Kluwer Arbitration Blog

# Enforcing Arbitration Agreements Against Non-Signatories in Canada

Dina Prokic (Senior Assistant Editor) (Woods LLP) · Sunday, February 6th, 2022

Canadian courts are frequently asked to rule upon the effects of arbitration agreements in the context of potential class actions. For example, the Supreme Court of Canada ("SCC") has upheld arbitration clauses for most, if not all issues, disallowing class action recourse in *Dell Computer Corp. v. Union des consommateurs*(2007), *Rogers Wireless Inc. v. Muroff* (2007) and *Seidel v. TELUS Communications Inc* (2011). Conversely, it refused to refer disputes to arbitration, either on grounds of legislative override or the doctrine of unconscionability, allowing proposed class actions to proceed, in *TELUS Communications Inc. v. Wellman* (2019)[1)] and *Uber Technologies Inc. v. Heller* (2020). Recently, the Supreme Court of British Columbia (the "Court"), which is the province's first instance court, faced a similar situation in *Wittman v. Blackbaud, Inc.* However, unlike the cases decided by the SCC, the country's highest court, in which plaintiffs had undoubtedly concluded contracts that contained arbitration clauses, the plaintiff in this case, Mr. Wittman, had no contractual relationship (and, consequently, no arbitration agreement) with the defendants. While the defendants had an arbitration agreement with a third party, the Court refused to refer the matter to arbitration because said agreement did not bind the plaintiff. In concluding that Mr. Wittman was not a "party claiming through or under a party" to the arbitration agreement, the Court distinguished his case from other Canadian and international authorities, including the judgment of the Indian Supreme Court in *Chloro Controls v. Severn Trent* ("*Chloro Controls*"), which was previously discussed on this blog (e.g. here and here).

In *Wittman*, the plaintiff had made a donation to the British Columbia Cancer Foundation (the "Foundation"), which was thereafter subject to a cyber attack. As the plaintiff's personal information had been potentially compromised, he sought to commence a class action against the Foundation's data management and service provider, Blackbaud Inc. and its wholly owned Canadian subsidiary, Blackbaud Canada, Inc. (collectively referred to as "Blackbaud"). The defendants moved to stay the action and refer the dispute to arbitration under the provincial *International Commercial Arbitration Act* ("ICAA") because their contract with the Foundation (the "Solutions Agreement") purportedly called for arbitration. The Court refused to extend the arbitration agreement to a non-signatory who "had no knowledge of or involvement in" the Solutions Agreement and also shone the light, albeit briefly, on the allocation of competence for determining parties to arbitration agreements.

**Proving the existence of the arbitration agreement through affidavits**

When a party claims that the dispute is to be resolved through arbitration, it will presumably provide the court with the enabling arbitration agreement. Blackbaud, however, did not. Instead, it furnished two affidavits from its chief information officer. The first affidavit reproduced the relevant provisions of the standard agreement that "*nearly all* of Blackbaud US's Customers, including the BC Cancer Foundation" entered into. Though Blackbaud appended this standard agreement (including the arbitration clause) to the first affidavit, it did not provide a copy of the Solutions Agreement actually executed with the Foundation. The second affidavit explained that the Solutions Agreement was not disclosed because it "contained confidential pricing and other terms".

Understandably, the plaintiff contested the sufficiency of such evidence. He argued that, first, the absence of proof of the Foundation's acceptance required the Court to draw an inference that the Foundation had not accepted Blackbaud's standard agreement. Second, stating that "nearly all" customers entered into standard agreements left doubt as to whether the Foundation was actually subject to such an agreement. The Court dismissed the plaintiff's concerns, concluding that even though the first affidavit left "room for the possibility that not all of Blackbaud US's customers may be subject to the standard form Solutions Agreement, the only plausible reading of the [first affidavit] [was] that the BC Cancer Foundation [was]" (para. 51).

**(Not) binding the clueless non-signatory to the arbitration agreement**

British Columbia courts have previously enforced arbitration agreements against non-signatories where:

1. a contractual agreement between a party and a non-signatory incorporates an arbitration agreement by reference;
2. an agency agreement exists between a party to an arbitration agreement and the non-signatory;
3. it is appropriate to pierce the corporate veil; and,
4. a non-signatory is bound by estoppel (para. 26).

Conceding that most of these circumstances were inapplicable to the matter at hand, Blackbaud's main arguments focused on the doctrine of equitable estoppel and international authorities that purportedly gave the phrase "claiming through or under a party" an "expanded" meaning.

Blackbaud's estoppel argument had several components, some of which were derived from domestic and international caselaw, whereas others were inspired by the general notion of "fairness". The Court dismissed the estoppel argument, first, because the plaintiff's conduct in no way indicated to Blackbaud that he would be bound by the terms of the arbitration agreement. After all, how could it when the plaintiff had no knowledge of or involvement in the Solutions Agreement, having only discovered it during the proceedings? (paras. 18, 74). Blackbaud's reliance on the doctrine of "direct benefit estoppel," an American doctrine the applicability of which in Canada was not demonstrated, was also futile since the plaintiff did not appear to have received any "direct benefit" from the Solutions Agreement (paras. 80-85). Blackbaud's argument that plaintiff's claims were so intertwined with the Solutions Agreement that they had to be determined by reference thereto was equally ineffective (paras. 86-98).

