IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lin v. HomeAway.com, Inc.,*
2025 BCSC 253

Date: 20250219
Docket: S223171
Registry: Vancouver

Between:

Arthur Lin

Plaintiff

And

HomeAway.com, Inc.

Defendant

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for the Plaintiff:	S. Lin A. Majidi S. Cheong
Counsel for the Defendant:	S. Schafler E. Irving
Place and Date Hearing:	Vancouver, B.C. May 16–17, 2024
Place and Date of Judgment:	Vancouver, B.C. February 19, 2025

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[1] This action is a proposed class proceeding under the *Class Proceedings Act,* R.S.B.C. 1996, c. 50. The plaintiff, Arthur Lin, used websites operated by the defendant, HomeAway.com Inc. ("HomeAway"), to book rental accommodation, for which he was charged a service fee. He argues that HomeAway was providing either real estate or travel agency services without having a license to do so contrary to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*]. As such, he alleges HomeAway was not entitled to charge the service fee.

[2] HomeAway brings this application seeking to stay some aspects of this action in favour of arbitration pursuant to a clause in its terms and conditions that the plaintiff accepted.

I. LITIGATION HISTORY

[3] The notice of civil claim (the "NOCC") was filed April 14, 2022. I was assigned as the case management judge in August 2022.

[4] On January 4, 2023, HomeAway filed a jurisdictional response disputing that this Court could or should exercise its jurisdiction over it.

[5] The parties first appeared before me on January 6, 2023. They advised me that the Court of Appeal was hearing certain appeals later that month that they anticipated would be relevant to issues in this action. Therefore, they agreed to set certain dates far enough in the future with the hope the appellate judgements would be released before they returned before me. In particular, the parties at that time agreed to set a hearing date for a sequencing application because HomeAway sought to have its application for a stay based on its jurisdictional response heard before certification, which the plaintiff opposed.

[6] On May 30, 2023, HomeAway filed its notice of application seeking an order that the proceedings against it be stayed in favour of arbitration, or in the alternative, on the basis of that the court lacked territorial jurisdiction over it. It also sought to have the application heard before the application for certification.

[7] The plaintiff filed a response dated June 7, 2023, but only addressed the issue of sequencing and did not address the substantive issue of staying the action in favour of arbitration, or because of the court's lack of territorial jurisdiction.

[8] Those positions remained the same after the Court of Appeal released the relevant judgments in August 2023. At a case management conference in October 2023, the parties agreed to have the sequencing application heard January 19, 2024.

[9] The parties' positions then evolved. At some point before the January 19, 2024 sequencing hearing, the parties requested instead that two days be set for HomeAway's application for a stay.

[10] The plaintiff filed a substantive response to HomeAway's application for a stay on January 8, 2024. In it, the plaintiff submits that the arbitration agreement is unenforceable, and that the application for a stay should be dismissed for the following reasons:

a) the arbitration agreement relied upon by HomeAway is merely an "agreement to agree" and not legally enforceable;

b) there is no prospect that an arbitrator will hear the Canadian law issues arising in this action; and

c) the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 [*ICAA*], relied upon by HomeAway does not apply to the claims anchored in provincial consumer protection legislation.

[11] The Court was advised in May 2024 that the parties agreed that the issue of territorial jurisdiction would be dealt with at the same time as certification, as needed. HomeAway reserved the right to address territorial jurisdiction with regard to the elements of the test for certification, including class definition and scope of the proposed class, but confirmed it would not dispute this Court's territorial jurisdiction over it.

[12] The Court was also informed that HomeAway would only seek a partial stay, in the sense that the stay would not apply to "the relief sought under s. 172 of the *BPCPA* and other applicable provincial consumer protection legislation" (the "Consumer Claims").

[13] The hearing took place on May 16 and 17, 2024. At its conclusion, I asked the parties to send me a draft order to confirm the relief they sought with regard to the application, which they both did.

[14] However, counsel for the plaintiff also sent submissions by way of letter dated May 27, 2024 (and a reminder letter dated June 24, 2024) to Supreme Court Scheduling ("SCS") advising that the NOCC has been amended, which in counsel's view, "carves out the plaintiff's claim that the defendant sought to stay". Counsel for the plaintiff sought leave to provide two pages of submissions or to have a "short appearance" to address whether the defendant's application was now moot. In the letter, counsel for the plaintiff also conveyed the defendant's position that no further submissions were warranted, but that if leave was granted for the plaintiff to file submissions, it sought leave to do so also.

[15] Subsequently, there was further correspondence between the parties and SCS that resulted in a hearing being set for two hours on November 2, 2024.

[16] The plaintiff's letter amounts to a legal submission. It was improper for counsel to make that submission by way of letter to SCS. At the very least, counsel ought to have completed the on-line request to appear before me.

[17] After the November 2, 2024 hearing date was set, I sought clarity on its purpose and directed the parties to appear before me, which they did on July 23, 2024. At that Judicial Management Conference, the plaintiff asked the Court not to issue judgment on HomeAway's application, which had been argued on May 16–17, 2024, based on the amended NOCC. HomeAway's response, in part, was that the plaintiff's position may amount to an abuse of the Court's process.

[18] I informed the parties by memorandum on July 25, 2024, that no additional submissions would be required at this time, and I cancelled the November 2, 2024 hearing.

II. FACTS

[19] The plaintiff did not file an affidavit. Instead, he relies on three affidavits filed by his counsel's legal administrative assistant attaching various documents, as well as affidavits containing expert evidence.

