COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Isagenix International LLC v. Harris,* 2023 BCCA 96

Date: 20230224
Docket: CA48176

Between:

Isagenix International LLC, Isagenix Canada ULC, Isagenix Canada, Isagenix, and Isagenix International

Appellants
(Defendants)

And

Chera Harris

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Willcock
The Honourable Justice Griffin
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated February 18, 2022 (*Harris v. Isagenix International*, 2022 BCSC 268, Kelowna Docket S131720).

Counsel for the Appellants:	M. Vesely F. Wu
Counsel for the Respondent:	C.M. Trivett D.G. Einfeld
Place and Date of Hearing:	Vancouver, British Columbia January 30, 2023
Place and Date of Judgment:	Vancouver, British Columbia February 24, 2023

Written Reasons by:
The Honourable Justice Griffin

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Abrioux

Summary:

The appellant appeals from dismissal of its application to stay the litigation based on an arbitration clause. Held: Appeal dismissed. The judge did not err in refusing the stay application. The arbitration clause only applied to claims arising from the contracts containing the clause. The claim being advanced does not arise from the contracts containing the arbitration clause, but rather, is based on the tort of negligence, claiming damages for personal injury allegedly suffered from eating the appellant's products. The appellant could not establish an arguable case that the matter was one agreed to be submitted to arbitration.

Reasons for Judgment of the Honourable Justice Griffin:

Overview

[1] This appeal raises questions about whether arbitration clauses in agreements having to do with the appellants' sale of edible products to the respondent Ms. Harris for her resale or personal purchase, as part of a multilevel marketing scheme, should result in a stay of her litigation claim for personal injury damages arising from her consumption of some of the products.

[2] For ease of reference, I will refer to the three appellants together as Isagenix.

[3] More precisely, this appeal raises the question of whether the competence to determine this question is reserved for an arbitrator, or could be properly decided by a court first.

[4] Isagenix brought an application pursuant to s. 8 of the *International Commercial Arbitration Act*, R.S.B.C 1996, c. 233 ["*ICAA*"] for a stay of Ms. Harris's claim. The judge concluded that there was "no arguable case" that the arbitration clauses covered the type of claim advanced by Ms. Harris. He therefore dismissed Isagenix's application. For the reasons that follow, the appellants have not established that the judge erred and I would dismiss the appeal.

Arbitration Agreements

[5] Isagenix sells various edible products, marketed as health products and as containing certain fortified vitamins and minerals. It does so through a "multi-level-

marketing scheme", meaning it sells the products directly to consumers who contract with it as "Preferred Customers", and to persons who are described as Associates and who then resell the products for a commission.

[6] Both Preferred Customers and Associates are able to purchase the products from Isagenix for their own consumption, and their contracts provide for some incentives when they do so.

[7] Ms. Harris initially enrolled into the Isagenix "Preferred Customer" program, from July 20–August 23, 2017. During this time, Isagenix claims she placed two orders for product. Isagenix says that she was subject to the terms and conditions of a Customer Contract which contained an arbitration clause.

[8] The judge set out the arbitration clause in the Customer Contract as follows:

> [5] The Customer Terms contains an arbitration clause stating as follows:
>
> (a) ANY CONTROVERSY OR CLAIM ARISING OUT OF, OR RELATING TO, THE CUSTOMER MEMBERSHIP APPLICATION AND AGREEMENT, INCLUDING THESE TERMS AND CONDITIONS, OR THE BREACH THEREOF, SHALL BE SETTLED BY CONFIDENTIAL ARBITRATION ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION UNDER ITS COMMERCIAL ARBITRATION RULES,
> !AND JUDGMENT ON THE AWARD RENDERED BY THE ARBITRATOR MAY BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF. IF YOU FILE A CLAIM OR COUNTERCLAIM AGAINST ISAGENIX, YOU MAY ONLY DO SO ON AN INDIVIDUAL BASIS AND NOT WITH ANY OTHER INDIVIDUAL OR AS PART OF A CLASS ACTION. YOU WAIVE ALL RIGHTS TO TRIAL BY JURY OR TO ANY COURT.
> All arbitration proceedings shall be held in Maricopa County, State of Arizona, unless the laws of the jurisdiction where you reside expressly require the application of its laws, in which case the arbitration shall be held in the capital of that jurisdiction. At least one arbitrator shall be an attorney at law experienced in business law transactions and network marketing. Neither the parties nor the arbitrator(s) may disclose the existence, content, or results of any arbitration without the prior written consent of both parties. Judgment on any award rendered by the arbitrator(s) may be entered in any court having jurisdiction. Each party to the arbitration shall be responsible for its own costs and expenses, including legal and filing fees; provided, however, that the arbitrator will have discretion to award legal fees and other costs to the prevailing

