Federal Court of Appeal | Cour d'appel fédérale

Date: 20230725

Docket: A-189-22

Citation: 2023 FCA 165

CORAM: **BOIVIN J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

STEPHANIE DIFEDERICO and JAMESON EDMOND CASEY

Appellants

and

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

Respondents

Heard at Toronto, Ontario, on April 17, 2023.

Judgment delivered at Ottawa, Ontario, on July 25, 2023

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: WOODS J.A.
LASKIN J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20230725

Docket: A-189-22

Citation: 2023 FCA 165

CORAM: **BOIVIN J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

STEPHANIE DIFEDERICO and JAMESON EDMOND CASEY

Appellants

and

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

Respondents

REASONS FOR JUDGMENT

BOIVIN J.A.

I. Introduction

[1] Is an arbitration agreement set forth in the terms and conditions of use for an online purchasing service binding in the context of consumer claims of a commercial nature? The Federal Court answered yes. For the reasons that follow, I agree.

[2] This appeal arises out of a proposed class action brought by Stephanie Difederico (Ms. Difederico)[1] in the Federal Court against Amazon.com, Inc. (Amazon.com), Amazon.com.ca, Inc. (Amazon.ca), Amazon.com Services LLC, Amazon Services International, Inc., and Amazon Services Contracts, Inc. (together, Amazon). In bringing her proposed class claims, Ms. Difederico alleges that Amazon has entered into price-fixing agreements with third-party sellers contrary to sections 45 and 46 of the *Competition Act*, R.S.C., 1985, c. C-34 (Competition Act) and seeks damages under section 36 of the same Act.

[3] In response to Ms. Difederico's proposed class action, Amazon brought a motion seeking a stay of proceedings on the grounds that the parties are subject to an arbitration agreement. In the decision of the Federal Court, *per* Furlanetto J. (the Judge), dated September 6, 2022 (2022 FC 1256 (Judge's decision)), the Judge granted the requested stay in favour of arbitration pursuant to the *United Nations Foreign Arbitral Awards Convention Act*, R.S.C., 1985, c. 16 (2nd Supp.) (UNFAACA). In so doing, the Judge determined that Ms. Difederico entered into a valid arbitration agreement with Amazon covering her purchases on Amazon.ca and there were no overriding public policy or unconscionability grounds to justify refusing to give effect to that agreement.

[4] Ms. Difederico appeals the Judge's decision before our Court on the grounds that the Judge erred in finding that her claims are commercial in nature, thereby enforcing the

[1]Jameson Edmond Casey, the other named appellant, is the proposed class representative of two other classes of purchasers, neither of which are in issue in this appeal.

arbitration agreement pursuant to the UNFAACA. I find that the Judge did not err and that the appeal fails for the following reasons.

II. Background

[5] On April 1, 2020, Ms. Difederico commenced the proposed class action seeking to represent the proposed Amazon E-Commerce Class of purchasers consisting of persons or entities in Canada who, from June 1, 2010, purchased products on Amazon.ca or Amazon.com. As noted, Ms. Difederico, who has accounts with both Amazon.ca and Amazon.com, alleges as part of her proposed class action that Amazon entered into anticompetitive agreements with third-party sellers amounting to criminal price-fixing. She further alleges that she has a statutory right, under section 36 of the Competition Act, to recover loss and damages accordingly.

[6] When online purchasers such as Ms. Difederico create an account and make purchases, be it with Amazon.ca or Amazon.com, they are notified of the Conditions of Use which include a dispute resolution clause pursuant to which all purchasers must agree to arbitration. In Ms. Difederico's case, she purchased products through each of her accounts on Amazon.ca and Amazon.com by placing over 285 orders since the creation of her accounts.

[7] Ms. Difederico's proposed class action does not relate to any specific purchase *per se*. Rather, it is based on allegations of criminal price-fixing in violation of the Competition Act. By way of a motion dated April 6, 2021, Amazon sought to stay Ms.

Difederico's proceedings in favour of arbitration pursuant to the mandatory dispute resolution clause in both the Conditions of Use of Amazon.ca and of Amazon.com.

[8] A month later, in May 2021, Amazon removed the arbitration provisions included in Amazon.com's Conditions of Use. Amazon accordingly narrowed its stay motion, requesting only to stay Ms. Difederico's proposed claims relating to her purchases on Amazon.ca, as the arbitration agreement included in Amazon.ca's 2014 Conditions of Use remained in effect. This arbitration agreement along with the choice of law clause set forth in the 2014 Conditions of Use provide as follows:

> **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.
>
> **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.

[9] On February 3, 2022, the Judge heard Amazon's stay motion and took the matter under reserve.

[10] The following month, on March 30, 2022, while the Judge's decision concerning the stay motion remained under reserve, Amazon made minor amendments to the 2014 Conditions of Use for Amazon.ca, including changes to the arbitration agreement set forth in the dispute resolution clause. The amendments made explicit that the arbitration agreement would yield to statutes that barred its enforcement. The 2022 amendments stated that (i) claims can be asserted in small claims court if the claims qualify and, (ii) "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."

[11] The Judge thereafter convened a case management conference to discuss the 2022 amendments and the impact, if any, on the decision under reserve. Additional written and oral submissions were made by both parties in this regard. The Judge addressed the 2022 amendments issue in her decision, and as will be described in more detail below, found that they had no impact on the issues raised by the present matter.

III. Relevant Statutory Provisions

[12] For ease of reference, the relevant statutory provisions in this appeal are reproduced here.