[20] In the NOCC, the plaintiff asserts that he used HomeAway's services to book accommodations inside and outside of British Columbia in 2018, 2019 and 2021. He seeks to represent the class of individuals who used HomeAway's services and paid the service fee, but excluding people who used HomeAway's services for business travel or who were residents of the United States.

[21] HomeAway is a company incorporated pursuant to the laws of Delaware, and its corporate headquarters and principal place of business is Texas. HomeAway maintains that since its inception in 2005, it has not had a place of business in British Columbia.

[22] HomeAway currently operates, among others, the website vrbo.com. In the past, it operated other websites, including, homeaway.com, vacationrentals.com, bedandbreakfast.com, and canadastays.com.

A. The Booking Process

[23] HomeAway relies on affidavit evidence from Lee Huberman, Jonathan James and Michael Marron, in addition to two affidavits from a legal administrative assistant and expert reports.

[24] Mr. Huberman has been employed in different roles by HomeAway since May 2016. Since March 1, 2019, he has been its director of product management. He deposed that HomeAway is primarily an "online marketplace" and "forum for third-party property owners and/or managers to advertise their properties". He is familiar

with HomeAway's public-facing webpages and its terms and conditions to which clients must agree when purchasing services offered by HomeAway (the "Terms of Service"). The Terms of Service have consistently contained an arbitration clause throughout his employment. Jon James has been employed as HomeAway's vice president of performance and planning since 2016. He is also familiar with HomeAway's Terms of Service.

[25] It is not disputed that throughout the booking process, users of HomeAway's websites are repeatedly prompted to and must agree to HomeAway's Terms of Service before obtaining a reservation. In addition, HomeAway's computer system automatically generates a confirmation email once a booking is made, which includes a hyperlink to the Terms of Service.

B. The Arbitration Clauses

[26] Included in HomeAway's Terms of Service is an arbitration clause. The relevant portions of the Terms of Service in effect from July 2016 to June 30, 2021 (the "2016 Arbitration Clauses"), included the following:

> **19. Disputes; Arbitration.**
>
> HomeAway is committed to customer satisfaction, so if you have a problem or dispute, we will try to resolve your concerns, But if we are unsuccessful, you may pursue claims as explained in this section. You agree to give us an opportunity to resolve any disputes or claims relating in any way to the Site, any dealings with our customer experience agents, any services or products provided, any representations made by us, or our Privacy Policy ("Claims") by contacting HomeAway Customer Support or 1-877-228-3145. If we are not able to resolve your Claims within 60 days, you may seek relief through arbitration or in small claims court, as set forth below.
>
> **Any and all Claims will be resolved by binding arbitration, rather than in court**, except you may assert Claims on an individual basis in small claims court if they qualify. This includes any Claims you assert against us, our subsidiaries, users or any companies offering products or services through us (which are beneficiaries of this arbitration agreement). This also includes any Claims that arose before you accepted these Terms, regardless of whether prior versions of the Terms require arbitration.
>
> **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 statutory damages, attorneys' fees and costs), and must follow and enforce these Terms as a court would.**

> Arbitrations will be conducted by the American Arbitration Association (AAA) under its rules, including the AAA Consumer Rules. Payment of all filing, administration and arbitrator fees will be governed by the AAA's rules, except as provided in this section. If your total Claims seek less than $10,000, we will reimburse you for filing fees you pay to the AAA and will pay arbitrator's fees. You may choose to have an arbitration conducted by telephone, based on written submissions, or in person in the state where you live or at another mutually agreed upon location.
>
> …
>
> **Any and all proceedings to resolve Claims will be conducted only on an individual basis and not in a class, consolidated or representative action.**
>
> …
>
> **22. GENERAL**
>
> …
>
> These Terms are governed by the Federal Arbitration Act, federal arbitration law, and for reservations made by U.S. residents, the laws of the state in which your billing address is located, without regard to principles of conflicts of laws.
>
> [Bold in original.]

[27] On June 30 2021, HomeAway updated the 2016 Arbitration Clauses. Although the wording cited above remained identical, new portions were added (collectively, the "2021 Arbitration Clauses"). The relevant portions of the added provisions included the opening paragraph of clause "19. Disputes; Arbitration":

> HomeAway's right to amend these Terms, in whole or in part, at any time as set forth below in Section 22 does not apply to this "Disputes; Arbitration" section. The version of this "Disputes; Arbitration" section in effect on the date you last accepted the Terms controls.

[28] Also, a new paragraph was added roughly in the middle of clause 19:

> By agreeing to arbitration under the AAA Rules, the parties agree, among other things, that the arbitrator, and not any federal, state or local court or agency, shall have the exclusive power to rule on any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

[29] The arbitration clauses were changed on November 4, 2022 (the "2022 Arbitration Clauses"), which HomeAway notes was after the NOCC was filed. Its relevant portions are:

19. Disputes; Arbitration.

Please read this Section carefully. It requires that any and all claims be resolved by binding arbitration or in small claims court, and it prevents you from pursuing a class action or similar proceeding in any forum. Arbitration is required if your country of residence enforces arbitration agreements, including without limitation, the United States. If you are outside the United States but attempt to bring a claim in the United States, arbitration is required for determination of the threshold issue of whether this dispute resolution section applies to you, as well as all other threshold determinations, including residency, arbitrability, venue, and applicable law. If your country of residence does not enforce arbitration agreements, the mandatory pre-arbitration dispute resolution and notification and prohibition on class actions or representative proceedings provided below still apply to the extent enforceable by law.

