

CANADA / JUDGMENT

Williams v. Amazon.com, Inc.

2020 BCSC 300

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 300 Williams v. Amazon.com, Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Williams v. Amazon.com, Inc.,

2020 BCSC 300

Date: 20200304

Docket: S1810560

Registry: Vancouver

Between:

John Williams

Plaintiff

And

Amazon.com Inc., Amazon Services International, Inc., and

Amazon.com.ca, Inc.

Defendants

Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

January 31, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 4, 2020

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INTRODUCTION

- [1] The defendants apply for an order under s. 15 of the Arbitration Act, R.S.B.C. 1996, c. 55, staying this proceeding other than in respect of the relief sought by the plaintiff under s. 172 of the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 [BPCPA]. The defendant say that all of the plaintiff's remaining claims fall within the scope of a mandatory arbitration clause that governs the resolution of disputes between the parties.
- [2] In this action, the plaintiff alleges that the defendants have, for their own benefit and to the detriment of consumers, agreed with third party sellers not to compete for the sales of new books, music, movies, and DVDs on the Amazon Canada website. In particular, the plaintiff says that the defendants and third-party sellers have agreed that third parties will not sell these items through a feature on the Amazon.ca website that is described in the notice of civil claim as the "Buy Box". The plaintiff alleges that this agreement results in an unlawful overcharge to customers. He seeks an injunction and a restoration order under s. 172 of the BPCPA, in addition to damages under the Competition Act, R.S.C. 1985, c. C-34, damages for the tort of conspiracy, and equitable remedies for unjust enrichment.
- [3] The plaintiff seeks to certify this proceeding as a class proceeding under the Class Proceedings Act, R.S.B.C. 1996, c. 50. The plaintiff has served his application for certification. The defendants have not yet filed responsive materials and the certification hearing has not been scheduled. In reasons indexed at 2019 BCSC 1807, I directed that the defendants could bring their application for a stay under the Arbitration Act before taking any step in the proceeding.
- [4] The defendants concede that as a consequence of the decision of the Supreme Court of Canada in *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 [Seidel], claims under s. 172 of the BPCPA may be pursued in court notwithstanding the existence of a mandatory arbitration clause. For this reason, the defendants do not seek to stay the claim for relief under the BPCPA. The defendants seek to stay the remaining claims of the plaintiff. The

defendants say that Seidel directs that courts should give effect to an arbitration clause in a commercial contract, even a contract of adhesion.

- [5] The plaintiff opposes the relief sought by the defendants on the grounds that the conditions for a stay under s. 15 of the Arbitration Act are not met. Alternatively, the plaintiff says the arbitration clause should not be enforced as it is contrary to public policy and unconscionable.

BACKGROUND

The proceeding

- [6] The defendant Amazon.com Inc. ("Amazon.com") is incorporated under the laws of Delaware, USA, and carries on business as an online retailer through headquarters located in Seattle, Washington. The defendant Amazon Services International, Inc. ("Amazon International") and Amazon.com.ca, Inc. ("Amazon.ca") are incorporated under the laws of Delaware and operate as subsidiaries of Amazon.com through headquarters located in Seattle, Washington. I will refer to the defendants collectively as "Amazon".
- [7] Amazon offers products for sale to customers when they shop through the Amazon.ca website (the "Amazon Canada Store").
- [8] The plaintiff is a resident of British Columbia. He became a customer of Amazon on March 28, 2015, when he created an online Amazon account. The plaintiff deposes that has purchased products, including books, through the Amazon Canada Store.
- [9] The plaintiff filed his notice of civil claim on September 27, 2018. In his certification application, delivered in March 2019, the plaintiff defines the class of persons he proposes to represent as "All persons in Canada who purchased new books, music, videos or DVDs through the Buy Box on www.amazon.ca for personal use between November 5, 2003 and the date of certification". Counsel for the plaintiff has since advised the defendants of the plaintiff's intention to exclude residents of Ontario and Quebec from the proposed class definition.
- [10] In Part 2 of his notice of civil claim, at paras. 63-65, the plaintiff seeks relief against all three defendants pursuant to the BPCPA, including an injunction and restoration order under s. 172. As noted, the defendants' application for a stay does not encompass these claims. The defendants concede that the plaintiff can pursue remedies in court in relation to the defendants' alleged contravention of the BPCPA. I will refer to these claims as the "Consumer Claims".
- [11] At paras. 57-62 of Part 2 of the notice of civil claim, the plaintiff seeks the following relief from Amazon.com and Amazon International:
- damages under s. 36 of the Competition Act;

- damages for the tort of conspiracy;
- an accounting and restitution of the benefits received by these defendants as a result of what is alleged to be an anti-competitive overcharge of consumers;
- in the alternative, disgorgement of benefits; and
- punitive damages and interest.

[12] The defendants' application for a stay is limited to those claims that are not brought under the BPCPA. I will refer to these as the "Non-Consumer Claims".

[13] In December 2019, the plaintiff served an amended notice of civil claim. An unfiled copy of the amended notice of civil claim formed part of the application record before me. The proposed amendments do not substantively impact the relief sought, as summarized above. The amendments include the addition of a plea that the Consumer Protection Act, R.S.A. 200, c. C-26.3, applies to the claims of class members who are residents of Alberta. Section 16 of that Act provides that an arbitration clause in a consumer contract is generally void and unenforceable.

Amazon's Conditions of Use

[14] The defendants' evidence on this application is that they have sold products to customers subject to certain Conditions of Use since the Amazon Canada Store opened on June 21, 2002. All customers must agree to the Conditions of Use when opening an online account, and each time they make a purchase.

[15] Two versions of the Conditions of Use have been in effect over time. Both contain a mandatory arbitration clause.

[16] The original Conditions of Use were in effect from the time the Amazon Canada Store opened on June 21, 2002 until October 23, 2014 (the "2002 Conditions of Use"). They included the following relevant provisions:

Conditions of Use

Welcome to www.amazon.ca (the "Amazon.ca site"). The services on this site are offered to you by Amazon.com.ca, Inc. ("Amazon.ca") and its affiliates subject to the following conditions. If you visit or shop at the Amazon.ca site, you accept these conditions. Please read them carefully .