party. The decision of the arbitrator shall be final and binding on the parties. This agreement to arbitrate shall survive any termination or expiration of your relationship with Isagenix.

(b) Nothing in the arbitration provision prohibits either party from obtaining a temporary injunction, preliminary injunction, permanent injunction or other equitable relief available to safeguard and protect the party's interests prior to, during or following the filing of any arbitration or other proceeding, or pending the rendition of a decision or award in connection with an arbitration or other proceeding. The arbitrator(s) will have the authority to continue injunctive relief and to enter a permanent order granting such relief.

(c) In addition, nothing in the arbitration provision shall prevent Isagenix from filing a lawsuit to identify unknown persons, including, but not limited to, unidentified Customers or Independent Associates, who may be selling Isagenix products on the Internet, cybersquatting, registering or using Isagenix trademarks or confusingly similar domain names, or producing Isagenix merchandise without authorization. Once a person is determined to be a Customer or Independent Associate, Isagenix may take further action against such persons. The filing of a lawsuit and taking any action in that lawsuit to identify unknown persons shall not be a waiver of any right or obligation set forth in the arbitration provision.

(d) In the event that a dispute or claim arising out of, or relating to this Agreement, is not subject to arbitration as set forth above, the laws of the state of Arizona shall govern, and the parties agree that proper jurisdiction and venue shall be in the state and federal courts of Arizona. If the laws of your place of residence impose any requirement that is different from or in addition to those set forth in these Terms and Conditions, then these Terms and Conditions shall be deemed amended in conformance with those laws as to that jurisdiction only.

(e) BY CREATING AN ISAGENIX CUSTOMER ACCOUNT, YOU AGREE TO ACCEPT AND BE BOUND BY THE ABOVE CONFIDENTIAL AND BINDING ARBITRATION.

[9] Then, on August 23, 2017, Ms. Harris enrolled with Isagenix as a reseller, described as an “Associate”. As such, Isagenix says that she was required to assent to Isagenix Policies and Procedures all of which formed part of the “Associate Contract”. She thus agreed to an arbitration clause as part of that contract, as set out by the judge:

> [9] As with the Customer Terms, the Policies also contain an arbitration clause (the “Arbitration Clause”) that states as follows:

> ANY CONTROVERSY OR CLAIM ARISING OUT OF, OR RELATING TO, THESE POLICIES AND PROCEDURES, THE COMPENSATION PLAN, OR THE GUIDANCE DOCUMENTS, OR THE BREACH THEREOF, SHALL BE SETTLED BY CONFIDENTIAL ARBITRATION ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION UNDER ITS COMMERCIAL ARBITRATION RULES, AND JUDGMENT ON THE AWARD RENDERED BY THE ARBITRATOR MAY BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF. IF YOU FILE A CLAIM OR COUNTERCLAIM AGAINST ISAGENIX OR ITS OWNERS, DIRECTORS, OFFICERS OR EMPLOYEES, YOU MAY ONLY DO SO ON AN INDIVIDUAL BASIS AND NOT WITH ANY OTHER INDIVIDUAL OR AS PART OF A CLASS ACTION. YOU WAIVE ALL RIGHTS TO TRIAL BY JURY OR TO ANY COURT. All arbitration proceedings shall be held in Maricopa County, State of Arizona, unless the laws of the jurisdiction where you reside expressly require the application of its laws, in which case the arbitration shall be held in the capital of that jurisdiction. At least one arbitrator shall be an attorney at law experienced in business law transactions and network marketing. Neither the parties nor the arbitrator(s) may disclose the existence, content, or results of any arbitration without the prior written consent of both parties. Judgment on any award rendered by the arbitrator(s) may be entered in any court having jurisdiction. Each party to the arbitration shall be responsible for its own costs and expenses, including legal and filing fees; provided, however, that the arbitrator will have discretion to award legal fees and other costs to the prevailing party. The decision of the arbitrator shall be final and binding on the parties. This agreement to arbitrate shall survive any termination or expiration of your relationship with Isagenix.