We are committed to traveler satisfaction and to resolving consumer disputes in a timely and efficient manner. We have a two-step dispute resolution process that includes: (1) investigation and negotiation of your claim with our Traveler Support team; and, if necessary, (2) binding arbitration administered by the American Arbitration Association ("**AAA**") or, for arbitrations outside of the United States, an agreed upon arbitral tribunal. You and us each retain the right to seek relief in small claims court as an alternative to arbitration.

Agreement to arbitrate ("**Arbitration Agreement**")

…

… **The arbitrator shall also be responsible for determining all threshold arbitrability issues, including without limitation the existence, scope, or validity of the Arbitration Agreement, any defence to arbitration such as issues relating to whether this Arbitration Agreement can be enforced, is unconscionable or illusory, and any defenses to arbitration, including without limitation jurisdiction, waiver, delay, laches, or estoppel.**

…

Arbitration rules and governing law

This Arbitration Agreement is a "written agreement to arbitrate" evidencing a transaction in interstate commerce. The Federal Arbitration Act ("**FAA**") governs all substantive and procedural interpretation and enforcement of this provision. The arbitration will be administered by AAA in accordance with the AAA's Consumer Arbitration Rules or other AAA arbitration rules determined to be applicable by the AAA (the "**AAA Rules**") then in effect, except as modified here. The AAA Rules are available at www.adr.org. The arbitrator shall apply the law of the state of Washington, regardless of conflict of laws principles, except that the FAA governs all provisions relating to arbitration. Foreign laws do not apply. The Arbitration Agreement can only be amended by mutual agreement in writing.

…

22. GENERAL

…

> These Terms are governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"), AAA Rules, federal arbitration law, and for U.S. residents, the laws of the state in which you reside (as determined by the billing address you have provided us), without regard to conflict of laws principles. It is the intent of the parties that the FAA and AAA Rules shall preempt all state laws to the fullest extent permitted by law.
>
> [Bold in original.]

C. The Plaintiff's Claims

[30] As already noted, the NOCC was filed in April 2022. In it, the plaintiff seeks to have the action certified as a class action. He pleads and relies on three bookings he made using HomeAway's website for accommodation: in 2018 (in Kona, Hawaii), in 2019 (in Portland, Oregon), and in 2021 (in Victoria, BC).

[31] He pleads that in relation to each booking, he paid a service fee. He brings the claim on behalf all those who paid a service fee to HomeAway when booking rental accommodation and who either reside in British Columbia, Alberta, Saskatchewan, Ontario or Quebec (the "Named Provinces"), or those who do not reside in those provinces, but booked accommodation located in the Named Provinces. The claim is limited to those who booked rental accommodation for primarily personal, family or household rather than for business purposes.

[32] In relation to the bookings made with HomeAway, the plaintiff alleges those bookings constitute trading in real estate or rental property management, and/or providing travel or travel agent services. He alleges that the legislation in British Columbia, and in some or all of the Named Provinces, prohibits those unlicensed under applicable statutes from providing real estate services or travel or travel agent services.

[33] The plaintiff alleges HomeAway has been unjustly enriched by collecting service fees and earning interest on those fees. The plaintiff claims class members are entitled to both restitution of those fees as well as disgorgement of any interest earned on the collected fees.

[34] In addition, the plaintiff alleges HomeAway's collection of services fees amounts to, among others, deceptive and/or unconscionable acts or practices. He also contends that HomeAway's imposition of harsh or adverse terms and conditions that were inequitable is contrary to legislation enacted in British Columbia and the Named Provinces.

[35] Based on the foregoing allegations, the plaintiff submits he and the proposed class members are entitled to certify as a class action the following pleas for relief:

a) declarations that HomeAway's services are illegal because they are contrary to some or all of the Named Provinces' legislation regarding real estate, travel and travel agent services;

b) a declaration that any agreement, or any term within any agreement, that HomeAway entered into with class members that required payment of the service fee was illegal and void or voidable;

c) declaration that HomeAway was unjustly enriched by the collection of service fees and interest earned on those, and that the class members are entitled to restitution and disgorgement;

d) a declaration that HomeAway contravened the applicable consumer protection legislation in the Named Provinces entitling class members to damages, and/or restitution equivalent to the amount of fees collected and interest earned on those fees;

e) pursuant to s. 172 of the *BPCPA*, declarations, injunctions and an order requiring publication of any declaration granted in relation to the preceding alleged illegal acts, as well as similar equivalent relief under applicable statutes in the other Named Provinces; and,

f) an order for the aggregate assessment of monetary relief and punitive damages under the *Class Proceeding Act*, R.S.B.C. 1996, c. 50.

D. Legislation

1. Arbitration

[36] The relevant portions of the *Arbitration Act*, S.B.C. 2020, c. 2, are set out below:

> **7**(1) If a party commences legal proceedings in a court in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first response on the substance of the dispute, apply to that court to stay the legal 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 void, inoperative or incapable of being performed.
>
> (3) An arbitration may be commenced or continued and an arbitral award made even if an application has been brought under subsection (1) and the issue is pending before the court.

[37] Section 8 of the *ICAA* also addresses the stay of court proceedings.

> **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.

2. The BPCPA

[38] The plaintiff relies on a number of sections of the *BPCPA*. The following definitions in s. 1(1) are relevant:

> **"consumer transaction"** means
>
> > (a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or
> >
> > (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a),
>
> and, except in Parts 4 and 5, includes a solicitation of a consumer by a supplier for a contribution of money or other property by the consumer;

> …
>
> **"supplier"** means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by
>
> (a) supplying goods or services or real property to a consumer, or
>
> (b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",
>
> whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person and, except in Parts 3 to 5 *[Rights of Assignees and Guarantors Respecting Consumer Credit; Consumer Contracts; Disclosure of the Cost of Consumer Credit]*, includes a person who solicits a consumer for a contribution of money or other property by the consumer;
>
> …
>
> **"supply"** includes, in respect of the supply of goods or services or real property to a consumer, a sale, lease, assignment, award by chance or other disposition;

[39] The plaintiff also relies on section 3:

> **3** Any waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act.

