DOES A DECISION TO ARBITRATE STILL MAKE SENSE?

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Leslie Dizgun & Jennifer Dolman[1]

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1. Introduction

Franchisors and franchisees wary of the significant costs associated with litigation have often turned to arbitration as an alternative mode of resolving their disputes. In recent years, however, criticism of franchise arbitration, and commercial arbitration, generally, has mounted. Critics often point to the extensive discovery process associated with franchise arbitrations, for example, as evidence that arbitration does not, in fact, represent a more cost or time efficient alternative to litigation. In this paper we address these criticisms and consider whether arbitration continues to represent a viable alternative to litigation for franchisors and franchisees. We go on to consider legal issues surrounding the enforceability of arbitration agreements when one of the parties seeks to commence court proceedings against the other. We conclude with practical recommendations for franchisors and franchisees in the design and selection of an appropriate dispute resolution procedure.

2. Why Should Franchisors and Franchisees Arbitrate their Franchise Disputes?

Arbitration has come to be adopted by many businesses and their corporate counsel as a viable and cost-effective alternative to litigation. Rather than an alternative to litigation, for many users it has become the forum of choice for many business disputes.

Nevertheless, currently, there are many concerns by business users that arbitration now costs just as much and takes just as long as litigation. In the United States previous users of arbitration are beginning to remove arbitration clauses from their agreements. This growing disquiet with arbitration procedures inevitably leads us to consider whether arbitration does indeed remain a better alternative to litigation in the management of franchise disputes[2].

Let us first review some of the traditional and key advantages of arbitration over litigation.

(a) *The Business Objective in Electing a Dispute Resolution Procedure*

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[1] Leslie Dizgun is a general partner at Himelfarb Proszanski LLP in Toronto. A significant part of his practice is devoted to the mediation and arbitration of commercial disputes, including franchise matters. Jennifer Dolman is a litigation partner in the Toronto office of Osler, Hoskin & Harcourt LLP whose practice focuses principally on franchise and distribution disputes for franchisors. The authors wish to thank Matt Thompson, a litigation associate in the Toronto office of Osler, Hoskin & Harcourt LLP, for his assistance in the preparation of the paper.

[2] College of Commercial Arbitrators, Protocols for Expeditious, Cost Effective Commercial Arbitration, ED.T.J. Stipanowich, 2010.

Opting for an ADR procedure requires a justifiable business purpose. It also requires consideration of whether all disputes arising from the franchise agreement or only some of them will be arbitrated and/or mediated. For example, it is unlikely that a franchisor would choose to have a trade-marks dispute made subject to arbitration. This may be a too highly valued asset not to have determined in the public domain and subject to rights of appeal. Classically, the business motivation for selecting arbitration was its efficiency, speed, and cost-effectiveness and additional subsidiary benefits. In addition, a franchisor would ordinarily prefer to have the franchise dispute be dealt with on an individual basis and in respect of the claims of only one franchisee.

(b) ***Confidentiality***

Litigation is conducted in a public forum. Anyone can attend in court and search the court file. Hearings, motions, or applications are open to the public including the media. It is quite difficult to restrict access to documents filed in court by the disputing parties. Arbitration is a private and confidential procedure, provided confidentiality is contracted for by way of the arbitration agreement. As long as all matters requiring motions or other interim applications are heard by the arbitrator, confidentiality is maintained.

(c) ***Arbitrator Expertise***

An arbitrator selected by the parties can be chosen for his/her particular and specialized knowledge of franchising and franchise systems. The selection of an arbitrator can be tailored to the particular kind of franchise business of the parties to the dispute. Although many Superior Court judges are quite familiar with franchising and the *Arthur Wishart Act*[3], many may not be, which, amongst other things, imports a certain degree of unpredictability as to outcomes and/or the need to appeal a decision.

(d) ***Cost, Speed and Efficiency***

The promise of arbitration is that it offers a cost-effective, speedy, and adaptable procedure for litigants. In other words, the ideal arbitration fits the forum to the fuss. The parties to an arbitration have the opportunity to design a procedure that controls the nature or amount of motions that are required, any rights of appeal, the discovery process, if any, the number of hearing dates required, and the timeline for delivery of a binding award. However, the adoption of Ontario's *Rules of Civil Procedure*[4] for the conduct of an arbitration without further thought may simply replicate the litigation process rendering the arbitration neither cost effective nor speedy, and, as a result, not efficient.

(e) ***Preserving the Relationship***

The key advantage of arbitration (and mediation) for franchise disputes ought to be the ability to better preserve the franchise relationship. ADR is often promoted as an effective process where relationships require preservation. However, this is usually only true where the ADR procedure occurs at an early stage in order to inhibit acrimony in the dispute, moves

[3] *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 ["*AWA*"].

[4] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

quickly, and results in a final and binding outcome. It should be noted that an arbitration conducted pursuant to the *Arbitration Act*[5] of Ontario, provides for limited rights of appeal or judicial review of the arbitrator's decision to the Superior Court of Justice. Unless the parties contract out of the appeal provisions of the *Arbitration Act*, the parties only have the right to appeal on a question of law with leave. Leave may only be granted, pursuant to Section 45(1)[6] if the court is satisfied that the matters at stake in the arbitration are of sufficient importance to the parties to justify an appeal, and determination of the question of law at issue will significantly affect the rights of the parties.

3. Pros and Cons of Arbitration in the Franchise Context

The maintenance of confidentiality has a number of benefits. All allegations made, documentation produced, and evidence of the parties and other witnesses may all be confidential. Trade secrets of the franchise system, including the unique aspects of the franchise system important to the franchisor, are kept confidential, and the dispute itself is not available to others, including the media. Confidentiality also protects the relationship between the franchisor and the franchisee as the opportunity for reconciliation remains while the dispute is private. Resolution is less likely to occur if the dispute is aired in the public. Further, to the extent that the dispute may be maintained on a private and confidential basis and resolved effectively, it is less likely to engender complaints from other franchisees, and cause collateral harm to the franchise system.

Nevertheless, contracting for confidentiality may not insulate the franchisor from an obligation to disclose material facts pursuant to the *AWA*. SubSection 5(4) of the *AWA* requires that the disclosure document shall contain, "all material facts, including materials facts as prescribed."[7] Ontario Regulation 581/00, SubSection 2(5): "...requires disclosure of whether the franchisor, ... has been found liable in a civil action of misrepresentation, unfair or deceptive business practices or violating a law that regulates franchises or businesses, including a failure to provide proper disclosure to a franchisee, or if a civil action involving such allegations is pending against the person."[8]

Although arbitration is not a civil action, nevertheless, the obligation to disclose all material facts may still require a franchisor to disclose a pending arbitration, where, for example, an arbitrator makes findings with respect to the allegations prescribed under the Regulations. The possible obligation to disclose a pending arbitration may make arbitration less attractive than litigation. However, given that arbitration, even if disclosed, continues to be private and that arbitration materials are not available to the public or the media, arbitration should continue to remain a viable option.

The very existence of a well designed arbitration process may provide confidence to all franchisees in the franchise system that the franchisor is ready, able, and willing to deal with franchisee complaints, first, directly, and, secondly, by a well-designed dispute resolution

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[5] *Arbitration Act*, S.O. 1991, c. 17.

[6] *Ibid.* s. 45(1).

[7] *AWA*, supra, s. 5(4).

[8] O Reg 581/00, s. 2(5).

procedure. If the arbitration procedure is indeed speedy with a quick turnaround of the award, the business relationship between the franchisee and the franchisor is more likely to be preserved than by the litigation process, which is often drawn out and is subject to the possibility of appeals of both interlocutory and final decisions.

The selection of an arbitrator with relevant corporate expertise may well result in a well thought out arbitration award that is more sensitive to the needs of the franchise system whereas the decision of a judge, who indeed may have no problems in interpreting the *AWA*, may not be sensitive to the nuances of the franchise business.

Cost effectiveness has always been an important factor in the selection of dispute resolution procedures such as arbitration. However, franchisees, in many cases, balk at the prospect of arbitration in view of the fact that the cost of the adjudicator is either borne equally by the parties, or allocated to one party if the arbitration is governed by the *Arbitration Act* of Ontario[9]. In order to encourage franchisees to enter into an arbitration agreement, it may be necessary for franchisors to offer a franchisee an incentive; for example, by offering to absorb the entire cost of the adjudicator and the cost of preparing the award where the arbitration is limited in scope.

