UPDATE

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# Supreme Court of Canada Clarifies Use of Mandatory Arbitration Clauses in Standard Form Consumer Contracts

For several years, courts across the country have rendered conflicting decisions regarding the legitimacy of clauses in standard form "consumer contracts" that require the parties to privately arbitrate disputes (rather than participate in a proposed class action for example). Until now the Supreme Court of Canada ("SCC") had previously only waded into the arena with decisions involving Quebec law (see *Dell Computer Corp v. Union des consommateurs,* 2007 SCC 34 and *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35).

This changed on March 18, 2011, when the SCC released *Seidel v. Telus*, 2011 SCC 15 ("*Seidel*"), a decision with wider application on this issue. Although the SCC was sharply divided in the result, a careful reading of *Seidel* reveals general agreement on several important principles. Importantly, *Seidel* permits the use of mandatory arbitration clauses in certain circumstances as a tool for companies to protect against the possibility of becoming ensnared in class action litigation.

## Factual Background

The plaintiff brought a proposed class proceeding against TELUS, asserting claims under British Columbia's *Business Practices and Consumer Protection Act* ("BPCPA"). The action alleged that TELUS engaged in deceptive practices by falsely representing how it calculated air time for billing purposes. The plaintiff sought personal damages, a declaration that TELUS had engaged in a deceptive practice and an injunction restraining that conduct.

The contract between the parties contained a clause that any dispute between them would be referred to a private mediation and arbitration at the joint cost of the parties. The arbitration clause also contained a waiver of any right to participate in a class action against TELUS. As a result, TELUS argued that the proposed class proceeding should be stayed in favour of mediation and arbitration.

## Majority Decision and Underlying Principles

The majority held that the claims for a declaration and injunction could be advanced in the proposed class proceeding, but the claims for personal damages had to proceed as required by the arbitration clause. The dissent would have required all of the claims to proceed pursuant to the arbitration clause. Despite these differences, the entire Court agreed on the following general principles:

- The choice to restrict or not to restrict mandatory arbitration clauses in consumer contracts is a matter for the legislature.
- Absent legislative intervention (a legislative override), the courts will generally give effect to the terms of a commercial contract freely entered into, including a mandatory arbitration clause.
- The above principle applies to standard form contracts (contracts of adhesion). A standard form contract requiring that the parties arbitrate is not contrary to public policy. To find otherwise would be tantamount to finding that dispute resolution by arbitration is itself contrary to public policy.
- A particular mandatory arbitration clause could be worded such that it offends public policy, or some other legal doctrine, such as unconscionability. Generally speaking, mandatory arbitration clauses are permissible.

## Statutory Interpretation

***Class Proceedings Act:*** Notably, the question of whether a legislative override existed in B.C. did not include any significant discussion of B.C.'s *Class Proceedings Act* by the majority. The majority did not elaborate on the issue, but in determining that certain claims to be advanced in the proposed class proceeding had to be arbitrated, the majority clearly concluded there was nothing in the *Class Proceedings Act* to restrict the operation of a mandatory arbitration clause.

The dissent was more articulate on this point. They reiterated the principle that class action legislation does not create any new substantive rights, but merely creates a procedure for grouping individual claims together. Class action legislation creates no special jurisdiction and, as a result, an agreement to use the arbitration procedure ousts the jurisdiction of the courts to hear the claim, both on an individual basis and by way of a proposed class action.

***BPCPA:*** With the *Class Proceedings Act* posing no bar to the mandatory arbitration clause, the SCC focused on the BPCPA. In interpreting the BPCPA the dissent noted "if a legislature intends to exclude arbitration as a vehicle for resolving…disputes, it must do so explicitly." The dissent also placed great emphasis on supporting a policy to promote resolution of disputes by private arbitration.

While the majority acknowledged that "the virtues of commercial arbitration have been recognized and indeed welcomed" they found no need to resort to such policy considerations to determine whether the BPCPA contained an override of the mandatory arbitration clause. The majority noted that the BPCPA "is all about consumer protection" and should be interpreted "generously in favour of consumers." Section 3 of the BPCPA prevents any waiver of the "rights, benefits or protections" under the statute.

The majority found that the claim for personal damages under the BPCPA had to proceed by way of arbitration. The majority concluded, in the result, that being forced to arbitrate that claim did not take away any right, benefit or protection of the BPCPA.

However, being forced to arbitrate the claims under s. 172 would offend s. 3. Section 172 of the BPCPA contains a remedy whereby "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" to enforce the statute's consumer protection standards.

The majority interpreted s. 172 as creating a remedy that could be pursued by an individual without any personal interest in the matter for the benefit of the public. The majority questioned the ability of an arbitrator in B.C. to issue an injunction against a company restraining it from acting in relation to all consumers in B.C. (the dissent did not share this view). The private nature of an arbitration was also deemed to be inconsistent with the public nature of proceeding under s. 172, a provision that could have potential benefits for consumer awareness and protection. Therefore, being forced to privately arbitrate eroded a right, benefit or protection under s. 172.

In summary, the difference in the scope and quality of the remedies available to an arbitrator, compared to those under the BPCPA, constituted a legislative override of the parties' freedom to choose arbitration.

***Saskatchewan Issues:*** The SCC was unanimous that restricting mandatory arbitration clauses is a choice for legislatures. The Court also noted that such clauses are prohibited in Ontario. In Alberta, the government must specifically approve them. In Saskatchewan's *Consumer Protection Act* ("CPA") there is no explicit ban, so a purposive and contextual assessment would need to occur.

Like the BPCPA, it is reasonable to generally conclude that since the CPA is also consumer protection legislation it will be interpreted generously in favour of consumers. However, it would not be reasonable to conclude that the CPA contains a legislative override in the manner discussed in *Seidel*.

Under section 15(1), the CPA allows the Director of the Consumer Protection Branch to commence an action when he or she believes this to be in the public interest. A member of the public is not included in this section and there is no other apparent equivalent to s. 172 of the BPCPA that would allow a Saskatchewan resident to privately commence a "public interest" action. Section 22 of the CPA also restricts the ability to bring an application for an injunction to the Director alone, and s. 14(2) restricts the right to bring an action to only those consumers who have "suffered a loss as a result of an unfair practice." Section 14(2) is similar in nature to the provisions under which the plaintiff in *Seidel* was forced proceed by way of arbitration.

Unless a separate argument exists, the reasoning in *Seidel* suggests that the current intent of the Saskatchewan legislature regarding CPA claims is not to restrict the use of mandatory arbitration clauses in consumer contracts.

## Conclusion

The SCC has upheld the ability of companies to use properly worded mandatory arbitration clauses in consumer agreements, provided such a practice is not restricted by their provincial legislature. *Seidel* also approves of the use of standard form contracts of adhesion to accomplish this result. Although the type of consumer contract and provincial legislation will need to be considered in each case, *Seidel* opens the door for companies to use mandatory arbitration clauses in consumer contracts to protect themselves against class action litigation.