

# Consumer rights: *Seidel* and you.

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## An Introduction:

### Pre-dispute arbitration clauses.

The main motivation behind this research was to investigate the barriers presented to consumers by pre-dispute arbitration clauses in contracts and their implications on the consumers' access to justice and adequate redress. The objective of this project was to determine if the pendulum has swung too far in favour of arbitration and has actually lead to the disenfranchisement of consumers and their rights. At the core of this project was a canvassing of the current judicial and legislative stance on arbitration clauses within consumer contracts and what, if any, reform needs to take place in order to safeguard consumer rights more fully.

## Arbitration: Shield or Sword?

Arbitration is heralded as a fast, efficient, and private process for resolving disputes. It has gained widespread acceptance by the legislatures and courts as a legitimate and often preferable form of dispute resolution. The provinces have adopted legislation that generally encourages the use of arbitration. The Supreme Court of Canada has affirmed this position in two recent decisions, *Dell v. Union des Consommateurs*, 2007 SCC 34, and *Seidel v. Telus Communications Inc.*, 2011 SCC 15.

## Advantages

- Sword for consumers.
- The court system is slow, expensive, and overburdened.
- Arbitration provides a fast, efficient and cheaper option for consumers.
- Any dispute that does end of being litigated will be prohibitively expensive for all but the most serious of breaches.

## Concerns

- Shields suppliers from public scrutiny.
- Individual arbitration is still cost prohibitive for the majority of disputes.
- Arbitration clauses deny all access to courts, preventing class actions.

## Class Action: Consumers Restrained.

The class action is the aggregation of claims into a single joint proceeding. The objective is to provide access to justice for litigants, efficient manage judicial resources, and modify behaviour by sanctioning wrong doers. It provides a procedural mechanism for consumers to litigate claims that would otherwise be too cost prohibitive.

## Advantages

- Allows collection of individual minor claims into one effective proceeding.
- Promotes notoriety and publicity of supplier misconduct.

## Concerns

- Procedural vehicle rather than substantive right.
- Certification of class is often difficult and leads to watering down of legitimate issues.

## Results:

### The Courts.

#### The Supreme Court of Canada

##### *Dell v. Union des Consommateurs*(2007):

Class Actions do not give consumers any substantive rights. It is just a procedure for grouping individual claims into a convenient vehicle. When faced with arbitration clauses, the courts must stay a proceeding, regardless of whether it's an individual or class proceeding.

##### *Seidel v. Telus Inc.*(2011):

Re-affirmed Dell. Except for narrow situations permitted by legislation, courts are to differ to arbitration.

#### The Ontario Court of Appeal

##### *Griffin v. Dell*(2011):

Preceded Seidel. Ontario Court of Appeal recognized serious concerns over suppliers shielding themselves from liability. Allowed the certification of a class action procedure against Dell computers despite 30% of the class having a valid arbitration clause. Determined that the class action was the only way those 30% would "get their day in court."

## Results:

### The Legislature.

#### Ontario:

Sections 7&8 of Ontario's *Consumer Protection Act* makes pre-dispute arbitration clauses in consumer contracts and waivers of class proceedings invalid. Unless they are subsequently adopted by the consumer after a dispute arises.

#### Quebec:

Section 11.1 of Quebec's *Consumer Protection Act* bans any clauses in consumer contracts that would deny consumers access to the courts or class actions.

#### Alberta:

Section 16 of Alberta's *Fair Trading Act* asserts the primacy of arbitration clauses in consumer contracts but requires that they receive Ministerial approval.

#### British Columbia:

Section 3 of British Columbia's *Consumer Protection Act* has been interpreted by the Supreme Court of Canada in *Seidel* to allow class action proceedings for rights granted by the statute.

## The Wrap Up:

### How far has the pendulum swung?

The post *Seidel* landscape is not entirely inhospitable to consumers but it certainly is not ideal. While arbitration does significantly facilitate the resolution of disputes and class actions can provide access to justice and notoriety for consumers, they are not perfect mechanisms. In the first instance, pre-dispute arbitration clauses can, and have, been used to deter consumers from resolving their disputes and deny them access to utilizing a class action to realize their goals. On the opposite side, class actions are often too difficult to certify and must take a secondary role to arbitration. It is only through legislative enactments like Ontario *Consumer Protection Act* or Alberta's *Fair Trading Act* that consumers are able to bring this procedural vehicle to bear.

It is clear by the various legislative instruments such as bans or selected approvals, that there is no one silver bullet to remedy all consumer grievances. Even an amalgamation of arbitration and class action into a class arbitration does not seem to hold a truly viable response. Arbitration may be a helpful tool in most scenarios, but one must be aware that even the most beneficial tool can be misused. With the pendulum having been pushed decisively in favour of arbitration, it is now up to the legislatures, courts, and academics to ensure that consumer issues do not get pushed aside.

## The Fine Print: Acknowledgements.

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