ADR

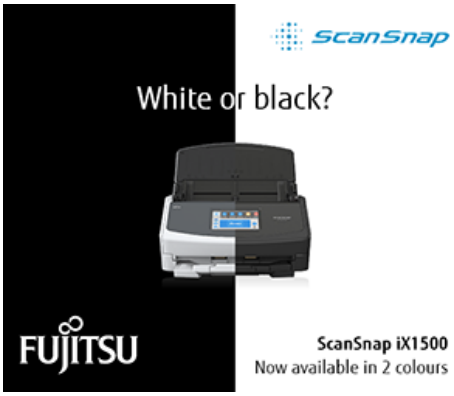
Canada is an arbitration-friendly jurisdiction

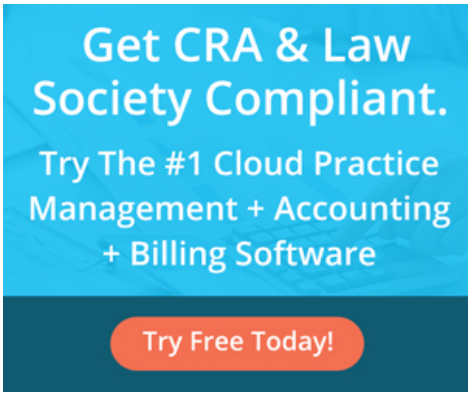
Toronto commercial arbitrator Marvin J. Huberman says recent media reports about arbitration clauses contained in the fine print of contracts really highlights the differences between American and Canadian approaches to ADR.

An investigative series in the *New York Times* examined several aspects of arbitration, and examined clauses inserted into consumer and employment contracts. The newspaper reports that these individual clauses are a way for corporations to circumvent the court process and bar people from joining in class-action lawsuits, which are "realistically the only tool citizens have to fight illegal or deceitful business practices," one of the articles states.

Huberman tells AdvocateDaily.com that while it's important that the arbitration debate is going mainstream, he says the *New York Times* articles also expose the fundamentally different approaches to the arbitral process taken by courts in the United States and by those in Canada.

"It seems that the courts in the U.S. have really focused on two things," he says. "First, they're hyper focused on whether Americans have been deprived of fundamental constitutional rights through arbitration clauses, particularly being deprived of having their day in court or right to a jury trial.





"In Canada, we're not so focused on that aspect. Here we don't have a constitutionally entrenched right to a jury trial, except for in a criminal matter which involves a penalty or a sentence involving at least five years. Other than that, we don't have a constitutionally guaranteed right to a jury trial, certainly not in civil matters," Huberman says.

The second aspect American courts — as well as U.S. disputants and their counsel — have focused on is constitutional division of powers (known in Canada as issues of paramountcy) between the individual states and the federal government.

"If you look at some of the cases in the U.S., there are all of these arguments about which law trumps the other. You get some serious litigation in the U.S. in that arena," he says.

"We don't really have that issue in Canada and certainly not at the Supreme Court of Canada level," he adds.

He notes the Supreme Court of Canada and the Federal Court of Appeal have given substantial deference to arbitration. "We've got a long-standing pro-arbitration stance in Canada and that's been reaffirmed by the SCC in a number of cases and by a recent Federal Court of Appeal decision as well," Huberman says

Any statutory claims will be subjected to arbitration where the parties have agreed to arbitrate unless there is language in the statute that expresses a clear legislative intent to the contrary, he says.

"Canada is an arbitration-friendly jurisdiction and in the absence of factors like statutory language expressing clear legislative intent, the courts will generally not interfere with class-action waivers or agreement to arbitrate their disputes," he says.

Huberman says the mainstream debate really brings to the surface the greater need for parties to a dispute to think more wisely about how arbitration can be used.

"One needs to use arbitration, having regard to the three Ps, which are: people, the problem, the process," he says. "If the process is arbitration, the process needs to be tailor-made for the people and the problem. If they do that, then the potential for achieving the objectives of the clients and the objectives of the courts to enforce the reasonable expectations in a forum and in a process that can achieve those goals, then that's the way to do it."

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