Do Arbitration Clauses in Contracts Preclude Class Action Litigation in Alberta?

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In all Canadian provinces, except Ontario and Quebec, arbitration clauses are enforceable and effectively preclude class action litigation. The majority of provinces (which lack legislation prohibiting mandatory arbitration clauses) follow the Supreme Court of Canada's decisions in *Dell Computer Corp. v. Union Des Consommateurs (2007)* and *Rogers Wireless Inc. v. Muroff (2007).* These landmark companion cases state the matter shall first be submitted to the arbitrator for a determination of the validity of the arbitration clause and a determination by the arbitrator regarding their jurisdiction to hear the issue. If the arbitration clause is found to be valid, the Courts are precluded from hearing the dispute.

Although Alberta does not have a prohibition on mandatory arbitration clauses, it does allow some leeway for the Courts to retain jurisdiction over disputes regarding unfair trading practices involving consumer transactions. Unfair trading practices can loosely be defined as misrepresentations, exertion of undue pressure on the consumer to enter the transaction or the taking advantage of the customer's ability to understand the transaction. Section 16 of the *Fair Trading Act* (Alberta) states a consumer is precluded from using the courts if the consumer agreed, in writing, to arbitration **and** the Minister approves the arbitration agreement. This second requirement provides protection to consumers and might result in the mutually agreed arbitration clause being of no effect.

Ayrton v. PRL Financial (Alberta) Ltd. (2004) is the only case dealing with Alberta's regulation of arbitration clauses in consumer contracts. In *Ayrton*, the Plaintiff obtained several payday loans from the Defendant companies. He signed standard agreements each time the Defendant advanced money to him. The standard agreements contained arbitration clauses. The Plaintiff filed a Statement of Claim in the Court of Queens Bench, alleging the mandatory brokerage fees and interest charged by the Defendant companies were in excess of 60%, a violation of s. 347 of the *Criminal Code*. The Defendant made an application to stay the Court action, and requested the matter be submitted to arbitration, as mutually agreed to in the standard agreements.

The court noted s. 16 of the *Fair Trading Act* (Alberta) (which upholds the validity of arbitration clauses), is operative only when the consumer has agreed, in writing, to submit to the arbitration and the Minister has approved the arbitration agreement. In this case, the arbitration agreement was not approved by the Minister and thus, the arbitration clauses in the standard contracts were inoperative. The Plaintiff was free to adjudicate his matter in Court.

It is interesting to note there is nothing in the statute, its regulations, or any case law indicating the criteria upon which the Minister must rely in deciding whether to approve an arbitration agreement in the consumer context. To date, the only arbitration agreement granted Ministerial approval under the *Fair Trading Act* (Alberta) is the Canadian Motor Vehicle Arbitration Plan.

The result: corporations conducting business in Alberta can not rely solely on the inclusion of arbitration clauses in consumer contracts to shield themselves from the Courts and the threat of class action litigation. Without the approval of the Minister, arbitration clauses in these types of contracts are ineffective.

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