Kluwer Arbitration Blog

Canadian Courts One Year After Seidel: Pro-Arbitration and Still Holding

Marc Gold (www.marcgold.ca) · Thursday, August 2nd, 2012

In recent years, Canada has an enjoyed a reputation as an arbitration-friendly country. This is due to a number of factors, including the incorporation or adaptation of the Model Law into the arbitration legislation at the provincial and federal level, a sophisticated arbitration community well versed in both the common and civil law traditions, and, more than anything else, a judiciary that has come to respect, and indeed to encourage, the arbitration process once it has been properly invoked by the parties. In this respect, the Supreme Court of Canada has played a central role by giving a broad interpretation to the scope of arbitral power and taking what all would agree was a pro-arbitration stance.

The question is whether that stance has changed in light of the Court's decision of last year in *Seidel v. TELUS Communications Inc.* [2011] 1 S.C.R. 531. The purpose of this note is to assess the Canadian case-law citing *Seidel* to determine what impact it had on the attitude of Canadian courts to the arbitration process.

At issue in *Seidel* was the enforceability of clause inserted into the standard form cellular phone services contract, which referred disputes to private and confidential mediation and arbitration and purported to waive any right to commence or participate in a class action. A class action against Telus was commenced alleging deceptive and unconscionable practices under section 172 of the Business Practices and Consumer Protection Act of British Columbia (S.B.C. 2004, c. 2). Telus brought an action to stay the proceedings on grounds that the matters were properly subject to arbitration. Although the argument did not prevail before the judge of first instance, the British Columbia Court of Appeal held that the arbitration clause applied and ordered a stay of all proceedings pending arbitration. The Supreme Court of Canada reversed. By a majority of 5-4, the Court held that claims brought against Telus were inarbitrable. The Court characterized the provisions of the Act as creating a public interest remedy, one in which the public interest would not be served by being addressed in private and confidential arbitration hearings. The Court inferred a legislative intent to have such claims dealt with by the ordinary courts, and accordingly allowed the class action to proceed.

In a posting sharply critical of the case, Professor Frédéric Bachand worried that Seidel will have the effect of changing the attitude of Canadian courts to the arbitration process. In his view, "[t]he key lesson is that, when faced with an ambiguity in statutory provisions or precedents bearing on an arbitration law issue, Canadian courts can no longer be safely expected to prefer the pro-arbitration solution". Responding to his concern, others thought that the case would be relatively

confined to the area of consumer protection legislation and remedies.

It has now been well over a year since *Seidel* was decided, and it appears fairly clear that the worst fears about the impact of *Seidel* have not been realized. Equally interesting, it also appears that *Seidel* has not had a dramatic impact even in the area of so-called consumer protection legislation.

At the time of writing, *Seidel* has been cited in sixteen cases. (For a list of these cases and links thereto, see here.) Of these, six are irrelevant for our purposes, *Seidel* typically being cited for the proposition that consumer legislation should be interpreted generously in favour of consumers or for the general rules governing class actions. No arbitral issue was raised in these cases.

In the remaining ten cases where an issue of arbitration did arise, there is no evidence that *Seidel* has had a negative impact on courts' attitudes towards the arbitration process.

In cases where consumer protection legislation was not at issue, the courts citing *Seidel* have tended to support the arbitration process, whether deferring to arbitrators' ruling on the scope of their jurisdiction, or upholding the scope of an arbitrator's remedial powers. (Regarding jurisdiction, see *Padmawar v. Altig and Altig International*, 2011 BCSC 682 (CanLII); *1338121 Ontario v. FDV Inc.*, 2011 ONSC 3816 (CanLII); *Boxer Capital Corporation v. Marine Land Developments Ltd.*, 2012 BCSC 684 (CanLII); *Ontario v. Imperial Tobacco Canada Limited*, 2011 ONCA 525 (CanLII). Regarding remedial powers, see *Mercer Gold Corporation (Nevada) v. Mercer Gold Corp (B.C.)*, 2012 BCCA 103 (CanLII).)

Even where class action proceedings were at issue, *Seidel* seems to be limited in its impact. Where a class action was allowed to proceed despite the existence of an arbitration agreement, it was strictly on the basis that the defendant in the class action suit was not a party to the arbitration agreement in question. (See *Ontario v. Imperial Tobacco Canada Limited*, 2011 ONCA 525 (CanLII). Indeed, in the case of the parties to the agreement, the Court upheld the arbitrator's determination that he had jurisdiction over the dispute.) In another case, an application to exclude a class from a class action suit because of an ostensible arbitration agreement was rejected on the basis that there was no evidence of the arbitration agreement. (*Toronto Community Housing Corporation v. Thyssenkrupp Elevator (Canada) Limited*, 2011 ONSC 4914 (CanLII).) In neither case can it be said that *Seidel* had a material bearing on the orientation of the courts towards arbitration.

What then of those cases where consumer protection legislation was at issue? Even here, *Seidel* has not had the anti-arbitration impact that some feared.