. . . .

DISPUTES

Any dispute relating in any way to your visit to the Amazon.ca site or to products you purchase through Amazon.ca shall be submitted to confidential arbitration in Seattle, Washington, United States, except that, to the extent you have in any matter violated to threatened to violate the intellectual property rights of Amazon.ca or its affiliates, Amazon.ca or its affiliates may seek

injunctive or other appropriate relief in any state or federal court in the state of Washington, and you consent to exclusive jurisdiction and venue in such courts. Arbitration under this agreement shall be conducted under the rules then prevailing of the American Arbitration Association. The arbitrator's award shall be binding and may be entered as a judgment in any court of competent jurisdiction. To the fullest extent permitted by applicable law, no arbitration under this Agreement shall be joined to an arbitration involving any other party subject to this Agreement, whether through class arbitration proceedings or otherwise.

[Emphasis in the original.]

[17] The 2002 Conditions of Use were amended as of October 24, 2014 (the "2014 Conditions of Use"). From October 24, 2014 to present, the relevant provisions were as follows:

Conditions of use

Welcome to www.amazon.ca (the "Amazon.ca site"). Amazon.com.ca, Inc., and/or its affiliates ("Amacon.ca") provide website features and other products and services to you when you visit or shop at the Amazon.ca site, use Amazon.ca products or services, use Amazon.ca applications for mobile, or use software provided by Amazon.ca in connection with any of the foregoing (collectively, "Amazon.ca Services"). Amazon.ca provides the Amazon.ca Services subject to the following conditions.

By using Amazon.ca Services, you agree to these conditions. Please read them carefully.

....

Applicable Law and Disputes

(Not applicable to Quebec consumers) Any dispute or claim relating in any way to your use of any Amazon.ca Service, or to any products or services sold or distributed by Amazon.ca or through Amazon.ca Services will be resolved by binding arbitration, rather than in court, except that you may assert claims in small claims court if your claims qualify. The U.S. Federal Arbitration Act and U.S. federal arbitration law apply to this agreement.

There is no judge or jury in arbitration, and court review of an arbitration award is limited. However, an arbitrator can award on an individual basis the same damages and relief as a court (including injunctive and declaratory relief or statutory damages), and must follow the terms of these Conditions of Use as a court would.

To begin an arbitration proceeding, you must send a letter requesting arbitration and describing your claim to our registered agent Corporation Service Company, 300 Deschutes Way SW, Suite 304, Tumwater, WA 98051. The arbitration will be conducted by the American Arbitration Association (AAA) under its rules, including the AAA's Supplementary Procedures for Consumer-Related Disputes. The AAA's rules are available at www.adr.org or by calling 1-800-778-7879. Payment of all filing, administration and arbitrator fees will be governed by the AAA's rules. We will reimburse those fees for claims totaling less than \$10,000 unless the arbitrator determines

the claims are frivolous. Likewise, Amazon.ca will not seek attorneys' fees and costs in arbitration unless the arbitrator determines the claims are frivolous. You may choose to have the arbitration conducted by telephone, based on written submissions, or in person in the county where you live or at another mutually agreed location.

We each agree that any dispute resolution proceedings will be conducted only on an individual basis and not in a class, consolidated or representative action. If for any reason a claim proceeds in court rather than in arbitration we each waive any right to a jury trial. We also both agree that you or we may bring suit in court to enjoin infringement or other misuse of intellectual property rights.

(Not applicable to Quebec consumers) By using any Amazon.ca Service, you agree that the U.S. Federal Arbitration Act, applicable U.S. federal law, and the laws of the state of Washington, United States, without regard to principles of conflict of laws, will govern these Conditions of Use and any dispute of any sort that might arise between you and Amazon.ca.

[Emphasis in the original.]

- [18] In creating his account in 2015, and subsequently by purchasing products from the Amazon Canada Store, the plaintiff agreed to be bound by the 2014 Conditions of Use, including the above-quoted provision for resolving disputes (the "Arbitration Clause").
- [19] The parties disagree as to the relevance of the 2002 Conditions of Use. The defendants say that the stay application is concerned only with the plaintiff's action. As all of the plaintiff's claims are subject to the Arbitration Clause in the 2014 Conditions of Use, the defendants say that any previous version of the Conditions of Use has no bearing on the application. The plaintiff says that it is open to him to advance claims on behalf of other proposed class members who may have agreed to the 2002 Conditions of Use.
- [20] It is not obvious to me that there are differences between the versions of the dispute resolution clause contained in the 2002 and 2014 Conditions of Use that would materially impact the outcome of the analysis. While the seat of arbitration is Seattle under the 2002 Conditions of Use, there is no evidence before me that this would foreclose the possibility of arbitration by way of written submission or telephone hearing.
- [21] In any event, for reasons set out later in this judgment (at paras. 94-99) I agree with the defendants that the only question for me on this application is whether the Non-Consumer Claims advanced by the plaintiff should be stayed in favour of arbitration. The plaintiff is only a party to the Arbitration Clause contained in the 2014 Conditions of Use.
- [22] As such, the issue I must resolve on this application is whether the Arbitration Clause in the 2014 Conditions of Use agreed to by the plaintiff requires a stay of his Non-Consumer Claims in favour of arbitration.

THE LEGAL FRAMEWORK

Section 15 of the Arbitration Act

[23] The defendants' application is brought pursuant to s. 15 of the Arbitration Act.[1] Section 15 provides as follows, in relevant terms:

15 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.

(2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

[24] "Arbitration agreement" is defined in s. 1 of the Arbitration Act as:

a written or oral term of an agreement between 2 or more persons to submit present or future disputes between them to arbitration, whether or not an arbitrator is named, but does not include an agreement to which the International Commercial Arbitration Act applies;

[25] In *Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368 (C.A.) at 375, our Court of Appeal held that s. 15 establishes three prerequisites to a stay of proceedings in favour of arbitration:

- (a) the applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;
- (b) the legal proceedings must be in respect of a matter agreed to be submitted to arbitration; and
- (c) the application must be brought in a timely manner; that is, before the applicant takes a step in the proceeding.