[13] The relevant provisions of the *Competition Act*, R.S.C., 1985, c. C-34 (Competition Act) include sections 36, 45 and 46:

Recovery of damages	**Recouvrement de dommages-intérêts**
36 (1) Any person who has suffered loss or damage as a result of	**36 (1)** Toute personne qui a subi une perte ou des dommages par suite :
(a) conduct that is contrary to any provision of Part VI, or	**a)** soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,	**b)** soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,
may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.	peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

…

Offences in Relation to Competition

Conspiracies, agreements or arrangements between competitors

45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

(a) to fix, maintain, increase or control the price for the supply of the product;

(b) to allocate sales, territories, customers or markets for the production or supply of the product; or

(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

Penalty

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both.

Foreign directives

46 (1) Any corporation, wherever incorporated, that carries on

…

Infractions relatives à la concurrence

Complot, accord ou arrangement entre concurrents

45 (1) Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement :

a) soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;

b) soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;

c) soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel et encourt un emprisonnement maximal de quatorze ans et une amende maximale de 25 000 000 $, ou l'une de ces peines.

Directives étrangères

46 (1) Toute personne morale, où qu'elle ait été constituée, qui

business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.	exploite une entreprise au Canada et qui applique, en totalité ou en partie au Canada, une directive ou instruction ou un énoncé de politique ou autre communication à la personne morale ou à quelque autre personne, provenant d'une personne se trouvant dans un pays étranger qui est en mesure de diriger ou d'influencer les principes suivis par la personne morale, lorsque la communication a pour objet de donner effet à un complot, une association d'intérêts, un accord ou un arrangement intervenu à l'étranger qui, s'il était intervenu au Canada, aurait constitué une infraction visée à l'article 45, commet, qu'un administrateur ou dirigeant de la personne morale au Canada soit ou non au courant du complot, de l'association d'intérêts, de l'accord ou de l'arrangement, un acte criminel et encourt, sur déclaration de culpabilité, une amende à la discrétion du tribunal.

[14] Turning to the *United Nations Foreign Arbitral Awards Convention Act*, R.S.C., 1985, c. 16 (2nd Supp.) (UNFAACA), the relevant portion of section 4, as well as the relevant portions of the UNFAACA Schedule, are likewise reproduced as follows:

Convention Approved	**Approbation**
Limited to commercial matters	**Restriction**
4 (1) The Convention applies only to differences arising out of	**4 (1)** La Convention n'est applicable qu'aux différends découlant d'un rapport commercial

commercial legal relationships, whether contractual or not

…

SCHEDULE

Convention on the Recognition and Enforcement of Foreign Arbitral Awards [New York Convention]

Article I
1 This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought

…

3 When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which

de droit, contractuel ou non contractuel

…

ANNEXE

Convention pour la reconnaissance et l'exécution des sentences arbitrales étrangères [Convention de New York]

Article premier
1 La présente Convention s'applique à la reconnaissance et à l'exécution des sentences arbitrales rendues sur le territoire d'un État autre que celui où la reconnaissance et l'exécution des sentences sont demandées, et issues de différends entre personnes physiques ou morales. Elle s'applique également aux sentences arbitrales qui ne sont pas considérées comme sentences nationales dans l'État où leur reconnaissance et leur exécution sont demandées

…

3 Au moment de signer ou de ratifier la présente Convention, d'y adhérer ou de faire la notification d'extension prévue à l'article X, tout État pourra, sur la base de la réciprocité, déclarer qu'il appliquera la Convention à la reconnaissance et à l'exécution des seules sentences rendues sur le territoire d'un autre État contractant. Il pourra également déclarer qu'il appliquera la Convention uniquement aux

are considered as commercial under the national law of the State making such declaration.	différends issus de rapports de droit, contractuels ou non contractuels, qui sont considérés comme commerciaux par sa loi nationale.
Article II ...	Article II …
3 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.	**3** Le tribunal d'un État contractant, saisi d'un litige sur une question au sujet de laquelle les parties ont conclu une convention au sens du présent article, renverra les parties à l'arbitrage, à la demande de l'une d'elles, à moins qu'il ne constate que ladite convention est caduque, inopérante ou non susceptible d'être appliquée.

[15] Finally, section 50 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 (Federal Courts Act) is also of relevance and hence, reproduced as follows:

Procedure	**Procédure**
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 :
(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or	**a)** au motif que la demande est en instance devant un autre tribunal;

(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.

IV. The Judge's Decision

[16] The Judge carefully addressed and responded to each of Ms. Difederico's arguments. She summarized her findings as follows at paragraph 2 of her decision:

> 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.

[17] As part of her analysis, the Judge recalled from the outset that it is well-settled in Canada that commercial arbitration agreements are complied with and are enforced by courts unless they are found to be null, void, inoperative, or incapable of performance. The Judge referred to the decision of this Court in *Murphy v. Amway Canada Corporation*, 2013 FCA 38, [2014] 3 F.C.R. 478 (*Murphy*) to further recall that this extends to arbitration agreements relating to claims under the Competition Act. Hence, absent legislative intervention, the Judge observed, consistent with the Supreme Court of Canada's jurisprudence, courts should give effect to arbitration agreements (Judge's decision at paras. 42-43).

[18] The Judge pursued her analysis by considering the impact of Article II(3) of the United Nations' *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Can. T.S. 1986 No. 43 (the New York Convention), incorporated into Canadian law by the UNFAACA, in the context of a motion for a stay of proceedings. Before the Judge, Amazon argued that the New York Convention applied to require the court to enter a stay, while Ms. Difederico submitted that the New York Convention did not apply. Further, Ms. Difederico argued that, at most, paragraph 50(1)(*b*) of the Federal Courts Act provides a highly discretionary power to enter a stay, if the interest of justice so requires and faulted the Judge for not considering or applying paragraph 50(1)(*b*) (Appellants' Memorandum of Fact and Law at para. 37).