In addition, disputes also arise between franchisees in a franchise system. For example, disputes may arise regarding a franchisee's territory, solicitation of employees of other franchisees, etc. Mediation and arbitration of these disputes make eminent sense in order to maintain a healthy franchise system.

Notwithstanding the existence of an arbitration agreement, however, in some cases franchisees have nevertheless attempted to bring court proceedings against franchisors. Such a situation raises a number of legal issues of which franchisors should be aware. We examine these issues in greater detail in the next section of this paper.

4. Can Arbitration Provisions in Franchise Agreements Stay Court Proceedings?

(a) *The Arbitration Act*

With the enactment of the *Arbitration Act* the Ontario government sought to encourage the use of alternative, less costly forms of dispute resolution. Through its provisions, the *Arbitration Act* mandates that parties who have agreed to resolve their disputes through arbitration should be held to that agreement. SubSection 7(1) of the *Arbitration Act* states:

> 7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.[10]

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[9] *Arbitration Act*, supra, s. 54(1).

[10] *Arbitration Act*, supra, s. 7(1).

On the basis of SubSection 7(1), a party to an agreement with a mandatory arbitration clause[11] should be able to rely on that clause to obtain a stay of a court proceeding brought by the other party to the agreement. The party seeking the stay must only demonstrate that the dispute giving rise to the court proceeding falls within the scope of the arbitration agreement.

Even if a party is able to successfully demonstrate that a dispute falls within the ambit of their arbitration agreement, the opposing party may still be able to resist a stay if they are able to establish that one of the following exceptions to the general rule, enumerated in SubSection 7(2) of the *Arbitration Act*, applies in their circumstances:

> 7. (2) However, the court may refuse to stay the proceeding in any of the following cases:
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> 1. A party entered into the arbitration agreement while under a legal incapacity.
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> 2. The arbitration agreement is invalid.
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> 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
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> 4. The motion was brought with undue delay.
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> 5. The matter is a proper one for default or summary judgment.[12]

In *Mantini v. Smith Lyons LLP* the Ontario Court of Appeal provides a helpful summary of the approach which a court will take when considering whether to give effect to an arbitration clause:

> In order to determine whether a claim should be stayed under s. 7(1) of the Arbitration Act, the court first interprets the arbitration provision, then analyzes the claims to determine whether they must be decided by an arbitrator under the terms of the agreement, as interpreted by the court. If so, then under s. 7(1), the court is required to stay the action and refer the claims to arbitration subject to the limited exceptions in s. 7(2): T1T2 Limited Partnership v. Canada 1994 CanLII 7368 (ON S.C.), (1994), 23 O.R. (3d) 66, 35 C.P.C. (3d) 353 (Gen. Div.) at pp. 73-74 O.R.[13]

A detailed discussion of these exceptions is beyond the scope of this paper, but with respect to the second exception: "The arbitration agreement is invalid", it should be noted that SubSection 17(1) of the *Arbitration Act* is significant:

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[11] Mandatory arbitration clauses are often referred to as 'arbitration agreements.' They are deemed to survive the termination or repudiation of the larger agreement of which it forms a part.

[12] *Arbitration Act*, supra, s. 7(2).

[13] *Mantini v. Smith Lyons LLP* (2003), 64 O.R. (3d) 505 (O.N.C.A.), at para 17, see also *MDG Kingston*, infra, at para 14 where this approach is reaffirmed.

> 17. (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.[14]

This provision provides an arbitrator with authority to rule on his or her own jurisdiction and on issues relating to the validity of the arbitration agreement. It thereby serves to prevent parties from escaping their arbitration agreements by simply alleging that the agreements are invalid. SubSection 17(2) of the *Arbitration Act* further provides that the arbitration agreement is to be considered independently from the larger agreement of which it forms part, for the purpose of determining arbitral jurisdiction:

> 17. (2) If the arbitration agreement forms part of another agreement, it shall, for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the main agreement is found to be invalid.[15]

Together, Sections 7 and 17 of the *Arbitration Act* clearly establish a general rule favouring the enforcement of arbitration agreements. The ensuing question for franchisors and franchisees is whether that general rule applies in the franchise context.

(b) *Application of the Arbitration Act to Franchise Agreements*

In numerous recent decisions, Ontario courts have stayed court proceedings commenced by franchisees on the basis of arbitration agreements.

In *MDG Kingston Inc. v. MDG Computers Canada Inc.*, for example, a franchisee brought a claim against a franchisor computer manufacturer for breach of two franchise agreements, one of which had been entered immediately following the expiration of the other[16]. The franchisee purported to rescind the latter of the two agreements on the grounds that the franchisor failed to deliver a disclosure document, required under Section 5 of the *AWA*, within two years after the parties entered into that agreement. That provision requires a prospective franchisor to disclose all significant information about the franchise business that a prospective franchisee may need in order to make an informed decision whether to become a franchisee of the business[17]. The franchisee claimed that the failure by the franchisor to meet its Section 5 obligation rendered the franchise agreement invalid; it accordingly sought rescission of the second agreement, and damages in respect of both the first and second agreements. The franchisor claimed that because the first agreement was essentially renewed without interruption it was entitled to an exemption from its Section 5 disclosure obligation under SubSection 5(7)(f) of the *AWA* which applies under such circumstances, and in the alternative denied that the agreement was invalid. Before proceeding to trial, the franchisor moved to enforce arbitration clauses in both franchise agreements.

The motion judge, however, refused to stay the proceedings, holding that the arbitration agreement was indeed rendered invalid as a result of the franchisor's failure to meet its

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[14] *Arbitration Act*, supra, s. 17(1).

[15] *Ibid.* s. 17(2).

[16] *MDG Kingston Inc. v. MDG Computers Canada Inc.*, 2008 ONCA 656, at paras 3-6 ["*MDG Kingston*"].

[17] *AWA*, supra s. 5.

disclosure obligations. The Court of Appeal overturned the decision of the motion judge and granted a stay. First, the Court held that neither the arbitration agreement nor the franchise agreement was rendered 'invalid' simply because the franchisee purported to terminate them. The statutory right of rescission does not render an agreement invalid, in the sense that it is *void ab initio*[18]. Rather, an agreement is void, for example, where it is illegal, or where no agreement was ever reached by the party[19]. Second, the Court held that even if the franchise agreement was found to have been validly rescinded by the franchisee, the arbitration clause would not be rescinded as well. An arbitration clause will survive the rescission of the balance of the agreement. On the other hand, if the entire agreement was *void ab initio*, the arbitration clause would be inoperative[20]. Third, pursuant to Section 17 of the *Arbitration Act*, it was for the arbitrator and not the court to decide, in any case, the merits of the franchisee's right to rescission argument[21]. Finally, the Court noted that because the purpose of the *AWA* is to protect franchisees, one would expect that if the legislature intended that rescission of the arbitration clause was necessary for that protection, it would have provided that consequence specifically in Section 6 of the statute, in addition to the existing reference to penalties and obligations[22].

In *2162683 Ontario Inc. v. Flexsmart Inc.*, the Superior Court of Justice similarly granted a stay in respect of an action brought by a franchisee. Suing for various breaches of the franchise agreement, the franchisee argued that its action should not be stayed because the arbitration agreement was invalid. It based its argument of invalidity on the fact that the franchisor failed to meet its disclosure obligations in respect of the franchise agreement[23]. As the Court did in *MDG Kingston*, the Court held here that even if there were some merit to the franchisee's misrepresentation claim, this would be a matter for the arbitrator to decide[24].

In *Nazarinia Holdings Inc. v. 2049080 Ontario Inc.*, a franchisee brought an action against a franchisor for various breaches of their franchise agreement, and argued that the action should not be stayed because the franchise agreement was invalid. The franchisee argued that the agreement was invalid because: its rights under the franchise agreement had already been granted to another company; the individual who executed the agreement on the franchisor's behalf did not have authority to do so; and the franchisor was guilty of fraudulent or negligent misrepresentations. The Court disagreed that the agreement was invalid on all of the above grounds and stayed the action. First, it held that the franchisee's arguments went to the invalidity of the franchise agreement *as a whole*, and not the arbitration clause in particular[25]. Second, it

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[18] *MDG Kingston*, supra at para 25.

[19] *Ibid.* at para 24.

[20] *Ibid.* at para 30.

[21] *Ibid.* at paras 30-33.

[22] *Ibid.* at para 31.

[23] *2162683 Ontario Inc. v. Flexsmart Inc.*, 2010 ONSC 6493, at paras 3 and 6.