[26] In determining whether these prerequisites are met, the role of the court is only to assess whether the applicant has established an arguable case. The court does not resolve legitimate disputes between the parties regarding the scope of the arbitration agreement or the identification of the parties to the agreement as these are matters for the arbitral tribunal to determine: *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.) [Gulf Canada] at 120; *Sum Trade Corp. v. Agricom International Inc.*, 2018 BCCA 379 [Sum Trade] at paras. 25-26. As stated by Pearlman J. in *Pixhug Media Inc. v. Steeves*, 2017 BCSC 2171:

[45] As the Court explained in *Gulf Canada*, it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement. Those are matters within the jurisdiction of the arbitral tribunal. Only if it is clear that the

dispute falls outside the terms of the arbitration agreement, or that party is not a party to the arbitration agreement, or that the application is out of time, should the court make the final determination regarding those matters. Conversely, "[w]here it is arguable that the dispute falls within the terms of the arbitration agreement, or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then the stay should be granted and those matters left to be determined by the arbitral tribunal": *Gulf Canada* at 120.

- [46] The low threshold of an arguable case reflects the strong public policy in giving effect to arbitration agreements: *Prince George (City)* at para. 36.
- [27] Under the general rule of competence-competence, any challenge to an arbitrator's jurisdiction is to be determined in the first instance by the arbitrator. There is an exception to the general rule if the jurisdictional challenge involves a pure question of law, or one of mixed fact and law that requires "only superficial consideration of documentary evidence in the record": *Seidel* at para. 29; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 [Dell] at paras. 84-85; *Sum Trade* at para. 35. Otherwise, a court should not depart from "the rule of systematic referral" of jurisdictional questions to the arbitrator in the first instance: *Dell* at para. 84.[2]
- [28] If the applicant establishes an arguable case that the prerequisites to a stay under s. 15 of the Arbitration Act are met, then the court must grant a stay unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

Seidel

- [29] The decision of the Supreme Court of Canada in *Seidel* provides the backdrop to the defendants' application in the present case.
- [30] The plaintiff in *Seidel* sought to certify a class action against TELUS arising from the latter's alleged overcharge of cell phone customers. The plaintiff asserted common law and statutory causes of action, including claims under the BPCPA. The plaintiff's cell phone contract with TELUS contained a clause that required the parties to refer any claim or dispute to "private and confidential mediation", and thereafter, if unresolved, to "private, confidential and binding arbitration". The British Columbia Court of Appeal granted a stay of the plaintiff's entire action pursuant to s. 15 of the Arbitration Act.
- [31] On further appeal to the Supreme Court of Canada, the issue was whether claims under s. 172 of the BPCPA were legislatively exempt from a contractual arbitration provision. The Court started from the presumption that it would require legislative intervention to overcome the binding effect of an arbitration clause, even where the clause is found in a standard form contract:
- [2] The choice to restrict or not to restrict arbitration clauses in consumer contracts is a matter for the legislature. Absent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause. The important question raised by this appeal, however, is whether the

BPCPA manifests a legislative intent to intervene in the marketplace to relieve consumers of their contractual commitment to "private and confidential" mediation/arbitration and, if so, under what circumstances.

- [32] A majority of the Court in Seidel held that s. 172 of the BPCPA did in fact manifest a legislative intent to override private arbitration and mediation clauses. The Court found that the provision is intended to encourage private enforcement of statutory rights in the public interest. Remedies are available under s. 172 regardless of whether or not the self-appointed plaintiff is affected by the consumer transaction in issue. The Court held that the purpose of the provision should be generously interpreted in favour of consumer protection.
- [33] The majority in Seidel rejected the notion that such an outcome was inconsistent with the Court's prior jurisprudence which emphasized the public policy favouring enforcement of contractual arbitration clauses. Justice Binnie, writing for the majority, stated:
- [42] For present purposes, the relevant teachings of Dell and Rogers Wireless is simply that whether and to what extent the parties' freedom to arbitrate is limited or curtailed by legislation will depend on a close examination of the law of the forum where the irate consumers have commenced their court case. Dell and Rogers Wireless stand, as did Desputeaux, for the enforcement of arbitration clauses absent legislative language to the contrary.

[Emphasis in the original.]

- [34] On this basis, the Court concluded that the plaintiff was not contractually barred from pursuing certification of her claims under s. 172 of the BPCPA as a class action. The stay issued by the Court of Appeal was lifted to allow the s. 172 claims to proceed, while the stay remained in place for the plaintiff's non-BPCPA claims. To the extent this resulted in bifurcated proceedings, the Court in Seidel observed, at para. 50, that this was a result of deliberate choice by the British Columbia legislature.
- [35] In the present case, the defendants say that Seidel mandates the outcome they are seeking on this application; that is a stay of the plaintiff's Non-Consumer Claims, with the Consumer Claims proceeding to a certification hearing.

ISSUES

- [36] The various arguments advanced by the plaintiff in opposition to the defendants' stay application give rise to the following issues:
- i. Are the prerequisites to a stay under s. 15 of the Arbitration Act absent on one or both of the following grounds:
 - (1) The Arbitration Clause does not mandate arbitration because a claimant has the option of pursuing the claim in small claims court.

- (2) The Conditions of Use are unclear as to the identity of the contracting parties.
- ii. Alternatively, is the Arbitration Clause void, inoperative or incapable of being performed on one or both of the following grounds:
- (1) An arbitrator applying U.S. law is not a court of competent jurisdiction for the purpose of granting remedies under the Competition Act.
- (2) The Arbitration Clause is unconscionable in imposing a prohibitive cost and burden on an individual with a relatively small claim in pursuing a remedy.
- iii. What is the effect of any stay that is granted on the Non-Consumer Claims of potential class members other than the plaintiff?

ANALYSIS

ISSUE I: Are the prerequisites to a stay of proceedings established?