[19] The Judge rejected Ms. Difederico's contention. She noted that subsection 4(1) of the UNFAACA states that "the [New York] Convention applies only to differences arising out of commercial legal relationships, whether contractual or not" and that Ms. Difederico contended her legal relationship with Amazon.ca was not "commercial" (Judge's decision at paras. 50-52). She observed that neither the UNFAACA nor the New York Convention provides a definition of "commercial relationship" and that none had been developed in the Federal Court's jurisprudence on arbitration. To resolve this issue, the Judge referred to the modern approach to statutory interpretation in considering the definition of the word "commercial" in the context of the UNFAACA (Judge's decision at paras. 56-67).

[20] The Judge determined that, although Ms. Difederico is a consumer, the nature of her claims "have a commercial foundation" (Judge's decision at para. 66). It follows,

according to the Judge, that the UNFAACA—and not paragraph 50(1)(*b*) of the Federal Courts Act—is applicable in the circumstances. Having analysed the relationship between the parties and found that their dispute was commercial and that the UNFAACA accordingly applied, the Judge then turned to the question as to whether the stay requested by Amazon should be granted.

[21] In this regard, the Judge found that there is "no serious debate" that an arbitration agreement is in place between the parties. The Judge also rejected the contention that Ms. Difederico did not have adequate notice of the dispute resolution clause encompassing the arbitration agreement. More particularly, the Judge noted, "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 [Conditions] of Use" (Judge's decision at para. 76). The Judge further observed that Ms. Difederico continued to make purchases through Amazon.ca even after instituting her proposed class action in which she challenges the same Conditions of Use.

[22] As mentioned above, the Judge also addressed the 2014 Conditions of Use compared to the 2022 Conditions of Use. She concluded that the operative portion of the 2014 arbitration agreement and the 2022 arbitration agreement remained the same. The Judge found that the 2022 version merely sets out in express terms the legal principles as they would apply, regardless of whether they were included in the agreement itself. Consequently, the Judge found that the 2022 arbitration agreement was binding and

enforceable (Judge's decision at para. 91). Given the broad scope of the arbitration agreement (whether it be the 2014 or 2022 version) that covered matters in relation to purchases made on Amazon.ca, the Judge found that Ms. Difederico's claims against Amazon.ca were indeed covered (Judge's decision at para. 95).

[23] The Judge went on to examine whether there were grounds to otherwise refuse the requested stay. She recalled in this regard the general principle of competence-competence; that is, when an arbitration agreement or the jurisdiction of the arbitrator is challenged, the rule is to refer the issue to the arbitrator, subject to limited exceptions.

[24] In particular, the Judge rejected Ms. Difederico's argument that she would be barred from seeking remedies under the Competition Act because of the choice of U.S. law in the Conditions of Use. The Judge considered the expert evidence adduced by the parties and concluded that it was "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" (Judge's decision at para. 116). She also found that the cost of arbitration was not prohibitive and that the law did not support Ms. Difederico's arguments that the 2014 and 2022 arbitration agreements were inoperative or unconscionable. Thus, the Judge found that there was no basis to displace the competence-competence principle in the circumstances (Judge's decision at paras. 128-29).

[25] Ms. Difederico now appeals from the Judge's decision to our Court.

V. Applicable Standards of Review

[26] The standards of review applicable in the circumstances are those set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; that is, correctness for questions of law and palpable and overriding error for questions of fact or mixed fact and law.

VI. Issues

[27] This appeal raises three issues:

1. Did the Judge err in determining that the UNFAACA is applicable in the present case?
2. Did the Judge err in finding that there is an enforceable arbitration agreement between the parties?
3. Did the Judge err in concluding that section 36 of the Competition Act does not preclude mandatory arbitration?

VII. Analysis

A. *Preliminary Observations*

[28] Before turning to the substance of the issues raised by this appeal, a few preliminary observations are worthwhile to briefly recall the history of the New York Convention and its application in Canada. A few words on the competence-competence principle and its significance for motions to stay in favour of arbitration are also in order.

(i) The New York Convention

[29] The New York Convention was adopted by the United Nations in 1958 and came into force in June 1959. It was developed for the purpose of advancing the protections

provided to arbitral awards under the Geneva Protocol of 1927. The overall objective of the New York Convention is to promote uniformity in the treatment of arbitration agreements and awards internationally. Initially, the New York Convention was meant to be limited to the recognition and enforcement of foreign arbitral awards to the exclusion of arbitration agreements (United Nations, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, 2016 ed., at 39; Gary B. Born, International Commercial Arbitration, 3rd ed., (Kluwer Law International, 2023), at 351). But in the final weeks, prior to the adoption of the New York Convention, its drafters decided to include a provision regarding the recognition and enforcement of arbitration agreements. This explains why Article I of the New York Convention, delineating the scope of its application, only refers to arbitral awards and not to arbitration agreements (New York Convention, Article I). In reality, the Convention applies to both.

[30] Canada ratified the New York Convention nearly four decades ago, in 1986. There are currently 172 contracting state parties. By adhering to the New York Convention, these states have undertaken to give effect to arbitration agreements and to recognize and enforce awards made in other states, subject to certain limited exceptions. The New York Convention is described as setting a "ceiling" of control that contracting states may exert over international arbitral awards and arbitration agreements for purposes of ensuring their recognition and enforceability. It is credited for having created a uniform, simpler and therefore more effective regime for the resolution of international commercial disputes (Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 7th ed., (Oxford University Press, 2022), at 26-27).