[10] Isagenix submits that there was another clause in the Associate Contract documents that is relevant:

> 9.1 Scope, Applicability and Interpretation.
>
> These Policies govern the relationship between lsagenix Canada ULC and/or any of its affiliates (“lsagenix”) with any Associate or entity that holds an lsagenix Position.

Claim for Personal Injury

[11] On July 28, 2021, Ms. Harris commenced a claim against Isagenix. In her notice of civil claim she alleges that Isagenix designed, manufactured, distributed, marketed and supplied products in Canada that were recalled by Health Canada and the Canadian Food Inspection Agency due to their unsafe over-fortification of vitamins and minerals, contrary to the labelling of these products. She alleges she

used the products as directed and intended by Isagenix. She alleges that she suffered an overdose of vitamins and minerals, and suffered various personal injuries due to her consumption of these products, for which she claims damages. She alleges that the harm she suffered was due to Isagenix's negligent design, manufacture, and failure to warn. She alleges that Isagenix owed her a duty of care as the designers, manufacturers, marketers and suppliers of the product, and knew, or ought to have known, that unsafe levels of vitamins and minerals in the products would cause her foreseeable injury.

[12] Nowhere in Ms. Harris's claim does she plead or rely on any contractual relationship with Isagenix as the basis for Isagenix owing her a duty of care.

The *International Commercial Arbitration Act* [*ICAA*]

[13] On October 20, 2021, Isagenix filed a jurisdictional response to Ms. Harris' notice of civil claim, disputing that the court had jurisdiction over it.

[14] Concurrently, Isagenix filed a notice of application seeking an order that the claim be stayed pursuant to s. 8 of the *ICAA*, on the ground that "the claims made in the proceeding are subject to an arbitration agreement".

[15] The *ICAA* applied because the designated place of arbitration was outside British Columbia, namely in Arizona: s. 1(3)(b)(i).

[16] Section 8 of the *ICAA* provides:

> 8 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first statement on the substance of the dispute, apply to that court to stay the proceedings.
>
> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.
>
> (3) Even if an application has been brought under subsection (1) and even if the issue is pending before the court, an arbitration may be commenced or continued and an arbitral award made.
>
> [Emphasis added.]

[17] Only s. 8(1) was at issue before the judge.

Principles Governing Statutory Stay in Favour of Arbitration

[18] It is not disputed that Isagenix brought its application, for a stay of the litigation, before submitting its first statement on the substance of the dispute, meeting one of the requirements of s. 8(1).

[19] The question that concerns this appeal is whether Isagenix met the test under s. 8(1) for establishing that the litigation was "in respect of a matter agreed to be submitted to arbitration".

[20] This requires consideration of when should a judge determine the question of whether, under s. 8(1), the legal proceedings are "in respect of a matter agreed to be submitted to arbitration", and when should a judge grant a stay and refer that question as one to be determined by the arbitrator.

[21] There are stay provisions similar to s. 8 of the *ICAA* in international commercial arbitration statutes in other provinces in Canada as well as in statutes governing domestic arbitrations, such as s. 7 of the *Arbitration Act*, S.B.C. 2020, c. 2. Recently the Supreme Court of Canada has reviewed the principles that apply to similar stay provisions, in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 [*Peace River Hydro*].