[40] Part 9 of the *BPCPA* is titled "Licenses". The plaintiff relies on s. 143:

> **143** A person must not engage in a designated activity unless the person is
>
> (a) licensed to engage in the designated activity, or
>
> (b) exempted by regulation from the requirement to be licensed.

[41] Section 142 defines "designated activity" to mean a "business, industry, trade, profession, occupation or employment designated by regulation under section 142.1". Section 142.1(1) states that for the purpose of Part 9, government may designate by regulation a business, industry, trade, profession or occupation or employment except those referred to in subsection (2)–(4).

[42] I note that s. 142.1(3)(q) prohibits government from designating, under Part 9, a "business, industry, trade, profession, occupation or employment" in relation to which the *Real Estate Services Act,* S.B.C 2004, c. 42, applies. This would appear to possibly apply to portions of the plaintiff's claim. However, the parties have not had

opportunity to address this issue. For that reason, I will not rely on s. 142.1(3)(q) to make any findings or conclusions in this judgment, but I may ask the parties to address that section and its implications at a subsequent hearing, if necessary.

[43] The *Travel Industry Regulation*, B.C. Reg. 296/2004, enacted under Part 9 of the *BPCPA* contains the following definitions:

> **"travel agent"** means a person who engages in the business or occupation of selling or otherwise providing to the public travel services supplied by another person;
>
> **"travel service"** means
>
> (a) transportation,
>
> (b) accommodation, or
>
> (c) another service combined with transportation or accommodation that is for the use or benefit of a traveller, tourist or sightseer;

[44] The plaintiff also pleads and relies on ss. 4–5, 8–9 of the *BPCPA* relating to deceptive and unconscionable acts or practices. Deceptive act or practice is defined in s. 4(1) to mean, in relation to a consumer transaction, "an oral, written visual, descriptive or other representation by a supplier, or any conduct by a supplier, that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor".

[45] Sections 5(2) and 9(2) places the burden of disproving that a supplier engaged in a deceptive or unconscionable act or practice with regard to a consumer transaction on the supplier.

[46] The plaintiff specifically seeks relief under s. 172, which states as follows:

> **172**(1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:
>
> > (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
> >
> > (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.
>
> …

(3) If the court grants relief under subsection (1), the court may order one or more of the following:

> (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;
>
> (b) if the action is brought by the director, that the supplier pay to the director the actual costs, or a reasonable proportion of the costs, of the inspection of the supplier conducted under this Act;
>
> (c) that the supplier advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section.

…

(5) In an application for an interim injunction under subsection (1) (b),

> (a) the court must give greater weight and the balance of convenience to the protection of consumers than to the carrying on of the business of a supplier,
>
> (b) the applicant is not required to post a bond or give an undertaking as to damages, and
>
> (c) the applicant is not required to establish that irreparable harm will be done to the applicant, consumers generally or any class of consumers if the interim injunction is not granted.

[47] The plaintiff also pleads for damages under s. 171 of the *BPCPA*:

171 (1) Subject to subsection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a

> (a) supplier,
>
> (b) reporting agency, as defined in section 106 *[definitions]*,
>
> (c) collector, as defined in section 113 *[definitions]*,
>
> (d) bailiff, collection agent or debt repayment agent, as defined in section 125 *[definitions]*, or
>
> (e) a person required to hold a licence under Part 9 *[Licences]*
>
> who engaged in or acquiesced in the contravention that caused the damage or loss.

(2) A person must not bring an action under this section if an application has been made, on the person's behalf, to the court in respect of the same defendant and transaction under section 192 *[compensation to consumers]*.

> (3) The Provincial Court has jurisdiction for the purposes of this section, even though a contravention of this Act or the regulations may also constitute a libel or slander.

III. PRELIMINARY ISSUE: CLAIM AGAINST A NON-PARTY

[48] HomeAway submits that only the 2016 Arbitration Clauses are relevant. As noted above, they were in place until June 2022. The NOCC refers to bookings made in 2018, 2019 and 2021. HomeAway's position is that all bookings, including the 2021 booking made for accommodation in Victoria, British Columbia, are governed by the 2016 Arbitration Clauses.

[49] In response, the plaintiff asserts, among other things, that his 2021 booking in Victoria, British Columbia, was booked on a different website, Hotels.com. He submits that Hotels.com does not incorporate HomeAway's Terms of Service, and it is therefore not subject to any arbitration clause.

[50] I note the plaintiff's submission on this point has a weak evidentiary basis. As noted, the plaintiff did not file an affidavit. He relies on an email confirmation of a booking he apparently made that is attached as an exhibit to his counsel's legal administrative assistant's affidavit. That affidavit is devoid of narrative and simply attached documents handed to the legal administrative assistant by counsel. Attaching those documents to a bare affidavit does not make them admissible because they constitute hearsay (possibly double or triple hearsay). In other words, there is no admissible evidence about the plaintiff's bookings.

[51] Leaving that concern aside, there is a more important impediment to the plaintiff's argument about the booking he made for accommodation in Victoria: Hotels.com is not named as a defendant.