- (1) Is arbitration mandatory under the Arbitration Clause?
- [37] The plaintiff's first argument is that the 2014 Conditions of Use do not contain a binding provision for arbitration, but rather a provision that contains two alternative options: arbitration or court. The plaintiff says that this is not the kind of arbitration agreement that can be the basis for a stay application under the Arbitration Act because it is not binding or exclusive. Instead, it grants the consumer a unilateral right to elect a process other than arbitration. The plaintiff says that "small claims court" is not a defined term in the Arbitration Clause, and the B.C. Supreme Court could qualify. Thus, the plaintiff says he has followed an option available to him under the Arbitration Clause in filing his notice of civil claim in this Court.
- [38] The plaintiff relies on a number of cases in which courts have held that a stay of proceedings under s. 15 of the Arbitration Act is not appropriate where the contract between the parties permits an election between arbitration or a court proceeding. See for example: *Scouts Canada v. Scouts Canada* [1997] B.C.J. No. 2646 (S.C.) [Scouts Canada]; *Freightliner Ltd. v. American Home Assurance Co.*, 2005 BCSC 1054 [Freightliner]; *Lailey International Student Volunteers Inc.*, 2008 BCSC 1344 [Lailey]; *829194 Ontario Inc. v. Garibotti et al.*, 2013 ONSC 5857 [Garibotti].
- [39] I do not find the cases cited by the plaintiff to be applicable to the issues on the present application. In *Scouts Canada*, an agreement to arbitrate was mutually rescinded when the parties made a new agreement that the dispute could be litigated in court. The court refused to stay a proceeding filed in court by one party in reliance on this new agreement. In these circumstances, the Court held that the option of arbitration was no longer available by mutual agreement of the parties. *Scouts Canada* does not stand for the proposition that one party can unilaterally terminate an agreement to arbitrate by filing a court action. There is authority to the contrary: *Cass v. Vion Venture Corp.*, [1998] B.C.J. No. 1318 (S.C.) at para. 34.

- [40] The remaining cases cited by the plaintiff are also inapposite. In *Freightliner*, the dispute resolution clause allowed the parties to choose between binding arbitration and non-binding mediation followed by a judicial proceeding if the mediation was unsuccessful. The court declined to issue a stay because the agreement did not mandate arbitration. In *Lailey*, the contract provided for "nonbinding arbitration", which *Grauer J.* held was not a type of agreement contemplated by the Arbitration Act. In *Garibotti*, the clause provided for arbitration only with the mutual consent of the parties.
- [41] In my view, the Arbitration Clause in the 2014 Conditions of Use is of a fundamentally different nature than the clauses in issue in the cases cited by the plaintiff. The Arbitration Clause provides that all disputes or claims "will be resolved by binding arbitration, rather than in court", with the exception that a claim can be filed in a small claims court if the claim qualifies. The small claims exception is a feature of any arbitration governed by the AAA's Consumer Arbitration Rules. Rule 9 provides that either party may choose to take their claim to a small claims court if the claim is within the jurisdiction of that court.
- [42] The small claims exception may be seen as a feature that enhances the overall effectiveness of arbitration as a means of achieving efficient adjudication of disputes. In any event, a small claims action, where available, is the only alternative to binding arbitration under the dispute resolution clause that the plaintiff has agreed to under his contract with Amazon. The Arbitration Clause, on its clear terms, does not entitle the plaintiff to unilaterally elect to file a proposed class proceeding in B.C. Supreme Court.
- [43] There is, in my view, no ambiguity as to what constitutes a "small claims court" in British Columbia. The small claims court is the Provincial Court exercising jurisdiction under the Small Claims Act, R.S.B.C. 1996, c. 430, to hear civil claims up to a prescribed monetary amount. If the claim is less than \$5,000, the small claims jurisdiction is exercised by the Civil Resolution Tribunal: see s. 3(3) of the Small Claims Act, ss. 16.4 and 118 of the Civil Resolution Tribunal Act, S.B.C. 2012, c. 25, and the Civil Resolution Small Claims Tribunal Regulation, B.C. Reg. 111/2017.
- [44] The plaintiff says that if he is required to, he will file an action in small claims court and then immediately apply to have the action transferred to the B.C. Supreme Court and joined with this proceeding. The plaintiff says that his ability to do so demonstrates that the process that he has chosen is not at odds with the Arbitration Clause. The plaintiff further says that he should not be required to go through such procedural hoops just to arrive back at his current starting point in B.C. Supreme Court.
- [45] It is unnecessary for me on this application to anticipate where a small claims proceeding might lead the plaintiff. I simply observe that the path from a small claims action to a class proceeding in B.C. Supreme Court does not appear as straightforward to me as the plaintiff assumes, having regard to the legislative conditions for a transfer of a small claims proceeding to B.C. Supreme Court: Small Claims Rules, B.C. Reg. 261/93, s. 7.1(1); Civil Resolution Tribunal Act, s. 16.4. This is quite apart from the question of which, if any, of the

plaintiff's Non-Consumer Claims would be within the jurisdiction of a small claims court in any event.

- [46] The fact is that the plaintiff has not opted to file an action in small claims court. The procedure he has chosen - filing a proposed class proceeding in B.C. Supreme Court - is not one permitted by the Arbitration Clause. Unless and until the plaintiff files an action in small claims court, his only option under the Clause is mandatory arbitration.
- (2) Are the Conditions of Use unclear as to the identities of the parties?
- [47] The plaintiff next argues that the Conditions of Use are ambiguous as to the identity of the contracting parties. The 2014 Conditions of Use state that Amazon.ca "and/or its affiliates" provide services to customers subject to conditions of use. The plaintiff argues that the term "affiliates" is undefined, and therefore there is ambiguity as to whether the affiliates include Amazon.com and Amazon International. The plaintiff says that the doctrine of contra proferentem requires that any ambiguity in the language of the 2014 Conditions of Use be construed against Amazon as the drafter of the language.
- [48] The plaintiff relies on *Robinson v. National Money Mart Co.*, 2013 BCSC 967 [Robinson]. In *Robinson*, Griffin J., as she then was, refused a stay application in the context of a proposed class action by customers who borrowed payday loans from B.C.-based franchisees of the defendant National Money Mart Company ("Money Mart"). The contract between the customers and the franchisees contained an arbitration clause. The only relief sought by the plaintiff against the franchisees was pursuant to s. 172 of the BPCPA. It was common ground that as a result of *Seidel*, such claims were legislatively exempt from the arbitration clause. The non-BPCPA claims were advanced only against Money Mart and the personal defendants, who were directors and officers of the franchisees. None of these defendants were a party to the arbitration agreement.
- [49] It was in these circumstances that Griffin J. concluded in *Robinson* that the conditions of a stay under the Arbitration Act were not met. As Money Mart and the personal defendants were not parties to the arbitration agreement, there was no alternative dispute resolution mechanism available to the plaintiff to pursue the claims. There was no question in *Robinson* that Money Mart and the personal defendants were not parties to the arbitration agreement. The case turned on a question of the proper interpretation of the Arbitration Act in a case where there were multiple defendants and the plaintiff had an arbitration agreement with one defendant but not in relation to the relief sought against that defendant in the action.
- [50] Amazon argues that all of the defendants are parties to the 2014 Conditions of Use. Amazon says the term "affiliates" is well-understood to include a corporation that is related to another corporation by shareholdings or other means of control, and includes subsidiary, parent and sibling corporations. Amazon relies on the definition of "affiliate" in *Black's Law Dictionary*, 11th ed. (Thomson Reuters, 2019), as well as statutory definitions in s. 2(2) of the Competition Act, s. 2(1) of the Business Corporations Act, S.B.C. 2002, c. 57, and s. 2 of the

