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Recent Cases

COMMERCIAL LITIGATION INSIGHTS: PRESERVING EFFICIENCY AND FINALITY: COURT OF APPEAL CLARIFIES SCOPE OF "FRAUD" IN ARBITRATION

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Arbitration offers contracting parties a typically faster and more cost-effective dispute resolution alternative to traditional court proceedings. While the *Arbitration Act, 1991*, S.O. 1991, c. 17, limits court interference in arbitral proceedings, it allows for arbitral awards to be set aside on limited and specific grounds such as fraud. Recently, the Court of Appeal in *Campbell v. Toronto Standard Condominium Corporation No. 2600*, [2024] O.J. No. 1340, 2024 ONCA 218 ("***Campbell***") clarified that the term "fraud" within the *Act* does not include constructive fraud, as it risks significantly undermining the principles of efficiency and finality in arbitral proceedings.

Campbell was concerned with whether the word "fraud" in sections 46(1)9 and 47(2) of the *Act* encompasses the concept of "constructive fraud". In this case, the former unit owners commenced an application to set aside an arbitrator's decision awarding costs to the condominium corporation on a number of grounds, including that the award was obtained by fraud (s. 46(1)9). The application was commenced after the normal 30-day time limit under the *Act*; however, exceptions to this time constraint are applicable in instances where allegations of fraud or corruption are raised. While the application judge held that no actual fraud occurred, it set aside the arbitral award based on constructive fraud. In the application judge's decision, he interpreted "fraud" in s. 46(1)9 and s. 47(2) to include constructive fraud, which focuses on unfairness more than it does on deceit. The application judge held that it was "unconscionable and unfair" that the condominium corporation lured the former unit owners, their counsel, and the Arbitrator into adjudicating issues beyond those of costs.

The condominium corporation appealed the application judge's decision on the basis that the word "fraud" should be construed narrowly, excluding constructive fraud. The Court of Appeal agreed. It highlighted the objectives and legislative intent of the *Act*: efficiency, finality, and limited court intervention. Appeals from arbitration decisions are neither required nor routine, and courts are advised against strategic attempts to enlarge the scope of appeal beyond what was agreed-upon. *Campbell* emphasized that s. 46 provides a narrow basis for court intervention in arbitral awards and broadening the interpretation of s. 46(1)9 could undermine the objectives and legislative intent of the *Act*. The Court ultimately held that the word "fraud" does not encompass constructive fraud as it is a much broader concept than fraud in that it eliminates the requirements of knowledge and intent to deceive. If the legislature intended to expand the meaning of

"fraud", it would have done so explicitly; the term "fraud" was not defined in the *Act*. Consequently, the Court allowed the appeal, held that the application judge erred in its expansive interpretation of "fraud", and restored the arbitral award.

Key takeaways

Campbell serves as a reminder that court intervention in arbitral proceedings should be limited and underscores the importance of adhering to the terms of arbitration agreements. Arbitration is designed to offer a quicker and more cost-effective alternative to traditional court proceedings, and courts are to intervene only on limited grounds, such as fraud. By affirming a narrow interpretation of the word "fraud", *Campbell* upheld the efficiency and finality in arbitration proceedings, discouraging strategic efforts to expand the grounds of appeal beyond what the contracting parties have agreed to.

RECENT CASES

Bias in One of Three Arbitrators Found but Court Exercised Discretion to Not Set Aside Award

Ontario Superior Court of Justice, October 23, 2023

The applicant was a U.S.-based manufacturer of motorcycles. In 2001, the applicant entered into a joint venture agreement with a Mexican company for the sale and marketing of its motorcycles in Mexico. The applicant brought a claim against the respondent Mexico, pursuant to Chapter 11 of the North American Free Trade Agreement ("NAFTA"). The dispute related to Mexico's denial of NAFTA preferential *ad valorem* import tariffs to the applicant's motorcycles, which the applicant alleged resulted in the impairment and ultimate destruction of its business under the joint venture agreement. The arbitration was administered by the International Centre for Settlement of Investment Disputes pursuant to the ICSID Arbitration (Additional Facility) Rules. Pursuant to article 1123 of NAFTA, each party appointed one arbitrator, and the third arbitrator was appointed by agreement of the parties. In the tribunal's 2020 award, the arbitrators unanimously found that Mexico did not breach its obligations under NAFTA and dismissed the applicant's claims on the merits. The tribunal rejected the applicant's argument that officials of Mexico's Tax Administration Service had acted under express "marching orders" to target the applicant for the purpose of driving the applicant out of the Mexican motorcycle market. After the award was released, the applicant learned that Mexican officials had undisclosed communications with the arbitrator chosen by Mexico, Mr. Perezcano, during the arbitration, and that Mr. Perezcano was being offered candidacy for panels of arbitrators under two different trade agreements. The positions were awarded to him on the day the award was issued.