[52] HomeAway relies on the affidavit of Michael Marron who has been senior vice president, legal and assistant secretary of Expedia, Inc. since 2018. He deposed that Hotels.com and HomeAway are separate legal entities. He described their corporate structures. HomeAway is a Delaware corporation, which operates, among

others, the VRBO website. HomeAway is wholly owned by VRBO Holdings, Inc., which is wholly owned by Expedia, Inc.

[53] Hotels.com is a limited liability partnership wholly owned by two entities, Hotels.com GP, LLC and HRN 99 Holdings LLC. These two entities, Hotels.com GP, LLC and HRN 99 Holdings, LLC are, in turn, also wholly owned by Expedia, Inc.

[54] None of Expedia, Inc., Hotels.com GP, LLC or HRN 99 Holdings LLC are named in this lawsuit.

[55] I cannot see how it is proper to consider a claim against a legal entity not named in the lawsuit. This is especially so when the plaintiff purports to rely on Hotel.com's terms and conditions attached to a legal administrative assistant's affidavit.

[56] Accordingly, I will only consider the parties' arguments as they relate to the bookings that the plaintiff submits he made in 2018 and 2019. Therefore, there can be no dispute that the only clauses that are relevant to this application are the 2016 Arbitration Clauses.

IV. ANALYSIS

[57] The parties' approaches to the application differed. HomeAway focussed on the case law addressing applications for stay on the basis of an arbitration clause in commercial contracts, including the threshold issue of whether there is an arguable case that arbitration should be preferred. The plaintiff focussed on characterizing what he asserts is the essential character of the proposed class action as relating to consumer protection. Therefore, his submissions focussed on the breadth of consumer protections in legislation in British Columbia and the Named Provinces.

[58] HomeAway submits that perspective is unhelpful since it is not seeking to stay those aspects of the claim that fall under the *BPCPA* or other provincial consumer protection legislation. Because it does not dispute that the Consumer

Claims are not subject to the stay it seeks, it contends that large portions of the plaintiff's response and legal submissions were essentially irrelevant.

[59] I agree with HomeAway.

[60] The problem with the plaintiff's focus on the consumer protection characterization of the proposed class action is that at this stage, the action has not yet been certified. The issue before me is whether the plaintiff—not the proposed class members—is bound by an arbitration agreement. This is "a single action", and he is the only plaintiff: *Williams v. Amazon.com, Inc*., 2023 BCCA 314 at para. 11 [*Amazon BCCA*].

[61] In his January 8, 2024 response to HomeAway's notice of application, the plaintiff addressed the reasons why the arbitration agreement should not be enforced (see above, para. 10). However, for the May 16–17, 2024 hearing, the plaintiff's counsel specifically asked the Court to ignore those portions of his written submissions that addressed those very issues. He thus appears to rely entirely on the 2022 Arbitration Clauses, and his description of the interaction of the relevant case law to legislation in provinces other than British Columbia.

[62] There is therefore a significant lacuna in the plaintiff's position. Specifically, he appears not to have addressed the issue on which he bears the burden: whether there is a reason not to enforce the arbitration agreement if HomeAway establishes the technical prerequisites are met.

[63] Out of an abundance of caution in the event I have misunderstood the plaintiff's position, I will address the arguments raised in his application response after addressing the threshold issue.

A. The Technical Prerequisites

[64] The following comments of the Court of Appeal in *Amazon BCCA* sets the backdrop to the issues before me:

> [5] … However, the legislative scheme that governs domestic arbitration matters in British Columbia renders arbitration agreements presumptively

> enforceable, even in the consumer context and when embodied in standard form contracts. These agreements are generally respected, and, when they apply, the affected disputes must proceed to arbitration unless a plaintiff is able to establish on a balance of probabilities that the arbitration agreement is void, inoperative, or incapable of being performed.

[65] HomeAway argues the threshold consideration is whether "there is an arguable case that the dispute falls within the arbitration clause" or "a particular party to the legal proceedings is a party to the arbitration agreement". Where it does, the matter should be stayed and referred to the arbitrator for determination: *Williams. v. Amazon.com Inc*., 2020 BCSC 300 at paras. 25, 28 [*Amazon BCSC*]; *Petty v. Niantic Inc.,* 2022 BCSC 1077 at para. 17 [*Niantic*]; *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 at paras. 83–84 [*Peace River*].

[66] In *Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117, the Court of Appeal affirmed the meaning of "arguable case" and the "competence-competence" principle that stands for the proposition that "jurisdictional issues relating to the scope of the arbitration agreement are to be resolved in the first instance by the arbitrator": at para. 24.

[67] This "arguable case" standard applies under both s. 8(1) of the *ICAA* and s. 7 of *Arbitration Act*: *Isagenix International LLC v. Harris*, 2023 BCCA 96 at paras. 21–22 [*Isagenix*].

[68] There are four prerequisites to a stay of proceeding, known as the technical prerequisites. The governing principles for the technical prerequisites were set out in para. 83 of *Peace River* as follows:

a) there is an arbitration agreement;

b) court proceedings have been commenced by a party to that arbitration agreement;

c) the court proceedings are in respect to a matter that the parties agreed to submit to arbitration; and,

d) the party applying for the stay does so before taking any step in the proceedings.

[69] HomeAway bears the burden of proving that the prerequisites are met on the standard of an "arguable case". If it does so, the burden then shifts to the plaintiff to establish that the arbitration agreement is "null and void, inoperative, or incapable of being performed": *ICAA*, s. 8(2); *Peace River* at paras. 76–79.