Canada Business Corporations Act, R.S.C. 1985, c. C-44.

- [51] In determining whether the prerequisites for a stay are met, my role is to assess whether the Amazon applicants have established an arguable case that each of them is a party to the 2014 Conditions of Use. In my view, in light of the relatively low threshold, I conclude the defendants have made out an arguable case.
- [52] This is not a case, like *Robinson*, in which it is clear and undisputed that the applicants are non-parties to the arbitration agreement. In the present case, Amazon.com and Amazon International argue that they are "affiliates" of Amazon.ca within the meaning of the 2014 Conditions of Use. There is support in the authorities for the definition of affiliates that is advanced by Amazon. There may be an issue as to whether Amazon.ca can contract on behalf of its affiliates in light of the fact that the plaintiff's direct transactions in purchasing products were with Amazon.ca. However, in light of the relevant authorities, that seems to me to be an issue that must be decided by an arbitrator in the first instance: *Gulf Canada* at 120.

Summary on the prerequisites to a stay of proceedings

- [53] In summary, I conclude that the applicants have established an arguable case that the prerequisites for a stay are present. It is arguable that each of the defendants are a party to an arbitration agreement with the plaintiff, and the plaintiff has commenced legal proceedings in respect of matter agreed to be submitted to arbitration. There is no dispute that the Amazon defendants brought this application before taking a step in the proceeding.

ISSUE II: Is the Arbitration Clause void, inoperative or incapable of being performed?

- (1) Is an arbitrator applying U.S. law a court of competent jurisdiction under the Competition Act?
- [54] The plaintiff's argument is threefold. First, he says that claims for damages under s. 36 Competition Act can never be arbitrated because an arbitrator is not a "court of competent jurisdiction" within the meaning of that provision. Second, he says that, in any event, an arbitrator conducting an arbitration under the 2014 Conditions of Use would not have jurisdiction to grant a remedy under the Competition Act because the dispute would be governed by the law of the state of Washington. Third, the plaintiff says it would be contrary to public policy to allow a claim under the Competition Act to be contractually overridden by a clause that requires disputes to be resolved under U.S. law.
- [55] The plaintiff argues, accordingly, that the clause is void, inoperative or incapable of being performed in relation to his claims for damages under the Competition Act.

Are claims under the Competition Act arbitrable?

- [56] Section 36 of the Competition Act creates a statutory cause of action which allows for the recovery of damages or loss resulting from conduct that is contrary to Part VI of the Act. Pursuant to s. 36, a private lawsuit to recover damages may be brought in a "court of competent jurisdiction".
- [57] The question of whether damage claims under s. 36 of the Competition Act may be the subject of arbitration was addressed by the Federal Court of Appeal in *Murphy v. Amway Canada Corporation*, 2013 FCA 38 [Murphy]. Murphy involved an application to stay a proposed class action in favour of arbitration where the claims advanced by the plaintiff included a claim for damages under s. 36 of the Competition Act. The plaintiff argued that arbitration was inconsistent with the public interest focus of the Competition Act.
- [58] The Federal Court of Appeal held in *Murphy* that the question of the arbitrability of claims under the Competition Act was answered by the Supreme Court of Canada's decision in *Seidel*. *Seidel* confirmed that an agreement to arbitrate should be enforced absent legislative intervention. The Federal Court of Appeal concluded that the Competition Act did not evidence a legislative intent to override the provisions of a mandatory arbitration agreement:
- [60] On the principles stated by Binnie J. in *Seidel*, I must conclude that the issues raised by the appellant in his statement of claim brought under section 36 of the Competition Act are arbitrable. The Supreme Court has made it clear that express legislative language in a statute is required before the courts will refuse to give effect to the terms of an arbitration agreement. In that regard, the Competition Act does not contain language which would indicate that Parliament intended that arbitration clauses be restricted or prohibited. More particularly, there is no language in the Competition Act that would prohibit class action waivers so as to prevent the determination of a claim by way of arbitration.
- ...
- [64] In the end, as I understand the appellant's arguments, he says that competition law, by its very nature, should never be the subject of arbitration because arbitration is not compatible with the public interest objectives found in the Competition Act. In other words, there is something sacrosanct about competition law that trumps any arbitration agreement. Similar arguments were made in *Dell and Rogers Wireless* in the context of consumer law, which arguments the Supreme Court rejected.
- [59] The plaintiff says that *Murphy* was wrongly decided and ought not to be followed. However, the plaintiff does not undertake any analysis of the Competition Act to show, contrary to the holding in *Murphy*, a clear legislative intent to override the terms of an arbitration agreement. The direction in *Seidel* is that absent legislative intervention, arbitration agreements are to be enforced. *Murphy* appears to me to be consistent with *Seidel*. *Seidel* is, of course, authority that is directly binding on this Court.

[60] For this reason, I conclude that the plaintiff's claim for damages under s. 36 of the Competition Act is arbitrable.

Are claims under the Competition Act arbitrable in an arbitration under the Arbitration Clause in the 2014 Conditions of Use?