The applicant applied under articles 18 and 34 of the *UNCITRAL Model Law on International Commercial Arbitration* (the "Model Law") to set aside the arbitration award on two bases. The applicant argued that it was unable to present its case, as the tribunal had refused to allow its key witness, Mr. Ortúzar, to testify in response to an unfinished phone recording made without Mr. Ortúzar's knowledge or agreement and used to impeach his credibility. The applicant further argued that there was a reasonable apprehension that Mr. Perezcano was biased due to the undisclosed opportunities he was offered by Mexico while the arbitration was ongoing.

The application was dismissed. The Court did not find that the applicant established that the tribunal's conduct was sufficiently serious "to offend our most basic notions of morality and justice" or that it could not be condoned under Ontario law, as required to set aside the decision for reasons of fairness or natural justice, under article 34(2)(*a*)(ii) of the Model Law. The applicant relied on *Browne v. Dunn*, (1893), 6 R 67 (HL), pursuant to which, if a party intended to impeach a witness, it had to give the witness an opportunity to provide any explanation the witness could have for the contradictory evidence. The Court stated that this rule, rooted in fairness, was not a fixed rule, and the extent of its application was dependent on the circumstances of the case and the discretion of the judge, who was ultimately best suited to determine whether any unfairness was suffered by a party due to the failure to cross-examine.

The Court found that the applicant failed to establish that it was unable to present its case. The award indicated that the applicant was able to adduce substantial evidence and make arguments in support of its position on all the issues

on which the tribunal made rulings. Considering the award in its entirety, the Court found that the subjects that were not touched in cross-examination but later contradicted were of little significance to the resolution of critical issues of fact. The award did not refer to the recording or to Mr. Ortúzar's telephone conversations. Any breach of the *Browne v. Dunn* rule was remedied by the tribunal giving significant weight to Mr. Ortúzar's evidence and not making any adverse credibility findings against him. The applicant had the right to cross-examine Mexico's witness on the recording but chose not to do so, as a tactical decision.

For a finding of bias, the test was whether an informed person, viewing the matter realistically and practically, would conclude that it was more likely than not that the arbitrator, whether consciously or unconsciously, would not decide fairly. The Court found that Mr. Perezcano's conduct gave rise to a reasonable apprehension of bias. His appointment to the roster of panelists was a valuable professional opportunity, conferring the potential for future financial benefits. Mr. Perezcano had an incentive to please Mexico pending the confirmation of his appointment. As a result, he had a duty to disclose Mexico's offers to him, pursuant to article 12 of the Model Law and the IBA Guidelines on Conflicts of Interest in International Arbitration.

Despite its finding on reasonable apprehension of bias, the Court found it was appropriate to exercise its discretion pursuant to article 34(2) of the Model Law to not set aside the award. The test was whether the procedural error produced real unfairness or real practical injustice. The most significant factor was the potential impact of the breach on the result. The Court found that a reasonable apprehension of bias in one of three arbitrators did not necessarily taint the award of the entire panel. As all arbitrators signed the award, the reasonable conclusion was that all three shared the same view as to the disposition of the arbitration. The Court found that no reasonable person would assume that the other two arbitrators were influenced by Mr. Perezcano. In considering the seriousness of the breach, the Court noted that there was no financial compensation associated with the appointment to a roster, and appointments of panelists were announced publicly and done through a process that was mandated by the text of the trade agreements. With regard to potential prejudice flowing from the need to redo the arbitration, the Court considered that the arbitration took approximately five years and resulted in costs of over $625,000, in addition to the parties' legal costs. The events underlying the dispute took place 20 years ago. The Court concluded that redoing the arbitration would result in a significant waste of resources and raise concerns regarding time passage and witnesses' recollections. The arbitration award was upheld.