[24] *Ibid.* at paras 8-10.

[25] *Nazarinia Holdings Inc. v. 2049080 Ontario Inc.*, 2010 ONSC 1766 at para 24. Note that SubSection 17(1) of the *Arbitration Act* makes clear that an arbitration agreement is separable from the rest of a franchise agreement and survives its repudiation or termination.

held that, in any event, it would be within the jurisdiction of the arbitrator to determine whether the agreements were invalid[26]. Finally, it held that the mere allegation of "misrepresentations" by a franchisee against a franchisor does not render their arbitration agreement invalid[27]. Indeed, it would render arbitration clauses essentially obsolete if a party were able to escape them by simply alleging fraud against the other party.

Finally, in *Lougheed v. Garden City Entrepreneurs Inc.*, the Superior Court of Justice stayed an action for damages arising out of an alleged breach of a franchise agreement. The franchisee was attempting to obtain default judgement against the franchisor. The Court refused to grant the judgement and stayed the action, holding that a mandatory dispute resolution clause in the parties' franchise agreement was "a complete answer to this motion and must be enforced."[28]

We were also able to locate three decisions from other provinces in which courts have stayed court proceedings commenced by franchisees on the basis of arbitration agreements[29].

On the other hand, we do note that on at least three occasions, Ontario courts have refused to grant a stay of an action in the franchise context in spite of an arbitration agreement.

In *Stoneleigh Motors Limited v. General Motors of Canada Limited*, the Superior Court of Justice permitted various General Motors dealers to participate in a group action against GM despite the existence of an arbitration clause in their dealer agreements. At issue was a provision in the parties' dealer agreements in which the parties agreed to arbitrate their disputes under the NADAP Rules. The Court interpreted NADAP as applying only to *individualized* disputes and not to disputes affecting all dealers, as was the case here. The Court, therefore, held that group or class proceedings, such as the one before it, were beyond the scope of the arbitration agreement and refused to grant the stay on this basis[30].

Similarly, in *Nafzaah International Ltd. v. RMCF Franchise Corp.*, the plaintiff pursued an action for the continuation of the franchise agreement by way of a declaration that the defendant was not entitled to terminate, and, by way of an injunction, restraining the defendant from terminating. Despite the existence of an arbitration clause, the Court refused to grant a stay, holding that under the arbitration clause the arbitrator could not grant either of the remedies being sought by the plaintiff. For that reason, the dispute fell outside the scope of the equitable arbitration clause[31].

Finally, in *Rosedale Motors Inc. v. Petro-Canada Inc.*, a franchisee service station brought an action against a franchisor gas company for damages arising from breaches of the

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[26] *Ibid.* at para 36.

[27] *Ibid.* at para 41.

[28] *Lougheed v. Garden City Entrepreneurs Inc.*, 2008 CarswellOnt 4536, at para 17 (O.N.S.C.).

[29] A summary of these cases is attached as Appendix "A".

[30] *Stoneleigh Motors Limited v. General Motors of Canada Limited*, 2010 ONSC 1965, at paras 51-53 ["*Stoneleigh*"]. Note that Osler, Hoskin and Harcourt acted for the defendant General Motors in this proceeding.

[31] *Nafzaah International Ltd. v. RMCF Franchise Corp.* (2003), 40 B.L.R. (3d) 304 (O.N.S.C.) at paras 12-14.

franchise agreement and alleged misrepresentations by the gas company that the franchise would be profitable. The gas company brought a motion for summary judgment and alternatively a stay of proceedings over the breach of contract claim basis on the basis of an arbitration clause in the franchise agreement. The parties agreed that only the breach of contract claim was arbitral. The Ontario Court of Justice, General Division, refused both summary judgment and a partial stay over the breach of contract claim. With respect to the motion to stay the breach of contract action, the Court reasoned that because that claim was so closely bound up with the other non-arbitral claims, especially that for misrepresentation, it would be highly desirable the claims proceed together before the same forum so as to avoid a multiplicity of proceedings[32].

While we were able to locate three cases in which courts have refused to stay proceedings arising from franchise agreements which contained an arbitration clause, we note that in *Stoneleigh*, *Nafzaah*, and *Rosedale Motors* the Courts' decisions not to grant a stay were based on a strict textual interpretation of the particular arbitration clauses at issue. There is nothing to suggest in any of the above cases that characteristics specific to the franchise context factored into the Courts' decisions. In *Stoneleigh*, for example, the decision ultimately turned upon a specific provision in the parties' dealer agreements requiring the parties to arbitrate their disputes under NADAP rules, which the Court interpreted as applying only to *individualized* disputes and not to disputes affecting all dealers. Similarly, in *Rosedale Motors*, the decision to order a stay was based on the fact that a number of non-arbitral claims were closely related to the arbitral claim, and in the interest of judicial economy a multiplicity of proceedings should be avoided. The ruling in *Rosedale Motors* is consistent with other decisions in the non-franchise context[33]. Furthermore, we were able to locate a greater number of recent cases in which courts *have* stayed actions on the basis of an arbitration clause in a franchise agreement. On these bases, we are of the view that the following comment from the Court of Appeal in *MDG Kingston* concisely summarizes the attitude of Ontario courts with respect to the issue of arbitration agreements in the franchise context:

> An agreement to arbitrate is mutually applicable, and has become a common and cost-effective method of dispute resolution. If the arbitration clause is fairly drafted, there is no reason that it should be viewed as a disadvantage for the franchisee. In my view, it is fair to conclude, based on the Arthur Wishart Act and the regulations, that the legislature intended that the normal rules regarding arbitration clauses, including the arbitrator's authority to decide its own jurisdiction as well as the severability of an arbitration clause under s. 17 of the Arbitration Act, would apply under the Arthur Wishart Act.[34]

In other words, provided the arbitration clause is drafted fairly and broadly to capture all disputes arising from the franchise agreement, it appears that the normal *Arbitration Act* rules regarding arbitration clauses apply to franchise agreements. Recent developments in the case law, however, have cast some doubt on this conclusion as it relates specifically to class proceedings against a franchisor. This issue will be explored in detail in the section which follows.

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[32] *Rosedale Motors Inc. v. Petro-Canada Inc.* (1998), 42 O.R. (3d) 776 (O.N.C.J.) at paras 18-19 ["*Rosedale Motors*"].

[33] *Griffin v. Dell Canada Inc.*, 2010 ONCA 29, at para 47.

[34] *MDG Kingston*, supra at para 32.

5. Will a Court Refuse to Stay a Group or Class Action on the Basis of Section 4 of the Arthur Wishart Act?

(a) *The Supreme Court of Canada Decision in Seidel v. Telus*

As we discussed in the previous section, it appears as though the normal rules relating to arbitration clauses apply in the franchise context. However, in light of recent developments in the case law there are now some questions as to the strength of franchise arbitration clauses in the face of class proceedings.

These questions arise from the recent Supreme Court of Canada decision in *Seidel v. Telus Communications*[35]. In that case, on appeal from the B.C. Court of Appeal, the central issue was whether Seidel could participate in a class proceeding against her telephone service provider. Seidel alleged that Telus engaged in deceptive business practices in violation of various provisions of the *Business Practices and Consumer Protection Act*[36]. Telus argued that she should not be permitted to do so because the standard-form consumer contract to which she agreed contained a mandatory arbitration clause which expressly waived any right to participate in a class action.

Telus applied for a stay of Seidel's action pursuant to Section 15 of the B.C. *Commercial Arbitration Act*, which, similarly to Section 7 of the Ontario *Arbitration Act*, requires that a court stay any legal proceeding commenced by a party to an arbitration agreement against another party to the agreement upon the application to the court by either party[37].

In 2007, the Supreme Court of Canada addressed a similar issue in the context of a Quebec action: *Dell Computer Corp. v. Union des consommateurs*[38]. In *Dell*, the Court stayed the class proceeding and referred the parties back to arbitration. This decision accorded with a line of Supreme Court of Canada precedent affirming the independence and importance of arbitration as an alternative forum for dispute resolution. The question at the heart of the appeal in *Telus* was whether the principles articulated by the Court in *Dell* applied in the common law provinces.

The B.C. Court of Appeal held that *Dell* applied in the common law provinces, and stayed Seidel's action. Writing for a narrow 5-4 majority, Justice Binnie overturned the decision of the B.C. Court of Appeal, in part, upholding the stay ordered over most of Seidel's claims, but lifting it in respect of her claim under Section 172 of the *BPCPA*. Section 172 states:

> 172 (1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:

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[35] *Seidel v. Telus Communications Inc.*, 2011 SCC 15 ["*Telus*"].