In *Kary v. 1147237 Alberta Ltd.*, 2011 ABPC 178 (CanLII), a provincial court judge in Alberta cited *Seidel* for the proposition that an arbitration clause did not preclude a class action proceeding based upon provincial consumer legislation, but the case was informed by the judge's doubts as to whether or not an arbitration agreement was, in fact, in effect at all.

More significantly, in *Telus v. Comtois*, 2012 QCCA 170 (CanLII), the Quebec Court of Appeal had to consider an arbitration clause between Telus and its corporate customers. *Seidel* was cited on a number of occasions, first for the proposition that in the absence of a contrary provision of law, an arbitration clause should be deferred to by courts and later to support the proposition that the arbitration clause in the service contracts with Telus' corporate customers were valid and not abusive as per the terms of the relevant Quebec legislation. This hardly reflects an anti-arbitration *virage* by Canadian courts.

Indeed, one court seems to have gone out of its way to place *Seidel* in the context of the pro-arbitration line of Supreme Court of Canada cases. In *Murphy v. Compagnie Amway Canada*, 2011 FC 1341 (CanLII), the Federal Court had to consider the relationship of the class action remedy under the Competition Act (RSC 1985, c. C-34) with the existence of an arbitration clause in the Registration agreement between the plaintiff and Amway. The Court rejected the analogy between the Competition Act and the consumer protection legislation at issue in *Seidel*, and held that the arbitration clause applied. It is worth citing the Court's reasons for judgment at some length.

> [42] Although more recent, the Siedel case comes after a long string of Supreme Court of Canada decisions which have contributed to confirming Canada's status as an "arbitration-friendly" jurisdiction. In particular, the Court recalls the Supreme Court of Canada's landmark decision in Desputeaux v Éditions Chouette (1987) inc., 2003 SCC 17 (CanLII), 2003 SCC 17, [2003] 1 SCR 178 [Desputeaux], which stands for the principle that a statute cannot be assumed to exclude arbitration unless it so states (para 42). This principle was also acknowledged in Dell Computer Corp. v Union des consommateurs, 2007 SCC 34 (CanLII), 2007 SCC 34, [2007] 2 S.C.R.801 [Dell], Rogers Wireless v Muroff, 2007 SCC 35 (CanLII), 2007 SCC 35, [2007] 2 SCR 921 [Rogers] and Bisaillon v Concordia University, 2006 SCC 19 (CanLII), 2006 SCC 19, [2006] 1 SCR 666 [Bisaillon]. These cases – and the Siedel case does not take exception to this – all illustrate that arbitration agreements must be enforced by courts absent specific legislative language to the contrary.
>
> [43] More particularly, the majority reaffirmed this principle in Seidel at paras 2 and 42:
>
> [2] The choice to restrict or not to restrict arbitration clauses in consumer contracts is a matter for the legislature. Absent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause. …
>
> [42] For present purposes, the relevant teaching of Dell and Rogers Wireless is simply that whether and to what extent the parties' freedom to arbitrate is limited or curtailed by legislation will depend on a close examination of the law of the forum where the irate consumers have commenced their court case. Dell and Rogers Wireless stand, as did Desputeaux, for the enforcement of arbitration clauses absent legislative language to the contrary. [Emphasis in Original]
>
> [44] The Court accordingly may not, absent legislative language to this effect, assert jurisdiction over a matter that is subject to an arbitration agreement. The enforcement of arbitration agreements has long been recognized by Canadian jurisprudence as an acknowledgment of the "jurisdictional choice" made by the parties. This has been the case in the face of class action waivers applicable to matters subject to public order consumer protection legislation void of language to the contrary (Dell).

It is hard to imagine a stronger pro-arbitration stance by a judge, one that seems designed to ensure that *Seidel* does not become a *point de départ* for a change in judicial attitude towards the arbitration process.

In conclusion, a review of the sixteen cases in which *Seidel* was cited reveal no clear change in the Canadian judiciary's attitude towards the arbitration process. Even in cases where consumer legislation and class action remedies were at issue, Canadian courts do not appear to have wavered from a generally pro-arbitration stance. In this respect, it would appear that the worst fears of some commentators have not been realized.

To be sure, it may take longer for the full impact of *Seidel* to be felt as lawyers incorporate it into their arguments at trial and on appeal, and any predictions about how courts will incorporate its teachings should be approached with cautious reservation. (I recall my constitutional law professor observing that she who lives by the crystal ball must be prepared to eat glass.) Nonetheless, it does seem safe to say that the arbitration process is alive and well in Canada and that the pro-arbitration stance of the Canadian judiciary appears to be holding.

This entry was posted on Thursday, August 2nd, 2012 at 3:18 pm and is filed under Arbitration, Arbitration clause, Arbitration Proceedings, Canada, Consumer contracts, Domestic Courts,

Enforcement of an arbitration clause, Pro arbitration

You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.