Kluwer Arbitration Blog

Canada's Brick Wall Framework for Competence-Competence: Should Businesses Be Concerned About Canada's Unique Method Of Referring Parties To Arbitration?

Robin M. Kelly (University of Ottawa) · Thursday, May 29th, 2025

Competence-competence is fundamental to arbitration. It prevents costly and onerous court proceedings from frustrating the dispute resolution process. For competence-competence to be effective, courts must take a step back and generally stay court proceedings if the dispute is also subject to an arbitration agreement.

Still, there are times when courts' deferral to arbitrators to define their own jurisdiction undermines the very integrity of the arbitral system that it seeks to protect. A number of those instances are laid out in article 8(1) of UNCITRAL's Model Law on International Commercial Arbitration ("MAL"). This article requires courts to refer disputes that are subject to an arbitration agreement to arbitration unless the agreement is "null and void, inoperative, or incapable of being performed."

Canada has taken a unique approach to interpreting article 8(1) of MAL. In particular, the 2020 Supreme Court of Canada case, *Uber Technologies v. Heller*, allowed courts to assume arbitrators' jurisdiction where there is a "real prospect" that an arbitration will never result from a stay in court proceedings. This interpretation differs from the binary terms in article 8(1) of MAL because *Uber* considers practical, discretionary reasons that would prevent arbitration from going forward. This apparent expansion to article 8(1) of MAL seems to contradict the restrained approach to court intervention implicit in MAL's limits on court actions.

When *Uber* was first released, it stirred-up fears across international arbitration practitioners that it would erode competence-competence in Canada – a risk that was well described in this post. Others argued that *Uber* strayed from the MAL but was justified in the increasingly gig economy.

As the five-year anniversary of *Uber* approaches, courts across Canada have applied *Uber* in a range of decisions, providing a roadmap to how Canadian courts will look at questions of competence. Considering these new cases (and contrary to some of the predictions) Canadian courts' referral to arbitration remains in step with international interpretations of MAL despite its unorthodox approach.

Canadian Courts' Brick Wall Framework for Refusing to Refer Parties to Arbitration

MAL jurisdictions around the world have taken different approaches to interpreting article 8(1)'s reference to arbitration agreements that are "null and void, inoperative or incapable of being performed." For example, France, and Switzerland have opted to conduct a highly deferential approach to arbitral tribunals: refusing to refer parties to arbitration only where the arbitration agreement is *manifestly* (or "incontestably") null and void, inoperable or incapable of being performed. According to another post, Australia's courts have likewise found that "mere speculation" that an arbitration proceeding would be void is insufficient to refuse to refer parties to arbitration.

The foundation for Canada's analysis on whether to refuse to refer parties to arbitration is *Dell Computer Corp. v. Union des consommateurs*. In an approach described as "firmly pro-arbitration," the Supreme Court of Canada ("SCC") in *Dell* indicated that courts can only depart from the systematic referral to arbitration when (a) there is a pure question of law or, in some instances, (b) there is a mixed question of law and the factual issues require only superficial consideration of the documentary record. In *Dell*, the challenges to the arbitration clause included whether the plaintiff had actual knowledge of the arbitration clause, which required testimonial evidence, and thus the SCC determined that "the matter should have been referred to arbitration."

Connected to courts' refusal to refer parties to arbitration based on a question of mixed fact and law, *Uber* added that courts may refuse to refer parties if there was (a) a genuine challenge to the arbitral jurisdiction and (b) a real prospect that the arbitration would never actually occur. This is the case when the financial or practical requirements to begin an arbitration are so cumbersome that they amount to a "brick wall" for actually bringing the dispute to arbitration. The SCC found that the arbitration clause in this case effectively formed a brick wall for Uber drivers to start claims against Uber because it mandated an arbitration in the Netherlands and required an upfront payment of US$14,500 plus legal and other expenses, representing most of Uber drivers' annual income.

Does Canada's Interpretation Comply with Systematic Referral to Arbitration in MAL?

Article 8(1) of MAL sets out binary criteria to promote minimal court intervention when referring parties to arbitration. Consequentially, a major concern deriving from *Uber* is a court's possible discretion when evaluating whether there is no real prospect of an arbitration occurring. This opens a grey zone to the previously black and white criteria laid out in article 8(1) of MAL. Expanding judicial discretion for determining whether an arbitration has a *real* prospect may allow courts to claim jurisdiction too readily and render arbitration redundant.

This fear of opening the flood gates for courts to usurp arbitrators' jurisdiction might have been justified if Canadian cases had relied on Brown J's concurring reasons in *Uber* to give courts jurisdiction. Brown J's reasons were based on the public policy that the court cannot enforce contractual terms that "deny access to independent dispute resolution" because it would undermine Canada's constitutional principle of access to justice. If Brown J's reasoning were adopted into *Dell*'s framework, it would have allowed courts to refuse to refer parties to arbitration where it caused undue hardship.