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

[37] *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, s. 15.

[38] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 ["*Dell*"].

> (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
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> (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.[39]

The provision, therefore, permits any individual, whether or not that individual is affected by a particular transaction, to bring an action in B.C. Supreme Court to restrain a supplier from contravening the *BPCPA*. As we will discuss in the following section, it is possible that the decision in *Telus* could prove problematic for franchisors in Ontario seeking to rely on arbitration agreements when faced with a class proceeding.

(b) *The Impact of Telus in the Ontario Franchise Context*

On the surface, *Telus* may be characterized as a decision concerning a particular piece of B.C. legislation. However, there is reason to suspect that the decision could have broader implications for parties to non-consumer contracts in Ontario, particularly franchise agreements. In *Telus* the Supreme Court of Canada affirmed that arbitration clauses will continue to be enforced "absent legislative language to the contrary."[40] The issue raised by this statement is what constitutes 'legislative language to the contrary'. Justice Binnie frames the question as follows:

> The important question raised by this appeal, however, is whether the *BPCPA* manifests a legislative intent to intervene in the marketplace to relieve consumers of their contractual commitment to "private and confidential" mediation/arbitration and, if so, under what circumstances.[41]

Whether a party will be able to establish such legislative intent, it seems, will depend largely upon their ability to draw parallels between a particular piece of legislation and Section 172 of the *BPCPA*.

Franchisors should take particular note of Section 4 of the *AWA*. Specifically, SubSection 4(1), which affords franchisees in Ontario the right to associate; SubSection 4(2), which provides that this right cannot be interfered with, prohibited or restricted by contract or otherwise; and SubSection 4(4), which mandates that any provision in a franchise agreement or any other agreement relating to a franchise which purports to interfere with, prohibit or restrict a franchisee from exercising the right to associate is void. A franchisee could conceivably attempt to argue based on *Telus* that a provision in its franchise agreement requiring the franchisee to arbitrate any and all disputes interferes with its Section 4 right to associate[42]. It appears to be

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[39] *BPCPA*, supra s. 172.

[40] *Telus*, supra at para 42.

[41] *Ibid* at para 3.

[42] Indeed, a franchisee did raise this argument in a franchise class action case decided before *Telus*, *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*(2008), 89 O.R. (3d) 252 at para 64 [O.N.S.C.] ["*Quizno's*"] (overturned by the Divisional Court on other grounds). In *Quizno's*, a franchisee argued that any contracting out of the *Class Proceedings Act, 1992* is illegal because it is contrary to the "right to associate" under s. 4. It should be noted that *Quizno's* may be distinguished insofar as it involved a 'contracting out provision' rather than an arbitration clause. The *Arbitration Act*, therefore, did not apply. At para 55 of *Quizno's*, however, Justice Perrell

settled law following *405341 Ontario Limited v. Midas Canada Inc.*, a 2003 decision of the Ontario Court of Appeal, that a franchisee's right to associate under Section 4 includes a right to participate in a class proceeding against a franchisor[43]. As a result of *Midas* and *Telus*, a franchisee appears now to be in a position to argue that a mandatory arbitration clause should not be enforced because it interferes with their Section 4 right to associate.

It remains to be seen, however, whether or not a franchisee will be able to advance such an argument successfully[44]. As mentioned, a franchisee will have to demonstrate that Section 4 of the *AWA* manifests a legislative intent to interfere with the operation of an arbitration clause. In order to establish this, a franchisee will attempt to draw parallels to Section 172 of the *BCPCA*.

Indeed, there are some similarities between the B.C. legislation and the *AWA*, which a franchisee will likely be able to identify. First, both Section 172 of the *BPCPA* and Section 4 of the *AWA* were enacted to serve a remedial purpose. In his analysis of the legislative intent behind Section 172, Justice Binnie notes:

> The fact that such persons do not necessarily act in their personal interest (as they don't need to have any) emphasizes the *public* interest nature of the s. 172 remedy. Opening the door to private enforcement in the public interest vastly increases the potential effectiveness of the Act and thereby promotes adherence to the consumer standards set out therein. The legislature clearly intended the Supreme Court to be able to enjoin a supplier guilty of infractions of the *BPCPA* from practising the offending conduct against any consumer (orders which only courts can issue), rather than just in relation to a particular complainant (as in a "private" and "confidential" arbitration created by private contract).[45]

The Court interprets the purpose of this provision as being to: "shine a spotlight on allegations of shabby corporate conduct"[46], a remedial policy which would be ill-served by private arbitrations in light of their private nature[47]. Like the B.C. legislation, the purpose of the *AWA* and Section 4, specifically, is also remedial, insofar as it attempts to level the playing field between franchisors and franchisees[48].

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drew parallels between an arbitration clause and a 'contracting out provision'. Inevitably, Justice Perrell declined to rule on the Section 4 issue, instead choosing to focus on other factors in his analysis of the preferable procedure.

[43] *405341 Ontario Limited v. Midas Canada Inc.*, 2010 ONCA 478 at para 39 ["*Midas*"]; see also *405341 Ontario Limited v. Midas Canada Inc.* (2009), 64 B.L.R. (4th) 251 at para 17 (upheld by the Court of Appeal) [O.N.S.C.].

[44] This argument was also raised in *Stoneleigh* at paras 58-62. The Court did not decide the issue, as it found that the claim fell outside the scope of the parties' arbitration clause.

[45] *Telus*, supra at para 32.

[46] *Telus*, supra at para 36.

[47] *Telus*, supra at para 38.

[48] *MDG Kingston*, supra at para 1; see also *Personal Service Coffee Corp. v. Beer* (2005), 256 D,L,R, (4th) 466 (O.N.C.A.) at para 28; and *779975 Ontario Limited v. Mmmuffins Canada Corporation* (2009), 62 B.L.R. (4th) 137, (O.N.S.C.) at para 30.

Second, like the *BPCPA*, the *AWA* applies to relationships governed by a 'contract of adhesion' – contracts whose terms are dictated to one party by the other rather than negotiated. As the Court notes in *Telus*, ambiguities regarding a contract of adhesion, including provisions relating to a contracting party's right of access to the court will be resolved in favour of the party (consumer or franchisee) forced to accept the agreement:

> However if there is any ambiguity in the TELUS clause, it is resolved in favour of Ms. Seidel's right of access to the court by the principles of *contra proferentum*. "Whoever holds the pen creates the ambiguity and must live with the consequences": *Gibbens v. Co-operators Life Insurance Co.*, 2009 SCC 59, [2009] 3 S.C.R. 605 (S.C.C.), at para. 25; see also, *ACS Public Sector Solutions*, *per* Donald J.A., at para. 50. This, the Court said in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102 (S.C.C.), "is particularly true where the clause is found in a standard printed form of contract, frequently termed a contract of adhesion, which is presented by one party to the other as the basis of their transaction" (at p. 108).[49]

Should a franchisee be able to identify an ambiguity in an arbitration clause, they could conceivably argue, as was the case in *Telus*, that Section 4 of the *AWA* should be applied to resolve the ambiguity in their favour. Indeed, courts will generally interpret any ambiguities in a franchisee's favour.

On the other hand, there are some compelling arguments available to a franchisor seeking to distinguish the B.C. legislation and enforce their arbitration clause. First, it should be noted that Justice Binnie did, in fact, decide to uphold stays over all of Seidel's claims besides her claim under Section 172. One claim which Seidel initially pursued but which was stayed was under Section 171 of the *BPCPA*. Section 171 states:

> 171 (1) Subject to subSection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a
>
> (a) supplier,
>
> (b) reporting agency, as defined in Section 106 [definitions],
>
> (c) collector, as defined in Section 113 [definitions],
>
> (d) bailiff, collection agent or debt pooler, as defined in Section 125 [definitions], or
>
> (e) a person required to hold a licence under Part 9 [Licences]
>
> who engaged in or acquiesced in the contravention that caused the damage or loss.
>
> (2) A person must not bring an action under this Section if an application has been made, on the person's behalf, to the court in respect of the same defendant and transaction under Section 192 [compensation to consumers].

[49] *Telus*, supra at para 47.