[22] Generally speaking, the "competence-competence" principle applies, meaning that courts favour allowing the arbitrator the first opportunity to determine the arbitrator's own jurisdiction. The standard that has developed is the "arguable case" test: if the party seeking a stay can establish an "arguable case" that the legal proceedings are "in respect of a matter agreed to be submitted to arbitration", the stay should be granted in favour of allowing the arbitrator the first opportunity to determine the arbitrator's jurisdiction: *Peace River* at paras. 39, 85.

[23] However, there are exceptions to the general rule that questions of an arbitrator's jurisdiction should be referred to the arbitrator to decide at first instance. These exceptions were described in *Peace River* at para. 42:

> [42] The competence-competence principle is not absolute, however. A court may resolve a challenge to an arbitrator's jurisdiction if the challenge involves pure questions of law, or questions of mixed fact and law requiring only superficial consideration of the evidentiary record (*Uber*, at para. 32; *Dell*, at paras. 84-85). This exception is justified by the particular expertise that courts have in deciding such questions. Further, it allows a legal argument relating to the arbitrator's jurisdiction "to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate" (*Dell*, at para. 84).
>
> [Emphasis added.]

[24] To summarize, Isagenix could meet the test for a stay and referral of the matter to arbitration under s. 8(1), if it established an arguable case that the legal proceeding is in respect of a matter agreed to be submitted to arbitration. However, if the question of the arbitrator's jurisdiction could be determined against Isagenix by the judge as a pure question of law, or as one of mixed fact and law requiring only superficial examination of the evidentiary record, the judge could dismiss the stay application.

[25] This approach, and the question of what is a superficial review of the record, was discussed in *Uber Technologies Inc. v. Heller,* 2020 SCC 16:

> [34] The doctrine established in [*Dell Computer Corp. v. Union des Consommateurs,* 2007 SCC 34] is neatly summarized in its companion case, *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35 (CanLII), [2007] 2 S.C.R. 921, at para. 11:
>
> > The majority of the Court held that, when an arbitration clause exists, any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone. Where a question concerning jurisdiction of an arbitrator requires the admission and examination of factual proof, normally courts must refer such questions to arbitration. 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.

> …
>
> [36] Neither *Dell* nor [*Seidel v. TELUS Communications Inc.*, 2011 SCC 15] fully defined what is meant by a "superficial" review. The essential question, in our view, is whether the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties (see *Trainor v. Fundstream Inc*., 2019 ABQB 800, at para. 23 (CanLII); see also *Alberta Medical Association v. Alberta*, 2012 ABQB 113, 537 A.R. 75, at para. 26).
>
> [Emphasis added.]

The Judgment Under Appeal

[26] The judge considered the arbitration clauses in both the Customer Contract as well as the Associate Contract.

[27] As set out above, these arbitration clauses stated that they applied to "any controversy or claim arising out of, or relating to" the contract. For ease of reference, I will refer to this language as a singular arbitration clause.

[28] The judge noted that the competence-competence principle applied, such that a stay should be granted so long as the applicant establishes an arguable case: para. 16.

[29] The judge said that Ms. Harris's case "raises a question of law that can be determined on undisputed facts, or alternatively one of mixed fact and law that requires 'only superficial consideration of the documentary evidence in the record' for its disposition": para. 19.

[30] He held that there was "no arguable case" that the words in the arbitration clause covered the type of claim advanced by the plaintiff. He noted that while the words "arising out of" or "relating to" were broad, they were constrained to the contract documents: para. 20. He held:

> [20] … The claim advanced by the plaintiff is not dependant on any of the referenced documents; she does not need, nor does she plead, any of these Contract documents in order to establish her traditional products liability claim.

[31] The judge noted that even though the contracts allowed for Ms. Harris to purchase product for her own use and to receive some credit for her personal purchases, this did not mean that her personal injury claim was "arising out of" the contract. The dispute was not about the calculation of any credits for her personal purchases, but was a personal injury claim and of an "entirely different character": para. 23.