Despite the praises Brown J's reasoning received upon initial release, a recent British Columbia Court of Appeal ("BCCA") decision clarified that Brown J's reasoning is *not* to be used as the

basis for a court to refuse to refer parties to arbitration. Rather its role is to determine whether an arbitration agreement is valid *after* the court has established that the court has jurisdiction. The BCCA emphasized that competence-competence is not displaced simply by one of the parties alleging that there is a public policy issue because arbitral tribunals have adequate expertise to determine that matter.

Unlike the proposed use of Brown J's reasoning in the *Dell* framework, the *Uber*'s majority tried to limit reviewing courts' role to conducting a *prima facie* analysis, emphasizing that any defects in the arbitration clause should be "manifest." These terms directly reflect MAL drafters' preoccupations about limiting court analysis under article 8(1) of MAL.

Still, the SCC admitted that such a *prima facie* analysis would require a superficial review of facts. A superficial analysis according to *Uber* is one in which "the necessary legal conclusions can be drawn from the facts that are either evident on the face of the record or undisputed." The court in *Uber* relied on factual evidence about the specific impact of the arbitration fees on the plaintiff because the facts were uncontested. However, this type of inquiry could quickly devolve into a mini trial.

Avoiding extensive court intervention for a referral to arbitration motion depends on the trial courts' interpretation of a superficial review of the facts. The Ontario Superior Court of Justice, upheld by the Court of Appeal for Ontario, conducted a restrained analysis of the facts to refuse to refer parties to arbitration in *Lochan v. Binance Holdings Limited*. The proposed representative plaintiff for a class action against a crypto currency trading platform argued that it was not bound to the arbitration agreement because the agreement effectively insulated the transaction from adjudication. The arbitration agreement was within 50 pages of terms and conditions that the website allowed users only 30 seconds to review. These terms also allowed the crypto platform to change the applicable law, location, and arbitral rules for disputes without notifying customers. Relying on *Uber*, the Ontario Court of Appeal agreed with the trial judge that a superficial review of these boilerplate terms revealed that there was no real prospect that an arbitrator would ever determine its own jurisdiction if the court stayed proceedings. This functioned as a superficial review because they were boilerplate provisions and uncontested facts.

However, in *Spark v. Google,* (appeal to the SCC dismissed) the BCCA referred the parties to arbitration despite an arbitration clause that imposed significant financial burden because the record did not show that the plaintiff had similar financial vulnerability to Uber drivers. In this case, Google moved to block Spark's action for price fixing, citing the arbitration clause Spark signed. Spark tried to show that the arbitration agreement was a brick wall to dispute resolution through evidence of the higher relative cost for pursuing arbitration on the merits of the claim compared to court proceedings. However, the evidence on record did not show that this higher cost was a particular barrier for Spark to begin the arbitration. The record for review remained limited, with minimal specific information about the plaintiff or factual particularities. Limiting the court's analysis to Spark's record, without investigating all revenues or potential vulnerabilities, maintained a restrained judicial analysis of the potential for the arbitration to proceed.

Considering *Spark* alongside *Lochan* indicates that Canadian courts are adopting a nuanced and restrained interpretation of *Uber,* finding no real prospect of arbitration only in the most extreme circumstances.

Canada's Approach focuses on Arbitration's Integrity for Referral to Arbitration

Despite the unconventional approach in *Uber*, the court's reasoning remains compatible with MAL's purpose. MAL is designed to promote arbitration; this includes article 8(1). The article acts to safeguard the integrity of arbitration by allowing parties that have no valid recourse to arbitration to have their dispute resolved in court. *Uber*'s identification of a case where arbitration is not a true option defines article 8(1) in a way that upholds arbitration's integrity.

While *Uber* opens some discretion, the practical barriers referred to in Uber are a significant threshold to meet. The contract in Uber required upfront payment that represented the majority of the contracted workers' gross annual salary plus legal and travel fees. In *Lochan*, the procedure to start an arbitration was at the sole discretion of the crypto platform. As the court in *Uber* noted, such provisions rendered arbitration agreements "illusory." The high practical barrier in applying *Uber* to refer parties to arbitration leads it to be closer to concepts of duress or undue influence that could infect consent, than to substantive matters to be dealt with in arbitration.

MAL was meant to shift with evolving business practices while maintaining uniformity by upholding its purpose. *Uber* provides one iteration of how a court can grapple with the sometimes-competing objectives that both empower and restrict domestic courts' intervention in international commercial arbitration. Although *Uber* undoubtedly expands courts' reviewing power for whether arbitration agreements are null and void, it maintains a rigorous threshold to prevent courts from conducting in-depth inquiries and defeating the purpose of arbitration.

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