Federal Court  Cour fédérale

Date: 20220906

Docket: T-445-20

Citation: 2022 FC 1256

Toronto, Ontario, September 6, 2022

PRESENT: The Honourable Madam Justice Furlanetto

PROPOSED CLASS PROCEEDING

BETWEEN:

STEPHANIE DIFEDERICO AND JAMESON EDMOND CASEY

Plaintiffs

and

AMAZON.COM, INC., AMAZON.COM.CA, INC., AMAZON.COM SERVICES LLC, AMAZON SERVICES INTERNATIONAL, INC., AND AMAZON SERVICES CONTRACTS, INC.

Defendants

ORDER AND REASONS

[1] This is a motion brought under paragraph 50(1)(b) of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*] to stay the claim the representative Plaintiff, Stephanie Difederico, seeks to advance in this proposed class action as it relates to her purchases made on Amazon.ca stores, on the basis that it is subject to binding arbitration.

[2] For the reasons that follow, I find that a stay in favour of arbitration should be ordered, as there is an arbitration agreement in place that would cover Ms. Difederico's purchases on the Amazon.ca stores. Ms. Difederico has not made out any exceptional grounds on which to deny a stay, including on the basis of public policy or unconscionability and any challenge to the jurisdiction of the arbitrator or the validity of the arbitration clauses should be referred to the arbitrator.

I. Background

[3] Ms. Difederico is an individual residing in Windsor, Ontario. On April 1, 2020, Ms. Difederico filed this proposed class action against Amazon.com, Inc, Amazon.com.ca, Inc, Amazon.com Services LLC, Amazon Services International, Inc, and Amazon Services Contracts, Inc [collectively, Amazon] as Defendants [Claim]. The Claim alleges that certain provisions, namely a competitive pricing provision in effect from 2010 to March 2019, and a related subsequent fair pricing policy, constitute criminal price fixing contrary to section 45 of the *Competition Act*, RSC 1985, c C-34 [*Competition Act*].

[4] The Claim was amended to include an additional proposed class representative, Jameson Edmund Casey, on September 30, 2020. Ms. Difederico seeks to represent the proposed Amazon E-Commerce Class of purchasers. Mr. Casey proposes to represent two other classes of purchasers, neither of which are at issue in this motion. The Amazon E-Commerce Class is defined in the amended Claim as:

> All persons or entities in Canada who, from 1 June 2010 to the present (the "Class Period"), purchased products on Amazon.ca or Amazon.com. Excluded from the Amazon E-Commerce Class are

> the defendants and their parent companies, subsidiaries, and affiliates.

[5] The Defendant Amazon.com, Inc. operates as a retailer with headquarters in Seattle, Washington. The Defendant Amazon.com.ca, Inc. and the other Defendants are subsidiaries of Amazon.com, Inc. Amazon.com.ca, Inc. operates the online stores www.amazon.ca [Amazon.ca].

[6] Both Amazon.ca and the online stores operated by Amazon.com Services, LLC [Amazon.com] have terms and conditions for the use of their services called "Conditions of Use". Customers are required to agree to the Conditions of Use when they create an account with Amazon.ca and Amazon.com and each time they make an order under that account with these online stores.

[7] Ms. Difederico has accounts with both Amazon.ca and Amazon.com, and purchased products through each of these accounts. In 2016, she created her account on Amazon.ca and subsequently by June 23, 2021 had placed over 285 orders with Amazon.ca for various products. Such orders continued to be placed after the underlying action was commenced and this motion was filed.

[8] From October 24, 2014 until March 30, 2022, the Conditions of Use for Amazon.ca [2014 Conditions of Use], included the following dispute resolution and arbitration clause [2014 Arbitration Clause]:

> 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.
>
> [...]
>
> 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.

[9] The 2014 Conditions of Use also included a choice of law clause that read as follows:

> APPLICABLE LAW
>
> (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.

> For Quebec consumers: These Conditions of Use and any dispute of any sort that might arise between you and Amazon.ca shall be governed by the laws of the Province of Quebec, without reference to its conflict of laws provisions, and the laws of Canada applicable therein, and any disputes will be submitted to the courts of competent jurisdiction of the District of Montreal (Quebec). [...]

[10] Similar dispute resolution and choice of law clauses were found in the Conditions of Use applicable to Amazon.com until May 3, 2021. As of May 3, 2021, there is no longer a dispute resolution clause providing for arbitration as part of the Conditions of Use for Amazon.com.

[11] Amazon originally filed this motion to stay the action in favour of arbitration on April 6, 2021. The original notice of motion sought to stay Ms. Difederico's claims against both Amazon.ca and Amazon.com because of the arbitration provisions included in the dispute resolution clauses contained in the Conditions of Use for both of these online stores.

[12] On April 13, 2021, this Court ordered the stay motion to be heard prior to the certification motion in the underlying action [Sequencing Order]. The Sequencing Order was not appealed.

[13] Ms. Difederico moved to vary the Sequencing Order after becoming aware that the arbitration provision had been removed from the Amazon.com Conditions of Use. The motion to vary was dismissed on August 13, 2021 [Motion to Vary Order], and is currently under appeal.

[14] On November 3, 2021, the Federal Court of Appeal dismissed a motion by Ms. Difederico to stay the effect of the Sequencing Order and Motion to Vary Order pending determination of their appeal.

[15] The notice of motion relating to the present motion was amended on June 28, 2021 to relate only to Ms. Difederico's proposed claim relating to her purchases on Amazon.ca.

[16] Each side filed significant evidence on this motion, including from expert witnesses; however, none of the affiants were subject to cross-examination.

[17] The Defendants submitted two affidavits from Larry Matthew Raibourn, the Category Leader of Amazon.ca's Consumer Electronics business at the Defendant Amazon.com.ca Inc. The first affidavit was sworn April 2, 2021 [First Raibourn Affidavit] and the second affidavit was sworn June 4, 2021. They also provided an expert affidavit from George A. Bermann, Professor of Law at Columbia University Faculty of Law in New York, and two affidavits from Vaughn R. Walker, an arbitrator and mediator with Federal Arbitration Inc., and former Judge on the United States District Court, Northern District of California. The first Walker affidavit was sworn June 4, 2021 [First Walker Affidavit], and a supplementary affidavit was sworn September 24, 2021 [Supplemental Walker Affidavit].

[18] For the Plaintiff, Ms. Difederico submitted her own affidavit, sworn May 6, 2021. She also provided an expert affidavit from Lea Brilmayer, Professor at Yale Law School, sworn May 7, 2021 [Brilmayer Affidavit]. Additionally, there were two expert affidavits from Eric A. Posner, Professor at the University of Chicago Law School; the first affidavit was sworn June 1, 2021, and a supplementary affidavit was sworn August 24, 2021 [Supplemental Posner Affidavit]. There were also two affidavits from Krupa Shah, a lawyer with Orr Taylor LLP,

solicitors for the Plaintiffs; the first affidavit was sworn May 7, 2021, and a supplementary affidavit was sworn August 26, 2021.

[19] The motion was initially heard on February 3, 2022 and was taken under reserve.

[20] On March 30, 2022, after this motion was heard, Amazon.ca made amendments to its 2014 Conditions of Use [Amendments]. The Amendments included changes to the dispute resolution and choice of law clauses. The new dispute resolution and arbitration clause [2022 Arbitration Clause] and choice of law clause read as follows (changes underlined):

> DISPUTES
>
> 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 (1) you may assert claims in small claims court if your claims qualify and (2) if an applicable law in your province of residence gives you the right to resolve your dispute or claim before the courts of that province notwithstanding your agreement to arbitration, you may elect either to do so or proceed in arbitration.
>
> 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.
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> [...]
>
> 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.