[32] And further:

> [24] The plaintiff is not seeking to enforce any rights that were granted to her under the Contract. Rather, she is relying primarily on her right to be free from the foreseeable consequences of negligent behaviour on the part of a supplier of a product designed for personal consumption.

[33] The above analysis was sufficient to dispose of the application for a stay.

[34] The judge went on to consider other arguments which I do not consider necessary to address on appeal.

Alleged Errors on Appeal

[35] Isagenix submits that the judge made many errors but the essence of its submission is that the judge did not properly apply the competence-competence principle. Isagenix says that there was an arguable case that Ms. Harris's claim arose out of the contract containing the arbitration clause, and so the question of whether it did fall within an arbitrator's jurisdiction ought to have been referred to the arbitrator.

[36] Ms. Harris submits that this is one of those clear cases that could and should have been resolved by a judge and did not justify referral to an arbitrator.

Analysis

[37] As part of its argument on appeal, Isagenix asserts that the judge failed to consider clause 9.1 of the Associate Contract. Again, that clause states:

> 9.1 Scope, Applicability and Interpretation.

> These Policies govern the relationship between Isagenix Canada ULC and/or any of its affiliates ("Isagenix") with any Associate or entity that holds an Isagenix Position.
>
> [Emphasis added.]

[38] The parties accept for purposes of this appeal that the "Policies" referred to above form part of the Associate Contract. Isagenix asserts that there is at least an arguable case that the tort claims by Ms. Harris arise out of or relate to Ms. Harris's relationship with Isagenix. It says this means that there is an arguable case that the arbitration clause in the contract governs the claim.

[39] I cannot agree with Isagenix that it is arguable that any claims arising out of a relationship between Isagenix and Ms. Harris are governed by the arbitration clause in their contract, even if the claims are personal injury claims based in negligence.

[40] In my view, Isagenix's argument goes too far. If Ms. Harris was a passenger in a car owned by Isagenix and driven by an officer of Isagenix, on the way to a meeting to sell Isagenix product, and Ms. Harris was injured in an accident due to the driver's negligence, Isagenix's position on this appeal would logically extend to saying that since the injury occurred in a relationship with Isagenix, it is arguable that the parties intended that she would have to arbitrate any claim against Isagenix for her injuries. This would be an absurd result.

[41] Isagenix concedes that an "arguable" case that the arbitration clause applies does not mean any possible argument, no matter how absurd and lacking of merit.

[42] In my view, it is inarguable that clause 9.1 refers only to the parties' commercial relationship arising from the contract; that is the relationship "governed by" the very policies forming the contract.

[43] Furthermore, the arbitration clause itself is self-limiting. It only applies to controversies or claims "arising out of, or relating to" the contract. In contrast to the implications of Isagenix's argument, it does not read, and cannot be arguably read, as applying to controversies or claims arising out of, or relating to, the parties' "relationship" generally.

[44] Isagenix relies on the case of *Turnbridge v. Cansel Survey Equipment (Canada) Ltd.*, 2000 BCSC 287, as support for its argument that a claim in negligence can arise out of a parties' contractual relationship. That case involved a distributorship contract between a seller of equipment, Cansel, and a manufacturer, Nikon. A purchaser of some Nikon equipment from Cansel, sued Cansel, claiming that the equipment was defective. Cansel then brought a third-party claim against Nikon, advancing claims that Nikon had breached the distributorship contract, breached the *Sale of Goods Act*, R.S.B.C. 1996, c. 410 and made negligent misrepresentations, and claims for products liability.

[45] In *Turnbridge,* the manufacturer, Nikon, obtained a stay of the third-party claim on the basis that it arguably fell within the scope of the arbitration clause in the distributorship contract. The arbitration clause was worded to cover any disputes arising out of or in relation to the distributorship contract, as well as any disputes arising out of or relating to sales contracts. This was a more broadly worded arbitration clause than in the case at bar.

