Cassels

Supreme Court of Canada Confirms Arbitration Clauses Enforceable Against Businesses Claims

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Business customers of Telus cannot avoid the terms of a mandatory arbitration clause by joining a class action with consumers who are not bound by the clause, the Supreme Court of Canada recently held, in its highly anticipated decision in *Telus Communications Inc. v. Wellman*, released April 4, 2019. The decision has implications for businesses that use arbitration clauses in their contracts and establishes that such clauses will generally be upheld in the commercial context, and can be used to avoid class actions in that context.

Background

Wellman filed a class action against Telus alleging that customers of Telus had been overcharged under their per-minute plan contracts as a result of undisclosed billing practices. The contracts included a mandatory arbitration clause to resolve all claims arising out of or in relation to the contract by arbitration. The class action involved claims by both consumers and business customers.

Ontario's *Consumer Protection Act* prohibits mandatory arbitration clauses and class action waivers in consumer agreements. However, the Act only applies to consumers (i.e., individuals acting for personal, family, or household purposes) and does not apply to persons acting for business purposes. Section 7(1) of Ontario's *Arbitration Act* requires a court (subject to prescribed exceptions) to stay a lawsuit in favour of arbitration, where the parties have agreed to arbitration in the respective agreement. Notably, section 7(1) of the *Arbitration Act* does not apply to lawsuits involving consumer agreements with mandatory arbitration clauses; however, it will apply if, after the dispute arises, the consumer agrees to arbitration. Despite this, the plaintiff argued that section 7(5) of the *Arbitration Act* (described below) gave the court the ability to allow the business customers to be part of the class action lawsuit, despite the arbitration clause.

Lower Courts Decide in Favour of Wellman

Telus conceded that the consumers were shielded from the mandatory arbitration clause and the clause was not enforceable against the consumers by virtue of the *Consumer Protection Act*. However, Telus argued that the business customers were not afforded the same protections and their claims had to be stayed as they were subject to a valid and binding arbitration clause. Both the Ontario Superior Court of Justice and the Ontario Court of Appeal agreed with Wellman and held that the *Arbitration Act* gave the court the discretion to allow a lawsuit to proceed despite a mandatory arbitration clause. They further held

that it would be unreasonable to separate the business customer claims from the consumer claims in the class action. Accordingly, the attempt by Telus to stay the class action with respect to the business customers was rejected. Telus sought and was granted leave to appeal the ruling to the Supreme Court.

Supreme Court decides in Favour of Telus

In a 5-4 decision, the Supreme Court allowed the appeal and stayed the claims of the business customers. The Supreme Court determined that the business customers were not subject to the *Consumer Protection Act* and were bound by the arbitration clause in the Telus contract. As such, the lawsuit of the business customers is subject to the stay under section 7(1) of the Arbitration Act and, as discussed below, the exceptions section 7(1) have no application.

The Supreme Court determined that section 7(1) of the *Arbitration Act* establishes a general rule that, where a party to an arbitration agreement commences a lawsuit in respect of a matter dealt with in the agreement, the court ***must*** stay the lawsuit in favour of arbitration. Section 7(2) of the *Arbitration Act* lists five exceptions to this general rule, in which the court can refuse to stay a lawsuit because it would be unfair or impractical to refer the matter to arbitration (legal incapacity, invalid arbitration agreement, subject matter is not capable of being the subject of arbitration under Ontario law, motion was brought with undue delay, and the matter is proper for default or summary judgment).

Section 7(5) of the *Arbitration Act* provides a further exception to the general rule, but has two requirements: (1) the lawsuit must involve at least one matter dealt with in the arbitration agreement and at least one matter that is not dealt with in the arbitration agreement, and (2) it is reasonable to separate the matters dealt with in the agreement from other matters. Where both preconditions are not met, then the exception in section 7(5) has no application. Absent an applicable exception, the general rule in section 7(1) applies and the lawsuit must be stayed.

The majority of the Supreme Court determined that there was one issue in the Wellman case, the alleged overcharging, and the issue was covered by the arbitration clause in the Telus contract. As such, the first precondition of section 7(5) was not met. Section 7(2) also had no application. Given none of the exceptions in the *Arbitration Act* applied, the Supreme Court determined that the general rule in section 7(1) applied to the Wellman case and stayed the class action claims of the business customers.

Implications of the Decision

The Supreme Court's decision is notable in addressing the interaction between arbitration and class actions. Businesses that use arbitration clauses used in agreements have some comfort in the limited exposure to class actions commenced by ***business*** customers (barring any applicable exceptions that would allow the arbitration to proceed). The decision also supports the intent of the *Consumer Protection Act*, rendering the mandatory arbitration clause in the contract unenforceable against consumers.

Also noteworthy is the division of opinion in the decision. Underlying what on the surface appears to be a dry exercise in statutory interpretation is a tug of war between conflicting goals of promoting access to justice via class actions and giving effect to private contracts which may be seen as constraining that access. While may provincial legislatures have explicitly decided in favour of the former in prohibiting arbitration in some contexts, a narrow majority of the Supreme Court has decided (for now at least) not to use its power of statutory interpretation to extend that prohibition.

Find the full decision here.

For more on the possible implications of this decision, please contact Suhuyini Abudulai, Tim Pinos or any member of the Banking, Lending & Specialty Finance Group or Litigation Group.