> APPLICABLE LAW
>
> 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, except to the extent Canadian federal or provincial law says otherwise.

[21] On June 17, 2022, a case management conference [CMC] was convened to discuss the Amendments. At the CMC, it was determined that the parties should be provided with the opportunity to make further written and oral submissions as to the impact, if any, of the Amendments on the pending stay motion. During the CMC, neither party submitted that additional evidence was required.

[22] The parties filed additional submissions and a further oral hearing was held on July 29, 2022.

[23] In her written materials and orally, the Plaintiff argued that because of the Amendments, the motion should be dismissed or provision should be made to require an amended notice of motion, further evidence and still further submissions.

[24] On August 3, 2022, the parties were advised that the Court would not be implementing a further schedule to provide for the filing of additional materials beyond those already provided in connection with the Amendments. As Ms. Difederico's request arose as part of her supplementary responding submissions, the parties were advised that the court would formally address the request in its order and reasons on the stay motion.

II. Preliminary Issues

[25] As part of her submissions on the initial motion, Ms. Difederico argued that this motion should be deferred until after certification because of the removal of the arbitration clause from Amazon.com. After the Amendments, Ms. Difederico repeated her argument that the motion should be dismissed or deferred because of the more recent Amendments. As a preliminary matter, I will deal with each of these arguments.

A. *Should a decision from the motion be deferred until after certification because of removal of the arbitration clause from Amazon.com?*

[26] Ms. Difederico asserts that the stay Amazon seeks will have little impact on the certification motion as Ms. Difederico may continue in her role as a representative plaintiff notwithstanding the Court staying her individual claims relating to Amazon.ca purchases.

[27] Amazon argues that Ms. Difederico's request to adjourn is an abuse of process and a collateral attack on the Sequencing Order and the Motion to Vary Order. It asserts that the Court should not entertain this argument; I agree.

[28] As set out in *Wilson v The Queen*, [1983] 2 SCR 594 at 599, a court order stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed; it may not be attacked collaterally in a manner other than where the specific object is the reversal, variation or nullification of the order. Collateral attacks circumvent appropriate review procedures and constitute an abuse of process: *Wild v Canada*, 2006 FC 777 at para 20.

[29] As set out above, Ms. Difederico did not appeal the Sequencing Order. Ms. Difederico moved to vary the Sequencing Order; however, her request was dismissed. The Motion to Vary Order is already under appeal and will be determined in due course. A request to stay the effect of the Sequencing Order and Motion to Vary Order pending determination of the appeal was heard and dismissed by the Federal Court of Appeal for failure to establish irreparable harm.

[30] The following summary was provided by LeBlanc JA in his decision (2021 FCA 214) on the stay motion:

> [4] On July 16, 2021, the appellants sought to set aside or vary the Sequencing Order pursuant to Rule 399(2)(*a*) of the *Federal Courts Rules*, SOR/98-106 (the Rules) on the ground that the respondents, subsequent to said order, had modified the Conditions of Use agreements for customers who purchase products from the Amazon.com platform so as to allow disputes arising from the use of that platform to be resolved in litigation, instead of arbitration, and amended their stay motion accordingly to narrow it to disputes arising from the use of the Amazon.ca platform, which remained subject to binding arbitration. According to the appellants, this change, which arose subsequent to the making of the Sequencing Order, would have prevented the relief sought by the respondents in their original motion for stay. This was so, for two reasons. First, there was no longer a potential to stay the claims of the entire Amazon e-commerce class and to narrow the class proceeding in the manner originally proposed by the respondents. Second, this change in circumstances would now require the Federal Court to delve into the composition of the class members of the Amazon e-commerce class, thereby further complicating the issues on the stay motion, with the inevitable increase in costs or delay.
>
> [5] On August 13, 2021, the Federal Court dismissed the applicants' motion to vary the Sequencing Order. Although it was satisfied that the change in the Conditions of Use agreements for customers who purchase products from the Amazon.com platform was, as required by Rule 399(2)(*a*) of the Rules, a "matter" not discoverable with reasonable diligence prior to the making of the Sequencing Order, the Federal Court found that this new information would not have had a determining influence on the Sequencing Order. In particular, it ruled that said Order could still have the effect of significantly narrowing issues before

> certification, which is not scheduled to be debated until October 24, 2022, by eliminating all purchases made on the Amazon.ca platform, thereby streamlining the certification motion and saving time and costs.

[31] The motion was dismissed for failure to establish irreparable harm:

> [12] ....I fail to see how the alleged harm, which stems from an alleged error in the exercise by the Federal Court of its authority to manage the proceeding before it, qualifies as unavoidable or incurable harm. If the present appeal is granted, then the alleged harm would be cured as it would have been an error on the part of the Federal Court to allow the respondents' amended stay motion to proceed ahead of certification. If, on the other hand, the appeal is dismissed on its merits, then there could be no harm in having the respondents' stay motion proceed ahead of certification, as this course of action would have been permitted by the court order of a procedural nature upheld on appeal as having resulted from a valid exercise of discretion. ... There is always the possibility that the respondent's amended motion could proceed before the underlying appeal is heard. To avoid or mitigate the potential issues associated with that possibility, the appellants could always seek that their appeal be expedited, something they could have – but have not – done in their stay motion's materials.
>
> [13] The appellants refer to *Heller v. Uber Technologies Inc.*, 2021 ONSC 5518, [2021] O.J. No. 4316 (QL/Lexis) for the proposition that the determining rights in the absence of a *lis* between the parties constitutes irreparable harm. However, I note from that judgment that Uber brought a motion to have the proposed class proceeding stayed in favour of arbitration. That motion was brought, as was done in the present matter, as an interlocutory motion in the proposed class proceeding and appears to have been fully debated on its merits up to the Supreme Court of Canada (*Heller* at paras. 41-45). *Heller* is of no assistance to the appellants for the purposes of the present motion.

[32] The Plaintiff's argument relating to the Amazon.com amendment is nothing more than a repeat of the argument already made and determined on the motion to vary, and pending before the Federal Court of Appeal. Ms. Difederico's request for deferral on this basis is a collateral attack on the Court's earlier decisions and is denied.

B. *Should the motion be dismissed or deferred because of the Amendments?*

[33] Ms. Difederico further asserts that the motion should be dismissed or deferred because of the more recent Amendments to the 2014 Conditions of Use. She argues that the Amendments create uncertainty as to which arbitration and choice of law clauses are in effect, and over what time period. She asserts that as a matter of procedural fairness, Amazon should be required to amend its notice of motion and the parties provided with the opportunity to file further evidence and submissions to address the Amendments.

[34] Amazon argues that the changes to the arbitration and choice of law clauses are immaterial to the issues on the motion as the operative parts of those clauses remain consistent and the relief requested on the motion remains unchanged. It asserts that the Amendments do nothing more than expressly state the law that was already in effect. As set out further below, I agree with this contention.

[35] When the Amendments were brought to the Court's attention, the Court convened a CMC with the parties to discuss next steps. On agreement of the parties, the Court allowed each party to file further submissions to address the Amendments as well as to make submissions at a further oral hearing. At no time during the CMC and this initial scheduling did either party indicate that they would be seeking to file further evidence to address the Amendments. Nor was any further motion brought with such request.

[36] In the Plaintiff's written submissions and at the oral hearing, the Plaintiffs argued that as a matter of procedural fairness, Amazon should be required to file an amended notice of motion

and that a further schedule should be implemented allowing for evidence from the parties, additional submissions and a further oral hearing, beyond that already provided.