> (3) The Provincial Court has jurisdiction for the purposes of this Section, even though a contravention of this Act or the regulations may also constitute a libel or slander. [50]

Unlike Section 172 which provides a right of action to a party with no personal stake in the outcome of a dispute, Section 171 provide a right of action to only to a party with a personal stake in the outcome. This point of distinction was decisive in Justice Binnie's decision to stay an action under the latter but not the former provision:

> As to the statutory context, s. 172 stands out as a public interest remedy (i.e. it is available whether or not the self-appointed plaintiff "is affected by a consumer transaction that gives rise to the action") as compared with s. 171 (where the plaintiff must be "the person who suffered damage or loss"). The difference in the personal stake (or lack of it) required of a plaintiff is scarcely accidental. Section 171 confers a private cause of action. Section 172 treats the plaintiff as a public interest plaintiff intended to shine a spotlight on allegations of shabby corporate conduct, and the legislative intent thereby manifested should be respected by the court.[51]

Justice Binnie held that the legislature only intended to intervene in the Section 172 situation to protect the rights of public interest litigants. In her capacity as a private litigant, Seidel was held to the terms of the arbitration agreement. It is clear that a franchisee, exercising their Section 4 right to participate in a class action against a franchisor, does indeed have a personal stake in the outcome of that action. Such an action is not pursued to serve the public interest, but a party's private financial interest. In this regard, a Section 4 right of action is more akin to a right of action under Section 171, which was stayed by the Court in *Telus*, than a right of action under Section 172, which was not.

Second, Justice Binnie takes a textual approach to interpreting Section 172, and emphasizes the fact that the provision provides a statutory right to a litigant to appear before a superior court. He notes:

> Unlike Quebec and Ontario, which have decided to ban arbitration of consumer claims altogether, or Alberta, which subjects consumer arbitration clauses to ministerial approval, the B.C. legislature sought to ensure only that certain claims proceed to the court system, leaving others to be resolved according to the agreement of the parties. It is incumbent on the courts to give effect to that legislative choice, in my view.[52]

Whereas Section 172 explicitly provides a consumer with the right to pursue an action in the court system, the *AWA* provides a franchisee no comparable right. In fact, where an alternative dispute resolution process is to be used in disputes between a franchisor and franchisee, the regulations to the *AWA* explicitly require a franchisor to disclose this fact and the specific circumstances when the process may be invoked to the franchisee.[53] In light of this, it would

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[50] *BPCPA*, supra s. 171.

[51] *Telus*, supra at para 36.

[52] *Ibid.* at para 40.

[53] O Reg 581/00, s. 5(1).

seem illogical not to give effect to an arbitration provision in franchise agreements in the context of a class action.

In conclusion, it is our view that *Telus* may offer a new tool to franchisees seeking to escape their arbitration agreements in order to participate in class actions against franchisors. Franchisors should bear this risk in mind. We are also of the view, however, that compelling arguments will be available for franchisors to distinguish the legislation at issue in *Telus* from the franchise disclosure legislation which will surely be at the heart of a franchisee's attempt to resist a stay. Even following *Telus*, we predict that a broad, clearly worded arbitration agreement will generally be enforced in the event that a franchisee attempts to bring an action against a franchisor. This therefore underscores the importance for franchisors of well-drafted arbitration clauses. We will consider the design of an arbitration agreement, in greater detail, in the next section of this paper.

6. Design of an Appropriate Dispute Resolution Procedure

We have thus far examined the continued viability of arbitration as an option for franchisors and franchisees, and legal issues surrounding the enforceability of franchise agreements. In these final sections, we provide practical recommendations for parties seeking to design an appropriate dispute resolution procedure.

The College of Commercial Arbitrators, Protocols for Expeditious, Cost Effective Commercial Arbitration ["the Protocols"] begin with the following:

> Despite meaningful efforts to promote better practices and ensure quality among arbitrators and advocates, criticism of American commercial arbitration is at a crescendo. Much of this criticism stems from the fact that business-to-business arbitration has taken on the trappings of litigation-extensive discovery and motion practice, highly contentious advocacy, long cycle time and high cost.[54]

In an article entitled: "Is There a Flight from Arbitration?", Christopher Drahozal and Quentin Wittrock, American experts in franchise law, state the following:

> An article in the National Law Journal reports " increased franchisor disenchantment with arbitration" with some attorneys suggesting that the tide is turning against the alternative forum." ... Rupert Berkoff ... finds a "growing skepticism towards arbitration ... Perhaps privacy is achieved, but speed, cost reduction, and finality have more and more often come in to question." As a consequence of this dissatisfaction, "anecdotal evidence suggests that franchisors are either abandoning arbitration altogether, or using more carve-out provisions (exempting specific categories of disputes from the franchise agreement arbitration clause)."[55]

The Protocols were developed as a result of a national symposium on arbitration and concerns with its present state. The Protocols reflect the experience of many arbitrators that arbitration which simply replicates the litigation process is of very limited or no benefit to disputing parties.

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[54] CCA (College of Commercial Arbitrators), Editor-in Chief, Thomas J. Spipanowich, 2010 CCA.

[55] Drahozal, Christopher R. and Wittrock, Quentin R. "Is There a Flight from Arbitration?" (2008), (37) Hofstra, L. Rev. 71, at 71-72.

A well-designed arbitration procedure coupled with a well-designed system of franchisor/franchisee dispute management, adopted by all parties, is likely to generate that promise of arbitration to yield relatively fair, informal, cost effective and speedy dispute resolution.

In other words, an arbitration clause contained in a franchise agreement is in itself insufficient to provide for the benefits of arbitration in lieu of litigation. Franchisors ought to consider the design of a dispute resolution procedure tailored to the kind and size of the franchise system, and which may contain the following components:

- A roster of arbitrators (three to five at the most): The arbitrators should have experience in franchise disputes and over time will develop greater familiarity with a specific franchise system that retains them on a regular basis
- Access to a selection method for an arbitrator on an emergency basis for, amongst other things, interim injunctive relief
- Required case management of the franchise dispute by the arbitrator: Disputes that otherwise would require motions in court take the form of brief attendances by counsel or telephone conferences, specifically, to resolve procedural matters, disclosure, or production of documents issues
- Joinder of claims: It may be useful to provide that the arbitrator may join any number of claims brought by a single franchisee against a franchisor
- The requirement of a Notice to Arbitrate
- In larger and more sophisticated franchise systems, the franchisor ought to consider, with respect to any complaint of the franchisor against the franchisee, or the franchisee against the franchisor, that it first be dealt with by the franchisor directly, and if not resolved, a Notice may be issued to arbitrate
- A right of the franchisee to remain in possession of the franchise until the issue of terminating the franchisee, subject to any interim relief is determined
- The right of the arbitrator to impose restrictions on the scope of discovery, if any, the scope of evidence to be heard, the manner in which evidence may be heard, and the number of hearing days required
- A limited right of appeal or judicial review: Franchisors may wish to provide for broader rights of appeal with respect to specified disputes such as, termination or some other matter vital to the franchisor's ability to operate the system, or the franchisor's reputation

Unless arbitration represents something markedly different from litigation, more and more franchisors and other business users will simply reject arbitration and conclude that the litigation process may indeed be more cost-effective and provide better results.

Franchisors should be cautious to respect the design of appeal rights in any dispute resolution procedure given that there may be certain matters vital to the franchise or its operating system for which there ought to be rights of appeal. Even with an absolute right of appeal on questions of law, the appeal from an arbitrator's award is to one judge of the Superior Court. Judges of the Superior Court are also often deferential to arbitrators' awards. If the franchise dispute was commenced at the Superior Court, there would be an automatic right of appeal to the Court of Appeal.

An experienced American trial lawyer, Edward Dunham, describes the promise of arbitration as follows:

> When all is said and done, whether arbitration is preferable to litigation as a dispute resolution mechanism for franchise systems may depend more than anything else upon just one thing: the quality of the arbitrators. Taking full advantage of the relative informality and flexibility that arbitration provides, a talented arbitrator can limit discovery, conduct efficient hearings and promptly produce a sensible award, all at costs far lower than litigation of the same dispute would inevitably generate. Those are that the supposed benefits of arbitration, and they can in fact be realized.[56]

A well-designed and up-front arbitration procedure will substantially improve the chances that arbitration will provide meaningful benefits to the parties.

The franchise context is well suited to benefit from the design and implementation of such a dispute resolution system. Ideally, such a system would be seen by all franchisees to be fair, transparent, and accessible; it would allow for complaints to be dealt with quickly; and complaints would not fester and develop into broader class-wide conflict. Indeed, the efficient management of disputes which inevitably arise between franchisor and franchisees is a crucial factor in the overall success of a franchise system.