[31] When Canada adopted and assented to the New York Convention in 1986 through the UNFAACA, it did so simultaneously with the adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law through the *Commercial Arbitration Act*, R.S.C., 1985, c. 17 (2nd Supp.) (CAA). The Model Law was developed by the international community to provide a more detailed legal regime for arbitral proceedings in the spirit of the New York Convention in 1985. Together, these instruments form the cornerstones of the international commercial arbitration regime.

[32] Given Canada's dualist federal-provincial process for international treaty implementation, various jurisdictions have taken different approaches to incorporating the New York Convention and the Model Law into domestic legislation. A number of provinces adopted both instruments together, resulting in single statutes, for example Ontario's *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5 (ICAA). In contrast, the Federal Government chose to adopt the two instruments separately, specifically the New York Convention under the UNFAACA and the Model Law under the CAA. At the federal level, pursuant to subsection 5(2) of the CAA, the Model Law's application is limited to circumstances "where at least one of the parties to the arbitration is Her Majesty in right of Canada, a departmental corporation or a Crown corporation or in relation to maritime or admiralty matters", whether international or purely domestic. As such, given that the claims at issue in the present case do not involve one of these parties or areas of law, only the UNFAACA is relevant for this case.

(ii) The Competence-Competence Principle

[33] Historically, courts in Canada were reluctant to give way to arbitration and more specifically to the competence-competence principle, which, as noted earlier, mandates that any challenge to an arbitrator's jurisdiction be decided by the arbitrator, not the courts. In essence, courts traditionally viewed the application of the competence-competence principle as favouring the autonomy of arbitration and thereby restricting their jurisdiction to judicially intervene in arbitration processes.

[34] The adoption of the New York Convention through the UNFAACA and of the UNCITRAL Model Law through the CAA paved the path for Canada to curb the historical reluctance to recognize arbitration in favour of becoming an "arbitration friendly" country. Indeed, several provinces followed suit and the Supreme Court of Canada, through a series of seminal decisions, enshrined the acceptance and implementation of international law on arbitration and the competence-competence principle in particular throughout the country: *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178 (*Desputeaux*); *Seidel v. TELUS Communications Inc*., 2011 SCC 15, [2011] 1 S.C.R. 531 (*Seidel*); *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801 (*Dell*); *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144; *Uber Technologies Inc. v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118 (*Uber*).

[35] It is now well-established that Canadian courts will only consider challenges to the jurisdiction of an arbitrator or the enforceability of an arbitration agreement where such challenges raise a pure question of law or a question of fact or mixed fact and law that only requires a superficial consideration of the record (*Dell* at paras. 84-86). These questions may

go to whether the arbitration agreement is null and void, inoperative, or incapable of being performed, as stated in Article II(3) of the New York Convention, or, since *Uber*, invalid for being unconscionable. As such, cases involving an arbitration agreement will be systematically referred to arbitration, subject to one of these limited exceptions.

[36] Having made these preliminary observations, I will now turn to addressing the questions raised by this appeal.

(1) Did the Judge err in determining that the UNFAACA is applicable in the present case?

[37] The scope of application of the UNFAACA is limited to commercial matters as indicated at subsection 4(1). For ease of reference, the text of subsection 4(1) is reproduced again here:

Limited to commercial matters	**Restriction**
4 (1) The Convention applies only to differences arising out of commercial legal relationships, whether contractual or not [Emphasis added].	**4 (1)** La Convention n'est applicable qu'aux différends découlant d'un rapport commercial de droit, contractuel ou non contractuel [mon soulignement].

[38] In the present matter, Ms. Difederico alleges that the Judge erred in ordering a stay of her proposed class action on the basis of the UNFAACA. Ms. Difederico submits that her proposed class action claims are beyond the scope of the UNFAACA. These claims, according to Ms. Difederico, are mere consumer claims, not commercial ones as

contemplated by the UNFAACA. Ms. Difederico thus disagrees with the Judge's interpretation and argues for a narrower interpretation of the word "commercial", essentially maintaining that there can never be a "commercial relationship" when one party to the transaction is a consumer.

[39] This threshold issue begs the question: do Ms. Difederico's claims arise out of a commercial legal relationship within the meaning of the UNFAACA?

[40] In order to address this question, it must be recalled from the outset that the New York Convention, as implemented by the UNFAACA, provides, in the broadest terms, that a contracting state may declare that "it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration" (Article I(3)). Canada exercised this option by virtue of subsection 4(1) of the UNFAACA. Hence, what is the meaning of commercial in the context of the UNFAACA? This case offers our Court an opportunity to address the interpretation to be given to this term.

[41] The term "commercial legal relationships" is not defined by the UNFAACA. Be that as it may, the proper approach is what has been described as a unified, textual, contextual and purposive approach: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601. Consistent with this approach, the Judge in the present matter noted 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" (Judge's decision at para. 56; E.A. Driedger, *Construction of Statutes*, 2nd ed., (Butterworths, 1983), at 87).

[42] As a starting point, Black's Law Dictionary provides a definition of commercial that includes "[o]f or relating to, or involving the buying and selling of goods" and "[r]esulting or accruing from commerce or exchange". Black's Law Dictionary also defines "e-commerce" as "[t]he practice of buying and selling goods and services through online consumer services and of conducting other business or activities using an electronic device and the Internet" (Brian A. Garner, ed., *Black's Law Dictionary*, 11th ed., (Thomson Reuters, 2019)). These definitions, in and of themselves, are sufficiently broad as to include a consumer's relationship with a merchant of goods and services.

[43] From a contextual perspective, it must be reiterated that the UNFAACA incorporates the New York Convention, and its terms must accordingly be interpreted in a manner that is consistent with the purpose and objective of the New York Convention. In this spirit, the Supreme Court of Canada observed in *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401 (*GreCon*), that "the purpose of the *New York Convention* is to facilitate the enforcement of arbitration agreements by ensuring that effect is given to the parties' express intention to seek arbitration" (see article II(3) of the New York Convention). The Supreme Court of Canada also emphasized that "[t]he interpreter must therefore encourage arbitration clauses, and facilitate their enforcement." (*GreCon* at para. 43).