[46] The nature of the claim that was stayed in *Turnbull* was very different than the claim in this case. The claim in *Turnbull* was not a claim in negligence brought by a consumer of an edible product. Rather, it was a third-party claim by the distributor of the product. The court found that the distributorship contract or sales contracts provided "the foundation" for all of the third-party claims, including the negligence-based claims, and were "germane to proof of those claims": para. 17.

[47] The analysis in *Turnbridge* confirms that on a stay application the court needs to take a close look at the pleading of the claim to determine if the nature of the dispute is one that the parties agreed to be resolved by arbitration. By looking at the pleading, the court determined that the foundation of the claim was the parties' contract containing the arbitration clause, and that the parties' contract was going to provide necessary proof of those claims. It was not a claim by a consumer of edible goods, based on a tort duty that stands independent of contract, as in this case.

[48] In the present case, the judge did not explain what question he was referring to when he stated in para. 19 that “the plaintiff raises a question of law”.

[49] In context of the judge’s reasons as a whole, I understood the judge to conclude that Ms. Harris’s products liability claim was pleaded on the basis of longstanding tort principles of negligence, and he could determine as a matter of law that the pleading of the negligence cause of action was made out by elements that stood apart from and did not relate to the parties’ contract: see paras. 20 and 24, set out above. I see no error in this conclusion.

[50] Whether a party owes another a duty of care in tort is a question of law: *Van Tent v. Abbotsford (City)*, 2013 BCCA 236 at paras. 22–23. That question has long been resolved in cases of a manufacturer of edible goods. As a matter of law, since the 1932 case of *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), a manufacturer of an edible product owes a duty to the ultimate consumer of the good to take reasonable care that the good is free from defect likely to cause injury to health: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paras. 4–6. As explained in *Donoghue*, an action for breach of this duty of care is not based upon contract but upon negligence: at para. 73.

[51] Whether pleadings disclose the elements of a valid cause of action is a question of law: *Hryniak v. Mauldin*, 2014 SCC 7 at para. 84.

[52] Isagenix is also critical of the judge’s comments in relation to the Customer Contract, at para. 23, where he said: “I did not see that any of the terms therein drive the conclusion that personal injury claims arising from purchases for oneself need to be resolved by arbitration”. Isagenix submits this statement shows that the judge did not apply the “arguable case” test, instead elevating it to a higher standard of requiring Isagenix to show that the contract “drives” a conclusion that the arbitration clause applies. Respectfully, this argument ignores the context of the judge’s comment.

[53] Reading the judge's reasons as a whole, it is apparent that in this aspect of the reasons, the judge was carefully considering Isagenix's argument that not just the Associate Contract, but also the Customer Contract, made out an arguable case that the arbitration clause applied to the dispute. While he could have worded it more precisely, I do not conclude that he strayed from the "arguable case" standard. He was simply explaining that he disagreed with Isagenix's position.

[54] The judge's reasons also show that he considered, in the alternative, that if the issue — whether the dispute arose out of or in relation to the parties' contract — was one of mixed fact and law, he was able to determine it based on a cursory review of the content of the parties' contracts and Ms. Harris's pleading, and therefore it did not warrant referral to an arbitrator. His review of these documents led him to conclude that her personal injury claim was "of an entirely different character" than a claim arising out of the contract: paras. 19, 20, 23.

[55] I agree with the judge's conclusion. A review of Ms. Harris's pleading makes it obvious that her claim is based in negligence, not in contract; the language of the arbitration clause makes it obvious that it only applies to claims arising out of or relating to the parties' contracts containing the arbitration clause. No further factual matrix needed to be reviewed or decided by an arbitrator, and the judge did not err in deciding the issue.

