Federal Court of Appeal confirms availability of contractual waiver of class actions in favour of arbitration absent contrary statutory language

28 mars 2013

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On February 14, 2013, the Federal Court of Appeal in *Murphy v. Amway Canada Corp.*affirmed the decision of the court below, staying a proposed class proceeding in light of a contractual arbitration clause and class action waiver. The decision re-affirms the principle espoused by the Supreme Court of Canada in *Seidel v. TELUS Communications Inc*. ("*Seidel*") that, absent statutory language restricting or prohibiting either arbitration clauses or class action waivers, the courts should give effect to them.[1]

Background

In 2009, the Plaintiff ("Murphy") signed a Registration Agreement with Amway Canada ("Amway") to become an independent business owner ("IBO"). As an IBO of Amway, Murphy would distribute Amway products and recruit additional distributors. The Registration Agreement contained an agreement to arbitrate and incorporated the IBO Rules of Conduct by reference. The relevant provisions of the Rules of Conduct were:

11.3.9. No party to this agreement shall assert any claim as a class, collective or representative action if (a) the amount of the party's individual claim exceeds $1,000, or (b) the claiming party, if an IBO, has attained the status of Platinum either in the current fiscal year or any prior period. This subparagraph shall be enforceable when the applicable law permits reasonable class action waivers and shall have no effect when the applicable law prohibits class action waivers as a matter of law. In any case, the class action waiver provision, as well as any other provision of Rule 11, is severable in the event any court finds it unenforceable or inapplicable in a particular case.

11.3.10. Class action claims are not arbitrable under these Rules under any circumstances; but in the event a court declines to certify a class, all individual plaintiffs shall resolve any and all remaining claims in arbitration.

Murphy brought a $15,000 claim against Amway, proposing to be the representative plaintiff for a class proceeding, on allegations that Amway breached various sections of the *Competition Act* by allegedly failing to provide accurate information to its potential distributors about the business opportunities offered, failing to provide accurate information to its distributors about compensation, and by allegedly operating an illegal scheme of pyramid-selling. Murphy moved for certification of the proposed class action. In

response, Amway brought a motion to stay and compel arbitration, which motion was granted by the Federal Court of Canada.

The Appeal

On appeal, Justice Nadon, writing for the unanimous three member panel of the Federal Court of Appeal, found no basis on which to disagree with the reasoning of the court below as: (i) the arbitration agreement was clear that only class actions for amounts below $1,000 were permissible and claims in excess of that amount were subject to class action waiver; (ii) class action claims were not arbitrable under the applicable Rules of Conduct in any circumstances; and (iii) if a court declined to certify a class for claims under $1,000, all individual plaintiffs would be required to resolve their claims by arbitration. However, the main issue on appeal was whether a private claim for damages brought under section 36 of the *Competition Act* was arbitrable.

Murphy argued that private claims under section 36 of the *Competition Act* are not arbitrable, asserting a public policy rationale premised on the concern that if his claim were arbitrated, it would be submitted to an American arbitrator who would apply Michigan law and that this was not a desirable outcome given the private nature of arbitration and the importance of competition to the Canadian market. Specifically, Murphy asserted that the private and confidential nature of arbitration was manifestly incompatible with the underlying objectives of the *Competition Act,* including the promotion of an economic environment free of anti-competitive practices. Murphy further argued that the Supreme Court of Canada's decision in *Seidel* stood for the proposition that public interest concerns, and in particular, class action waivers, could displace arbitration agreements.

Amway, the respondent on appeal, argued that if Murphy's position was accepted, no claim under section 36 of the *Competition Act* could ever be sent to arbitration under any circumstances and cited recent case law indicating that public order concerns should not impact whether or not arbitration is permitted.[2] Amway further argued that, in this case, unlike in *Seidel*, a case brought in the context of consumer protection legislation which expressly prohibited arbitration, section 36 of the *Competition Act* did not contain any language excluding arbitration, and Murphy's action was therefore arbitrable.

After a thorough analysis of *Seidel,* the Court agreed with Amway; there was no basis to conclude that claims brought under section 36 of the *Competition Act* could not be determined by arbitration. The Court found that the Supreme Court of Canada had made clear in *Seidel* (and in previous cases such as *Dell Computer Corp. v. Union des Consommateurs et al.*and *Rogers Wireless Inc. v. Muroff* which confirmed that matters of public order can be subject to arbitration) that the courts will only refuse to give effect to valid arbitration agreements "…where the statute can be interpreted or read as excluding or prohibiting arbitration."

Conclusion

This decision confirms Canada's status as "an arbitration-friendly jurisdiction" and promotes a narrow application of the Supreme Court of Canada's decision in *Seidel* to cases where there is express legislative language prohibiting enforcement of an arbitration clause (such as, for example, in certain consumer protection legislation).

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[1] For a summary of the decision in *Seidel v. TELUS Communications Inc.,* please see our blog post from March 22, 2011, which can be found here.

[2] *Dell Computer Corp. v. Union des Consommateurs et al.*, *Rogers Wireless Inc. v. Muroff*, *Desputeaux v. Éditions Chouette (1987) inc.*, and*Jean Estate v. Wires Jolley LLP*.