[37] The Defendants argued that an amended notice of motion and further schedule was not required as the request for relief had not changed, nor had the legal basis for the stay requested. Further, the Defendants did not propose to file any new evidence and aside from the Plaintiff arguing that the Defendants should be compelled to do so, the only additional evidence that the Plaintiff proposed she might file was a possible fact affidavit to establish that she made a purchase under the new Conditions for Use.

[38] However, the Plaintiff did not establish how any proposed evidence from Ms. Difederico would affect the issues to be determined on the motion, or that such evidence would change the result: *Scott v Cook*, 1970 CanLII 331 (ON SC), [1970] 2 OR 769; *671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59. This was particularly so in view of Amazon's agreement that the Court consider the language of the Amendments as part of its reasons.

[39] As a full opportunity to provide further submissions both orally and in writing was provided to the parties, in my view, there has been procedural fairness.

[40] The Plaintiff's request to compel an amended notice of motion and for a further schedule allowing for evidence and further submissions to be filed in connection with the Amendments is accordingly denied.

III. Issues

[41] The following issues are raised by this motion:

(a) What is the appropriate approach for considering whether a stay should be granted?

(b) Should a stay be granted?

IV. Analysis

A. *What is the appropriate approach for considering whether a stay should be granted?*

[42] As argued by the Defendants, there is a well-settled policy in Canada that compliance with commercial arbitration agreements is to be enforced by the courts to the extent such agreements are not null, void, inoperative, or incapable of performance: *Nanisivik Mines Ltd v F.C.R.S. Shipping Ltd*, [1994] 2 FC 662, 1994 CarswellNat 274 (FCA) [*Nanisivik*] at para 8. The Supreme Court has consistently held that Courts should give effect to arbitration agreements absent legislative intervention: *Seidel v TELUS Communications Inc*, 2011 SCC 15 [*Seidel*] at para 2; *TELUS Communications Inc v Wellman*, 2019 SCC 19 [*Wellman*] at para 46.

[43] This includes arbitration agreements that apply to proceedings for damages under section 36 of the *Competition Act*: *Murphy v Amway Canada Corporation*, 2013 FCA 38 [*Murphy*]; *Seidel*. The Federal Court of Appeal rejected an argument that competition law by its nature should never be the subject-matter of arbitration: *Murphy* at paras 65.

[44] Amazon contends that this policy is reflected in the *United Nations Foreign Arbitral Awards Convention Act*, RSC 1985, c 16 (2nd sup) [UNFAACA], which they assert, applies to this motion. The UNFAACA incorporates into Canadian law, the *Convention on the Recognition*

and Enforcement of Foreign Arbitral Awards, 330 UNTS 3, adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958 [Convention]. Article II(3) of the Convention states:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

[45] Similar legislation implementing the Convention has been passed by provincial legislatures either implementing the Convention in substance but not form (British Columbia, see *Seidel* at paras 17 and 28), or adopting it directly (Ontario, *International Commercial Arbitration Act, 2017*, SO 2017, c 2 Sch 5 [ICAA]).

[46] The Defendants assert that the Court has *no* residual discretion under paragraph 50(1)(b) of the *Federal Courts Act* to refuse a stay in favour of arbitration under Article II(3) of the Convention, where the dispute arguably falls within an arbitration agreement that is not null, void, inoperative or incapable of being performed: *Nanisivik* at paras 8-15; William C Graham, "The Internationalization of Commercial Arbitration in Canada: A Preliminary Reaction" (1987) 13:1 Can Bus LJ 2 at p. 26.

[47] Ms. Difederico contends that the UNFAACA does not apply to this motion. Rather, she asserts that the Court must only consider paragraph 50(1)(b) of the *Federal Courts Act*, which provides the Court with discretion to stay proceedings where it is in the interests of justice:

Stay of proceedings authorized	**Suspension d'instance**
50 (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter	50 (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :
[. . .]	[. . .]
(b) where for any other reason it is in the interest of justice that the proceedings be stayed.	b) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[48] Ms. Difederico argues that it is not in the interests of justice to grant a stay here because there is no contractual relationship on the dispute resolution clauses, the dispute resolution clauses violate public policy by barring access to justice, the dispute resolution clauses are unconscionable, and the balance of harm weighs against the stay.

[49] In order for me to frame the analysis, I will accordingly determine at the outset whether the UNFAACA applies.

(1) Does the UNFAACA Apply?

[50] Subsection 4(1) of the UNFAACA states that "the Convention applies only to differences arising out of commercial legal relationships, whether contractual or not."

[51] The Defendants argue that the ordinary and legal meaning of the term "commercial relationship" and the legislative intention underlying the enactment of the UNFAACA support an interpretation that the relationship between Amazon and Ms. Difederico falls within the UNFAACA.

[52] Ms. Difederico asserts that Amazon and Ms. Difederico's relationship is not commercial; rather, when consumers purchase goods on Amazon they are buying goods for consumption.

[53] There is no definition of "commercial relationship" within the UNFAACA or the Convention. Nor has the Court given any interpretation to this phrase of the UNFAACA.

[54] Amazon argues that conventional dictionary definitions support its argument that the relationship between the parties would fall within the meaning of a commercial relationship. It refers to the definitions of "commercial" in *Black's Law Dictionary*, which include "[o]f, relating to, or involving the buying and selling of goods" and "[r]esulting or accruing from commerce or exchange": Bryan A. Garner et al., eds, *Black's Law Dictionary*, (St. Paul, MN: Thomson Reuters, 2019) [*Black's Law Dictionary*] sub verbo "commercial". It similarly points to the definition of "e-commerce", a term used by the Plaintiffs in the name of the proposed class at issue. E-commerce is defined in *Black's Law Dictionary* as "[t]he practice of buying and selling goods and services through online consumer services and of conducting other business activities using an electronic device and the Internet".

[55] Amazon further relies on a number of cases where consumer relationships have been found to be "commercial" in certain legal contexts (*i.e.*, under tax law, a search violating the *Charter*, and tort respectively): *Marcantonio v Minister of National Revenue*, [1991] 1 CTC 2702, 1991 CarswellNat 472 (TCC.) at para 10; *R v Plant*, [1993] 3 SCR 281 at 294; *Stevenson v Clearview Riverside Resort*, [2000] OJ No 4863, 2000 CarswellOnt 4888 (ON SC) at para 21. However, none deal with the same legal context at issue here.

[56] The modern approach to statutory interpretation provides that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Wellman* at para 47.

[57] The Convention defines its scope broadly as applying to the recognition and enforcement of arbitral awards "arising out of differences between persons, whether physical or legal" (Article I(1)), and agreements to arbitrate "all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration" (Article II(1)).

[58] However, the Convention also provides that signatories may limit the application of the Convention to "legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration" (Article I(3)), an option which Canada exercised in subsection 4(1) of the UNFAACA.

[59] The Supreme Court has interpreted the purpose of the Convention as "to facilitate the enforcement of arbitration agreements by ensuring that effect is given to the parties' express intention to seek arbitration": *GreCon Dimter inc v JR Normand inc*, 2005 SCC 46 at para 43.

