NO "PIGGYBACKING" TO AVOID B2B ARBITRATION: SUPREME COURT OF CANADA AFFIRMS ENFORCEABILITY OF ARBITRATION CLAUSES DESPITE RELATED CLASS ACTION

Posted on April 9, 2019

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In its recent 5-4 decision in *Telus Communications Inc v. Wellman*,[1] the Supreme Court of Canada ruled that courts must enforce valid arbitration agreements between businesses despite the existence of parallel litigation by other plaintiffs against the same defendant - even where that litigation is a class action raising identical issues.

The decision is an important victory for Canadian businesses that rely on arbitration clauses in either standard form B2B agreements or carefully negotiated commercial contracts between sophisticated parties. In order to take full advantage of this important decision, Canadian businesses should review their contracts to ensure that their arbitration clauses cover a broad range of claims and can efficiently address the risk of parallel proceedings.

The Dilemma of Arbitration and Third Party Litigation

Should a court enforce a valid arbitration clause between two parties if one of them is involved in related litigation with a third party? On the one hand, courts usually enforce valid contracts. Doing so for an arbitration clause gives effect to the parties' choice of an alternative dispute resolution method that offers procedural flexibility, a chance to select an expert decision-maker and other advantages. On the other hand, enforcing an arbitration clause where there is related litigation may give rise to multiple proceedings and potentially inconsistent results. Some claims are also too small to arbitrate individually and can only be prosecuted by a class action. While courts respect freedom of contract, they also try to avoid inefficient overlapping proceedings and ensure access to justice.

Prior to *Telus*, Canadian courts in most common law provinces were often reluctant to allow multiple proceedings or restrict access to class actions. However, the *Telus* case should lead lower courts to favour party autonomy and enforce valid arbitration clauses.

The *Telus* Business and Consumer Contract Claims

The *Telus* case involved a proposed class action of Ontario residents who entered into per minute billing plans for mobile phones. The plaintiff alleged that Telus' terms and conditions made no mention of a practice of "rounding up" calls to the next minute, resulting in overbilling. He sought to certify a proposed class consisted of about 1,400,000 consumers and 600,000 businesses.

Although the arbitration clause in Telus' standard terms and conditions covered the plaintiff's claims, *Ontario's Consumer Protection Act*[2] invalidated the clause in agreements with consumers. As result, at least 70% of the claims would proceed in court under the *Class Proceedings Act*.[3] The issue was whether Ontario's domestic Arbitration Act[4] gave the courts discretion to refuse a stay of the proposed class proceeding for the remaining 30% of Telus' business customers. Refusal of the stay of proceedings would effectively invalidate the otherwise binding arbitration clauses in the business agreements.

The plaintiff relied on a long line of cases in which Canadian courts refused to stay court proceedings in favour of arbitration on the basis that only some of the litigants were bound by the arbitration clause and the litigation claims were so closely related to the arbitration claims that it would be unreasonable to separate them.[5] Many of these cases were ordinary commercial disputes in which a plaintiff named a non-party to the arbitration agreement as a co-defendant in the litigation.[6] In the class action context, plaintiffs seeking to circumvent arbitration clauses would take a different approach. They tried to piggyback on the related claims of other plaintiffs against the same defendant. Both strategies would lead to a risk of multiple proceedings and, until the Supreme Court's *Telus* decision, Canadian courts tended to look for ways of consolidating the related disputes in a single action.

Discretion to Refuse a Stay Is Limited

The *Arbitration Act* uses the mandatory language "shall" to direct courts to stay proceedings by parties to an arbitration agreement.[7] This mandatory stay is only subject to narrow exceptions such as those relating to capacity or the validity of the arbitration agreement,[8] none of which applied to the businesses in the *Telus* case.

However, section 7(5) of the *Arbitration Act* includes an additional provision that is also found in the domestic arbitration legislation of other Canadian jurisdictions. It applies where:

a. the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
b. it is reasonable to separate the matters dealt with in the agreement from the other matters.

If these preconditions are satisfied, the court "may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters."[9]

The majority of the Supreme Court recognized that section 7(5) of the *Arbitration Act* does not create an additional category of exceptions to the narrow grounds for refusing a stay of proceedings. Instead, it expands a court's power to stay proceedings that are only partly covered by an arbitration clause. This power to issue a partial stay of proceedings and permit residual litigation that is beyond the scope of an arbitration clause does not allow a court to refuse to stay proceedings that do fall within the scope of the clause.

The Supreme Court's minority decision warned that this interpretation of section 7(5) risked limiting access to justice for small claims that could only be pursued by class actions and risked multiple inefficient proceedings for larger claims. As a result, the minority preferred to interpret the statute as allowing courts to override arbitration in these circumstances. While the majority recognized these risks, it insisted that they should be addressed by the legislature rather than the courts.

Lessons for Canadian Businesses

While the *Telus* case dealt with related proceedings against the same defendant, the court's reasoning appears to also address cases where a single plaintiff adds non-signatory defendants to its litigation against a party to the arbitration clause. Although those situations may involve a single "proceeding", as long as the claim asserted against a signatory defendant falls within the scope of the arbitration clause, it should be stayed by a court.

In light of the *Telus* decision, Canadian businesses seeking to ensure the enforceability of their arbitration clauses should:

- **Use broadly-worded clauses**: A stay of proceedings can only be fully effective if the arbitration agreement is sufficiently broad to deal with all of the matters in dispute. Parties should use language that covers all claims arising out of their relationship regardless of whether the claims are contractual or not.
- **Ensure a fair arbitration procedure**: Both the majority and minority opinions in *Telus* signaled that courts will look more closely at whether contracts of adhesion containing arbitration clauses are unconscionable. Indeed, the majority cited with approval a recent Ontario Court of Appeal decision finding that Uber's use of a widely accepted set of international arbitration rules was unconscionable in its contracts of adhesion with drivers.[10] Companies should incorporate arbitration rules that all can handle smaller disputes fairly and efficiently, e.g. without imposing large filing fees on the parties.

Consider the potential for consolidation: The *Telus* decision notes that the potential for a multiplicity of proceedings is a foreseeable result of the contracting parties' choice of arbitration. In some cases, parties may wish to obtain the advantages of arbitration while still consolidating related claims. Some, but not all,

arbitration rules allow for consolidation of related claims provided that all relevant parties have consented to this possibility in their agreements. Businesses should review their contracts to determine whether or not their arbitration agreements provide for consolidation of related disputes.

[1] 2019 SCC 19 [“*Telus*”][ps2id id='1' target='/]
[2] *Consumer Protection Act*, 2002 S.O. 1992, c.30[ps2id id='2' target='/]
[3] *Class Proceedings Act*, 1992 S.O.1992, c.6[ps2id id='3' target='/]
[4] *Arbitration Act*, 1991 S.O. 1991, c17, s.7[ps2id id='4' target='/]
[5] *Telus* at para.33[ps2id id='5' target='/]
[6] For example, in *Radewych v. Brookfield Homes (Ontario) Ltd.*, 2007 ONCA 721, the Court of Appeal refused to stay a claim by a homeowner against a builder where the plaintiff had named the home’s architect and a sub-contractor as co-defendants.[ps2id id='6' target='/]
[7] *Arbitration Act*, s.7(1)[ps2id id='7' target='/]
[8] *Arbitration Act*, s.7(2)[ps2id id='8' target='/]
[9] *Arbitration Act*, s.7(5)[ps2id id='9' target='/]
[10] *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 [invalidating a standard ICC arbitration clause][ps2id id='10' target='/]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.