[61] The more difficult question is whether a claim for damages under the Competition Act can be arbitrated under the specific Arbitration Clause in issue in this case. The Clause provides, in part, that "the laws of the state of Washington, United States, without regard to principles of conflict of laws" will govern the Conditions of Use.

[62] Each party tendered expert opinion evidence on the issue of whether, in light of the choice of law language, an arbitrator appointed pursuant to the Arbitration Clause would have jurisdiction to grant remedies under the Competition Act.

[63] The plaintiff's expert, George Sampson, is a practicing lawyer in the state of Washington with extensive experience in antitrust litigation. Mr. Sampson opines that an arbitrator would be bound to apply the choice of law rules set out in the Arbitration Clause, which he says requires an arbitrator to exclusively apply U.S. and Washington State law. As such, in Mr. Sampson's view, an arbitrator appointed under the 2014 Conditions of Use would not apply the Competition Act.

[64] The defendants' expert, Professor George Bermann, is a professor in the Faculty of Law at Columbia University. His area of expertise includes international commercial arbitration. Professor Bermann disagrees with the opinions expressed by Mr. Sampson. He cites the decision of the U.S. Supreme Court in *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) [*Mitsubishi*] in support of the proposition that an arbitral tribunal is not foreclosed by a choice of law clause from applying the law of a country other than the one designated in that clause.

[65] *Mitsubishi* involved a dispute between Mitsubishi Motors, a Japanese automobile manufacturer, and Soler Chrysler-Plymouth, a Puerto Rican automobile distributor. Their contract contained a provision requiring that disputes be finally settled by arbitration in Japan. The choice of law clause provided that "[t]his Agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein." In enforcing the agreement to arbitrate, the Court held in *Mitsubishi* that an arbitrator would, despite the choice of law clause, give full effect to U.S. antitrust law. As stated at 636-637:

Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both of its remedial and deterrent function.

- [66] By analogy to *Mitsubishi*, Professor Bermann opines that an arbitrator appointed under the 2014 Conditions of Use would similarly apply the Competition Act in deciding a claim advanced under that Act. Professor Bermann does not consider it significant that the clause in issue in *Mitsubishi* omitted the words "without regard to principles of conflicts of laws" because the Court's decision was not based on *renvoi*; that is, the application of conflict of laws rules from Switzerland that led back to U.S. law as a source of substantive jurisdiction. Rather, the Court assumed that the substantive law of Switzerland would apply. The Court nevertheless held that an arbitrator would give effect to claims arising under U.S. antitrust laws.
- [67] Finally, Professor Bermann opines that even if an arbitrator concluded that he or she was barred from applying the Competition Act by the choice of law language, a prospect he considers unlikely, then U.S. antitrust law would be applied instead. Under U.S. antitrust law, private actions for damages have long been permitted.
- [68] In his reply report, Mr. Sampson reiterates his view that the choice of law provision in the Arbitration Clause would mandate the application of U.S. law to the exclusion of claims under the Competition Act. Mr. Sampson interprets *Mitsubishi* to simply stand for the proposition that antitrust claims under U.S. law are capable of arbitration. He notes that in *Mitsubishi*, there was a concession that U.S. law applied to the antitrust claims. Mr. Sampson does not address Professor Bermann's final observation that the claimant would have a remedy under U.S. antitrust law even if an arbitrator would not give effect to a claim under the Competition Act.
- [69] In light of the principle of competence-competence, I do not consider it appropriate for me to finally determine whether an arbitrator appointed under the 2014 Conditions of Use would have the jurisdiction to grant relief under the Competition Act. That is for the arbitrator to determine.
- [70] For the purpose of this application, I accept that there is a realistic prospect that an arbitrator would decline to entertain a claim under the Competition Act in light of the choice of law language in the parties' agreement. The basis for the Court's conclusion in *Mitsubishi* that U.S. antitrust law would apply to an arbitration governed by Swiss law is not entirely clear to me. The experts agree that the Court did not apply *renvoi*, which begs the question of why U.S. antitrust law was found to be applicable. It may have been, as Mr. Sampson points out, that the Court simply relied on *Mitsubishi*'s concession that U.S. antitrust law applied.
- [71] The question then becomes whether the realistic prospect that the plaintiff will be barred from seeking remedies under the Competition Act in an arbitration is a basis for this Court to decline to enforce the Arbitration Clause by refusing a stay. This leads to the third prong of the plaintiff's argument on this point.

Is it contrary to public policy to mandate arbitration in the U.S. at the risk of a claimant's remedies under the Competition Act?

- [69] The plaintiff says that the Arbitration Clause is contrary to public policy and therefore void because it permits Competition Act claims for damages to be adjudicated in a foreign forum and under foreign law. He says the Clause undermines Parliament's intention to create civil remedies in the Canadian court system for anti-competitive conduct of a type alleged here. The statutory cause of action in s. 36 of the Competition Act is critical, the plaintiff argues, to serving the overall objectives of the statute.
- [72] The plaintiff relies, by way of analogy, on the decision of the Supreme Court of Canada in *Douez v. Facebook*, 2017 SCC 33 [Douez]. Douez concerned the enforcement of a forum selection clause in a standard form contract between Facebook and its customers which provided that disputes would be resolved in state or federal courts in Santa Clara County, California, with the dispute to be governed by California law. The plaintiff wanted to sue Facebook in British Columbia for alleged breaches of the Privacy Act, R.S.B.C. 1996, c. 373.
- [73] Douez focussed on the common law test for forum selection clauses. The Court in Douez, at para. 26, characterized such clauses as a "unique category of contracts" because they do not simply affect the parties but also encroach on a public sphere of adjudication. A forum selection clause cannot bind a court or interfere with the court's jurisdiction to hear disputes that are properly before it. For this reason, courts will apply a two-step approach to determining whether to enforce a forum selection clause: (i) first, there must be a valid, clear and enforceable clause that applies to the dispute, and (ii) second, the plaintiff must show strong cause why the clause should not be enforced.
- [74] In Douez, the Court held that the strong cause analysis at the second step of this test must account for different considerations when a forum selection clause is found in a standard form consumer contract as opposed to a commercial agreement reached between sophisticated parties (at para. 35). In the former context, courts may have regard to public policy considerations such as gross inequality of bargaining power and the nature of the rights at stake (at para. 38). On the facts of Douez, the majority found there was a strong cause not to enforce the clause because the claim involved a consumer contract of adhesion and a statutory cause of action implicating the quasi-constitutional privacy rights of British Columbians. On the latter point, the majority stated:
- [58] Canadian courts have a greater interest in adjudicating cases impinging on constitutional and quasi-constitutional rights because these rights play an essential role in a free and democratic society and embody key Canadian values. There is an inherent public good in Canadian courts deciding these types of claims. Through adjudication, courts establish norms and interpret the rights enjoyed by all Canadians.