[60] Ms. Difederico refers the Court to the decision in *Uber v Heller*, 2020 SCC 16 [*Uber*]. In *Uber,* the Supreme Court needed to determine whether the ICAA applied to the facts of that case. Subsection 5(3) of the ICAA provided that the *Model Law* applied to "international commercial arbitration agreements and awards made in international commercial arbitrations." At paragraphs 22-27, the Supreme Court provided its approach to considering this issue, which focussed on the nature of the dispute rather than the nature of the relationship between the parties:

> [22] Section 5(3) of the *ICAA* states that the *Model Law* applies to "international commercial arbitration agreements and awards made in international commercial arbitrations". The meaning of "commercial" in this section of the *ICAA* must be the same as the meaning of "commercial" under the *Model Law*, as the latter states that it "applies to international commercial arbitration" (art. 1(1)).
>
> [23] While the *Model Law* does not define the term "commercial", a footnote to art. 1(1) provides some guidance:
>
> > The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other

> forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.
>
> (*Model Law*, art. 1(1), fn. 2)

[24] The *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General* further explains that "labour or employment disputes" are not covered by the term "commercial", "despite their relation to business":

> Although the examples listed include almost all types of contexts known to have given rise to disputes dealt with in international commercial arbitrations, the list is expressly not exhaustive. Therefore, also covered as commercial would be transactions such as supply of electric energy, transport of liquified gas via pipeline and even "non-transactions" such as claims for damages arising in a commercial context. *Not covered are, for example, labour or employment disputes and ordinary consumer claims, despite their relation to business*.
>
> (United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General*, U.N. Doc. A/CN.9/264, March 25, 1985, at p. 10 (emphasis added); see also p. 11.)

[25] Two points emerge from this commentary. First, a court must determine whether the *ICAA* applies by examining the nature of the parties' dispute, not by making findings about their relationship. A court can more readily decide whether the *ICAA* applies (or an arbitrator can more readily decide whether the *Model Law* applies) by analysing pleadings than by making findings of fact as to the nature of the relationship. Characterising a dispute requires the decision-maker to examine only the pleadings; characterising a relationship requires the decision-maker to consider a variety of circumstances in order to make findings of fact. If an intensive fact-finding inquiry were needed to decide if the *ICAA* or the *Model Law* applies, it would slow the wheels of an arbitration, if not grind them to a halt.

[26] The second point to draw is that an employment dispute is not covered by the word "commercial". The question of whether

> someone is an employee is the most fundamental of employment disputes. It follows that if an employment dispute is excluded from the application of the *Model Law*, then a dispute over whether Mr. Heller is an employee is similarly excluded. This is not the type of dispute that the *Model Law* is intended to govern, and thus it is not the type of dispute that the *ICAA* is intended to govern.
>
> [27] This result is consistent with what courts have held (*Patel v. Kanbay International Inc.*, 2008 ONCA 867, 93 O.R. (3d) 588, at paras. 11-13; *Borowski v. Fiedler (Heinrich) Perforiertechnik GmbH* (1994), 1994 CanLII 9026 (AB QB), 158 A.R. 213 (Q.B.); *Rhinehart v. Legend 3D Canada Inc.*, 2019 ONSC 3296, 56 C.C.E.L. (4th) 125, at para. 27; *Ross v. Christian & Timbers Inc.* (2002), 2002 CanLII 49619 (ON SC), 23 B.L.R. (3d) 297 (Ont. S.C.J.), at para. 11). It is also consistent with the *Model Law*'s reference to "trade" transactions, which, as Gary B. Born observes, "arguably connot[es] involvement by traders or merchants, as distinguished from consumers or employees" (*International Commercial Arbitration*, vol. I, *International Arbitration Agreements* (2nd ed. 2014), at p. 309). Further, one could draw a negative inference from the definition's omission of "employment" relations (p. 309, fn. 454). It seems unlikely to us that the drafters of the *Model Law* would have included such a thorough list of included commercial relationships and not considered whether to include "employment".

[61] Ms. Difederico asserts that *Uber* established that employment disputes and consumer claims are not commercial.

[62] Amazon asserts that *Uber* is of no assistance in interpreting the meaning of "commercial" within the context of the UNFAACA. However, even if the Court were to consider the dispute between the parties, Amazon asserts that it would conclude that it is a commercial dispute. I agree.

[63] While the FCA has interpreted the remedies available under the *Competition Act* as private rather than public claims (*Murphy* at para 66), in my view the nature of the claims made

by Ms. Difederico have a uniquely commercial character. Although the harms Ms. Difederico alleges she has suffered are those of an ordinary consumer – overpaying for goods purchased in consumer transactions – the conduct resulting in that harm has a uniquely commercial character.

[64] The thrust of Ms. Difederico's claims is that Amazon conspired with third-party sellers to fix the prices for products that are sold to consumers on Amazon platforms in breach of the *Competition Act*. In my view, Amazon has properly characterized the pith and substance of the dispute as allegations of anti-competitive conduct related to Ms. Difederico's purchases of products online, including from Amazon.ca.

[65] Ms. Difederico's claims center around allegations that Amazon has entered into commercial agreements with third-party sellers on its sites regarding the pricing of goods. In my view, these purported agreements are commercial transactions between business entities akin to a "trade transaction for the supply or exchange of goods or services" or "distribution agreement" like the examples of commercial relationships listed in the footnote to the *Model Law*: *Uber* at para 23.

[66] Although Ms. Difederico is a consumer, in my view the claims she has made have a commercial foundation.

[67] Considering the words of the UNFAACA in context, and in their grammatical and ordinary sense, with the scheme of the Act, the object of the Act, and the intention of Parliament,

along with the relationship between the parties and the nature of the dispute between the parties, in my view favours a definition of commercial in which the UNFAACA would apply.

[68] As a framework for determining stay motions under the UNFAACA has not yet been articulated by this Court, Amazon contends that the same five-part analysis that Ontario courts have used when considering stay motions under the *Arbitration Act,* 1991, SO 1991, c 17 and the ICAA should apply such that the following questions are addressed (*Haas v Gunasekaram,* 2016 ONCA 744 at para 17):

> (i) Is there an arbitration agreement?
>
> (ii) What is the subject matter of the dispute?
>
> (iii) What is the scope of the arbitration agreement?
>
> (iv) Does the dispute arguably fall within the scope of the arbitration agreement?
>
> (v) Are there grounds on which the court should refuse to stay the action?

[69] As applicable to this case, whether or not a stay should be granted, in my view, conflates into the following three questions: 1) is there an arbitration agreement in place; 2) does Ms. Difederico's claim arguably fall within the scope of the arbitration agreement; and 3) are there any grounds on which to deny the stay.

B. *Should a stay be granted?*

(1) Is there an arbitration agreement in place?

[70] With respect to the first question, I agree with Amazon, there can be no serious debate that that an arbitration agreement is in place.

[71] Ms. Difederico argues there is no binding arbitration agreement as she did not receive adequate notice of the dispute resolution terms, the dispute resolution clause on Amazon.ca is irreconcilable with the Conditions of Use on Amazon.com and any agreement is made non-mandatory by the Amendments to the dispute resolution clause. However, none of these arguments is persuasive as set out further below.

(a) *Did Ms. Difederico have adequate notice of the arbitration agreement?*

[72] Ms. Difederico relies on *Tilden Rent-A-Car Co v Clendenning* (1978) 18 OR (2d) 601, 1978 CanLII 1446 (ON CA) [*Tilden*] to argue that there was no meeting of the minds because Amazon failed to bring the 2014 Arbitration Clause to Ms. Difederico's attention.

[73] In *Tilden*, the affected party defendant signed a contract for automobile insurance coverage for damages when renting a car at the airport. The outstanding issue was whether the defendant was liable for damage caused to the automobile because of exclusionary provisions in the contract. In that case, the Court held that a party submitting a standard form printed contract for signature is responsible for taking reasonable measures to draw any unusual, stringent and onerous provisions to the attention of the party signing the contract (at paras 32-34).

[74] In my view, the circumstances here are distinct from those in *Tilden*.

