

COURT OF APPEAL FOR ONTARIO

CITATION: Lochan v. Binance Holdings Limited, 2024 ONCA 784

DATE: 20241028

DOCKET: COA-24-CV-0069

Huscroft, Harvison Young and Copeland JJ.A.

BETWEEN

Christopher Lochan and Jeremy Leeder

Plaintiffs (Respondents)

and

Binance Holdings Limited*, Binance Canada Capital Markets Inc.
and Binance Canada Holdings Ltd.

Defendants (Appellant*)

Caitlin Sainsbury, Graham Splawski, and Pierre N. Gemson, for the appellant

James C. Orr, Alexandra Allison, and Jonathan Careen, for the respondents

Heard: October 2, 2024

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated December 13, 2023, with reasons reported at 2023 ONSC 6714.

REASONS FOR DECISION

[1] The appellant, Binance Holdings Limited, appeals the order of the motion judge dismissing its motion for a stay of proceedings in favour of arbitration, pursuant to s. 9 of the *International Commercial Arbitration Act 2017*, S.O. 2017, c. 2, Schedule. 5.

[2] We dismiss the appeal for the reasons that follow.

Factual background

[3] The appellant operates the world's largest cryptocurrency trading platform. Between 2019 and early 2022, the appellant sold cryptocurrency derivatives to Canadians through its website. The motion judge found that cryptocurrency derivatives contracts are novel, complex, and risky securities, which present investor protection concerns. A seller is required to file a prospectus prior to selling cryptocurrency derivatives. The appellant did not register with the Ontario Securities Commission or seek an exemption from registration. The appellant did not file a prospectus with respect to any of its securities offerings.

[4] The respondents are representative plaintiffs who commenced a proposed class action in June 2022. The claim is based on s. 133 of the *Ontario Securities Act*, R.S.O. 1990, c. S.5, which provides purchasers with a right of action for rescission or damages against a company selling securities for failure to file or deliver a prospectus. The statement of claim proposes a class defined as everyone in Canada who, from September 2019 to the date of certification of the proposed class proceeding, purchased cryptocurrency derivatives from the appellant.

[5] The appellant¹ moved to stay the proceeding on the basis that the terms of use contract agreed to by users of the Binance website requires that any disputes be resolved by arbitration.

[6] The motion judge dismissed the motion for a stay in favour of arbitration. He found that exceptions to the competence-competence principle applied that justified the Ontario court deciding whether the arbitration clause was void as contrary to public policy or on the basis of unconscionability. He found that a stay in favour of arbitration should be refused because the arbitration clause was void both as contrary to public policy and because it was unconscionable.

[7] In coming to the conclusion that the arbitration clause was contrary to public policy and unconscionable, the motion judge's findings included the following:

- The appellant's website prompted users to open accounts in "under 30 seconds", during which the users purported to agree to roughly 50 pages of terms, including the arbitration clause;
- The arbitration clause provides that the appellant can change any part of the arbitration agreement, and that by agreeing to the terms of use for the website, users agree to any subsequent amendment to the terms by the appellant;

¹ The other two defendants are related companies that are inoperative. As a practical matter, the appellant is the only defendant.

- The record showed that during the proposed class period, the appellant changed the forum of the arbitration and the governing law four times, to various destinations far from Canada, including from April 2020 to January 2021 to an “unspecified location, under unspecified law, under unspecified administration and rules”;
- The last forum for arbitration set by the appellant, Hong Kong, under Hong Kong law, administered by the Hong Kong International Arbitration Centre, imposed prohibitive costs. For disputes under \$1 million USD, the median cost of arbitration is \$26,743 USD (approximately \$36,000 CAD). This figure does not include costs of travel and accommodation, tribunal appointed expert advice, legal fees, transcript services, etc.

[8] The motion judge found that the starting cost to access the arbitral tribunal of approximately \$36,000 CAD plus legal fees and travel expenses rendered the forum inaccessible to the average crypto investor:

Given that the OSC report discloses that the average crypto investor will have something like a \$5,000 claim, the choice of Hong Kong as an arbitral forum – a forum with no connection to either the potential claimants or Binance itself as a Cayman Islands company – could effectively amount to a grant of immunity to Binance.