- [75] I note that Douez was directly concerned with the forum selection clause and not the choice of law clause (i.e. that California law would govern). The Court declined to opine on which body of law would govern the dispute, but noted that even if a California court could or would apply the Privacy Act, courts in British Columbia were better placed to assess the purpose and intent of the legislation.
- [76] I do not consider Douez directly relevant to the present case because this case does not involve a forum selection clause. In this respect the present case is distinguishable from Douez and also from Heller v. Uber Technologies Inc., 2019 ONCA 1, leave to appeal granted [2019] S.C.C.A. 58 [Heller], a case on which the plaintiff places considerable reliance. (See Heller at para. 63.)
- [77] The issue before me does not concern two competing forums for public adjudication of a dispute. There is no concern that a court will be required by a contractual agreement between the parties to adjudicate a dispute that is not properly before it. An arbitrator's decision does not have binding effect, and is not publicly accessible. It will not establish norms and interpret rights for anyone other than the parties to the agreement.
- [78] Arbitration is a method of private dispute resolution that is the result of an agreement voluntarily entered into by the parties. As repeated decisions of the Supreme Court of Canada have held, most recently Seidel, the fact that an arbitration clause is contained in a standard form consumer contract is, absent legislative intervention, irrelevant to the question of its enforcement. Furthermore, there are limited grounds for invalidating an arbitration clause. It must be shown that the agreement is void, inoperative or incapable of being performed.
- [79] I accept that an arbitration clause might be rendered invalid to the extent that it amounts to a contracting out of statutory entitlements when contracting out is prohibited by statute. This was the case in Heller where the Ontario Court of Appeal held that an arbitration clause was invalid because it amounted to contracting out of employment standards legislation contrary to a statutory prohibition on doing so. However, there is no similar prohibition on the contracting out of the private right of action in s. 36 of the Competition Act.
- [80] It may be that an arbitrator will interpret his or her jurisdiction under the Arbitration Clause in the 2014 Conditions of Use to include an ability to award damages under s. 36 of the Competition Act. If such a remedy not available, there is the alternative remedy of damages under U.S. antitrust law. There is nothing in the record before me to suggest that damages under U.S. antitrust law would be an inferior remedy to damages under the Competition Act. The plaintiff has not advanced such an argument. The plaintiff simply says that the availability of damages for a U.S. cause of action as a substitute for a Canadian cause of action is irrelevant on public policy grounds because he is entitled to a remedy under the law of Canada. I do not agree. It seems to me that the question of whether the plaintiff can potentially be made whole through remedies available in an arbitration is a relevant consideration when the plaintiff seeks to invalidate an arbitration clause on the ground of

the unavailability of certain remedies.

- [81] For these reasons, I conclude that the prospect that an arbitrator may lack jurisdiction to award damages under s. 36 of the Competition Act is not a ground for finding the Arbitration Clause in the 2014 Conditions of Use is void, inoperative or incapable of performance.
- (2) Is the Arbitration Clause unconscionable in imposing a prohibitive cost and burden on an individual with a relatively small claim?
- [82] The plaintiff relies on the decision of the Ontario Court of Appeal in *Heller* in support of his position that the Arbitration Clause in the 2014 Conditions of Use is unconscionable and therefore void. The plaintiff says that the Arbitration Clause was not negotiated, and is the result of inequality in the positions of the parties. He says that forcing him to pursue his claim in a foreign country and under foreign law is so inequitable as to be unconscionable.
- [83] *Heller* involved a proposed class action on behalf of Uber drivers in Ontario. The remedies sought, in addition to damages, included declarations that Uber had violated the provisions of Ontario's Employment Standards Act, 2000, S.O. 2000, c. 41 [ESA], and that provisions in the service agreements between the parties requiring mediation and arbitration of disputes were void and unenforceable. The up-front administrative and filing fees for a driver to participate in the mediation-arbitration process provided for in the agreements was \$14,500, and the place of arbitration was Amsterdam, The Netherlands.
- [84] The Ontario Court of Appeal overturned the decision of the lower court in *Heller* which had granted a stay of the proposed class proceeding in favour of arbitration. The Court of Appeal held that a stay was not warranted for two reasons. First, as noted, the Court found the arbitration clause to be invalid because it constituted a contracting out of the provisions of the ESA, when such contracting out is prohibited by the statute. Second, the Court held that the clause was unconscionable in light of the significant financial and geographic barriers it created to the initiation of the arbitration process.
- [85] In order to set aside a contract for unconscionability, a party must establish: (i) inequality in the position of the parties arising from the ignorance, need or distress of the weaker, which left him in the power of the stronger, and (ii) proof of substantial unfairness in the bargain: *Do v. Nichols*, 2016 BCCA 128 at paras. 25-26, leave to appeal ref'd [2016] S.C.C.A. No. 206. The arbitration clause in issue in *Heller* was found to be substantially unfair because it required a driver to incur significant upfront fees to pursue an arbitration in the Netherlands: *Heller* at para. 68. The costs of arbitrating were out of all proportion to the amounts likely to be involved in any one driver's claim: *Heller* at para. 68.
- [86] I do not consider the Arbitration Clause in the 2014 Conditions of Use to be analogous to the agreement in issue in *Heller*. A claimant such as the plaintiff is only required to pay a relatively modest up-front administrative fee of \$200. Amazon is bound under the Arbitration Clause to refund these fees for claims less than \$10,000, unless the arbitrator determines the claim to be frivolous. The arbitration may be conducted by telephone,

written submission, or in a mutually agreed upon location. A claimant has the option of proceeding in a small claims court where the claims fall within the jurisdiction of that court.