[75] As noted by Judge Walker, click-through purchase contracts that provide notice that clicking constitutes acceptance of a hyperlinked agreement are a valid type of agreement under US law (Supplemental Walker Affidavit, para 27). Neither of Ms. Difederico's experts,

Professor Posner or Professor Brilmayer, contest this assertion. Similarly, click-through contracts of adhesion have been deemed valid by Canadian courts for over two decades: *Rudder v Microsoft Corp* (1999), 2 CPR (4th) 474, 1999 CanLII 14923 (ON SC) at paras 10-18; *Electronic Commerce Act, 2000*, SO 2000, c 17, subparagraph 19(1)(b)(i).

[76] In this case, there is no dispute that Ms. Difederico made an account with Amazon.ca and made numerous purchases through the Amazon.ca online stores. In doing so, she was notified that clicking through to make an account or to complete a purchase constitutes acceptance of the Terms of Use. As outlined at paragraphs 7 and 8 of the First Raibourn Affidavit:

> 7. Customers must create an Amazon account to make purchases on Amazon.ca Stores, at which point the customer agrees to the Conditions of Use. The process that a customer follows today is materially similar to the process that a customer would have followed throughout the Class Period. For example, on the Amazon.ca website, a customer first creates an account by clicking on the "New customer? Start here." icon. After clicking on that icon, a Canadian customer is taken to a "Create account" sign-up page, which states: "By creating an account, you agree to Amazon's Conditions of Use and Privacy Notice". In that statement, the terms "Conditions of Use" and "Privacy Notice" are highlighted in blue font and contain hyperlinks to the Conditions of Use and Privacy Notice. [...]
>
> 8. In addition, before a customer makes a purchase on the Amazon.ca website, the customer is taken to a "Review your order" page, which states: "By placing your order, you agree to Amazon.ca's privacy notice and conditions of use". The terms "privacy notice" and "conditions of use" are highlighted and in blue font and contain hyperlinks to the Privacy Notice and Conditions of Use.

[77] Even after the present litigation was initiated and allegations were made with respect to the Conditions of Use, Ms. Difederico continued to make purchases through Amazon.ca.

[78] The Conditions of Use, including the 2014 Arbitration Clause were accessible via hyperlink, and Ms. Difederico was free to take as much time as needed to review them. The 2014 Arbitration Clause is not in fine print, and is preceded by a "DISPUTES" heading. The portion of the clause requiring that disputes be referred to arbitration is in bold font and states that disputes "will be resolved by binding arbitration, rather than in court." Similarly structured arbitration clauses have been found to give adequate notice to consumers: *Kanitz v Rogers Cable Inc* (2002), 58 OR (3d) 299, 2002 CanLII 49415 (ON SC) at paras 30-33. In my view, the same conclusion should be reached here.

[79] The Plaintiff asserts that there is no evidence before the Court relating to the acceptance by Ms. Difederico of the 2022 Conditions of Use. However, the arbitration clause found in the 2022 Conditions of Use contains the same operative language as the arbitration clause included in the 2014 Conditions of Use, which Ms. Difederico voluntarily agreed to when she set up her account and each time she made her over 285 subsequent purchases. The 2014 Conditions of Use gave notice to users that modifications could be made to the clauses of the 2014 Conditions of Use as follows:

> Please review our other policies, such as our pricing policy, posted on Amazon.ca site. These policies also govern your use of Amazon.ca Services. We reserve the right to make changes to our site, policies, Service Terms, and these Conditions of Use at any time. If any of these conditions shall be deemed invalid, void, or for any reason unenforceable, that condition shall be deemed severable and shall not affect the validity and enforceability of any remaining condition. [Emphasis in original]

[80] As the operative portion of the 2014 Arbitration Clause and 2022 Arbitration Clause remains the same, I am of the view that it can be concluded that an arbitration agreement remains

in place under either version of the arbitration clause (hereinafter the 2014 Arbitration Clause and 2022 Arbitration Clause will be referred to collectively as the Arbitration Clauses).

(b) *Is the arbitration agreement rendered inoperative or irreconcilable because of the Conditions for Use on Amazon.com?*

[81] Ms. Difederico argues that the Conditions of Use on Amazon.com and Amazon.ca must be read together such that the amended Amazon.com Conditions of Use create an irreconcilable conflict with the Amazon.ca Arbitration Clause. She relies on the opinion of Professor Posner in support of her argument. However, this argument cannot succeed under either US or Canadian law based on the language on the face of the documents.

[82] While I agree with Professor Posner that the definition of affiliate in the Conditions of Use include both Amazon.ca and Amazon.com (Supplemental Posner Affidavit, para 19), in my view, Professor Posner's opinion that this leads to the conclusion that the Conditions of Use for both Amazon.ca and Amazon.com apply to all purchases made through either website is unpersuasive. Particularly, as this approach ignores the language of the introductory clause in each of the Conditions of Use, which limits the document to services provided by the relevant Amazon entity.

[83] As stated by Judge Walker "[e]ach purchase is a separate transaction governed by the specific [Conditions of Use] linked to that purchase." The Amazon.com Conditions of Use apply only to Amazon.com purchases, and the Amazon.ca Conditions of Use apply only to Amazon.ca purchases.

[84] As noted by Judge Walker, the Amazon.ca Conditions of Use do not incorporate by reference the Amazon.com Conditions of Use and there is no reference whatsoever to the Amazon.com Conditions of Use in the Amazon.ca Conditions of Use. The Amazon.ca Conditions of Use are a separate, free-standing document that does not depend on or refer to the Amazon.com Conditions of Use. Each purchase is a separate, distinct transaction, with a separate order form, separate consideration, its own delivery date and a distinct hyperlinked Conditions of Use. There is no basis to deem the Amazon.ca Conditions of Use to be part of, or integrated with, the Amazon.com Conditions of Use. The US case law referenced by Professor Posner is not of assistance.

[85] Further, even if the matter were to be determined under Canadian law, I find that the case cited by Ms. Difederico (*Graves v Correactology Health Care*, 2018 ONSC 4263 [*Graves*]) does not assist her. In *Graves*, the Court was faced with contradictory clauses within the body of the same contractual agreement. This is not the situation here.

[86] I do not find that the Amazon.com Conditions of Use render the Amazon.ca Conditions of Use irreconcilable.

(c) *Do the Amendments render the application of the arbitration clause optional?*

[87] Ms. Difederico's further argument that the Amendments render the arbitration language non-mandatory is also not persuasive.

[88] The 2022 Arbitration Clause simply sets out in express terms the legal principle already in place – i.e., that if an applicable law of the province of residence gives a right to resolve the dispute or claim before the courts of that province, notwithstanding the agreement to arbitrate, there is a right to proceed in that manner.

[89] However, as Amazon notes no such express statutory language is applicable in this case nor has any been asserted by Ms. Difederico. While Ms. Difederico raises the language of section 36 of the *Competition Act*, the Federal Court of Appeal has already recognized that Parliament has not restricted or prohibited the enforceability of arbitration agreements in claims arising under the *Competition Act*. As held by the Court in *Murphy* at paragraph 60, "...the Competition Act does not contain language which would indicate that Parliament intended that arbitration clauses be restricted or prohibited. ... 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."

[90] Further, I do not consider Ms. Difederico's reference to *Patel v Kanbay International Inc*., 2008 CanLII 21222 (ON SC) [*Patel*] to be applicable. In *Patel*, the arbitration clause related to an aspect of the agreement (i.e., shareholders agreement) that was not in issue for the action. The Court was able to separate issues that were covered by mandatory arbitration from those that were not. This is not the circumstance of this case.

[91] In my view, there is nothing arising from the language of the 2022 Arbitration Clause that makes it non-binding or unenforceable.

(2) Does Ms. Difederico's claims fall within the agreement?

