Cassels

Gotta Catch ’Em in Arbitration: British Columbia Supreme Court Enforces Arbitration Clause Found in Video Game Terms of Service

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Overview

Justice Mayer of the British Columbia Supreme Court (the Court) recently issued reasons for judgment[1] partially staying a proposed class proceeding in favour of arbitration. The arbitration agreement arose from the terms of service (the Terms of Service) for the video games Pokémon Go and Harry Potter: Wizards Unite (together, the Video Games). The Terms of Service mandated that disputes regarding services provided by the defendants be resolved in binding arbitration governed by California law, or by commencing an action in small claims court. The Terms of Service further contained a waiver of consumers’ rights to participate in a class action.

The proposed class plaintiffs claimed that the “loot boxes” (certain consumable purchasable items within the Video Games) amounted to an unlicensed, illegal gaming system contrary to the *Criminal Code*, the *Competition Act*, BC and Alberta consumer protection legislation, and the British Columbia *Infants Act*.

Ultimately, the Court held that the arbitration agreement was not invalidated by consumer protection legislation, was not outside of the jurisdiction of the arbitrator due to the *Competition Act*, and was not unconscionable or against public policy, pursuant to the decision of the Supreme Court of Canada in *Uber Technologies Inc. v. Heller*.[2]

The Decision

The Court held that the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 (*ICAA*) was applicable in this case, as the parties had their places of business in different states and the dispute arose out of a relationship of a commercial nature (see sections 1(3) and 1(6)). Section 8(2) of the *ICAA* provides that the Court shall “make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed”.

The Arbitration Clause Fell Within an Applicable Exception Under the Alberta Consumer Protection Act

The Alberta *Consumer Protection Act* prohibits enforcement of arbitration clauses in consumer transactions, with limited exceptions. In this case, the Court found that the exception in section 16(3)(b) was applicable, since the Terms and Conditions expressly provided that consumers may choose between resolving the dispute through arbitration or by commencing an action in small claims court.

The Arbitration Clause Was Not Unconscionable or Unenforceable for Public Policy Reasons

The plaintiffs relied on the Supreme Court of Canada decision in *Uber* and the British Columbia Court of Appeal decision in *Pearce v. 4 Pillars Consulting Group Inc.*[3] in support of their position that the Arbitration Agreement should not be enforced by virtue of the common law doctrine of unconscionability and for reasons of public policy.

Unconscionability

Unconscionability focusses on the vulnerability of the weaker party and the unfairness of a contract or one of its terms. A finding in unconscionability requires a finding of inequality of bargaining power and that the bargain itself is improvident.

Inequality of Bargaining Power

The Court was not satisfied that there was an inequality of bargaining power that would justify a finding that the arbitration clause was unconscionable. There was no evidence that the use of the Video Games or the ability to purchase “loot boxes” within those Video Games were “important elements of everyday life which made the plaintiffs particularly dependent or vulnerable in terms of their need to access the game platforms.” The Video Games themselves were free and the consumer has the ability to choose whether it wishes to purchase the “loot boxes.” There was also no evidence of a special relationship of trust and the Court was satisfied that the plaintiffs were able to understand the Terms and Conditions, including the arbitration clause. The choice of proceeding by way of arbitration or in small claims court was also a factor in favour of the finding that there was no inequality of bargaining power.

Improvident Bargain

The Court was also not satisfied that the facts of the case established that an improvident bargain had been

made.

The Court applied the test from *Uber to* assess whether the arbitration clause was improvident: that is, whether the potential for undue advantage or *undue* disadvantage created by the inequality of bargaining power has been realized.

The Court held that the arbitration process was not unduly disadvantageous to the plaintiffs. The cost disadvantage of pursuing a claim in arbitration or in small claims court was mitigated by the provisions of the arbitration clause in the Terms and Conditions, in particular, that for claims of less than $75,000, the defendants would pay for filing arbitrator's fees and the consumer's legal costs, if the consumer prevailed. On the other hand, the Terms and Conditions provided that the defendants would not seek legal fees if they were successful (subject to certain exceptions). The Terms and Conditions also allowed for a consumer to opt-out of the arbitration clause within 30 days of accepting the Terms and Conditions.

Public Policy

In determining whether to refuse to enforce an arbitration clause for reasons of public policy, the court must determine whether the arbitration clause causes undue hardship with reference to the following factors: the nature of the disputes that are likely to arise and whether the cost to pursue a claim is disproportionate to the quantum of the claim; the relative bargaining power of the parties; and, whether the parties have attempted to tailor the limit on dispute resolution.

Considering the Terms of Service as a whole, and for similar reasons to the conclusions reached in the unconscionability analysis, the Court found that proceeding by way of arbitration or in small claims court were an accessible and viable method of resolving individual disputes. In this case, the fact that the consumer did not have an opportunity to negotiate terms and did not have the ability to access a particular form of proceeding in British Columbia Supreme Court, did not make the arbitration clause in the Terms and Conditions unfair or unduly burdensome.

Arbitrator to Determine Issue of Jurisdiction Under Competition Act

Finally, the plaintiffs argued that an American arbitrator acting under American law was not able to determine claims under the Canadian *Competition Act* as the Terms of Service expressly excluded the application of Canadian law. The Court, however, determined that it was for the arbitrator to decide the issue of jurisdiction.

Going Forward

This case reinforces that British Columbia courts will continue to consider arbitration agreements in the context of the contract as a whole, and are unlikely to render an arbitration clause in a consumer contract unenforceable, strictly on the basis of being a contract of adhesion. Provided the arbitration clauses in a consumer contract are clear, readily available to consumers and contemplate dispute resolution procedures that are accessible and not overly burdensome or unfair for consumers, courts will stay court proceedings in favour of arbitration.

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[1] *Petty v Niantic Inc.,* 2022 BCSC 1077 (*Niantic*)

[2] *Uber Technologies Inc. v. Heller,* 2020 SCC 16 (*Uber*)

[3] *Pearce v. 4 Pillars Consulting Group Inc.,* 2021 BCCA 198 (*Pearce*)