[44] Likewise, the author Gary. B. Born, one of the world's preeminent authorities in the field of international commercial arbitration, explains that the term "commercial" captures consumer transactions:

> In terms of the content of the term under the Convention, a "commercial" relationship should have its ordinary meaning, being a relationship involving an economic exchange where one (or both) parties contemplate realizing a profit or other benefit. This definition is consistent with the weight of lower court authority under the Convention and the definition of the term in other contexts. It is a liberal, expansive definition that includes all manner of business, financial, consulting, investment, technical and other enterprise.
>
> Among other things, the foregoing definition of "commercial" includes consumer transactions and (less clearly) employment contracts, thereby bringing agreements to arbitrate disputes arising from such matters within the Convention. [Emphasis added].
>
> (Born, *International Commercial Arbitration* at 27).

[45] It follows that, in order to interpret the UNFAACA in harmony with the purpose and objective of the New York Convention it incorporates, based on the statutory text, the context, and the broad and liberal interpretation it calls for, I am of the view that consumer relationships fall within the meaning of "commercial legal relationships" contemplated by the UNFAACA.

[46] In arguing the opposite, Ms. Difederico relies heavily on the recent decision of the Supreme Court of Canada in *Uber*. In that case, the plaintiff, an Uber driver based in Ontario, commenced a proposed class action on behalf of Ontario Uber drivers and argued that Uber drivers were employees of Uber. As such, he maintained that their relationship with Uber was governed by Ontario's *Employment Standards Act, 2000*, S.O. 2000 c. 41 (ESA), and therefore the drivers were entitled to the benefit of the ESA. The plaintiff's

contention was that Uber had violated the ESA and he sought to advance this contention in his proposed class action. In so doing, he argued that the arbitration agreement included in the contract of adhesion between Uber and the drivers was void and unenforceable. In response, Uber brought a motion to stay the proposed class action in favour of arbitration.

[47] In *Uber*, the Supreme Court thus addressed Ontario's arbitration framework, including the ICCA. Importantly, it noted that the ICAA incorporates both the New York Convention and the Model Law, but that only the Model Law was relevant for its analysis (*Uber* at para. 21). The definition of "commercial" articulated in *Uber* was accordingly not meant to be a comprehensive definition for the purposes of the New York Convention under the UNFAACA. Rather, the limited holding from *Uber* is that an employment dispute cannot be defined as "commercial" for the purpose of the ICAA because "[this] is not the type of dispute that the *ICAA* is intended to govern" (*Uber* at para. 26).

[48] It is also noteworthy that in *Uber*, the Supreme Court directed that in such circumstances, a court must focus on the nature of the dispute at issue and not the nature of the relationship between the parties to the arbitration agreement at paragraph 25:

> [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. [Emphasis added].

[49] The above is consistent with the competence-competence principle and prior Supreme Court jurisprudence directing that complex factual inquiries should be avoided when a court is seized of a motion for a stay in favour of arbitration. In any event, the Judge in the present case observed that if she were to consider the nature of the dispute between the parties, as opposed to the relationship, she would conclude it is a commercial one because the claims alleged by Ms. Difederico have "a uniquely commercial character". The Judge reasoned as follows at paragraphs 64 to 66:

> 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 Amazon.ca.
>
> 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.
>
> Although Ms. Difederico is a consumer, in my view the claims she has made have a commercial foundation.

[50] I see no reason to depart from that reasoning which is in keeping with the competence-competence principle, the purposes of the New York Convention, and the reference to "differences arising out of commercial legal relationships" in the text of subsection 4(1) of the UNFAACA.

[51] In view of the dispute arising from Ms. Difederico's claims pursuant to the Competition Act, I am thus of the view that the Judge did not err in finding that these claims

are captured by the meaning of "commercial" in the context of the UNFAACA. Consequently, the UNFAACA applies, as does, more particularly, Article II(3) of the New York Convention:

Article II	Article II
3 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.	**3** Le tribunal d'un État contractant, saisi d'un litige sur une question au sujet de laquelle les parties ont conclu une convention au sens du présent article, renverra les parties à l'arbitrage, à la demande de l'une d'elles, à moins qu'il ne constate que ladite convention est caduque, inopérante ou non susceptible d'être appliquée.

[52] Incidentally, had paragraph 50(1)(*b*) of the Federal Courts Act been considered and applied instead of the UNFAACA, as argued for by Ms. Difederico, the result would nonetheless be the same. Indeed, the discretion afforded to the Federal Court (and the Federal Court of Appeal) to stay proceedings under paragraph 50(1)(*b*) where it is in the interest of justice to do so would not circumvent the competence-competence principle and the present matter would likewise also be stayed in favour of arbitration, absent any of the exceptions considered below (*Murphy*). Indeed, the competence-competence principle has long been understood to be in the interest of justice. Until Parliament legislates otherwise, and unless the limited exceptions established by *Dell* and *Uber* apply, stays in favour of arbitration are to be granted in relation to claims brought under the Competition Act.

(2) Did the Judge err in finding that there is an enforceable arbitration agreement between the parties?

[53] The issue of the enforceability of the arbitration agreement at issue raises firstly the question of whether it is void on the grounds of unconscionability.

[54] In this regard, Ms. Difederico contends that the Judge misapplied Article II(3) of the New York Convention and failed to apply the exception set out in *Uber*. Specifically, she alleges that the arbitration agreement is void by virtue of being unconscionable and that, as such, even if the dispute otherwise met the requirements of Article II(3) of the New York Convention, the Judge erred when she referred the matter to an arbitrator.