[92] The threshold under this part of the analysis is low: the Court need only determine that it is arguable that the dispute falls within the arbitration provision: *Campney & Murphy v Bernard & Partners*, 2002 FCT 1136 at para 18; *Kore Meals LLC v Freshii Development LLC*, 2021 ONSC 2896 at para 15.

[93] The Claim relates to allegations that Amazon and its third-party sellers entered into anti-competitive agreements to fix the retail e-commerce prices in Canada, thereby causing loss or damage to Ms. Difederico who purchased products on Amazon.ca.

[94] The operative part of the Arbitration Clauses state that "[a]ny 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". The Conditions of Use define Amazon.ca Services as including shopping for products at Amazon.ca.

[95] Amazon asserts, and I agree, the scope of the Arbitration Clauses (in either form) is broad and covers all matters that pertain to purchases made on Amazon.ca. This includes Ms. Difederico's claim in respect of her Amazon.ca purchases.

(3) Are there Grounds on which the court should refuse to grant a stay?

[96] The general approach in cases where the validity of an arbitration agreement or the jurisdiction of the arbitrator is challenged is to refer the issue to the arbitrator, subject to limited

exceptions: *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 [*Dell*] at paras 84-86. As recently summarized by Justice Fothergill in *General Entertainment and Music Inc v Gold Line Telemanagement Inc*, 2022 FC 418 at paragraphs 37-38, there are two limited exceptions that emerge from *Dell*, namely where the challenge to the validity of the agreement and/or the arbitrator's jurisdiction concerns a question of law alone and where a question of mixed law and fact involve facts that entail only a superficial examination of documentary proof in the record and the Court is convinced that the challenge is not a delay tactic and will not prejudice the recourse to arbitration:

> [37] Where a party seeks to avoid an arbitration clause by challenging the validity of the agreement and/or the jurisdiction of the arbitrator, the Court should generally permit the matter to first be determined by an arbitrator (*Dell* at para 84). In *Uber Technologies Inc v Heller*, 2020 SCC 16 [*Uber*], the Supreme Court of Canada summarized the doctrine established in *Dell* as follows:
>
> > The doctrine established in *Dell* is neatly summarized in its companion case, *Rogers Wireless Inc. v. Muroff*, [2007] 2 S.C.R. 921, at para. 11: The majority of the Court held that, when an arbitration clause exists, any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone. Where a question concerning jurisdiction of an arbitrator requires the admission and examination of factual proof, normally courts must refer such questions to arbitration. For questions of mixed law and fact, courts must also favour referral to arbitration, and the only exception occurs where answering questions of fact entails a superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration.
>
> [38] With respect to what constitutes superficial review, the essential question is whether the necessary legal conclusions can

> be drawn from facts that are either evident on the face of the record or undisputed by the parties (*Uber* at para 36).

[97] In *Uber*, the Court set out a third exception in addition to the two competence-competence exceptions set out in *Dell*. A Court should not refer a *bona fide* challenge to the validity of an arbitration agreement or to an arbitrator's jurisdiction to the arbitrator if doing so would make it impossible for one party to arbitrate or for the challenge to be resolved. As stated in *Uber* at paragraphs 38-46:

> [38] The underlying assumption made in *Dell* is that if the court does not decide an issue, then the arbitrator will. As *Dell* says, the matter "must be resolved first by the arbitrator" (para. 84). *Dell* did not contemplate a scenario wherein the matter would never be resolved if the stay were granted. This raises obvious practical problems of access to justice that the Ontario legislature could not have intended when giving courts the power to refuse a stay.
>
> [39] One way (among others) in which the validity of an arbitration agreement may not be determined is when an arbitration is fundamentally too costly or otherwise inaccessible. This could occur because the fees to begin arbitration are significant relative to the plaintiff's claim or because the plaintiff cannot reasonably reach the physical location of the arbitration. Another example might be a foreign choice of law clause that circumvents mandatory local policy, such as a clause that would prevent an arbitrator from giving effect to the protections in Ontario employment law. In such situations, staying the action in favour of arbitration would be tantamount to denying relief for the claim. The arbitration agreement would, in effect, be insulated from meaningful challenge (see Jonnette Watson Hamilton, "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?" (2006), 51 *McGill L.J.* 693; Catherine Walsh, "The Uses and Abuses of Party Autonomy in International Contracts" (2010), 60 *U.N.B.L.J.* 12; Cynthia Estlund, "The Black Hole of Mandatory Arbitration" (2018), 96 *N.C. L. Rev.* 679).
>
> [40] These situations were not contemplated in *Dell*. The core of *Dell* depends on the assumption that if a court does not decide an issue, the arbitrator will.
>
> [41] Against these real risks of staying an action in favour of an invalid arbitration, one could pit the risk of a plaintiff seeking to

obstruct an arbitration by advancing spurious arguments against the validity of the arbitration. This concern animated *Dell* (see paras. 84, 86).

[42] In our view, there are ways to mitigate this concern that make the overall calculus favour departing from the general rule of referring the matter to the arbitrator in these situations. Courts have many ways of preventing the misuse of court processes for improper ends. Proceedings that appear vexatious can be handled by requiring security for costs and by suitable awards of costs. In England, courts have awarded full indemnity costs where a party improperly ignored arbitral jurisdiction (Hugh Beale, ed., *Chitty on Contracts* (33rd ed. 2018), vol. II, *Specific Contracts*, at para. 32-065; *A. v. B. (No.2)*, [2007] EWHC 54 (Comm.), [2007] 1 All E.R. (Comm.) 633, at para. 15; *Kyrgyz Mobil Tel Limited v. Fellowes International Holdings Limited* [2005] EWHC 1329, 2005 WL 6514129 (Q.B.), at paras. 43-44). Further, if the party who successfully enforced an arbitration agreement were to bring an action, depending on the circumstances they might be able to recover damages for breach of contract, that contract being the agreement to arbitrate (Beale, at para. 32-052; *West Tankers Inc. v. Allianz SpA*, [2012] EWHC 854 (Comm.), [2012] 2 All E.R. (Comm.) 395, at para. 77).

[43] Moreover, *Dell* itself makes clear that courts may refer a challenge to arbitral jurisdiction to the arbitrator if it is "a delaying tactic", or would unduly impair the conduct of the arbitration proceeding (para. 86). This provides an additional safeguard against validity challenges that are not *bona fide*.

[44] How is a court to determine whether there is a *bona fide* challenge to arbitral jurisdiction that only a court can resolve? First, the court must determine whether, assuming the facts pleaded to be true, there is a genuine challenge to arbitral jurisdiction. Second, the court must determine from the supporting evidence whether there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator.

[45] While this second question requires some limited assessment of evidence, this assessment must not devolve into a mini-trial. The only question at this stage is whether there is a real prospect, in the circumstances, that the arbitrator may never decide the merits of the jurisdictional challenge. Generally, a single affidavit will suffice. Both counsel and judges are responsible for ensuring the hearing remains narrowly focused (*Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 S.C.R. 87, at paras. 31-32). In considering any attempt to expand the record, judges must

> remain alert to "the danger that a party will obstruct the process by manipulating procedural rules" and the possibility of delaying tactics (*Dell*, at para. 84; see also para. 86).
>
> [46] As a result, therefore, a court should not refer a *bona fide* challenge to an arbitrator's jurisdiction to the arbitrator if there is a real prospect that doing so would result in the challenge never being resolved. In these circumstances, a court may resolve whether the arbitrator has jurisdiction over the dispute and, in so doing, may thoroughly analyze the issues and record.