[70] It is not disputed that the plaintiff, or any other user, could not book the rental accommodations offered on HomeAway's website, without accepting the Terms of Service. Given the 2016 Arbitration Clauses were in force at that time, there can also be little doubt that the plaintiff and HomeAway were parties to an arbitration agreement, which demonstrates that the first technical requirement has been met, and this litigation establishes the second prerequisite. Likewise, HomeAway specifically filed a jurisdictional response averring to its position that arbitration is mandatory, meeting the fourth condition.

1. Is the action in respect of a matter the parties agreed to arbitrate?

[71] With regard to the third prerequisite, HomeAway relies on key phrases in the 2016 Arbitration clause, including the following, "You agree to give us an opportunity to resolve any disputes or claims relating in any way to … any services … provided" and "**Any and all claims will be resolved by binding arbitration, rather than in court**" (Bold in original; see para. 26 above).

[72] HomeAway notes that phrases such as "relating in any way" have been interpreted to provide for the broadest possibility that a matter be submitted to arbitration: *Kwon v. Vanwest College Ltd*., 2021 BCSC 545 at paras. 35, 45. The claims asserted by the plaintiff are, broadly speaking, about the service fee attached to bookings he made using HomeAway's website. He contends those were done without the requisite license or licenses. The claims relating to deceptive or unconscionable conduct flow from the allegation that HomeAway was providing services for which it was not licensed.

[73] I agree that the 2016 Arbitration Clauses are broad and capable of applying to matters in the underlying proceeding. The plaintiff's position is that the claim is properly characterized as "consumer protection", thus making it immune to arbitration.

[74] While the case law discussing this issue certainly refers to the importance and relevance of the consumer protections aspect of legislation (including the *BPCPA*), I was not referred to any case that stands for the proposition that simply because that legislation is raised, arbitration is not possible at all. One must look carefully on what exactly is pleaded, including the relevant legislation, and the wording of the arbitration clause, and determine how all of those are impacted by the relevant case law.

2. Effect of BPCPA *on Arbitration Clauses*

[75] There has been considerable case law raising the same issue asserted by HomeAway in this case. HomeAway submits that despite that body of law, the controlling authority remains. In *Seidel v. TELUS Communications Inc*., 2011 SCC 15 [*Telus*], where the majority held, "Absent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause": at para. 2.

[76] In that case, the plaintiff had a contract with Telus for cellular phone services. That standard form contract contained a clause referring disputes to arbitration, and purporting to waive any right to commence or participate in a class action. The plaintiff sought to certify her claim as a class action, and Telus, relying on the arbitration clause, sought a stay. Like the assertion in this case, the plaintiff in *Telus* alleged that the contract, among other things, contravened provisions of the *BPCPA*, specifically ss. 171–172.

[77] The claims asserted by the plaintiff in *Telus* were described by the majority as follows:

> [10] … By a statement of claim dated January 21, 2005, she claims that TELUS falsely represented to her and other consumers how it calculates air

> time for billing purposes. She seeks redress against what she contends are deceptive and unconscionable practices contrary to ss. 3, 4(3)(b) and 4(3)(e) of the *TPA* and ss. 4, 5, 8(3)(b) and 9 of the *BPCPA* (statement of claim, at paras. 11-12). She invokes both s. 171 and s. 172 remedies. Further, as stated, she seeks certification to act on her own behalf and as representative of a class of allegedly overcharged customers, pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*").
>
> [11] I leave aside her claims under the *TPA* which are clearly subject to the arbitration agreement, and therefore not before the court. With respect to s. 172 of the *BPCPA*, however, she seeks a declaration that TELUS engaged in deceptive and unconscionable trade acts and practices under s. 172(1)(a). She also seeks an interim and permanent injunction under s. 172(1)(b), prohibiting TELUS from engaging in such acts and practices, and an order under s. 172(3)(a) restoring monies that TELUS acquired, she says, by contravening the *BPCPA*, including a proper accounting.

[78] The Court specifically recognized that s. 172 of the *BPCPA* was meant to provide an avenue for consumer activists or others to proceed to court, whether or not they were personally affected in any way by a consumer transaction. However, the impact of s. 172 on claims was not absolute:

> [7] Private arbitral justice, because of its contractual origins, is necessarily limited. As the *BPCPA* recognizes, some types of relief can only be made available from a superior court. Accordingly, to the extent Ms. Seidel's complaints shelter under s. 172 of the *BPCPA* (and only to that extent), they cannot be waived by an arbitration clause and her court action may continue, in my opinion. As to her alternative complaints, whether under other sections of the *BPCPA*, the now repealed *Trade Practice Act*, R.S.B.C. 1996, c. 457 ("*TPA*"), or at common law, the TELUS arbitration clause is valid and enforceable. As to those claims, her court action should be stayed pursuant to s. 15 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 ("*CAA*").

[79] Starting at para. 27, the Court discussed the competence-competence principle. The Court confirmed the principles has been adopted in British Columbia pursuant to s. 22 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, and its rules (now enshrined under s. 23 of the *Arbitration Act*: *Touvongsa v. Lahouri*, 2024 BCCA 405 at paras. 19–20). Thus, absent legislative exception, any challenge to an arbitrator's jurisdiction over the plaintiff's dispute with Telus had to first be determined by the arbitrator, unless the challenge involved a pure question of law, or one of mixed fact and law.

