which provides that the Court's power to hear appeals "shall carry with it all powers necessary to its exercise" (see also R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at p. 201).

234 We turn now to whether art. 1435 C.C.Q. applied in this case. Article 1435 C.C.Q. provides that external clauses are generally permitted, except in cases involving contracts of adhesion or consumer contracts, where, in order to be found valid, it must be proved that they have been brought to the party's attention or that the consumer or adhering party otherwise knew of it. The first question, then, is whether Dell's Terms and Conditions of Sale, hyperlinked to the bottom of the Configurator Page and containing the arbitration clause, constitute an external document.

235 The meaning of "external" is not defined in the C.C.Q.; however, both the doctrine and Quebec jurisprudence provide some insight into its meaning. Baudouin and Jobin provide a definition but they express ambivalence over whether, in general, hyperlinked documents are external within the meaning of art. 1435 C.C.Q.:

> [TRANSLATION] [An external clause is] a stipulation set out in a document that is separate from the agreement or instrument but that, according to a clause of this

> agreement, is deemed to be an integral part of it and thus binding on the parties. . . . In a contract entered into via the Internet, the contracting party must use one or more hyperlinks to find the external clauses that govern the contract appearing on the screen; it might be asked whether these are in fact external clauses. The external clause concept needs to be clarified somewhat. For instance, a document that is appended to the contract and is immediately submitted to each party, or a stipulation found on the back of the instrument, is not an external clause. [Footnotes omitted.]
>
> (*Baudouin et Jobin: Les obligations*, at p. 267)

236 The appellant's submissions were along similar lines, analogizing clicking a hyperlink on a Web page to the turning of the page of a contract in paper form. There may be some merit to this argument, but it ignores the fact that a Web page can contain several hyperlinks, which can obscure the relevant link containing important information about the consumer's legal rights.

237 S. Parisien provides better insight into when a hyperlinked document may be considered to have been expressly brought to the attention of the consumer at the moment of formation of the contract: [TRANSLATION] "A hyperlink to a document that is incorporated by reference should satisfy this condition if it is functional and clearly visible" ("La protection accordée aux consommateurs et le commerce électronique", in D. Poulin et al., eds., *Guide juridique du commerçant électronique* (2003), at p. 178). This is a reasonable approach to the issue; it is more realistic than a general finding that hyperlink documents are either always or never external. Applied to the facts of this case, the issue would be whether the relevant hyperlink's location and visibility on a Web page obscures it to such an extent that it can properly be said to be external.

238 It is true, as noted by the Court of Appeal, that the hyperlink to the Terms and Conditions of Sale was in smaller print, located at the bottom of the Configurator Page. The

evidence was that Dell places a hyperlink to its Terms and Conditions of Sale at the bottom of every shopping page on its site. This is consistent with industry standards. In fact, this is the placement that was at the time recommended by Industry Canada's Office of Consumer Affairs (*Your Internet Business: Earning Consumer Trust — A guide to consumer protection for on-line merchants* (1999), at p. 10). It is proper to assume, then, that consumers that were engaging in e-commerce at the time would have expected to find a company's terms and conditions at the bottom of the Web page. In light of this, we conclude that the hyperlink to the Terms and Conditions was evident to Dumoulin. Furthermore, the Configurator Page contained a notice that the sale was subject to the Terms and Conditions of Sale, available by hyperlink, thus bringing the Terms and Conditions expressly to Dumoulin's attention.

239 Upon clicking on the hyperlink, the first paragraph states, in block capital letters:

> PLEASE READ THIS DOCUMENT CAREFULLY! IT CONTAINS VERY IMPORTANT INFORMATION ABOUT YOUR RIGHTS AND OBLIGATIONS, AS WELL AS LIMITATIONS AND EXCLUSIONS THAT MAY APPLY TO YOU. THIS DOCUMENT CONTAINS A DISPUTE RESOLUTION CLAUSE.
>
> This Agreement contains the terms and conditions that apply to your purchase from Dell Computer Corporation, a Canadian Corporation ("Dell", "our" or "we") that will be provided to you ("Customer") on orders for computer systems and/or other products and/or services and support sold in Canada. By accepting delivery of the computer systems, other products and/or services and support described on the invoice, Customer agrees to be bound by and accepts these terms and conditions.
>
> (Appellant's Record, vol. III, at p. 381)

240 This warning brings the existence of the dispute resolution clause directly to the attention of the reader at the outset, and one has only to scroll down to find clause 13C, where the

arbitration clause is set out to easily access all information needed about the conduct of the arbitration process. For this reason, we would reject the suggestion that the arbitration clause was buried or obscured within the Terms and Conditions of Sale. We adopt the reasoning in *Kanitz v. Rogers Cable*, at para. 31, regarding a very similar arbitration agreement located in a standard-form contract:

> [The arbitration clause] is displayed just as all of the other clauses of the agreement are displayed. It is not contained within a larger clause dealing with other matters, nor is it in fine print or otherwise tucked away in some obscure place designed to make it discoverable only through dogged determination. The clause is upfront and easily located by anyone who wishes to take the time to scroll through the document for even a cursory review of its contents. The arbitration clause is, therefore, not at all equivalent to the fine print on the back of the rent-a-car contract in the *Tilden* case or on the back of the baseball ticket in the *Blue Jays* case.

241 Lemelin J. concluded that it was significant that the C.C.P. governing the arbitration process could be accessed only through an outside Web site. However, what is relevant is whether the arbitration agreement itself, and not the C.C.P., was evident and accessible through the Terms and Conditions of Sale.

V. Disposition

242 For these reasons, we would dismiss the appeal with costs.

Appeal allowed with costs, BASTARACHE, LEBEL *and* FISH JJ. *dissenting.*

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