[98] Ms. Difederico argues that the circumstances here justify a finding under the *Uber* exception. Her arguments, in my view, raise a *bona fide* challenge to both the jurisdiction of the arbitrator and the validity of the arbitration agreement. First, Ms. Difederico argues that the arbitrator cannot apply the *Competition Act*. Rather, the choice of law clause requires the arbitrator to apply US law. She argues that this will prevent access to remedies for violations involving commerce in Canada. Second, she asserts that the cost of litigating the case in a US arbitration under US law without a class action will be prohibitive. She argues that the arbitration agreement will prohibit access to justice and is therefore contrary to public policy and that it is also unconscionable. I will deal with each of these arguments in turn.

(a) *Will Ms. Difederico be prevented from access to a remedy?*

[99] I find it important at this stage to refer to the decision of the British Columbia Supreme Court [BCSC] in *Williams v Amazon.com Inc*., 2020 BCSC 300 [*Williams*], which is the closest decision, in my view, to the facts before this court. In *Williams*, the BCSC considered whether claims under the *Competition Act* were arbitrable under the 2014 Arbitration Clause. In that case, like this one, each party tendered expert opinion evidence on the issue of whether, in light of the choice of law language, an arbitrator would have jurisdiction to grant remedies under the *Competition Act* and each party's expert commented on *Mitsubishi v Soler Chrysler-Plymouth*,

473 US 614 (1985) [*Mitsubishi*]. However, Justice Horsman found that in light of the principle of competence-competence, it was not appropriate for the Court to finally determine whether an arbitrator appointed under the 2014 Arbitration Clause would have jurisdiction to grant relief under the *Competition Act*. Rather, that was something for the arbitrator to determine. As stated at paragraphs 65-69 of *Williams*:

> [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 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.

[100] Justice Horsman then went on to consider whether the 2014 Arbitration Clause was contrary to public policy because it mandated arbitration in the US at the risk of the claimant's remedies under the *Competition Act.* While Justice Horsman found that the prospect that an arbitrator may lack jurisdiction to award damages under section 36 of the *Competition Act* was not a ground for finding the 2014 Arbitration Clause void, inoperative or incapable of performance, he premised this finding on the understanding that the claimant would be entitled to some form of remedy under US antitrust law if an award under the *Competition Act* was not available. As stated by Justice Horsman at paragraphs 70-71, 79-81 of his decision:

> [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.

[...]

[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. ... 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. [Emphasis added]

[101] The Plaintiff's arguments in this case regarding the choice of law clause and the *Competition Act* are the same type of arguments that were addressed by Justice Horsman in *Williams*. Ms. Difederico's expert, Professors Brilmayer, opines that the choice of law clause operates to exclude Canadian law completely. A public policy exception only allows the arbitrator to decline to enforce foreign law in favour of US law, not vice versa (Brilmayer Affidavit, paras 26-28).

[102] However on the issue of access to remedies, the Plaintiff, in this case, has introduced evidence from US experts to indicate that should an ability to award damages under section 36 of the *Competition Act* be considered outside the jurisdiction of the arbitrator, as a matter of law, damages under US antitrust law – i.e., through the *Foreign Trade Antitrust Improvements Act* 15 US Code §6a [FTAIA] – would not be available to Ms. Difederico for a claim involving commerce in Canada.

[103] Amazon argues that the availability of relief under the FTAIA is beside the point, as the choice of law clause will not operate to exclude Canadian law.

[104] Professor Bermann asserts that *Mitsubishi* holds that a US seated tribunal will entertain a Canadian *Competition Act* claim if it is asserted and if the arbitration clause is drafted broadly enough to accommodate it. Claims within the scope of an arbitration clause will be determined in accordance with the law giving rise to the claim. In his view, a choice of law clause will not prevent a tribunal from entertaining a non-contractual claim (such as an antitrust or competition law claim), and will not be an obstacle to the tribunal's enforcement of Ms. Difederico's

Competition Act claims under the competition law of Canada. Counsel for Amazon also gives an undertaking that it will not argue in an arbitration that the *Competition Act* claims are precluded by the choice of law clause.

[105] As a matter of public policy, Professor Bermann also asserts that it is open to an arbitrator to apply the public policy of another jurisdiction. In his view, absent a conflict between Canadian and US public policy, the arbitrator would not hesitate to apply Canadian public policy in an arbitration.

[106] The Defendants further refer to the recent decision of the BCSC in *Petty v Niantic Inc*, 2022 BCSC 1077 [*Petty*], which also considered the application of the *Uber* exception to the competence-competence principle in a class proceeding involving the *Competition Act* and a US choice of law clause. In *Petty*, the Court found that the issue of whether the *Competition Act* would be applied in arbitration raised a question of mixed fact and law with more than a superficial analysis of the facts that should be referred to the arbitrator. Referring to *Uber*, the Court stated the following at paragraphs 108-112:

> [108] In *Uber* at para. 46 the Supreme Court stated that "a court should not refer a *bona fide* challenge to an arbitrator's jurisdiction to the arbitrator if there is a real prospect that doing so would result in the challenge never being resolved". The Supreme Court stated that in these circumstances, a Canadian court may resolve whether the arbitrator has jurisdiction over the dispute and, in so doing, may thoroughly analyze the issues and record: *Uber* at para. 46.
>
> [109] With respect to what constitutes a "real prospect", the Supreme Court in *Uber* commented that the up-front arbitration fees in that case "imposed a brick wall between Mr. Heller and the resolution of any of the claims he has levelled against Uber" and that "[a]n arbitrator cannot decide the merits of Mr. Heller's contention without those – possible unconscionable – fees first being paid": at para. 47. For this reason, the Supreme Court

> determined that it was better for that court to determine issues of the validity of the arbitration agreement at issue rather than referring them to arbitration in the Netherlands: *Uber* at paras. 47-48.
>
> [110] In this case expert evidence has been filed by both parties concerning an arbitrator's ability to decide his or her jurisdiction to address the plaintiffs' *Competition Act* claims. In *Uber* the Supreme Court confirmed that adducing expert evidence as to foreign law concerning an arbitrator's jurisdiction over the dispute at issue prevented the Canadian court from deciding the jurisdictional issue – which should be decided by the arbitrator in the first instance pursuant to the competence-competence principle: *Uber* at paras. 49-50 referring to *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34.
>
> [111] In *Dell* at para. 84, the Supreme Court set out the general rule that "in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator", with an exception being where the challenge was based solely on a question of law. The Supreme Court stated that where the challenge required the production and review of factual evidence the courts should normally refer the case to arbitration as arbitrators have the same resources and expertise of the courts. Finally, the Supreme Court stated that where questions of mixed fact and law are concerned, unless the questions of fact require only superficial consideration of the documentary evidence in the record, the case should be referred to arbitration: *Dell* at paras. 84-85.
>
> [112] There is no dispute that determining the jurisdiction of an arbitrator to decide claims under the *Competition Act* involves mixed questions of fact and law. In my view determining questions of fact concerning the impugned marketing activities of the defendants involving the sale of loot boxes will require more than a superficial analysis of the case and therefore engages the competence-competence principle. In these circumstances, I conclude that determining the issue of jurisdiction should be a matter for the arbitrator in first instance.

[107] Ms. Difederico argues that *Petty* is distinguishable from the facts of this case for two reasons. First, the Court in *Petty* found that the arbitration provision was fair, and not contrary to

public policy, because it contained *inter alia* an opt-out provision, where no such provision is contained in the clauses at issue here. As stated in *Petty* at paragraph 89:

> [89] As outlined in my reasons above dealing with the issue of unconscionability, the Arbitration Agreement does not present an insurmountable economic or procedural barrier to the plaintiffs. In summary, the plaintiffs have the choice to opt-out of the Arbitration Agreement within 30 days and after that period of time has elapsed, have the choice of whether to proceed to small claims court or to arbitration – both in their home jurisdiction. The costs of an arbitration, including filing and arbitrator's fees, are to be bourn by the defendants. As well, the plaintiffs are entitled to be reimbursed by the defendants for their legal fees if they prevail in their case and are not subject to the defendants' legal fees if they are not successful. In addition, a decision is timely in that arbitration decisions under the AAA Rules are to be made within 14 or 30 calendar days depending on the type of hearing. In my view, an arbitration in accordance with the Arbitration Agreement is sufficiently tailored to avoid undue hardship and therefore is not unenforceable for public policy reasons.