Vento Motorcycles, Inc. v. United Mexican States, 2024 ADR ¶105,293

Non-Negotiable "Click" Arbitration Agreement on Crypto Vendor Website Offended Public Policy and Was Unconscionable

Ontario Superior Court of Justice, December 13, 2023

The defendant related companies ("Binance") were the world's largest crypto trading platform and were based in the Cayman Islands. Binance sold crypto derivatives products to Canadians over its website from 2019 to early 2022. The plaintiffs were investors who had purchased crypto derivatives contracts from Binance. Despite the Ontario Securities Commission's requirement for a prospectus, Binance had never filed a prospectus with respect to any of its securities offerings, was not registered with the Ontario Securities Commission, and had not sought an exemption from registration. In June 2022, the plaintiffs commenced a proposed class action, pursuant to section 133 of the Ontario *Securities Act*, which provides purchasers with a right of action for rescission or damages against a company selling securities for failure to file or deliver a prospectus. The proposed class was everyone in Canada who had purchased crypto derivatives contracts from Binance from September 2019 to the date of certification. Binance brought a motion to stay the action in favour of arbitration. It relied on the arbitration agreement contained in its website's terms and conditions that the plaintiffs and every potential class member had digitally signed. The arbitration agreement provided that Binance could make changes to any of its terms. During the proposed class period, Binance made several changes to the arbitration agreement such that arbitration was to take place in forums spanning Singapore, Switzerland, and unnamed locations. Terms effective March 2021 provided that arbitration would take place in Hong Kong, under Hong Kong law, administered by the Hong Kong International Arbitration Centre ("HKIAC") under HKIAC rules. The plaintiffs relied on section 9 of the *International Commercial Arbitration Act, 2017* (the "ICAA") and article 8 of

the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") that the ICAA incorporated, to argue that the agreement to arbitrate was void or inoperable, as it was unconscionable and contrary to public policy.

The motion was dismissed. Pursuant to article 8 of the Model Law, an exception to enforceability of mandatory arbitration agreements existed where the agreement was "void, inoperative or incapable of being performed". The burden was on the plaintiffs to establish that one of the exceptions applied. Article 8 provided an exception to the competence-competence principle pursuant to which arbitrators generally decided on their own competence to hear a case. Pursuant to *Uber Technologies Inc v. Heller*, 2020 SCC 16, 2020 ADR ¶105,236 ("*Uber*") the court, rather than an arbitrator, was to determine whether an arbitration agreement was contrary to public policy where the challenge involved a "pure question of law" or one of mixed fact and law where "the relevant factual questions require 'only superficial consideration of the documentary evidence in the record'". The Court noted that the agreement was a standard-form contract and found that its enforceability was a question of law, as the plaintiffs had not raised individual facts or a factual matrix specific to the parties. The Court found that it was the local law of the forum that was applicable when determining whether not to enforce an agreement for being against public policy.

Applying the factors regarding public policy, set out in *Uber*, the Court considered that arbitration before the HKIAC would cost each claimant over $36,000, plus legal fees and travel expenses, and require posting substantial amounts as security for costs. Meanwhile, the evidence indicated that the average claim would be approximately $5,000. The Court found this was not a feasible means of resolving disputes for a consumer-type class of investors. The agreement also did not provide information about any fees or costs. The HKIAC further did not allow the class members to simply elect a virtual hearing to reduce their costs. The choice of Hong Kong as an arbitral forum, which had no connection to either the potential class members or to Binance, could in effect grant immunity to Binance.

With regard to relative bargaining power, the Court noted that Binance's website prompted investors to open their accounts in "under 30 seconds" and by doing so, investors were said to have agreed to approximately 50 pages of Binance terms. The investors could not negotiate those terms, and therefore there was no bargaining. Pursuant to case law, non-disclosure to investors, such as offering securities without providing a prospectus, offended the public policy of Ontario. Having regard to the above, the Court concluded that the agreement offended public policy and was thus void *ab initio* and unenforceable.

The Court found that the agreement was also unenforceable based on unconscionability. The Court found that the "inequality of information and inequality of power in the bargaining relationship" was "at a maximum" and was caused by the "informational deficit" that existed in the agreement, designed by Binance in such a way as to hide its complexity. The non-negotiable "click" contract did not reveal details, including the logistical complexity and expense of the arbitration. Further, as Hong Kong law would apply, it, rather than the Ontario *Securities Act*, would be the yardstick for Binance's conduct in marketing its product without a prospectus. As a result, a stay would raise the prospect of denying relief to the plaintiffs.