At a minimum, when designing arbitration clauses for inclusion in franchise agreements, parties should consider including provisions for the following:

- The selection of a specific arbitrator or institutional arbitration provider, and in the latter case, the importation of its rules in the conduct of the arbitration, including arbitrator selection
- The number of arbitrators
- The location of the arbitration
- The choice of applicable law[57]
- Confidentiality
- Available remedies[58]
- Limitations, if any, on damages that may be awarded
- Rights of appeal[59]
- Allocation of costs and expenses of the arbitration between the parties
- Joinder of claims
- Time limits for arbitrator selection, the hearing of the arbitration, and delivery of the award

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[56] Dunham, Edward, "A Trial Lawyer's Reflections on Arbitrating Franchise Disputes", (2009) 3 Entrepreneurial BUS.L.J.305, at page 311.

[57] We suspect that this will be a provision which governs the franchise agreement in its entirety.

[58] It is important to delineate exactly which powers the arbitrator has; for example, whether the arbitrator enjoys all of the powers of a Superior Court judge.

[59] Either the *Arbitration Act* of Ontario applies or parties may contract out of the Act, in part, with respect to certain rights of appeal.

7. Other Issues to Consider When Designing a Dispute Resolution Procedure

(a) *Mediation as an Adjunct to Arbitration*

In keeping with an appropriately designed dispute resolution procedure, mediation should be attempted prior to hearing of the arbitration. For example, mediation could be required within "x" number of days from the issuance of the Notice to Arbitrate by either party. For reasons of access and availability, the franchisor may also wish to maintain a roster of mediators.

It is also worth noting that Section 5 of the Regulations to the *AWA* provides that if an internal or external mediation or other alternative dispute resolution process is used by the franchisor in a dispute with a franchisee, the disclosure document is required to contain a description of the mediation or other alternative dispute resolution process, and of the circumstances in which those processes may be invoked[60]. In addition, SubSection 5(2) of the Regulations provides:

> Mediation is a voluntary process to resolve disputes with the assistance of an independent third party. Any party may propose mediation or other dispute resolution process in regard to the franchise agreement, and the process may be used to resolve the dispute if agreed to by all parties.[61]

(b) *The Availability of Group or Class Arbitration of Franchise Dispute*

The *Arbitration Act* of Ontario speaks to consolidation of arbitrations. SubSection 8(4) requires the application of all parties to more than one arbitration for a consolidation order[62], and SubSection 8(6) provides that parties to more than one arbitration may agree to consolidate arbitrations[63]. Accordingly, it appears that parties to more than one arbitration can either agree to proceed on a consolidated basis or one party can seek a court order, which, if it is on the application of all parties, is consensual. As a matter of practice, an arbitration may incorporate the *Rules of Civil Procedure*. If so, an arbitrator has the power to provide for joinder of *claims*, but not of *parties*. There appears to be no jurisprudence in Canada which specifically addresses the issue of whether an arbitration clause permits class arbitration.

In the United States, there has been considerable litigation and judicial comment on this issue, specifically in the context of consumer and employment contract disputes. In *Green Tree Financial Corp. v. Bazzle*[64], the United States Supreme Court concluded that it was for the arbitrator to determine whether the arbitration clause in a contract, which was silent as to group or class proceedings, could be read to allow class-wide arbitration. In that case, the consumer had commenced a class action lawsuit and the corporation was seeking to enforce the arbitration clause.

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[60] O Reg 581/00, s. 5(1).

[61] *Ibid.* s. 5(2).

[62] *Arbitration Act*, supra s. 8(4).

[63] *Ibid.* s. 8(6).

[64] *Green Tree Financial Corp. v. Bazzle*, 539 U. S. ____ (2003).

With that decision in hand, various arbitration providers developed class action procedural rules for arbitration and the large majority of arbitrators, found that the arbitration clause, although silent as to class-wide claims, made class-wide arbitration permissible[65].

As a result of arbitrators permitting the use of class-wide arbitration, many corporations have begun to include class action waiver provisions as part of their arbitration clauses; many of which are upheld but others struck as unconscionable. Corporations will surely be encouraged to continue including these sorts of class action waivers in consumer contracts, following the recent decision of the United States Supreme Court in the *AT&T Mobility LLC. v. Vincent Conception*[66] in which such an arbitration clause was specifically upheld in a consumer contract. Interestingly, the Court was generally of the view that having class-wide arbitrations defeated the relatively informal nature of the arbitration proceeding and did not provide the necessary multi-layered judicial review.

Arguably, it is possible to provide for group or class-wide arbitration by agreement. Such an agreement would appear to be consistent with Section 4 of the *Arthur Wishart Act*,[67] as it would do nothing to interfere with a franchisee's right to associate. Within the agreement it may also be possible to define the scope of both the group and the issues which may be arbitrated[68]. It should be noted, however, that any attempt to include a class arbitration clause will invariably be subject to the restrictions imposed by the *Arbitration Act* on joinder of parties[69].

There may be little reason, in any event, for a franchisor to provide for class-wide arbitration rather than a class action lawsuit. As the United States Supreme Court commented in the *AT&T Mobility* case referred to above, class-wide arbitration is likely to defeat the relative informality, speed and efficiency of arbitration. In addition, a class action is, for the franchisor, high stakes litigation, and it would be unlikely that a franchisor would prefer to submit this to an arbitrator, subject to very limited rights of review. Benefits of confidentiality are unlikely to extend so far as to protect a pending class arbitration from being disclosed to prospective franchisees in a franchise agreement. Accordingly, it appears unlikely that class-wide arbitrations will develop in Canada as they have in the United States.

8. Conclusion

There is no question that a franchise system benefits greatly from a well designed arbitration process. In most cases, agreements to arbitrate will be enforced by the courts. Accordingly, arbitration agreements are a powerful tool for franchisors if properly employed. Franchisors and franchisees will need to be creative in designing effective dispute resolution practices. The alternative is simply to replicate the litigation process, which will invariably

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[65] The AAA (American Arbitration Association) Policy on Class Arbitrations, and Supplementary Rules for Class Arbitrations is attached as Appendix "B".

[66] *AT&T Mobility LLC. v. Vincent Conception*, 563 U.S. ____ (2011) ["*AT&T Mobility*"].

[67] *AWA*, supra s. 4.

[68] Samples of such clauses from Entrepreneurial Business Law Journal, Vol 3:2, p. 302 [2009], are attached as Appendix "C".

[69] *Arbitration Act*, supra s. 8(4), s. 8(5) and s. 8(6).

cause participants to reject arbitration as a viable alternative to litigation. Whether class arbitration is viable in Canada is a much more complicated question, which will be answered in the months and years to come.

APPENDIX "A"

In *Chrysler Canada Inc. v. Eastwood Chrysler Dodge Ltd.*, an automotive dealer sold Chrysler vehicles pursuant to a Sales and Service Agreement. The parties agreed under a separate contract that the National Automobile Dealer Arbitration Program Rules ("NADAP Rules") would apply to the Sales and Service Agreement. The NADAP rules provide for a three-stage dispute resolution process culminating in arbitration. Chrysler brought an action against the dealer under the NADAP rules for payment credits mistakenly issued; the dealer counterclaimed in connection with an audit regarding chargeback amounts, conducted pursuant to the Sales and Service Agreement. Chrysler moved for a stay of the counterclaim given the failure of the dealer to follow the NADAP process. The motion judge denied the stay. The Manitoba Court of Appeal overturned the decision of the motion judge, and enforced the parties' agreement to resolve such issues through the arbitration process rather than the court process.[1]

In *D.L.T. Holdings Inc. v. Grow Biz International Inc*, a franchisor moved for an order dismissing or staying an action brought against it by a franchisee for, amongst other things, damages arising out of a breach of a franchise agreement, and general damages for negligence and misrepresentations. The franchisor alleged that by bringing the action the franchisee was in violation of the terms of the parties' franchise agreement which required that all disputes "arising under or in connection with this Agreement" be settled by arbitration under the U.S. Federal Arbitration Act in Minnesota. The P.E.I. Supreme Court Trial Division agreed, and stayed the franchisee's action.[2]

Finally, in *Continental Commercial Systems Corp. v. Telecheck International, Inc.* the parties were involved in an arbitration which arose out of four franchise and licence agreements. Despite the fact that each of the agreements contained an arbitration clause, Telechek commenced an action for the recovery of travel, lodging and related costs which Telecheck claimed were incurred in connection with the appearance of its representatives and witnesses at the arbitration. Continental applied for and was granted a stay of that action on the basis of the arbitration clause. The B.C. Supreme Court held that it is not clear that the issue between the parties is outside the terms of the arbitration agreement.[3]

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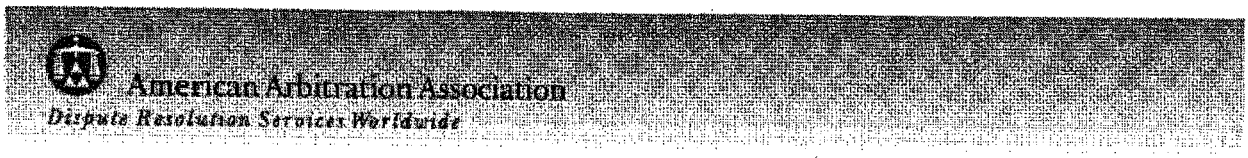
[1] *Chrysler Canada Inc. v. Eastwood Chrysler Dodge Ltd.*, 2010 MBCA 75, at paras 29-33.