[56] Isagenix also criticizes the judge for thinking of an alternative way in which the contract could be drafted, when he held:

> [21] In essence, the plaintiff wore two hats during the relevant period: she was both a consumer and an Associate. This proceeding is brought in her capacity as the former, not the latter. Just as she does not need to rely on her position as an Associate in order to sue as a consumer, she cannot be precluded from bringing an action as a consumer because of her status as an Associate.
>
> [22] The defendants seek to rely on the fact that the Contract includes a recognition that an individual might wear both hats, but the Contract contains no more than that—a recognition. <u>The defendants' argument presumes that the Contract actually goes on further to state: "If you consume the Product, any claim arising from such consumption must be brought by arbitration". But that is not what the Contract says</u>.

[Emphasis added.]

[57] Isagenix submits that the judge's reasoning shows that he lost sight of the "arguable case" standard. I disagree.

[58] The reason for the legal deference to arbitration clauses is to hold people to their bargains. This respects the autonomy of individuals to write their own contracts. It would disrespect contractual autonomy to create new bargains for them. That was the judge's point, that the effect of the Isagenix argument would be to rewrite the parties' contract. In my view, the judge was simply pointing out the obvious contradictions and flaws in Isagenix's argument.

[59] Here, in keeping with the *ICAA*'s purpose, the arbitration clause as drafted was unambiguously meant to apply to commercial disputes arising from or related to the parties' contracts containing the arbitration clause. These were business contracts and business terms. Supporting this clarity of purpose was the additional language by which Isagenix required that at least one arbitrator be "an attorney at law experienced in business law transactions and network marketing". It was intended that the arbitrator would be a lawyer, with that particular commercial specialty related to the parties' business relationship, and practicing in Maricopa County, Arizona. It is plain that the parties did not contemplate that the arbitrator would need to have expertise to determine a personal injury claim in tort based on ingesting a product said to be negligently manufactured.

[60] Even if one were to focus on the parties' relationship here, as urged by Isagenix, rather than on the pleading, the focus of the *ICAA* is on contracts to arbitrate arising from commercial relationships. The *ICAA* applies to "international commercial arbitration": s. 1(1). An arbitration is commercial if it arises out of a relationship of a commercial nature, as set out in s. 1(6):

> (6) An arbitration is commercial if it arises out of a relationship of a commercial nature including, but not limited to, the following:
>
> (a) a trade transaction for the supply or exchange of goods or services;
>
> (b) a distribution agreement;

> (c) a commercial representation or agency;
>
> (d) an exploitation agreement or concession;
>
> (e) a joint venture or other related form of industrial or business cooperation;
>
> (f) the carriage of goods or passengers by air, sea, rail or road;
>
> (g) the construction of works;
>
> (h) insurance;
>
> (i) licensing;
>
> (j) factoring;
>
> (k) leasing;
>
> (l) consulting;
>
> (m) engineering;
>
> (n) financing;
>
> (o) banking;
>
> (p) investing.

[61] Despite the long list of commercial relationships, one can see that the legislative drafters did not expressly consider a relationship between a consumer of an edible good and a manufacturer of that good as one of the enumerated commercial relationships.

[62] Section 6 of the *ICAA* provides:

> 6 (1) In interpreting this Act, a court or arbitral tribunal
>
> (a) must have regard to the international origins of the Act, the need to promote uniformity in its application and the observance of good faith, and
>
> (b) may have regard to the following:
>
> (i) the Reports of the United Nations Commission on International Trade Law on the work of its eighteenth (1985) and thirty-ninth (2006) sessions (UN Docs A/40/17 and A/61/17);
>
> (ii) the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration (UN Doc A/CN.9/264);
>
> (iii) the Commentary of the United Nations Commission on International Trade Law concerning the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 (UN Sales No. E.08.V.4).

> (2) Questions concerning matters governed by this Act that are not expressly settled in this Act are to be settled in conformity with the general principles on which this Act is based.