[9] He further found:

The Plaintiffs and other prospective class members signed an unnegotiable ‘click’ contract where not only were the details, including the changeable location, of the arbitration clause buried out of sight, and the logistical

complexity and expense of arbitration were not revealed anywhere.

Binance, as the party that designed and whose professionals drafted the contract, engineered the arrangement to take advantage of the complexity that was hidden behind that superficially benign appearance of an arbitration clause.

Analysis

(1) Void *Ab Initio* argument raised in response

[10] Before turning to the grounds of appeal raised by the appellant, we flag an argument made by the respondents that was not addressed by the motion judge. The respondents argued before the motion judge that the contract containing the arbitration clause was void *ab initio* for illegality, and as a result, the appellant did not satisfy a technical pre-requisite to seek a stay in favour of arbitration – the existence of an arbitration agreement: *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, at para. 76.

[11] The respondents argue that the contract for the sale of cryptocurrency derivatives is illegal because the appellant never filed a prospectus and that this renders the arbitration clause void *ab initio*. The respondents maintain this argument on appeal as another basis to uphold the motion judge’s decision.

[12] Whether the technical prerequisite of an arbitration agreement is met logically comes before consideration of the second step of the stay analysis: *Peace River*, at paras. 76-79. However, the motion judge did not decide the motion

on the basis that the technical prerequisite of the existence of an arbitration agreement was not met, and the remedial consequences of a finding of illegality were not fully addressed on the appeal.

[13] In these circumstances, we think it appropriate to resolve the appeal based on the grounds of appeal proffered by the appellant rather than the argument that the contract was itself illegal.

(2) Grounds of appeal

[14] The appellant raised three grounds of appeal. We note that the grounds as argued orally were significantly restructured from how they were argued in the appellant's factum. We address the grounds as argued orally.

[15] First, the appellant argues that the motion judge erred in holding that an arbitration clause being contrary to public policy is an independent ground for an Ontario court to take jurisdiction and refuse a stay in favour of arbitration. In making this argument the appellant placed emphasis on the recent British Columbia Court of Appeal decision in *Spark Event Rentals v. Google LLC*, 2024 BCCA 148. The appellant argues that the motion judge went straight to considering whether the arbitration clause was void as contrary to public policy without first considering whether an exception to the competence-competence principle applied that would justify an Ontario court deciding whether the arbitration clause was void for public

policy reasons, rather than allowing the arbitral tribunal to first consider the validity of the arbitration clause.

[16] *Spark* does not add anything to the analysis from *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, and *Uber Technologies Inc. v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118. In *Dell* and *Uber*, the Supreme Court of Canada held that, in general, challenges to an arbitral tribunal’s jurisdiction should first be decided by the arbitral tribunal – what is known as the “competence-competence” principle. Before a domestic court can entertain arguments that an arbitration clause is void for reasons such as unconscionability or being contrary to public policy, it must first be satisfied that the circumstances fall within an exception to the application of the competence-competence principle to justify the domestic court deciding whether the arbitration clause is void, rather than allowing the arbitral tribunal to first decide the issue: *Dell*, at para. 84.

[17] *Dell* considered the exception to the competence-competence principle for cases where the jurisdictional issue depends on a question of law alone or where questions of mixed fact and law require only a superficial consideration of the documentary record: *Dell*, at paras. 84-85. *Uber* discussed the *Dell* framework and also considered the exception to the competence-competence principle for cases where impediments exist that functionally prevent a party from bringing a matter to arbitration such that, if the issue of validity of the arbitration clause is left to the arbitral tribunal, there is a real prospect that it will never be resolved by the arbitral

tribunal. In *Uber*, the issue was high fees and inability, due to cost, to reach the place of arbitration. The concern underlying the *Uber* exception to the competence-competence principle is to address cases where an arbitration clause is effectively insulated from meaningful challenge. This is referred to in some of the jurisprudence as the “brick wall” framework: *Uber*, at paras. 32-40, 44-46.