[2] *D.L.T. Holdings Inc. v. Grow Biz International Inc.*, 2000 PESCTD 73, at para 36.

[3] *Continental Commercial Systems Corp. v. Telecheck International, Inc.*, 1995 CarswellBC 2409, at para 9 (B.C.S.C.).

APPENDIX "B"



AAA Policy on Class ARBITRATIONS

July 14, 2005

On October 8, 2003, in response to the ruling of the United States Supreme Court in Green Tree Financial Corp. v. Bazzle , the American Arbitration Association issued its Supplementary Rules for Class Arbitrations to govern proceedings brought as class arbitrations. In Bazzle , the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted. Accordingly, the American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.

The Association is not currently accepting for administration demands for class arbitration where the underlying agreement prohibits class claims, consolidation or joinder, unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the Association.

Commentary to the American Arbitration Association's Class Arbitrations Policy

February 18, 2005

It has been the practice of the American Arbitration Association since its Supplementary Rules for Class Arbitrations were first enacted to require a party seeking to bring a class arbitration under an agreement that on its face prohibits class actions to first seek court guidance as to whether a class arbitration may be brought under such an agreement. The Association's practice has been neither to commence administration of a case nor to refer such a matter to an arbitrator until a court decides that it is appropriate to do so. The Association's determination not to administer class arbitrations where the underlying arbitration agreement explicitly precludes class procedures was made because the law on the enforceability of class action waivers was unsettled; the Association takes no position as to whether such clauses are or should be enforceable.

In a recent review of this practice by the Association's Executive Committee it was agreed that this practice should be maintained in light of the continued unsettled state of the law. Courts in different states and different federal circuits have reached differing conclusions concerning the preclusion of class actions by agreement and "gateway" issues generally. However, the courts that have confronted the question have generally concluded that the decision as to whether an agreement that prohibits class actions is enforceable is one for the courts to make, not the arbitrator. In fidelity to its Due Process Protocols, the Association will continue to require all proceedings brought to it for administration to meet the standards of fairness and due process set forth in those protocols, but the Association will not seek to make decisions concerning class action agreements that the courts appear to have reserved for themselves.

The Executive Committee also determined at the same meeting to proceed forthwith in the creation of a special committee to explore the possibility of identifying counsel who could assist parties who cannot afford to pay for an

attorney in arbitral proceedings. This effort would supplement the Association's current ability to provide arbitrators who will serve pro bono, or for a reduced fee, in appropriate cases.

The Association will continue to monitor developments in this rapidly evolving intersection of arbitration and the courts.

Supplementary Rules for Class ARBITRATIONS
Rules Effective October 8, 2003
Fees Effective January 1, 2010

1. Applicability

(a) These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ("AAA") where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules. These Supplementary Rules shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class.

(b) Where inconsistencies exist between these Supplementary Rules and other AAA rules that apply to the dispute, these Supplementary Rules will govern. The arbitrator shall have the authority to resolve any inconsistency between any agreement of the parties and these Supplementary Rules, and in doing so shall endeavor to avoid any prejudice to the interests of absent members of a class or purported class.

(c) Whenever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under these Supplementary Rules, the arbitrator shall follow the order of the court.

2. Class Arbitration Roster and Number of Arbitrators

(a) In any arbitration conducted pursuant to these Supplementary Rules, at least one of the arbitrators shall be appointed from the AAA's national roster of class arbitration arbitrators.

(b) If the parties cannot agree upon the number of arbitrators to be appointed, the dispute shall be heard by a sole arbitrator unless the AAA, in its discretion, directs that three arbitrators be appointed. As used in these Supplementary Rules, the term "arbitrator" includes both one and three arbitrators.

3. Construction of the Arbitration Clause

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

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

4. Class Certification

(a) Prerequisites to a Class Arbitration

> If the arbitrator is satisfied that the arbitration clause permits the arbitration to proceed as a class arbitration, as provided in Rule 3, or where a court has ordered that an arbitrator determine whether a class arbitration may be maintained, the arbitrator shall determine whether the arbitration should proceed as a class arbitration. For that purpose, the arbitrator shall consider the criteria enumerated in this Rule 4 and any law or agreement of the parties the arbitrator determines applies to the arbitration. In doing so, the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described. The arbitrator shall permit a representative to do so only if each of the following conditions is met:

(1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately protect the interests of the class;

(5) counsel selected to represent the class will fairly and adequately protect the interests of the class; and

(6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.

(b) Class Arbitrations Maintainable

> An arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied, and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(1) the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;

(2) the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;

(3) the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum; and

(4) the difficulties likely to be encountered in the management of a class arbitration.

5. Class Determination Award

(a) The arbitrator's determination concerning whether an arbitration should proceed as a class arbitration shall be set forth in a reasoned, partial final award (the "Class Determination Award"), which shall address each of the matters set forth in Rule 4.

(b) A Class Determination Award certifying a class arbitration shall define the class, identify the class representative(s) and counsel, and shall set forth the class claims, issues, or defenses. A copy of the proposed Notice of Class Determination (see Rule 6), specifying the intended mode of delivery of the Notice to the class members, shall be attached to the award.

(c) The Class Determination Award shall state when and how members of the class may be excluded from the class arbitration. If an arbitrator concludes that some exceptional circumstance, such as the need to resolve claims seeking injunctive relief or claims to a limited fund, makes it inappropriate to allow class members to request exclusion, the Class Determination Award shall explain the reasons for that conclusion.

(d) The arbitrator shall stay all proceedings following the issuance of the Class Determination Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Class Determination Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Class Determination Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Class Determination Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

(e) A Class Determination Award may be altered or amended by the arbitrator before a final award is rendered.

6. Notice of Class Determination

(a) In any arbitration administered under these Supplementary Rules, the arbitrator shall, after expiration of the stay following the Class Determination Award, direct that class members be provided the best notice practicable under the circumstances (the "Notice of Class Determination"). The Notice of Class Determination shall be given to all members who can be identified through reasonable effort.

(b) The Notice of Class Determination must concisely and clearly state in plain, easily understood language:

(1) the nature of the action;

(2) the definition of the class certified;

(3) the class claims, issues, or defenses;

(4) that a class member may enter an appearance through counsel if the member so desires, and that any class member may attend the hearings;

(5) that the arbitrator will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded;

(6) the binding effect of a class judgment on class members;

(7) the identity and biographical information about the arbitrator, the class representative(s) and class counsel that have been approved by the arbitrator to represent the class; and

(8) how and to whom a class member may communicate about the class arbitration, including information about the AAA Class Arbitration Docket (see Rule 9).

7. Final Award

The final award on the merits in a class arbitration, whether or not favorable to the class, shall be reasoned and shall define the class with specificity. The final award shall also specify or describe those to whom the notice provided in Rule 6 was directed, those the arbitrator finds to be members of the class, and those who have elected to opt out of the class.

8. Settlement, Voluntary Dismissal, or Compromise

(a) (1) Any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of an arbitration filed as a class arbitration shall not be effective unless approved by the arbitrator.

(2) The arbitrator must direct that notice be provided in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(3) The arbitrator may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(b) The parties seeking approval of a settlement, voluntary dismissal, or compromise under this Rule must submit to the arbitrator any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(c) The arbitrator may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(d) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires approval under this Rule. Such an objection may be withdrawn only with the approval of the arbitrator.