[80] The Court in *Telus* recognized the importance of the consumer protection goals underlying the *BPCPA*, which meant the legislature intended that it override arbitration clauses to some degree:

> [40] In summary, s. 172 offers remedies different in scope and quality from those available from an arbitrator and constitutes a legislative override of the parties' freedom to choose arbitration. Unlike Quebec and Ontario, which have decided to ban arbitration of consumer claims altogether, or Alberta, which subjects consumer arbitration clauses to ministerial approval, the B.C. legislature sought to ensure only that certain claims proceed to the court system, leaving others to be resolved according to the agreement of the parties. It is incumbent on the courts to give effect to that legislative choice, in my view.
>
> [Emphasis added.]

[81] The Court noted that while s. 171 of the *BPCPA* allows only a person who suffered damages to bring an action for damages, s. 172 allows a person to bring an action for declarations or an injunction in relation to contraventions of the Act regardless of whether that person has been affected by the impugned consumer transaction: *Telus* at para. 32. If the court grants a declaration or injunction, the court may also order the restoration of money acquired by contravention of the Act and other relief (see above para. 46).

[82] Ultimately, the Court granted a partial stay, concluding that the plaintiff could seek certification for the claims brought under s. 172 of the *BPCPA*, but that her other claims could only be pursued in arbitration. That is precisely the relief sought by HomeAway in this case.

3. Conclusion on Technical Prerequisites

[83] I am satisfied that HomeAway has established it meets all the technical prerequisites. The facts in this case closely parallel those in *Telus*, which would appear to justify granting the stay as sought by HomeAway. However, the burden now shifts to the plaintiff to argue why the arbitration agreement should not be enforced.

B. Is there any reason not to enforce the 2016 Arbitration Clauses?

[84] I repeat the reasons articulated in the plaintiff's response as to why he submits the arbitration agreement should not be enforced:

a) the arbitration agreement is merely an "agreement to agree";

b) there is no prospect that an arbitrator will hear the Canadian law issues arising in this action; and,

c) the *ICAA* does not apply to the claims anchored in provincial consumer protection legislation.

[85] For the reasons set out below, I am not persuaded that any of these arguments have merit. The response (as did the submissions at the May 16–17, 2024 hearing) focussed almost exclusively on the inapplicable 2022 Arbitration Clauses that differ in material ways from the 2016 Arbitration Clauses.

[86] The plaintiff argues that arbitration agreement only constitutes an "agreement to agree" because the arbitral institution, law of the seat and applicable rules remain unspecified for non-US residents. That argument does not apply to the 2016 Arbitration Clauses, which specify that the Consumer Arbitration Rules of the American Arbitration Association ("AAA") apply. Those rules specifically incorporate the competence-competence principle, meaning challenges to the arbitrator's jurisdiction should first be determined by the arbitrator.

[87] The second argument appears to raise the "brick wall" framework. In *Dell Computer Corp. v. Union des consommateurs,* 2007 SCC 34, the Supreme Court of Canada confirmed that challenges to the jurisdiction of an arbitrator should first be referred to the arbitrator, unless the issue raised concerns a question of law alone, or a question of mixed law and fact where answering the questions of fact entails only a superficial examination of the documents: at paras. 84–85; see also *Beck v. Vanbex Group Inc*., 2021 BCSC 1619 at paras. 10, 23.

[88] In *Uber Technologies Inc. v. Heller,* 2020 SCC 16 [*Uber*], the Supreme Court of Canada stated an alternative approach to challenging the arbitrator's jurisdiction: if the court concludes that there is good reason to be concerned that "[t]he arbitration agreement would, in effect, be insulated from meaningful challenge": at para. 39. This has become known as the "brick wall" framework. In *Spark Event Rentals Ltd. v. Google LLC,* 2024 BCCA 148, the Court of Appeal explained this proposition:

> [19] *Uber* is important because it adds an alternative, or supplementary, basis authorizing a court to determine a challenge to arbitral jurisdiction. As the majority notes, the need to have recourse to this alternative is because the underlying assumption that if a court does not decide an issue, the arbitrator will, is not always true. Circumstances may exist where the issue may never be resolved, if not by the court: *Uber* at paras. 37–38. In *Uber*, for example, the Court found that Mr. Heller would be functionally barred from reaching arbitration, owing to terms that would require him to arbitrate in the Netherlands for fees approximately equivalent to his annual earnings as an Uber driver: at paras. 9–11, 47.
>
> [20] As I read *Uber*, the Court does not purport to lay out a precise test of when a "brick wall" effectively prevents a determination of a jurisdictional challenge within the arbitration. Rather, the majority illustrates some circumstances in which there is a real prospect that "the validity of an arbitration agreement may not be determined", such as when resolving that question in arbitration is fundamentally too costly or otherwise unavailable. The majority gives, as specific examples, high fees relative to the claim or an inability reasonably to reach the place of arbitration—examples that were relevant to the facts before them. But the concern arises generally from circumstances that effectively insulate the arbitration agreement from meaningful challenge: *Uber* at para. 39.

[89] The argument in the plaintiff's response is that there is "no prospect" the arbitrator will consider the Canadian law arguments. This relies exclusively on the wording in the 2022 Arbitration Clauses, especially the sentence, "[f]oreign laws do not apply", which does not exist in the 2016 Arbitration Clauses. The plaintiff also relies on expert evidence he filed, but that, too, is wholly dependant on the wording of the 2022 Arbitration Clauses.

[90] HomeAway points out that the 2016 Arbitration Clauses expressly incorporate the AAA Rules, which mirrors the agreements considered in both *Amazon BCCA* (at para. 12) and *Niantic* (at para. 14). Its position is that the plaintiff's argument

amounts to an attempt to relitigate both *Amazon BCCA* and *Niantic* despite there being little to distinguish the underlying facts or even expert opinions.