[55] More particularly, Ms. Difederico submits that the Judge should have found that the arbitration agreement is unconscionable because (i) Ms. Difederico did not have the bargaining power to protect her interests nor was she aware of the full import of the clauses and, (ii) the clauses unduly advantage Amazon and unduly disadvantage Ms. Difederico when assessed contextually, by making it practically impossible for her to obtain damages for violations of the Competition Act (Appellants' Memorandum of Fact and Law at paras. 56-57). Ms. Difederico further alleges, again on the basis of *Uber*, that the choice of law provisions set forth in the dispute resolution clauses contribute to the unconscionability of the arbitration agreement because they do not "affirmatively provide" Ms. Difederico with the right to obtain damages from an American arbitrator in the event that her claims are made out (Appellants' Memorandum of Fact and Law at paras. 63-66).

[56] Ms. Difederico's arguments regarding unconscionability must fail. A fair reading of the Judge's reasoning demonstrates a careful consideration of the evidence before her and a proper application of the jurisprudence on what amounts to being "unconscionable" (Judge's decision at paras. 117-26). Indeed, the Judge determined that the inequality of bargaining power alleged by Ms. Difederico was not analogous to that found in *Uber* because Ms. Difederico was not dependent on Amazon for "important elements of everyday life" akin to employment that would make her particularly dependent or vulnerable (Judge's decision at paras. 124-26). Ms. Difederico fails to point to evidence in the record that would establish any such vulnerability or dependence on her part relative to Amazon.

[57] In reality, Ms. Difederico appears to suggest that entering the arbitration agreement results in a denial of access to justice (Appellants' Memorandum of Fact and Law at paras. 58-63). Yet, as noted by the Judge, this would only be the case if there were a clear reason to conclude that referral to arbitration would make it truly impossible for the claim to proceed. In the words of the Judge at paragraph 112 of her reasons: "[a] mere possibility, in my view, is not enough to overcome the competence-competence principle."

[58] The Judge likewise properly considered the cost of arbitration in the circumstances and rejected Ms. Difederico's contention that it would render the arbitration "illusory", as was the case in *Uber*. Instead, The Judge found that here, the upfront cost to initiate arbitration was not disproportionate and that the arbitration procedure set out in the agreement was not prohibitive:

> 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.
>
> (Judge's decision at para. 118)

[59] In addressing Ms. Difederico's various contentions, the Judge also took care to draw the following distinction between the present case and *Uber* at paragraph 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 unconscionability.

[60] Finally, the Judge, in rejecting the Ms. Difederico's choice of law argument, considered the conflicting expert evidence adduced by the parties as to whether a referral to arbitration and the choice of U.S. law would preclude Ms. Difederico from asserting her claims under the Competition Act in the United States. On the basis of the record before her and given the fact that Amazon made an undertaking that it would not argue that the choice of law operates to exclude the Competition Act before an arbitrator, the Judge properly concluded that Ms. Difederico's contention remained hypothetical (Judge's decision at paras. 104, 116). The impact of foreign law is an issue of mixed fact and law that is seldom easy to resolve on the face of the record and, following the competence-competence principle, is indeed best left to the arbitrator to determine.

[61] As illustrated by the foregoing, the Judge fully considered each of Ms. Difederico's unconscionability arguments. Ms. Difederico has failed to point to any palpable and overriding error on the part of the Judge in finding, on the basis of the evidence, that the arbitration agreement at issue is not, on its face, an improvident bargain for her or otherwise likely to deny her access to justice. In light of both the principle of competence-competence and the framework established by the Supreme Court of Canada in *Dell* and *Uber*, the Judge was correct to refuse to analyse this issue any further.

[62] Before this Court, Ms. Difederico raises an additional argument based on the wording of Article II(3) of the New York Convention, contending that a stay may be denied when an otherwise valid commercial arbitration agreement "is inoperative or incapable of being performed" (Appellants' Memorandum of Fact and Law at para. 67). Ms. Difederico argues that such is the case here.

[63] In support of this new argument, Ms. Difederico relies on the Supreme Court decision in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, 475 D.L.R. (4th) 1 (*Peace River*), where a stay in favour of arbitration was denied. In that case, the Supreme Court found that the arbitration agreements at issue were inoperative within the meaning of subsection 15(2) of the British Columbia *Arbitration Act*, R.S.B.C. 1996, c. 55, as a result of a practical conflict with sections 183 (courts vested with jurisdiction) and 243 (courts may appoint a receiver) of the federal *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (BIA). In so doing, the Supreme Court articulated a non-exhaustive list of five factors to

analyse whether a stay should be refused in the context of a competing process under the BIA.

[64] Ms. Difederico contends that the decision in *Peace River* is applicable in the present case to the extent that a referral to arbitration would similarly undermine the Competition Act. Consequently, argues Ms. Difederico, the arbitration clause she agreed to is inoperative and the competence-competence principle does not apply.

[65] Ms. Difederico's reliance on *Peace River* is misplaced.

[66] In *Peace River*, the Supreme Court emphasized that it was only the particular policy objectives of the BIA that justified sidestepping the arbitration agreements at issue. Specifically, the Supreme Court observed at paragraph 9 that :

> Sections 243 and 183 of the *BIA* authorize courts to do what practicality demands in the context of a receivership. In this case, practicality demands that the Arbitration Agreements not be enforced, in the interest of an orderly and efficient resolution of the receivership. In short, the chaotic nature of the arbitral proceedings bargained for by the parties would compromise the integrity of the receivership, to the detriment of affected creditors and contrary to the purposes of the *BIA*. [Emphasis added].

