Kluwer Arbitration Blog

Has Forum Non Conveniens Gone the Way of the VCR Player? Canadian Court finds the Doctrine Obsolete in Age of Virtual Hearings

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The COVID-19 pandemic has normalized virtual hearings. According to the Ontario Superior Court, this has made the doctrine of *forum non conveniens* obsolete. In *Kore Meals LLC v Freshii Development LLC*, 2021 ONSC 2896, in the context of an application to stay Canadian court proceedings in favour of arbitration in the U.S., the Ontario Superior Court questioned whether the doctrine of *forum non conveniens* has "gone the way of the VCR player". The Court answered yes. "In the age of zoom… no one forum is more convenient than another".

The core finding of this decision is that *forum non conveniens* no longer applies to stay applications because all forums are equally convenient for virtual hearings. While this case highlights some of the virtues of virtual hearings, it also muddies the water with respect to stay applications in Ontario. Until this decision, *forum non conveniens* has not been part of the analysis to request a stay of court proceedings in favour of arbitration. *Forum non conveniens* (Latin for "inconvenient forum") is a common law doctrine that allows a court to stay an action where there is an appropriate and more convenient alternative forum to try the action.

Key Facts

The Plaintiff, Kore Meals LLC, a Houston-based company, and the Defendant, Freshii Development LLC ("Freshii Development"), a Chicago-based subsidiary of Toronto-based Freshii Inc, were parties to a contract to develop Freshii franchises in Texas. A dispute arose and the Plaintiff claimed breach of contract and unjust enrichment.

The contract contained an arbitration clause requiring disputes to be submitted to arbitration under the American Arbitration Association ("AAA") "in the city where Freshii Development has its business address", which was Chicago.

The Plaintiff commenced an action in the Ontario Superior Court, suing Freshii Development as well as its parent company, Freshii Inc, though the parent was not party to the contract. The Defendants moved to stay proceedings in Ontario in favour of arbitration in Chicago.

Decision of the Ontario Superior Court

The Ontario Superior Court held that the proceeding should be stayed in favour of arbitration in Chicago.

The Court found that Ontario's *International Commercial Arbitration Act* ("*ICAA*") applied to the case, and underlined the settled doctrine of competence-competence in Canada. Quoting the Supreme Court of Canada ("SCC") in *Uber Technologies Inc v Heller*, 2020 SCC 16 ("*Uber*"), the Court stated "in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by 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."

In *Uber*, the SCC held that Uber's standard agreement clause requiring an Ontario Uber driver to pursue arbitration in the Netherlands was unconscionable. The ruling sparked lively debate about its impact on the competence-competence principle, including on this blog. In *Uber*, the SCC re-affirmed the general competence-competence principle, but created an exception to allow court proceedings where an arbitration clause was unconscionable.

In *Kore Meals*, to determine whether to stay the proceeding in favour of arbitration in Chicago, the Court applied a five-part test from *Haas v Gunasekaram*, 2016 ONCA 744. This test is derived from the domestic *Arbitration Act*, which was found to be, "in effect, the same as the prevailing test" under the *ICAA*. The Court considered these five questions:

1. Is there an arbitration agreement?
2. What is the subject matter of the dispute?
3. What is the scope of the arbitration agreement?
4. Does the dispute arguably fall within the scope of the arbitration agreement?
5. Are there grounds on which the court should refuse to stay the action?

The Court found that the action should not be stayed unless the fifth question is answered in the affirmative – "*i.e*. unless there is some cogent reason for ignoring the express terms of the arbitration clause."

The Plaintiff submitted that Chicago was an inappropriate forum because the Defendant merely had a post box and did not carry on business there. The Plaintiff argued that Chicago was an unfair and impractical forum, or a *forum non conveniens*, because holding a hearing in Chicago would be unnecessarily burdensome and costly for both parties. Instead, Ontario would be the fairest and most logical jurisdiction, especially considering the addition of the non-signatory, Freshii Inc, to the proceeding. The force of these arguments was diminished by the fact that the hearing was being held virtually.