[91] HomeAway submits even if the 2022 Arbitration Clauses were at issue, the matter would still need to be referred to the arbitrator. Its position is that in light of the conflicting expert opinions, it is at least arguable that the arbitrator may apply Canadian law.

[92] Moreover, HomeAway argues that whether or not the arbitrator could apply Canadian law is not an issue that can be resolved based on a superficial examination of the record, given the duelling expert opinions. In my view, that position has merit, but it does not arise given my conclusion about which arbitration agreement applies.

[93] As to whether this claim falls within the brick wall framework, I agree with HomeAway that this argument could not succeed due to the lack of evidence. In *Uber*, the court held that the up-front filing fee of US$14,500 amounted to a barrier to access to justice. The plaintiff has filed no evidence to support a claim (even if it was raised) that he could not afford to arbitrate his claim.

[94] More importantly, the 2022 Arbitration Clauses upon which the plaintiff relies contains provisions that allow claimants to apply to either a fee waiver, or for the arbitrator to deem that HomeAway must pay the fees if a claimant can demonstrate that the costs are prohibitive.

[95] I also dismiss the third argument raised in the response. The plaintiff argues that the Consumer Claims are not captured by the *ICAA* because it applies only to "commercial" claims, relying on *Isagenix* at paras. 60–63. The plaintiff submits that the case stands for the proposition that "consumer claims are not covered" by the *ICAA*. In my view, that proposition overstates the Court of Appeal conclusion.

[96] *Isagenix* was a case about whether an arbitration clause in an agreement dealing with Isagenix's sale of edible products to the respondent, Ms. Harris, for her resale or personal purchase (as part of a multilevel marketing scheme) ought to

operate to stay her action. Her action was for personal injury damages arising from her consumption of some of the products. Isagenix sought to stay the action, relying on the *ICAA*.

[97] As noted by the Court of Appeal, nowhere in her claim did Ms. Harris rely on her contractual relationship with the company. Instead, her claim was based on the design, manufacture, distribution, marketing and supply of products by the company that were recalled by Health Canada and the Canadian Food Inspection Agency because they were unsafe. She claimed she consumed the products and suffered various personal injuries as a result: *Isagenix* at para. 11.

[98] The Court of Appeal upheld the trial judge's rejection of the stay, in part, because the company argued that any claim arising out of its relationship with the respondent was subject to arbitration. The Court of Appeal held the relationship is not the determinative factor. Whether a claim is commercial so as to fall under the *ICAA*'s umbrella or not depends on the nature of the dispute as shown by the pleadings: *Isagenix* at paras. 63, citing *Uber* at para. 25. The Court of Appeal in *Isagenix* explained that reasoning as follows:

> [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.

[99] The gravamen of the complaint in that case was the claim for personal injury damages, relying on the tort of negligence.

[100] In this case, the plaintiff grounds his claim on what he says is HomeAway's unauthorized charging a fee for services he booked on its website. The fact that portions of his claim are grounded on the consumer protection aspects of the legislation does not mean it is not a commercial transaction to which the *ICAA* applies. Even if the claims rooted in the *BPCPA* can only be described as "consumer" claims (a finding I do not make), those are not the ones HomeAway

seeks to stay. Furthermore, the plaintiff describes in para. 26 of the NOCC that the claim arising from the provision of goods or services “or other commercial matters”.

[101] For all those reasons, had the plaintiff relied on the arguments articulated in his response, I would not have found them persuasive.

[102] Therefore, I conclude that the partial stay sought by HomeAway should be granted, having found that the technical prerequisites are met and that no viable argument remain as to why the 2016 Arbitration Clauses should not apply to the plaintiff.

C. Further Issues

[103] Both parties have raised concerns about the evolution of the opposing party’s position.

[104] In responding to HomeAway’s position that the legislation in provinces other than British Columbia was not applicable to the arguments raised on the stay application, the plaintiff alleges this position is contrary to what he understood the parties had agreed: such arguments would be raised only at certification. The plaintiff submits he initially agreed to forego a sequencing application only because of what he says was a concession by HomeAway. HomeAway does not agree there is any contradiction in its position.

[105] Also, the plaintiff filed an amended NOCC on May 27, 2024. Counsel for the plaintiff asked this Court not to issue judgment based on the position that the relief sought was rendered moot by those amendments. The plaintiff implied that the amendment was tailored to what the plaintiff believes was HomeAway’s change in position. In response, HomeAway suggested the plaintiff’s request that judgment not be issued might amount to an abuse of process.

[106] These issues depend to some degree upon communications between the parties outside the Court. Absent proper evidence being filed and specific relief

being sought in an appropriately filed pleading, it is not appropriate for the Court to comment on the parties' apparent dispute about their dealings.

[107] These issues are contentious, and for that reason, I decline to consider the amended NOCC in issuing this judgment.

V. CONCLUSIONS

[108] For all the reasons stated above, the action is stayed except for the relief sought by the plaintiff under s. 172 of the *BPCPA*.

[109] I direct the parties to consult one another and come up with the earliest five dates they are mutually available for a one half-day case management conference. For clarity, at the case management conference, I expect the parties to discuss with the Court the following topics:

a) confirming the current schedule for a five-day certification hearing starting June 9, 2025;

b) whether a hearing is necessary to address the amended notice of civil claim;

c) whether the parties wish to address the impact, if any, of s. 142.1(3)(q) of the *BPCPA*.

[110] Counsel should then fill out the on-line request to appear before me, indicating the five dates they are all available. If there are other topics either party believes should also be addressed at the case management conference, that should be identified in the request to appear.

"Sharma J."