

Pitfalls of arbitration clauses, waivers and standard clauses in consumer contracts

Best practices when drafting arbitration and waiver clauses in consumer contracts

Know your statute: Before drafting a standard clause, carefully consider compliance with provincial consumer protection statutes. While arbitration agreements and waiver clauses will generally be enforced, consumer protection statutes can vary widely between provinces and Canadian courts have interpreted these laws expansively.

Online agreements: Be aware that online contracts of adhesion will be subject to strict public policy considerations by courts. Use caution when drafting key online agreement terms, such as forum selection, arbitration, and waiver clauses. Best practices include using plain language, and drawing attention through large, bold font.



Alberta

Fair Trading Act, RSA 2000, Chapter F-2

Prohibits waiver of the right to participate in class actions?

× **NO: Silent regarding waiver of the right to participate in class actions. BUT see s. 2(1) regarding waiver generally.**

Act prevails

2(1) Any waiver or release by a person of the person's rights, benefits or protections under this Act or the regulations is void.



British Columbia

Business Practices and Consumer Protection Act, SBC 2004, Chapter 2 (BPCPA)

Prohibits waiver of the right to participate in class actions?

× **NO: Silent regarding waiver of the right to participate in class actions. BUT see s. 3 regarding waiver generally.**

Waiver or release void except as permitted

3 Any waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act.



Ontario

Consumer Protection Act, S.O. 2002, Chapter 30, Schedule A

Prohibits waiver of the right to participate in class actions?

✓ **YES: Expressly prohibits a waiver of the right to participate in class actions.**

Class proceedings

8 (1) A consumer may commence a proceeding on behalf of members of a class under the Class Proceedings Act, 1992 or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.

Alberta	British Columbia	Ontario
<i>Fair Trading Act, RSA 2000, Chapter F-2</i>	<i>Business Practices and Consumer Protection Act, SBC 2004, (BPCPA) Chapter 2</i>	<i>Consumer Protection Act, SO 2002, Chapter 30, Schedule A</i>
Mandatory arbitration permissible?	Mandatory arbitration permissible?	Mandatory arbitration permissible?
<p>✓ YES: Permits and upholds the use of mandatory arbitration clauses in consumer contracts with approval by the Minister of Service Alberta (the Minister).</p>	<p>✓ YES: Statute is silent regarding mandatory arbitration. BUT see <i>Seidel v Telus Communications Inc.</i> (2011 SCC 15).</p>	<p>✗ NO: Expressly exempts consumer contracts from mandatory arbitration.</p>
<p>Arbitration</p> <p>16 <i>Despite any provision of this Act, neither a consumer nor the Director may commence or maintain an action or appeal under sections 13 to 15 if the consumer's cause of action under those sections is based on a matter that the consumer has agreed in writing to submit to arbitration, and the arbitration agreement governing the arbitration has been approved by the Minister.</i></p>	<p>Waiver or release void except as permitted</p> <p>3 <i>Any waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act.</i></p> <p><i>Seidel v Telus Communications Inc.</i> (2011 SCC 15)</p> <p>Mandatory arbitration is permissible to the extent it does not interfere with "rights, benefits or protections" under the BPCPA.</p>	<p>No waiver of substantive and procedural rights</p> <p>7 (1) <i>The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.</i></p> <p>Limitation on effect of term requiring arbitration</p> <p>(2) <i>Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.</i></p> <p>Action in Superior Court of Justice</p> <p>100 (1) <i>If a consumer has a right to commence an action under this Act, the consumer may commence the action in the Superior Court of Justice. 2002, c. 30, Sched. A, s. 100 (1).</i></p>