Goodmans LLP Update

The Future is Arbitration-Friendly: Supreme Court Confirms Arbitration Agreement Enforceable for Business Customers in Telus Class Action

The Supreme Court of Canada's decision in *Telus Communications Inc. v. Wellman* reaffirms that parties will generally be held to their agreements to arbitrate absent clear legislative direction otherwise, even in standard form contracts.

In a 5-4 ruling, the Court found that judges could not certify class action claims subject to a valid arbitration agreement even when identical claims were being made by parties not subject to arbitration. In doing so, the Court overturned appellate jurisprudence which had held that arbitrable claims could continue in court with non-arbitrable claims if it was unreasonable to separate the matters.

Although the decision implies that parties may use arbitration agreements as a tool to decrease the risk of class actions in the commercial context, the Court hinted at the potential for later cases to find certain standard form arbitration agreements unconscionable, which would allow the claims to continue in court.

Background

Avraham Wellman filed a proposed $520 million class action on behalf of about two million Ontario residents who had cell phone contracts with Telus. The action alleges Telus overcharged customers by engaging in an undisclosed practice of "rounding up" calls to the next minute.

Each proposed class member entered into a standard form contract with Telus which contained a mandatory arbitration clause. Under the *Consumer Protection Act*, consumers have a statutory right to start court proceedings, including class actions, despite any agreement to the contrary. Telus conceded its arbitration clause was unenforceable against the consumer class members, but moved for a partial stay of proceedings against the non-consumer business customers (making up about 30% of the proposed class). Telus argued that the arbitration clauses in the business customers' contracts prevented them from being in the class action.

Legislative and Judicial Framework and the Decisions Below

Historically, courts were not always so willing to cede territory to arbitrators. The prevailing view was that a traditional judicial proceeding was the proper method to resolve legal disputes and that any attempt to oust the courts' jurisdiction was contrary to public policy. But by the 1990s, legislatures across the country had recognized the benefits of arbitration in improving access to justice and party autonomy.

As a result, s.7(1) of Ontario's *Arbitration Act, 1991* (the "**Act**") abolished courts' discretion to refuse to enforce arbitration clauses on public policy grounds and replaced it with a general rule that requires courts to stay a court proceeding involving any matter that falls under an arbitration agreement. Under s.7(2), the courts retain only a limited discretion to refuse to stay, including where the arbitration agreement is invalid or cannot be the subject of arbitration under Ontario law.

A line of Supreme Court of Canada jurisprudence affirmed that courts should generally enforce arbitration clauses absent clear legislative language to the contrary, including in standard form contracts.

Telus turned on s.7(5) of the Act, which states a court may stay the proceeding for matters dealt with in the arbitration agreement but allow it to proceed on other matters if (a) the agreement deals with only some matters in the proceeding and (b) it is reasonable to separate the various matters. Previous Ontario cases held that s.7(5) allows courts to refuse a partial stay in the class action context where some class members were subject to a valid arbitration clause and others were not.

Relying on this authority, Mr. Wellman argued the class action should continue for all class members, including the business customers, because it would be unreasonable to separate their claims from the claims of the consumers. Telus argued this authority had been overtaken by the Supreme Court authority, and the business customers could not use s.7(5) to avoid a valid arbitration agreement.

The motion judge dismissed Telus' motion for a partial stay, stating that separating the claims of business customers from those of consumers could lead to "inefficiency, risk inconsistent results and create a multiplicity of proceedings". The Ontario Court of Appeal upheld the motion judge's decision. Telus appealed.

The Supreme Court's Decision

The Supreme Court split 5-4, revealing differing opinions about the balance between policies favouring arbitration and party autonomy and policies favouring class actions and access to justice.

The majority decision, written by Justice Moldaver, surveyed the courts' historical hostility toward arbitration and the later evolution—precipitated by the enactment of the Act—to emphasize party autonomy and holding parties to their agreements to arbitrate. After performing a detailed statutory interpretation analysis, the majority concluded a court has no discretion under s.7(5) to refuse to stay claims dealt with in a valid arbitration agreement.

The Court held that recourse to s.7(5) is only available where a proceeding deals with multiple matters, only some of which are covered by an arbitration agreement. The section did not apply here, where the only "matter" at issue was Telus' alleged overcharging (a matter covered by the business customers' arbitration agreements). Even where the preconditions are met, the Court held that a court may only allow the non-arbitrable matters to proceed (as opposed to ordering a full stay); it has no discretion to refuse to stay arbitrable matters.

The majority noted that the interpretation advanced by Mr. Wellman (and accepted by the dissent) would allow parties to arbitration agreements to "piggyback" onto the claims of others. This would reduce confidence in the enforcement of arbitration agreements and potentially discourage parties from using arbitration as an efficient, cost-effective way to resolve disputes.

While acknowledging the other policy concerns raised by Mr. Wellman (and relied on by the dissent)—including those of access to justice and potential unfairness of arbitration clauses in standard form contracts—the majority decision stressed that such concerns cannot distort the actual words of the statute to make the provision say something it does not. The legislature made a careful policy choice to exempt consumers—and only consumers—from the ordinary enforcement of arbitration agreements.

Interestingly, the Court said Mr. Wellman had not argued that the standard form arbitration agreement in question was unconscionable, which if proven would render it invalid and thus provide a basis for refusing a stay under s.7(2). The Court noted that arguments over any potential unfairness resulting from enforcing arbitration clauses in standard form contracts are better dealt with through the doctrine of unconscionability, and referenced this as the approach taken in the recent Ontario Court of Appeal case in *Heller v. Uber Technologies Inc.* (see our January 15, 2019 Update *Court of Appeal Invalidates Uber's Arbitration Clause*). Uber has sought leave to appeal that decision.

Implications of this Decision

This decision reinforces previous Supreme Court jurisprudence, and reaffirms that parties to arbitration agreements will generally be held to their agreement, even in standard form contracts. In the class action context, parties subject to an enforceable arbitration clause can no longer expect to "join on" their claims to those of other parties who are not subject to such a clause.

The result in *Telus* is that the 600,000 business customers will be excluded from the class action. Unless Parliament chooses to amend the legislative regime, the decision implies that including arbitration agreements in commercial contracts may reduce the chances of a party having to face a class action.

However, given the Supreme Court's nod to the approach taken in *Heller*, we anticipate we will see more arguments about standard form agreements being unconscionable as a means to avoid an arbitration clause in favour of class proceedings. Parties drafting commercial

contracts should consider whether their arbitration clauses have indicia of unconscionability (for example, significant inequality of bargaining power and a lack of legal advice by the other party) and, if so, whether the clause is fair to the parties.

For more information on this case or its potential implications, please contact any member of our Litigation Group.

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