Arbitration case-law update: Q1 2023

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In late 2022, the Supreme Court of Canada (SCC) released its decision in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, which concerned the enforceability of arbitration agreements in a receivership proceeding. The SCC ultimately denied to court proceedings commenced by the receiver but made it clear that such a finding was exceptional and Canadian law generally defers to and promotes arbitration proceedings. The SCC expressed a "legislative and judicial preference for holding parties to arbitration agreements".

So far in 2023, Canadian courts appear to be continuing this pro-arbitration trend. This article summarizes two noteworthy decisions concerning the arbitration of complex commercial disputes: *3-Sigma v Ostara*, 2023 BCSC 100 and *Costco Wholesale Corporation v. TicketOps Corporation*, 2023 ONSC 573. The cases concern, among other things, non-signatory issues and the bounds of procedural fairness in arbitration.

3-Sigma v Ostara, 2023 BCSC 100

In *3-Sigma*, the plaintiffs were shareholders of the defendant corporation (Ostara). They claimed that through a plan of arrangement, Ostara had orchestrated a sale of shares to its largest shareholder in such a way as to withhold the benefits of that sale from the plaintiffs. Other defendants included Ostara's majority shareholders, directors and senior management. The defendants sought a stay of the court proceeding on the basis that the claim was subject to a mandatory arbitration agreement found in a shareholders' agreement.

More particularly, the defendants relied on section 7 of B.C.'s *Arbitration Act*, which provides that a party to a legal proceeding may apply for a stay of those proceedings on the basis the parties agreed to submit the matter to arbitration. Pertinent to this analysis was the fact that several of the plaintiffs and defendants were not signatories to the shareholder agreement.

Decision

A main issue before the B.C. court was "whether the parties to the claim [were] parties to an agreement to arbitrate".

In resolving this issue, the BC Supreme Court began by explaining that the "guiding principle" for applications to stay court proceedings is "competence-competence". In other words, such applications must be guided by the foundational principle that arbitrators—not the court—are to decide the scope of an arbitration agreement in the first instance. It likewise follows that the burden on the party seeking the stay is low, requiring only an "arguable case" that the legal proceeding falls within an agreement to arbitrate.

Accordingly, the BC Supreme Court analyzed whether it was "arguable" that the non-signatory shareholders to the agreements were nevertheless bound by the arbitration clause. The court found, among other things, that the definition of shareholder under the agreements rendered it at least arguable the claims were subject to arbitration.

In the result, the court stayed the litigation in favour of the arbitration. While it may have been thought, at some time, that non-signatories would not be required to arbitrate, *3-Sigma* demonstrates this is not the case.

Costco Wholesale Corporation v. TicketOps Corporation, 2023 ONSC 573

This case concerned digital ticketing services provided by TicketOps to Costco. TicketOps was a wholesaler of digital tickets and would receive payments from Costco that were supposed to be passed on to ticket suppliers. However, during the onset of the COVID-19 pandemic, TicketOps stopped forwarding payments to suppliers in breach of the agreement with Costco. The parties' contract contained an arbitration clause, requiring arbitration seated in Seattle.

Costco thereafter commenced in an arbitration against TicketOps and was successful. Costco then sought enforce the award in Ontario. TicketOps opposed enforcement of the award in Canada.

Decision

In approaching the enforcement issue, the Ontario Superior Court of Justice confirmed that the applicable law was Ontario's *International Commercial Arbitration Act, 2017*, which incorporates the UNCITRAL *Model Law* and New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.

The court held that the *Convention* and *Model Law* mandate that domestic courts are to not interfere with international arbitration awards except in limited cases. More particularly, the court held that the grounds to refuse enforcement "are to be construed narrowly". Likewise, the court held that once a party shows the award was made by a court of competent jurisdiction is final and for a definite sum of money, then the only defences available to a respondent are "fraud, public policy and lack of natural justice". Lack of fairness or natural justice requires something contrary to basic notions of justice; whereas public policy "is not a remedy to be used lightly".

In this case, TicketOps raised numerous purported defences as to why the award should not be enforced in Ontario, including that (a) the arbitration clause provided for a summary arbitration hearing lasted only two days; and (b) there was a reasonable

apprehension of bias since the arbitrator was a “friend” of counsel to Costco on Facebook.

The Ontario court rejected these, and all other grounds, raised by TicketOps in opposition to enforcement. In particular, the court rejected that the admittedly short, two-day hearing, offended natural justice. The court held that “[h]ad the matter been a court proceeding in Ontario, the hearing would likely have been significantly longer than two days. However, it would be ill-advised for an Ontario court to find that: (a) a hearing in an international arbitration proceeding that does not sufficiently resemble a trial in an Ontario court proceeding is contrary to Canadian notions of fundamental justice; and (b) a party to such an international arbitration proceeding is unable to present its case.” The court held that TicketOps should be held to its agreement and there could be no procedural unfairness.

With respect to the Facebook friend issue, the court rejected that Facebook “friendships” raise a reasonable apprehension of bias. In particular, the court relied on authority from the Saskatchewan Court of Appeal for the proposition that “in today’s world, a reasonable and informed person would place little or no weight on the fact that two persons are “friends” on Facebook.

Ultimately, the court determined that TicketOps has failed to establish any ground for refusing the recognition and enforcement of the award and the court was duty bound to give effect to the award.

Outlook

In sum, it appears that Canadian courts have continued the trend of deferring to commercial arbitrations in early 2023. In particular, courts have stayed litigation in favour of proceedings even where parties did not sign the agreement containing the arbitration agreement and have enforced awards where arbitral procedures did not (at all) resemble civil litigation trials. These decisions accord with the principles set out in the SCC’s decision in *Peace River.*

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