9. Confidentiality; Class Arbitration Docket

(a) The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances. However, in no event shall class members, or their individual counsel, if any, be excluded from the arbitration hearings.

(b) The AAA shall maintain on its Web site a Class Arbitration Docket of arbitrations filed as class arbitrations. The Class Arbitration Docket will provide certain information about the arbitration to the extent known to the AAA, including:

(1) a copy of the demand for arbitration;

(2) the identities of the parties;

(3) the names and contact information of counsel for each party;

(4) a list of awards made in the arbitration by the arbitrator; and

(5) the date, time and place of any scheduled hearings.

10. Form and Publication of Awards

(a) Any award rendered under these Supplementary Rules shall be in writing, shall be signed by the arbitrator or a majority of the arbitrators, and shall provide reasons for the award.

(b) All awards rendered under these Supplementary Rules shall be publicly available, on a cost basis.

11. Administrative Fees and Suspension for Nonpayment

(a) A preliminary filing fee of $3,350 is payable in full by a party making a demand for treatment of a claim, counterclaim, or additional claim as a class arbitration. The preliminary filing fee shall cover all AAA administrative fees through the rendering of the Clause Construction Award. If the arbitrator determines that the arbitration shall proceed beyond the Clause Construction Award, a supplemental filing fee shall be paid by the requesting party. The supplemental filing fee shall be calculated based on the amount claimed in the class arbitration and in accordance with the fee schedule contained in the AAA's Commercial Arbitration Rules.

(b) Disputes regarding the parties' obligation to pay administrative fees or arbitrator's compensation pursuant to applicable law or the parties' agreement may be determined by the arbitrator. Upon the joint application of the parties, however, an arbitrator other than the arbitrator appointed to decide the merits of the arbitration, shall be appointed by the AAA to render a partial final award solely related to any disputes regarding the parties' obligations to pay administrative fees or arbitrator's compensation.

(c) If an invoice for arbitrator compensation or administrative charges has not been paid in full, the AAA may so inform the parties in order that one of them may advance the required deposit. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

(d) If an arbitration conducted pursuant to these Supplementary Rules is suspended for nonpayment, a notice that the case has been suspended shall be published on the AAA's Class Arbitration Docket.

12. Applications to Court and Exclusion of Liability

(a) No judicial proceeding initiated by a party relating to a class arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a class arbitration or potential class arbitration under these Supplementary Rules is a necessary or proper party in or to judicial proceedings relating to the arbitration. It is the policy of the AAA to comply with any order of a court directed to the parties to an arbitration or with respect to the conduct of an arbitration, whether or not the AAA is named as a party to the judicial proceeding in which the order is issued.

(c) Parties to a class arbitration under these Supplementary Rules shall be deemed to have consented that judgment upon each of the awards rendered in the arbitration may be entered in any federal or state court having

jurisdiction thereof.

(d) Parties to an arbitration under these Supplementary Rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action seeking damages or injunctive relief for any act or omission in connection with any arbitration under these Supplementary Rules.

APPENDIX "C"

APPENDIX

Sample Clauses:
Class Action Waivers, Class Arbitration Waivers, and Nonseverability Provisions

Class Action Waivers

Hungry Howie's Franchise Agreement

¶ 29. CLASS ACTION SUITS Franchise Owner waives, to the fullest extent permitted by law, the right to bring, or be a class member in, any class action suit relating to any dispute, controversy or claim arising out of [or] related to this Agreement or arising out of any breach or alleged breach of this Agreement.

Jackson Hewitt, Inc. Franchise Agreement

¶ *28.7. No class actions.* You agree that for our Network to function properly, we cannot be burdened with the costs of litigating network-wide disputes. You agree that any dispute between you and us is unique as to its facts, and you shall not institute, join or participate in any class action against us or our Affiliates.

Class Arbitration Waivers

AAMCO Transmissions, Inc. Franchise Agreement

¶ 28. Mediation and Arbitration. ...
(b) ... The parties specifically acknowledge and agree that no class action and multiparty claims shall be filed in any such arbitration proceeding pursuant to the terms of this Agreement.

Computer Renaissance Franchise Agreement

¶ 17.A. Arbitration. ... Any dispute and any arbitration will be conducted and resolved on an individual basis only and not a class-wide, multiple plaintiff, or similar basis. Any such arbitration proceeding will not be consolidated with any other arbitration proceeding involving other any other person, except for disputes involving affiliates of the parties to such arbitration.

Taco John's International, Inc. Franchise Agreement

¶ 17.10 (d) (iii) Arbitration. ... The parties agree that arbitration shall be conducted on an individual basis, except as specifically provided below. The parties agree further that arbitration shall not be conducted on a class-wide basis.

You may commence an arbitration as a claimant together with other franchisees of Taco John's Restaurant franchisees as co-claimants, subject to the following conditions:

(1) the claims of the other franchisees must present issues of fact or law in common with your claims; and

(2) at any time during the conduct of the arbitration, the total number of Taco John's Restaurants owned by the claimants in the arbitration may not exceed fifteen percent (15%) of the total number of franchised Taco John's Restaurants in operation.

You may consolidate any arbitration in which you are the claimant with other arbitrations in which other Taco John's Restaurants franchisees are claimants, subject to the following conditions:

(1) the claims of the other franchisees in the other arbitrations must present issues of fact or law in common with your claims in your arbitration proceeding; and

(2) at any time during the conduct of the consolidated arbitration, the total number of Taco John's Restaurants owned by the claimants in the consolidated arbitration may not exceed fifteen percent (15%) of the total number of franchised Taco John's Restaurants in operation.

If a claim which is subject to arbitration under this Agreement is properly the subject of a class action, then the party making that claim may, in its discretion, elect either to assert it as a single-party claim (as opposed to a claim on behalf of a class) in the arbitration, or to file it as a class action in a court of competent jurisdiction, pursuant to the laws and rules applicable to that court. If the court refuses to allow the matter to proceed as a class action, whether by refusing to certify a class or otherwise, then the party asserting the claim may not pursue it further in court, and if that party wishes to assert the claim further, then the party must submit it to arbitration in accordance with the provisions of this Paragraph 17.10.

Nonseverability Provisions

ChemDry Franchise Agreement

¶ **17.F. Arbitration.** ... HRI and FRANCHISEE agree that arbitration shall be conducted on an individual, not a class-wide basis and that an arbitration proceeding between HRI and FRANCHISEE and their respective affiliates, shareholders, officers, directors, agents, and/or employees shall not be consolidated with any other arbitration proceeding involving HRI and any other person. The parties further agree that if this Paragraph is held by any court, agency or tribunal with competent jurisdiction to be: (a) invalid, (b) contrary to, or (c) in conflict with, any applicable present or future law or regulation, the entire Section 17.F will be deemed null and void.

SignsNow Franchise Agreement

17.G. **ARBITRATION**. ... We and you agree that arbitration will be conducted on an individual, not a class-wide, basis and that an arbitration proceeding between us and our affiliates, and our and their respective shareholders, officers directors, agents, and/or employees, and you (and/or your owners, guarantors, affiliates, and/or employees) may not be consolidated with any other arbitration proceeding between us and any other person. **Notwithstanding the foregoing or anything to the contrary in this Section 17.G or Section 17.B, if any court or arbitrator determines that all or any part of the preceding sentence is unenforceable with respect to a dispute that otherwise would be subject to arbitration under this Section 17.G, then all parties agree that this arbitration clause will not apply to that dispute and that such dispute shall be resolved in a judicial proceeding in accordance with this Section 17 (excluding this Section 17.G).**

Snap-On Tools Standard Franchise Agreement

25.B. Arbitration. ... In the event any provision in this Section 25, other than the prohibition against consolidation, joinder and class action, is determined to be legally invalid or unenforceable under the law applicable in a particular case, then it is the intention of the parties to this Agreement that such provision be deemed inoperative and stricken from this Agreement, and that the remainder of this Section 25, to the extent not legally invalid or unenforceable under applicable law, be enforced as written as if the invalid or unenforceable provision or provisions had not been included in this Section 25. If the prohibition against consolidation, joinder and class action is determined to be legally invalid or unenforceable in a particular case, then it is the intent of the parties that the case shall proceed only in any federal court of competent jurisdiction, or in the event there is no jurisdiction in a federal court, then in that situation only, the case shall proceed in a state court of competent jurisdiction.