In the Court's view, Mr. Wittman's case was based on Blackbaud's duties under privacy legislation and the torts of negligence and intrusion of seclusion, not on its contractual duties to the

Foundation. Finally, the Court held that in a world "replete with agreements between product and service providers and supply chain intermediaries that are unknown to the end consumer and the public," binding a totally unsuspecting person such as the plaintiff to an arbitration agreement he had not signed would be anything but fair (paras. 102-106).

The two international authorities cited by Blackbaud, *Tanning Research Labs Inc. v. O'Brien* ("*Tanning*") from Australia and *Chloro Controls* from India, did not prompt the Court to expand the situations in which non-signatories could be bound by arbitration agreements. This is because, unlike here, in both of those instances there was a direct relationship with the non-signatory (para. 119). Neither *Tanning* nor *Chloro Controls* added anything new to the analysis. The premise in *Tanning* was akin to agency, which is already a recognized ground in British Columbia, whereas the statement in *Chloro Controls* that the words "claiming through or under" are "incapable of being construed narrowly and must be given expanded meaning" was taken out of context. The Court rightly pointed out that *Chloro Controls* concerned a very different factual scenario and the "group of companies" doctrine.

Hence, despite concluding that Blackbaud had demonstrated the existence of the arbitration agreement, the Court refused to bind the plaintiff to it and stay the proposed class action.

**Concluding remarks**

The Court's judgment raises several questions for prospective litigants and counsel. Had the Court ultimately decided to refer the plaintiff to arbitration, would it have accepted an unsigned standard form agreement as opposed to the agreement actually executed between the parties? Article II of the New York Convention which empowers a court to "refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed," clarifies that an "agreement in writing" is *signed by the parties* or is contained in an exchange of written communications. While the definition of the "arbitration agreement" contained in section 7 of the ICAA omits the signature requirement, is it proper to allow a party not to provide the actual arbitration agreement solely because doing so might reveal commercially sensitive terms? Especially when such confidentiality concerns can be allayed otherwise (e.g., through "attorneys eyes only" orders, by filing the documents under seal, etc.)?

Apart from determining the different bases for binding non-signatories to arbitration agreements, a vital question is also who gets to conduct this inquiry: an arbitral tribunal or a national court. Positions vary, though the Model Law's-consistent view is to give preference to arbitral tribunals. [2)] The question, therefore, is: once the Court found that there was an arbitration agreement, should it not have referred the matter to arbitration right away? Was proceeding to decide whether the plaintiff was bound to an arbitration agreement not impinging on the *kompetenz-kompetenz* principle?

In Canada, the companion principle to *kompetenz-kompetenz* is the rule of systematic referral, which provides that "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" (*Uber*, para. 34, citing previous SCC jurisprudence). Since the question of whether to add parties to an arbitration

by piercing the corporate veil has already been considered as a mixed question of fact and law (*DNM Systems Ltd. v. Lock-Block Canada Ltd.*, para. 87), the Court's examination of evidence in Mr. Wittman's case must have been "superficial" if it departed from the rule of systematic referral.

In the context of non-signatories, however, this rule is framed somewhat differently. The Court's judgment provides:

> [21] Where a party is alleged to be a party to an arbitration agreement, the discretion to decline the stay will only be invoked where that party "clearly establishes" that it is not a party […].
>
> [22] Where it is arguable that a claim falls within an arbitration agreement or where it is arguable that a party is bound by the agreement, the stay should be granted and the issue resolved in the arbitration unless, as set out in s. 8(2), the arbitration agreement is "null and void, inoperative or incapable of being performed" […].

Though the issue of competence occupies only six paragraphs, it is arguably one of the more salient portions of the judgment as it addresses the rule of systematic referral in the context of non-signatories. It is only when there is an *arguable* case that the issue of whether to bind a non-signatory will be referred to an arbitral tribunal. This is true not only under the ICAA, as demonstrated in this case and earlier decisions (such as in *AtriCure, Inc. v. Meng*, para. 62), but also under the domestic *Arbitration Act*, as appears from the judgment of the same Court in *Beck v. Vanbex Group Inc.* (para. 23), rendered only a week after the judgement in the plaintiff's case, where applying the same principles the Court reached a different conclusion, referring most of the parties' issues to arbitration.

** The views expressed herein are those of the author and do not necessarily reflect the views of Woods LLP or its partners.*

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References

?1 The Supreme Court of Canada allowed the class action proposed by physical persons, i.e. consumers, to proceed. Business customers, however, were bound by the arbitration clauses contained in their contracts with Telus.

?2 See e.g. G. B. Born, *International Commercial Arbitration*, Kluwer Law International (2021), pp. 1616-1619.

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