[63] The "Model Law" which was the impetus for international commercial arbitration statues and is referred to as an interpretative tool in s. 6 of the *ICAA*, was addressed by the Supreme Court of Canada in *Uber*. In discussing the meaning of "commercial" arbitration in Ontario's version of the *ICAA*, the Court noted as follows:

> [23] While the *Model Law* does not define the term "commercial", a footnote to art. 1(1) provides some guidance:
>
> > The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.
> >
> > (*Model Law*, art. 1(1), fn. 2)
>
> [24] The *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General* further explains that "labour or employment disputes" are not covered by the term "commercial", "despite their relation to business":
>
> > Although the examples listed include almost all types of contexts known to have given rise to disputes dealt with in international commercial arbitrations, the list is expressly not exhaustive. Therefore, also covered as commercial would be transactions such as supply of electric energy, transport of liquified gas via pipeline and even "non-transactions" such as claims for damages arising in a commercial context. *Not covered are, for example, labour or employment disputes and ordinary consumer claims, despite their relation to business*.
> >
> > (United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General*, U.N. Doc. A/CN.9/264, March 25, 1985, at p. 10 (emphasis added); see also p. 11.)
>
> [25] Two points emerge from this commentary. First, 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.
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> [26] The second point to draw is that an employment dispute is not covered by the word "commercial". The question of whether someone is an employee is the most fundamental of employment disputes. It follows that if an employment dispute is excluded from the application of the *Model Law*, then a dispute over whether Mr. Heller is an employee is similarly excluded. This is not the type of dispute that the *Model Law* is intended to govern, and thus it is not the type of dispute that the *ICAA* is intended to govern.
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> [27] This result is consistent with what courts have held (*Patel v. Kanbay International Inc.*, 2008 ONCA 867, 93 O.R. (3d) 588, at paras. 11-13; *Borowski v. Fiedler (Heinrich) Perforiertechnik GmbH* (1994), 1994 CanLII 9026 (AB KB), 158 A.R. 213 (Q.B.); *Rhinehart v. Legend 3D Canada Inc.*, 2019 ONSC 3296, 56 C.C.E.L. (4th) 125, at para. 27; *Ross v. Christian & Timbers Inc.* (2002), 2002 CanLII 49619 (ON SC), 23 B.L.R. (3d) 297 (Ont. S.C.J.), at para. 11). It is also consistent with the *Model Law*'s reference to "trade" transactions, which, as Gary B. Born observes, "arguably connot[es] involvement by traders or merchants, as distinguished from consumers or employees" (*International Commercial Arbitration*, vol. I, *International Arbitration Agreements* (2nd ed. 2014), at p. 309). Further, one could draw a negative inference from the definition's omission of "employment" relations (p. 309, fn. 454). It seems unlikely to us that the drafters of the *Model Law* would have included such a thorough list of included commercial relationships and not considered whether to include "employment".
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> [Italic emphasis by Abella and Rowe JJ.; underline emphasis added.]

[64] Isagenix's position on this appeal erroneously focuses entirely on the contractual relationship between Isagenix and Ms. Harris, as though the fact of the relationship is determinative, to the exclusion of her pleadings which define the nature of the dispute. However, the proper focus is the nature of the dispute, or to put it another way, on the gravamen of the complaint as stated in *Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117 at para. 48.

[65] Isagenix submits that if this Court dismisses its appeal, the precedent will be a significant erosion of the competence-competence principle. I disagree.

[66] It seems to me that the arguments of Isagenix in this case ignore the purpose of the *ICAA* and overstate the case law regarding the competence-competence

principle. The principle is not one that requires absolute deference to arbitration, whenever parties are in a contractual relationship that includes an arbitration clause and regardless of the nature of the dispute. In my view, if we interfere with the judgment under appeal, we will be ignoring the now well-established approach to determining stay applications under s. 8(1).

[67] In my view, it is inarguable that the nature of Ms. Harris's claim is a tort claim that has nothing to do with the contracts with Isagenix containing the arbitration clause. The judge did not err in concluding that her claim does not arise from or relate to her contracts with Isagenix to which the arbitration clause referred.

Disposition

[68] It is not necessary to deal with other arguments on appeal.

[69] I would therefore dismiss the appeal.

"The Honourable Justice Griffin"

I agree:

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Abrioux"