The Defendant countered that the terms of the contract stipulated that the place of arbitration was where the defendants' business address was located. Further, the Defendant pointed out that the Plaintiff knew that Chicago would be the seat of any arbitration, given the contract's explicit identification of the Chicago address.

The Court agreed with the Plaintiff that *forum non conveniens*-type factors can be considered to determine whether the arbitral venue is unfair or impractical. In Ontario, *forum non conveniens* factors include "the domicile of the parties, the locations of witnesses and of pieces of evidence,

parallel proceedings, juridical advantage, the interests of both parties, and the interests of justice".

The Court nevertheless held that these factors do not apply in the age of Zoom. No location is any more or less convenient than another. Documents are filed digitally, witnesses are examined remotely, and hearings are held via videoconference. Neither location is better for access to justice because "Chicago and Toronto are all on the same cyber street," meaning that they are equally accessible to both parties. As a result, the law governing "contests of competing forums" is "all but obsolete" and judges "can now say farewell to what was until recently a familiar doctrinal presence in the courthouse."

Analysis & Impact

Competence-competence principle

This case enforces important concepts in Canadian law with respect to the doctrine of competence-competence, as well as the court's willingness to stay court proceedings in favour of arbitration where parties have contractually agreed to resolve their disputes by arbitration.

Considering forum in stay applications

This case diverges from Canadian jurisprudence by applying *forum non conveniens* to an application to stay court proceedings in favour of arbitration. In *TELUS Communications Inc v Wellman* ("*Telus*"), cited by the Court in this case, the SCC did not engage in a *forum non conveniens* analysis. Rather, the SCC simply noted that Ontario's domestic *Arbitration Act* permits courts to refuse a stay of proceedings in five enumerated circumstances where "it would be either unfair or impractical to refer the matter to arbitration" (*Telus*, para 65). These five circumstances are the following:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

The SCC's remarks in *Telus* about the fairness and practicability concerns underlying these statutory factors to refuse a stay of proceedings did not expand the stay analysis to include factors considered in disputes about the most appropriate forum.

Likewise, in *Uber*, the SCC found that the arbitration clause was unconscionable, but the exception created in that case was not a *forum non conveniens* analysis.

In the end, this decision has imported *forum non conveniens* into the stay analysis while, in the same breath, also finding the doctrine obsolete at least with respect to arbitrations with virtual hearings. In the rare case where a court considers whether an arbitration clause is unconscionable, the physical location of the hearing will likely bear less weight in that analysis. We otherwise expect that this case will be an outlier in applications to stay court proceedings in favour of arbitration. However, the case may have an impact on applications with respect to *forum non*

conveniens in court proceedings.

Have virtual hearings rendered forum non conveniens 'obsolete'?

Despite the Court's decision, in jurisdictional motions in Canada, it is not clear that the *forum non conveniens* doctrine is obsolete even if a virtual hearing is being proposed. Courts may continue to consider factors that will remain unaffected by virtual hearings, for example whether there is a risk of parallel proceedings or where one venue presents a juridical advantage.

Will in-person hearings return?

While virtual hearings have certainly been normalized, we can expect some in-person hearings to resume as pandemic-related restrictions are lifted. Whether a hearing is virtual or in-person in a post-pandemic world will depend on the nuances of each case and the preferences of the parties. Virtual hearings may be more efficient and cost-effective, but may also present challenges in some cases. In essence, practitioners have gained a new tool for their toolbox, with the option of virtual hearings.

In our view, it is a step too far to say that in-person hearings are now obsolete. Virtual hearings have been a function of necessity during the pandemic. While we expect that virtual hearings are here to stay, and provide certain advantages, only time will tell how often and in what circumstances virtual proceedings will be chosen over in-person hearings (or vice versa).

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