Lochan. v. Binance Holdings Ltd., 2024 ADR ¶105,294

Applicant Entitled to *De Novo* Hearing Where Arbitrator's Ruling Was Preliminary

Ontario Superior Court of Justice, December 13, 2023

The respondents were sisters whose paternal grandfather had bequeathed his cottage property to his seven sons, including the respondents' father and uncle, the applicant. In August 2005, the applicant entered into a series of transactions with his siblings or their estates to acquire their interests in the cottage property. This included the sale of the respondents' father's estate's one-eighth interest, which the respondents approved. The respondents took the position that on the same date, the applicant signed a lease agreement with them and that the lease contained an arbitration agreement. The applicant denied having signed the lease. In 2020, the applicant sold the cottage, and the respondents challenged the sale, relying on rights under the alleged lease, including a right of first refusal to purchase the property. In 2020, the respondents provided notice of their intention to commence arbitration regarding the sale. The parties appointed an arbitrator on "the issue of the existence and validity of the alleged arbitration agreement and the jurisdiction of the arbitrator" by way of a motion under section 17 of the *Arbitration Act, 1991* (the "Act"). The

applicant claimed that the lease was fraudulent and challenged the arbitrator's jurisdiction. In his 2022 ruling, the arbitrator found that the arbitration clause in the alleged lease was valid and that there was jurisdiction to conduct the arbitration.

The applicant applied to the Court for a declaration that the lease was invalid and/or void based on fraud, an order setting aside the arbitrator's ruling and for a hearing *de novo*, relying on section 17(8) of the Act. The respondents took the position that section 17(8) did not apply, as the arbitrator's ruling on jurisdiction was the award, and only an appeal or review was available.

The application was allowed. Section 17(8) of the Act states, "If the arbitral tribunal rules on an objection as a preliminary question, a party may, within thirty days after receiving notice of the ruling, make an application to the court to decide the matter." Pursuant to case law, the "the matter" was the issue of the tribunal's jurisdiction and the associated objection as to the existence or validity of the arbitration agreement. The agreement and submission to arbitration provided: the parties "agree that the issue of the existence and validity of the alleged arbitration agreement and the jurisdiction of the Arbitrator shall be decided by the Arbitrator by way of motion pursuant to s. 17 of the [Act]". The Court noted that section 17(7) distinguished between a ruling and an award, with an award being an arbitrator's ultimate decision on the merits of a dispute. The arbitrator had described the ruling as a "preliminary jurisdictional motion pursuant to s. 17(1)" of the Act and noted that his jurisdiction was limited to ruling on the validity of the arbitration clause.

The Court dismissed the respondents' argument that there were two arbitration agreements, namely, the arbitration agreement in the alleged lease and the parties' agreement and submission to arbitration, with the arbitration proceeding being a complete, stand-alone arbitration that resulted in an award. The Court stated that this argument could not be reconciled with the statutory framework, the agreement and submission to arbitration, or the arbitrator's ruling. The respondents' position did not accord with section 17(8). The words of the agreement and submission to arbitration clearly indicated that the proceeding before the arbitrator was a preliminary jurisdictional motion. After the arbitrator issued a ruling on jurisdiction, the applicant was free to apply to the court under section 17(8) to "decide the matter" via a hearing *de novo*.

On the evidence, the Court found that the lease was not valid. The Court also found the respondents were not credible witnesses and that they displayed a deliberate disregard for the truth. They failed to put forth cogent evidence that the signature on the lease was the applicant's. The Court accepted the applicant's evidence that he did not sign the alleged lease. The Court concluded the alleged lease was invalid and held that there was no jurisdiction to conduct the proposed arbitration.

Clost v. Rennie, 2024 ADR ¶105,295

No Error in Finding Food Delivery Courier Arbitration Agreement Unconscionable and Invalid

Manitoba Court of Appeal, January 12, 2024

In 2014, the respondent Manitoba resident began working as a courier for the appellant food delivery app service, SkipTheDishes Restaurant Services Inc. The courier agreement in force in 2014 (the "2014 agreement") included a clause stating that the appellant could amend the agreement at any time; that any amendments would be effective upon the appellant posting the updated agreement; and that the courier's continued provision of services after the posting would constitute their consent to be bound by the amended agreement. The 2014 agreement did not contain an arbitration clause and provided that the parties agreed to the jurisdiction of the Manitoba Court of Queen's Bench to adjudicate any disputes. In early July 2018, the respondent contacted counsel about a potential class action against the appellant. In mid-July 2018, the appellant notified the respondent by e-mail that it was implementing a new agreement that would take effect in one week, on July 26, 2018 (the "new agreement"). The e-mail stated that the respondent had to agree to the new agreement if she wished to continue being a courier for the appellant and that the new agreement contained a mandatory arbitration agreement. The respondent filed and served her statement of claim on July 25, 2018. She sought various relief, including a declaration that she was an employee of the appellant and not an independent

contractor, and an order certifying the proceeding as a class action. The respondent e-mailed the appellant informing it that she would click "I agree" to the new agreement on its app solely under protest, in order to continue working.