[18] In *Spark*, the party resisting a referral to arbitration argued that where a party challenges the validity of an arbitration agreement on the basis that it is contrary to public policy, the party is not required to first meet the threshold of showing circumstances justifying an exception to the competence-competence principle: at para. 42. The British Columbia Court of Appeal rejected this argument. Consistent with *Dell* and *Uber*, the court held that before a domestic court can consider whether an arbitration clause is void, such that a matter should not be referred for arbitration, it must first consider the threshold question of whether an exception to the competence-competence principle applies which would justify the domestic court deciding the validity of the arbitration clause, rather than the arbitral tribunal: *Spark*, at paras. 43-48. The respondents do not dispute this proposition.

[19] The motion judge’s approach was consistent with *Spark*, *Dell*, and *Uber*. The appellant’s first argument fails because the motion judge did not go straight into the public policy analysis. Rather, as the jurisprudence provides, he first considered whether an exception to the competence-competence principle applied

to justify an Ontario court deciding whether the arbitration clause was void as contrary to public policy or on the basis of unconscionability.

[20] This brings us to the appellant's second argument – that the motion judge erred in holding that the circumstances fell within an exception to the competence-competence principle. The appellant argues that the motion judge erred in finding that the exception for questions of law was engaged because he made findings of fact in his analysis of whether the arbitration clause was void for public policy reasons and unconscionability.

[21] We see no error of law or palpable and overriding error of fact in the motion judge's finding that exceptions to the competence-competence principle were engaged that justified the Ontario courts deciding whether the arbitration clause was void for public policy reasons and/or unconscionability.

[22] The motion judge recognized that the starting point is the competence-competence principle that the validity of an arbitration clause should be decided by the arbitral tribunal. He recognized that the respondents bore the onus to show that an exception to referral to the arbitral tribunal applied. He recognized that the competence-competence principle is not lightly displaced.

[23] The motion judge found, based on the record before him, that the competence-competence principle was displaced. In doing so, he relied on the exceptions identified by both *Dell* and *Uber*. He found that the contractual terms at

issue were standard form, raising a legal issue. He further found that, to the extent that a review of the factual record was required, it did not require fact-finding specific to the representative plaintiffs, but rather could be considered on a review of the documentary record and the consideration of the types of disputes likely to arise under the arbitration clause at issue. He also found that the exception discussed in *Uber* applied because a superficial review of the record showed that, because of the inaccessibility of the arbitration forum due to cost, distance, and choice of law, there was a real prospect that the challenge to the validity of the arbitration clause would never be resolved if it were referred to the arbitral tribunal.

[24] To the extent that the motion judge engaged in a review of the factual record, both at the threshold stage and in his findings in relation to public policy and unconscionability, he did so based on a superficial review of the documentary record in the nature of that done by the majority in *Uber*.

[25] Finally, the appellant argues that the motion judge erred in his application of the *Uber* “brick wall” analysis by engaging in more than a superficial analysis of the evidence on the threshold issue: whether, if the dispute was referred for arbitration, the validity of the arbitration clause would likely never be decided. The appellant also argues that the motion judge erred in considering whether average purchasers of cryptocurrency could access the arbitral tribunal (given its cost and distance), rather than the respondents, who were representative plaintiffs in the

class action and engaged in larger value purchases than the average cryptocurrency buyer.

[26] We disagree. We have already addressed the level of the motion judge's review of the evidence. In our view, it did not exceed a superficial documentary review permitted by *Dell* and *Uber*.

[27] Nor do we agree that the motion judge erred in considering whether an average cryptocurrency buyer could access the arbitral tribunal in order to raise the issue of validity of the arbitration clause. As the motion judge noted, there is no nuance in the arbitration clause. All disputes, regardless of the specific subject-matter raised, are required by the clause to be arbitrated. We see no palpable and overriding error in the motion judge considering the issues of public policy and unconscionability on the basis of the typical cryptocurrency investor and the nature of disputes likely to arise under the arbitration clause.

Disposition

[28] The appeal is dismissed. The respondents are entitled to costs of the appeal in the agreed amount of \$30,000, inclusive of disbursements and taxes.

“Grant Huscroft J.A.”
“A. Harvison Young J.A.”
“J. Copeland J.A.”