[108] Second, she asserts that the Court also refrained from finding unconscionability in *Petty* because the subject matter at issue involved the online purchase of computer games that were considered frivolous and distinguishable from the serious subject matter at issue in *Uber* (employment relationship).

[109] In my view, these asserted factual distinctions do not take away from the principle applied in *Petty* that adducing expert evidence as to foreign law concerning an arbitrator's jurisdiction over the dispute at issue should render the jurisdictional issue to be finally decided by the arbitrator pursuant to the competence-competence principle, absent exceptional circumstances.

[110] As set out in *Uber*, there must be a "real prospect" that referral of an issue of jurisdiction or validity to an arbitrator would result in the challenge not being resolved.

[111] Amazon asserts that the entitlement to remedies should not be determined by the Court on this motion (First Walker Affidavit, paras 14-16). They argue that this issue requires a determination of the merits and does not address the issue of forum.

[112] I agree that to meet the exception set out in *Uber* should not require the complex analysis presented to the Court here. Rather, it must be clear on the record that deferral to arbitration raises a real prospect that there would be a denial of access to justice. A mere possibility, in my view, is not enough to overcome the competence-competence principle.

[113] In this case, even if the Court were to accept that US antitrust law may apply, a determination that seems remote, in my view, in light of the expert evidence provided, the undertaking given by Amazon, and the Amendments to the choice of law clause, which support Amazon's position, there remains a dispute as to whether Ms. Difederico would be disentitled to a remedy.

[114] While the experts agree that there is no recovery under the FTAIA for antitrust or competition law violations involving commerce in Canada, they do not agree on whether the "domestic effects exception" could apply to allow Ms. Difederico to obtain relief under an amended claim. The exception requires a claimant to show the anticompetitive conduct has a

direct, substantial, and reasonably foreseeable effect on American commerce and that the US effect "gives rise" to a US antitrust claim.

[115] As acknowledged by Professor Posner, Ms. Difederico's claim could be amended to reflect the claims made in a similar lawsuit brought in the US. There is conflicting expert evidence as to what effect this would have and whether this would satisfy the "domestic effects exception". These complex issues of fact and law are beyond the allowable review to be made by this Court.

[116] On the basis of the record before me, it is not clear that there would be no relief available to Ms. Difederico if the matter were to proceed to arbitration or that the choice of law clause would deny Ms. Difederico access to justice.

(b) *Is the cost of arbitration prohibitive?*

[117] I also cannot agree with Ms. Difederico's further argument that she would be denied access to justice because of the cost of advancing her arbitration claim outside of the "class" context.

[118] The Arbitration Clauses provide that Ms. Difederico is only required to pay a relatively modest up-front administrative fee of $200 to initiate arbitration. Amazon is bound under the Arbitration Clauses 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 small claims court where the claims fall within the jurisdiction of that court.

[119] Thus, Ms. Difederico is not precluded from advancing a claim against Amazon by virtue of the terms of the clause itself. Any barrier Ms. Difederico faces is due to the nature of the claims she raises.

[120] Ms. Difederico argues that the small expense of arbitration is immaterial as compared to the other large expenses of arbitrating her claim. She refers to the litigation funding agreement and related decision noting the millions of dollars that the claim will cost in litigation. Similarly, she refers to the evidence of Professor Posner who opined on the significant costs associated with US antitrust litigation.

[121] Given that the *Competition Act* does not include any legislative intervention to prevent class action waivers or arbitration clauses, and no such legislative intervention has been proposed under US law; in my view, the legislative scheme does not favour a finding that the Arbitration Clauses are otherwise contrary to public policy.

(c) *Are the Arbitration Clauses unconscionable?*

[122] In order to set aside a contract for unconsionability under Canadian law, a party must establish: (i) inequality of bargaining power, and (ii) an improvident bargain: *Uber* at paras 64-66.

[123] Ms. Difederico argues that there is an extreme inequality of bargaining power in this case, as Amazon drafted the dispute resolution clauses and it was not open to her to negotiate their terms. Ms. Difederico argues that she was unable to identify or appreciate the significance of the dispute resolution clauses on their own.

[124] For the reasons set out earlier, it is my view that Ms. Difederico should be held to the terms of the Arbitration Clauses. I do not agree that the nature of the goods offered by Amazon would put the facts of this case on par with the employment agreement considered in *Uber*. As similarly found in *Petty*, I am not satisfied that the nature of the goods offered on Amazon could be classified as important elements of everyday life that would make Ms. Difederico particularly dependant or vulnerable (*Petty* at paragraphs 59-60):

> [59] I am not satisfied that an inequality of bargaining power justifying a finding that the arbitration clause is unconscionable is made out on the facts of this case. As the Supreme Court in *Uber* and the British Columbia Court of Appeal in *Pearce* indicated, an analysis of unconscionability focuses on the vulnerability of the weaker party and unfairness of a contract or one of its terms.
>
> [60] Unlike the nature of the service at issue in *Douez* (communication and social networking) and *Uber* (an employment relationship), there is no evidence that use of the games Pokémon Go and Harry Potter: Wizards Unite, or the ability to purchase loot boxes within those games, are important elements of everyday life which make the plaintiffs particularly dependant or vulnerable in terms of their need to access the game platforms. The games themselves are free and the user has the choice whether to purchase loot boxes.

[125] Further, in *Uber* the arbitration clause itself barred Mr. Heller from accessing arbitration for *any* type of claim Mr. Heller wanted to raise.

[126] Here, Ms. Difederico's argument arises not from the Arbitration Clauses, but from the type of claim she now seeks to raise. This means that rather than the bargain being improvident at the time it was made, as was the case in *Uber* (at para 74), the Plaintiff's argument is that the Arbitration Clauses are now unconscionable in light of her particular claims. In my view, this argument is not supported by the law of unconsionability.

V. Conclusion

[127] For all of these reasons, it is my view that Ms. Difederico's claim relating to her purchases on Amazon.ca should be stayed in favour of arbitration.

[128] As set out above, it is my view that there is an arbitration agreement in place and that Ms. Difederico's claims against Amazon.ca arguably falls within this agreement under either the 2014 Conditions of Use or the 2022 Conditions of Use. The UNFAACA applies as does the competence-competence principle and there is no residual discretion to not refer the matter to arbitration.

[129] Any *bona fide* challenge to the jurisdiction of the arbitrator to address the *Competition Act* claims and to address the validity of the Arbitration Clauses should be determined by the arbitrator and there are no overriding public policy or unconscionability arguments to avoid arbitration in this case.

VI. Costs

[130] The parties have raised the issue of costs, particularly as it relates to the further hearing and submissions that were necessitated because of the Amendments. In view of the outcome of the motion, I consider it appropriate to allow short submissions as to costs to follow this Order. Provision for this will accordingly be made as part of my Order.

ORDER IN T-445-20

THIS COURT ORDERS that

1. Ms. Difederico's claims relating to her purchases on the Amazon.ca store are stayed in favour of arbitration.

2. The parties shall have thirty (30) days from the date of this Order to make submissions on costs, which shall not exceed six (6) pages each.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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