The appellant brought a motion seeking to stay the respondent's action in favour of arbitration, under section 7(1) of *The Arbitration Act* (the "Act"), relying on the new agreement. The respondent took the position that there was no arbitration agreement, or in the alternative, that the agreement was invalid under section 7(2)(*b*). The motion was dismissed, as the judge found that the 2014 agreement applied and there was no arbitration agreement when the action was brought. The judge also found that if the new agreement were applicable, it would be unconscionable under section 7(2) and thus unenforceable, due to a significant inequality of bargaining power between the parties and the bargain being improvident.

The appellant appealed, taking the position that the motion judge erred in undertaking an inquiry under section 7 of the Act instead of referring the matter to arbitration, erred in finding the new agreement was not the governing agreement, and in refusing to stay the action under section 7(2).

The appeal was dismissed. The Court found that the appeal raised questions of mixed fact and law and was reviewable for palpable and overriding error. While section 7(6) prohibited appeals from court decisions regarding a stay, an appeal under section 7(1) was permissible where the stay was refused because a court had held that there was no agreement to arbitrate. In such circumstances, the decision to refuse a stay was not made under the Act.

The Court rejected the appellant's argument that pursuant to the competence-competence principle, the arbitrator should have determined the issue of whether the new agreement applied. Pursuant to *Uber Technologies Inc v. Heller*, 2020 SCC 16, 2020 ADR ¶105,236, the court, rather than an arbitrator, was to determine whether an arbitration agreement governed where the challenge involved a pure question of law or one of mixed fact and law where "the relevant factual questions require 'only superficial consideration of the documentary evidence in the record'". The Court found that the question at issue was of mixed fact and law and the necessary legal conclusions could be drawn from facts that were evident on the face of the record. Accordingly, the analysis could be undertaken by the motion judge.

The Court found that the motion judge erred in finding that the 2014 agreement prevailed and in denying a stay under section 7(1) of the Act. Pursuant to the 2014 agreement, the respondent's continued provision of services after the appellant's notice of an amended agreement constituted the respondent's consent to be bound by the new agreement. The Court noted that such clauses were becoming increasingly common under standard-form contracts and there were strong commercial efficiency reasons behind them. The new agreement also provided that it replaced and superseded any previous agreements and governed any disputes arising from the new agreement or previous agreements.

In determining the issue of contract formation, the motion judge was required to ask if the respondent's conduct with respect to the new agreement demonstrated an objective outward manifestation of assent. The judge erred in relying solely on the respondent's e-mail to the appellant stating her subjective intentions to not agree, or only agree under protest, to the new agreement. The respondent had clicked "I agree" on the appellant's platform and continued to provide services after the amendments, and this constituted a clear objective manifestation of assent, resulting in the respondent being bound by the new agreement.

The judge further erred in finding there was no consideration to support the new agreement. Pursuant to case law, continued access to the appellant's platform would constitute consideration. The respondent also received additional benefits under the new agreement, such as a new seven-day notice for termination. The respondent's filing of pleadings one day before the new agreement was scheduled to take effect did not determine which agreement was applicable, as this did not crystalize the legal rights or obligations of the parties.

The Court found that the motion judge's decision that the new agreement was unconscionable under section 7(2) was an alternative finding and not *obiter*. The Court found no error in the judge's finding. A significant factor that supported unconscionability was the class action waiver. The requirement for arbitration, where disputes would likely concern relatively small amounts, would be beyond the respondent's financial means. The arbitration requirement would thus bar the respondent and prospective class members' access to any dispute resolution. As the agreement was invalid under section 7(2), section 7(6) of the Act thus barred an appeal, since the appeal related to a decision made under section 7.

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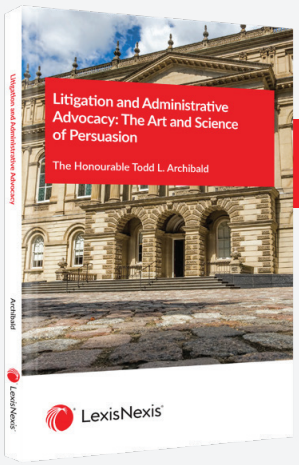

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