- [87] In sum, the Arbitration Clause in the present case, in contrast to Heller, provides for a low cost, and in many cases no cost, arbitration process where the claims advanced are less than \$10,000. I conclude that this is not a substantially unfair bargain so as to meet the test for unconscionability.
- [88] Before concluding on this issue, I must address two additional arguments advanced by the plaintiff.
- [89] First, a consistent theme throughout the plaintiff's arguments is that it is inherently unfair to enforce arbitration clauses contained in standard form consumer contracts. The plaintiff argues that such clauses are designed to avoid consumer actions, and class proceedings specifically. He cites studies reflecting the low rate at which consumers actually pursue arbitrations, and the even lower rate at which they succeed. The plaintiff says that any application for a stay of proceedings ought to consider this broader context.
- [90] The policy concerns raised by the plaintiff have been recognized in numerous court decisions, including Seidel itself (at para. 1). The potential mischief is that large corporations may employ arbitration clauses in standard form consumer contracts as a means of avoiding liability for wrongs that have widespread effect but which cause low-value harm on an individual basis: *Griffin v. Dell Canada Inc.*, 2010 ONCA 29 at para. 30. Absent the availability of a class proceeding, such wrongs go unremedied.
- [91] Some legislatures in Canada, including Alberta, have been motivated to address this concern by enacting legislation that renders arbitration clauses in consumer contracts void: see s. 16 of the Alberta Consumer Protection Act. The British Columbia legislature has not been so motivated, except to the extent that arbitration clauses do not bar proceedings under s. 172 of the BPCPA. The consistent direction of the Supreme Court of Canada is that absent legislative intervention, arbitration clauses are to be enforced: Seidel at para. 2; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 at para. 84. In light of that direction, I do not consider it open to me to invalidate an arbitration clause on the basis of such policy concerns where the legislature has chosen not to act.
- [92] Second, the plaintiff argues that even if the Arbitration Clause in the 2014 Conditions of Use is not unconscionable, the analogous dispute resolution provision in the 2002 Conditions of Use is unconscionable. The plaintiff points out that there is no provision for the refund of administrative fees in the 2002 Conditions of Use, and that the dispute resolution clause requires arbitration in Seattle, Washington.

[93] For the reasons set out in the next section of this judgment, I do not consider the 2002 Conditions of Use to be relevant to this stay application. The plaintiff is not a party to the 2002 Conditions of Use. His contract with Amazon is limited to the 2014 Conditions of Use. The question for me is whether the plaintiff's agreement to the Arbitration Clause in the 2014 Conditions of Use bars him from pursuing the Non-Consumer Claims in this Court.

ISSUE III: What is the effect of any stay that is granted on the Non-Consumer Claims of potential class members other than the plaintiff?

- [94] The plaintiff argues, finally, that even if his personal Non-Consumer Claims are stayed under s. 15 of the Arbitration Act, he is entitled to pursue claims on behalf of other potential class members.
- [95] The plaintiff relies on the decision of our Court of Appeal in *MacKinnon v. Instalogs Financial Solution Centres (Kelowna) Ltd.*, 2004 BCCA 472 [MacKinnon], in support of the proposition that as the representative plaintiff in a proposed class action, he has standing to advance claims on behalf of potential class members that he would not have standing to maintain as an individual. *MacKinnon* concerned an application to strike pleadings under what was then Rule 19(24), and is now Rule 9-5(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. The Court of Appeal held that the question of whether the pleadings disclosed a cause of action should be applied broadly so that a pleading survives a motion to strike even if the alleged causes of action could not be maintained by the representative plaintiff.
- [96] By analogy to *MacKinnon*, the plaintiff says that he may advance claims on behalf of other potential class members even if his own claims are stayed. For instance, the plaintiff says he may Non-Consumer Claims on behalf of potential class members who agreed to the 2002 Conditions of Use or who entered into contracts with Amazon in Alberta which are governed by s. 16 of the Alberta Consumer Protection Act.
- [97] In my view, *MacKinnon* is distinguishable from the present case. The issue in *MacKinnon* was whether the viability of pleaded claims in an existing proposed class proceeding should be assessed only by reference to causes of action between the plaintiff and the defendants, or by reference to causes of action that could be advanced by proposed class members.
- [98] By contrast, the issue in the present case is whether s. 15 of the Arbitration Act mandates that I make an order "staying the legal proceedings" on the basis of the plaintiff's contractual commitment not to bring the proceeding, at least in relation to the Non-Consumer Claims. The plaintiff's argument that he has standing to continue the proceeding on behalf of potential class members simply begs the question of what proceeding he proposes to continue. If an order staying the proceeding is issued under s. 15 of the Arbitration Act is issued, then there is no extant proceeding.

[99] In light of my conclusion that MacKinnon does not permit the plaintiff to continue a proceeding after a stay has been ordered under the Arbitration Act, I will not address the question of whether the plaintiff would have standing, in any event, to continue a stayed proceeding in British Columbia solely on behalf of individuals who entered into consumer transactions in Alberta.

CONCLUSION/ORDERS

[100] In summary, I conclude that Amazon has established the prerequisites for a stay of legal proceedings under s. 15 of the Arbitration Act in relation to the Non-Consumer Claims. I further conclude that the Arbitration Clause is not void, inoperative or incapable of being performed.

[101] As such, I order that this proceeding be stayed in relation to the Non-Consumer Claims.

[102] The parties are at liberty to schedule a further case planning conference in order to establish a certification schedule for the Consumer Claims.

"Horsman J."

[1] The parties both assume that the applicable statute is the Arbitration Act rather than the International Commercial Arbitration Act, R.S.B.C. 1996, c. 233. I will assume, without deciding the point, that the Arbitration Act governs. For the purpose of this application nothing turns on this question as International Commercial Arbitration Act contains an identical stay provision in s.8.

[2] The competence-competence principle is reflected in Rule 14 of the American Arbitration Association's ["AAA's"] Consumer Arbitration Rules, which apply to arbitrations conducted pursuant to the Arbitration Clause in the 2014 Conditions of Use. Rule 14 states that the arbitrator has the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or to the arbitrability of any claim.

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