[67] It is also significant that the Supreme Court in *Peace River* was mindful of the competence-competence principle and of Canada's reputation as an "arbitration-friendly" state. Contrary to Ms. Difederico's contention, the Supreme Court specified at paragraph 10 that *Peace River* was to be considered an exception:

> I stress that this result is context-specific. The unique facts of this case, which pit the public policy objectives underlying the *BIA* against freedom of contract and party autonomy, justify departing from the legislative and judicial preference for

> holding parties to their arbitration agreements. Contrary to conventional wisdom, however, arbitration law and insolvency law need not always exist at "polar extremes". They have much in common, including an emphasis on efficiency and expediency, procedural flexibility, and expert decision-making. These shared interests often converge through arbitration, such that granting a stay in favour of arbitration will promote the objectives of both provincial arbitration legislation *and* federal insolvency legislation. It is for this reason that courts should generally hold parties to their agreements to arbitrate, even if one of them has become insolvent. To do otherwise would not only threaten the important public policy served by enforcing arbitration agreements and thus Canada's position as a leader in commercial arbitration, but also jeopardize the public interest in the expeditious, efficient, and economical clean-up of the aftermath of a financial collapse. [Emphasis added].

[68] In other words, *Peace River* is an exception to the rule, consistent with the Supreme Court's jurisprudence, which has repeatedly emphasized the fundamental principle of competence-competence and directed courts to allow arbitrators to rule first on their own jurisdiction (*Dell*, *Seidel*, *Peace River*). Moreover, the non-exhaustive list of factors in *Peace River* was specific to insolvency law. The Supreme Court's analysis pertaining to those factors is introduced under a heading that leaves no doubt about its limited application to issues in connection with insolvency law: "Factors for Assessing Whether an Arbitration Agreement Is 'Inoperative' Under Section 15(2) of the Arbitration Act Due to Insolvency Proceedings" (*Peace River* at para. 155).

[69] In fact, Ms. Difederico's entire position is an invitation to revert back to a more interventionist role for Canadian courts in arbitration matters. The Supreme Court of Canada long ago rejected this approach and affirmed the importance of respecting the competence-competence principle within the Canadian judicial order. Ms. Difederico has failed to establish any reason to conclude otherwise in the present case.

(3) Did the Judge err in concluding that section 36 of the Competition Act does not preclude mandatory arbitration?

[70] From the Judge's reasons, it appears that in first instance, Ms. Difederico argued that the 2022 amendments to the arbitration agreement rendered it non-mandatory, as it now includes an explicit exception to arbitration where required by the law of the jurisdiction of residence. As noted above, the Judge did not agree that these amendments had a substantive effect, finding instead that it "simply sets out in express terms the legal principle already in place" (Judge's decision at para. 88).

[71] In the same spirit, the Judge also addressed Ms. Difederico's contention that the language of section 36 of the Competition Act restricts the enforceability of arbitration agreements, with reference to this Court's decision in *Murphy*. In this regard, the Judge found that this Court had already recognized at paragraph 60 in *Murphy* that, "the Competition Act does not contain language which would indicate that Parliament intended that arbitration clauses be restricted or prohibited" (Judge's decision at para. 89). As such, it was, in the Judge's view, already settled law that claims for damages pursuant to section 36 of the Competition Act are arbitrable.

[72] Before this Court, Ms. Difederico challenges the Judge's conclusion and argues that *Murphy*'s interpretation of the Competition Act is no longer tenable in light of *Pioneer Corp v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295 (*Godfrey*).

[73] Specifically, Ms. Difederico notes that *Murphy* relies on the premise that since there is no public interest aspect to section 36 of the Competition Act, claims brought pursuant to it may be arbitrable. However, in Ms. Difederico's view, the *Godfrey* decision, decided after *Murphy*, recognizes the public interest objectives of the Competition Act, such that claims under section 36 are no longer compatible with private dispute resolution (Appellants' Memorandum of Fact and Law at paras. 78-79, 81-82). It follows, says Ms. Difederico, that *Murphy* cannot be considered authority for the proposition that an arbitration agreement may oust the court's jurisdiction under section 36 of the Competition Act.

[74] However, the issue relevant to section 36 of the Competition Act in *Godfrey* was that it was not plain and obvious that so-called "umbrella purchasers" do not have a cause of action under section 36 of the Competition Act (*Godfrey* at paras. 56-57). More importantly, *Godfrey* did not decide any issues relating to arbitration and does not distinguish or make reference to *Murphy*. Hence, *Godfrey* is not inconsistent with this Court's reasoning in *Murphy* and does not cast doubt on the fundamental issue it ruled upon: a private claim for damages brought under section 36 of the Competition Act is arbitrable (*Murphy* at para. 40).

[75] Moreover, the circumstances of the case in *Murphy* and those of the present case are strikingly similar. In *Murphy*, like here, the appellant argued that a stay in favour of arbitration was wrongly ordered by the Federal Court and that the Federal Court erred in finding that the Competition Act did not include the kind of express legislative language necessary to oust an agreement to arbitrate. Likewise, the appellant in *Murphy* also contested

on appeal the Federal Court's finding that the reference to a "court of competent jurisdiction" in section 36 of the Competition Act does not declare the Federal Court to be the *only* competent forum and does not prevent parties from contracting out of that jurisdiction (*Murphy* at paras. 17, 41-42).

[76] In fact, Ms. Difederico's argument amounts to requesting this Court to overrule the holding of the panel in *Murphy* pursuant to our Court's decision in *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149 (*Miller*), presumably on the grounds that *Murphy* is allegedly "manifestly wrong". However, Ms. Difederico has not referred to *Miller* in her submissions before this Court nor has she attempted to explain the "exceptional circumstances" that would justify and satisfy the "manifestly wrong" test.

