Chris Kinnear Hunter
416-865-2874
chunter@litigate.com

February 11, 2019

Despite Heller Decision, Superior Court Affirms Preference for Enforcing Arbitration Agreements

A recent decision of the Ontario Superior Court of Justice affirms the preference of Ontario courts for enforcing arbitration provisions between parties to commercial agreements.

Belnor v Strobic Air Corporation concerned a dispute over the payment of sales commissions. When the plaintiff commenced an action seeking damages, the defendants moved to stay the proceeding on the basis of an arbitration clause contained in two identical sales agreements between the plaintiff and certain of the defendants.

The arbitration clause in the agreements stated:

> Any controversy dispute or claim arising out of, or relating to this Agreement, or any breach thereof, shall be settled in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award may be entered in any court having jurisdiction thereof. The prevailing party shall be entitled to its or her/her attorneys' fees and costs.

This provision mirrors the Standard Arbitration Clause in the introduction to the Commercial Arbitration Rules of the American Arbitration Association ("AAA") in all but one, albeit notable respect. The AAA Standard Arbitration Clause provides expressly that disputes between parties shall be subject to arbitration. It states that:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. (Emphasis added)

The agreements at issue in *Belnor* also did not contain any other provisions relating to an arbitral process such as how arbitrators were to be selected, the venue of the arbitration, and other related timelines and procedures for an arbitration.

The plaintiff argued that the absence of an express clause referring disputes to arbitration rendered the arbitration

provision in the sales agreements insufficient to oust the jurisdiction of the Court. In the alternative, relying on two prior decisions in which courts in Ontario had refused to enforce arbitration clauses that did not set out how an arbitration was to proceed, it asserted that the arbitration provisions were vague and therefore unenforceable. In the further alternative, the plaintiff argued that enforcing the arbitration provisions would be unconscionable, relying on the Ontario Court of Appeal's recent decision in *Heller v Uber Technologies Inc.*

The Court granted the motion and stayed the action. In rejecting the plaintiff's arguments, the Court pointed to the limited circumstances in Section 7 of the *Arbitration Act, 1991* and Section 8 of the *International Commercial Arbitration Act, 2017* in which a Court can refuse to stay a proceeding in favour of arbitration and the well-articulated preference in recent case law of giving effect to arbitration agreements.

Specifically, Justice Sossin held that while the arbitration provision "could have been drafted more clearly", the intent of the provision was clearly to have disputes resolved by arbitration, as reflected by the reference to the AAA's rules, and that the reference to the AAA's model rules provided sufficient certainty as to the procedure for the arbitration. His Honour also held that there was nothing unconscionable about enforcing the arbitration provision as the parties were all sophisticated commercial entities.

Belnor affirms the legislative and judicial preference in Ontario for giving effect to arbitration agreements except in rare circumstances. In particular, it confirms that commercial agreements need not set out extensive dispute resolution procedures where they reference the model rules of an arbitral body such as the AAA. As well, *Belnor* suggests that the Court of Appeal's decision in *Heller*—which has been the subject of much discussion, including on our blog—should be viewed as context-specific rather than a sea-change in the courts' general approach to the enforceability of arbitration provisions in Ontario.