[77] Ms. Difederico wrongly asserts that damages claims under section 36 of the Competition Act cannot be subject to arbitration. This issue was clearly disposed of in *Murphy*. Ms. Difederico also contends that *Murphy* did not consider the issue of whether an arbitrator is a "court of competition jurisdiction" within the meaning of section 36(1) of the Competition Act (Appellants' Memorandum of Fact and Law at para. 75). Again, the argument is misleading and must be rejected. Although the "court of competent jurisdiction" issue was not the focus of the reasons in *Murphy*, it was nonetheless addressed and dismissed (*Murphy* at paras. 17, 41-42) in accordance with *Desputeaux*. In that case, the Supreme Court found, with respect to the interpretation of section 37 (since repealed) of the *Copyright Act*, R.S.C., 1985, c. C-42, that:

> The purpose of enacting a provision like s. 37 of the *Copyright Act* is to define the jurisdiction *ratione materiae* of the courts over a matter. It is not intended to

> exclude arbitration. It merely identifies the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. It cannot be assumed to exclude arbitral jurisdiction unless it expressly so states. [Emphasis added].
>
> (*Desputeaux* at para. 42)

[78] Finally, Ms. Difederico refers to *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751 (*Douez*), where the Supreme Court held that a forum selection clause that ousted British Columbia's jurisdiction in a privacy matter was unenforceable. Ms. Difederico contends that *Douez* is authority for the proposition that courts can deny enforcing a forum selection clause when the legislature has manifested an intention "to protect 'the social, economic, or political policies of the enacting state in the collective interest'". Here, says Ms. Difederico, "[i]t is incompatible with the public interest and with the policy of the *Competition Act* to permit criminal anti-competitive conduct to be shielded from view through mandatory arbitration" (Appellants' Memorandum of Fact and Law at paras. 83-84).

[79] Ms. Difederico's contention cannot stand. The Supreme Court's comments in *Douez* on the effect of legislative intent to protect the public interest were made with respect to the enforceability of a forum selection clause in the context of an action brought under the *Privacy Act*, R.S.B.C. 1996, c. 373. As mentioned, the Competition Act has already been interpreted by our Court to not demonstrate this kind of legislative intent (*Murphy* at paras. 63-64). It is also recalled that the British Columbia Supreme Court considered very similar arguments on the impact of *Douez* on arbitration agreements in *Williams v. Amazon.com Inc.*, 2020 BCSC 300, [2020] B.C.J. No. 344 (*Williams*), and in *Petty v. Nianti Inc.*, 2022 BCSC 1077, [2022] B.C.J. No. 1156 (*Petty*). In both cases, it was found that the analysis

pertaining to forum selection clauses could not be transposed to apply to arbitration agreements (*Williams* at paras. 69-77; *Petty* at paras.101-12). In particular, it was highlighted that arbitration does not carry the same concern as forum selection clauses that "a court will be required by a contractual agreement between the parties to adjudicate a dispute that is not properly before it" (*Williams* at para. 77; *Petty* at para. 104).

B. *Concluding Remarks*

[80] Purchasing goods and services online has become ubiquitous in everyday life. While this has been true for many years, the COVID-19 pandemic further increased reliance on online retailers. Consumer transactions online are often completed through digital adhesion contracts, which, as in the circumstances of this appeal, usually include a mandatory arbitration agreement. Some provinces have reacted to this reality by adopting legislation protecting consumers from the potential unfairness of such adhesion contracts. For example, in Ontario, section 7 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, declares mandatory arbitration clauses invalid while section 8 renders invalid any clause that would operate to prevent a consumer class action. Similarly, section 11.1 of Quebec's *Consumer Protection Act*, chapter P-40.1, prohibits any stipulation that obliges a consumer to refer a dispute to arbitration as well as any stipulation that attempts to prevent a class action. By virtue of the same section, consumers have the option of agreeing to arbitration after a dispute has arisen. In contrast, section 172 of British Columbia's *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, has been interpreted to oust mandatory arbitration clauses but only in relation to claims brought under that particular

section. In adopting these provisions, each provincial legislature made a policy choice to shield consumers from arbitration clauses to varying degrees.

[81] Nothing precludes Parliament from making such a policy choice in the context of the Competition Act. However, in the absence of any indication of Parliamentary intent to do so, mandatory arbitration clauses in consumer adhesion contracts will be enforced, subject to the limited exceptions developed by the Supreme Court of Canada and addressed in these reasons.

[82] I would accordingly dismiss the appeal.

"Richard Boivin"
J.A.

"I agree.
Judith Woods J.A."

"I agree.
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-189-22
STYLE OF CAUSE:	STEPHANIE DIFEDERICO and JAMESON EDMOND CASEY v. AMAZON.COM, INC., AMAZON.COM.CA, INC., AMAZON.COM SERVICES, LLC, AMAZON SERVICES INTERNATIONAL, INC. and AMAZON SERVICES CONTRACTS, INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 17, 2023
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	WOODS J.A. LASKIN J.A.
DATED:	JULY 25, 2023

APPEARANCES:

DAVID R. WINGFIELD JAMES C. ORR JUSTIN SMITH	FOR THE APPELLANTS
CAITLIN SAINSBURY SUBRATA BHATTACHARJEE PIERRE N. GEMSON GLEN GIBSON	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

ORR TAYLOR LLP Toronto, Ontario STROSBERG SASSO SUTTS LLP Windsor, Ontario	FOR THE APPELLANTS
BORDEN LADNER GERVAIS LLP Toronto, Ontario	FOR THE RESPONDENTS