

## Pith and Substance: Determining the Scope of Arbitration Clauses

The recent decision of the Ontario Superior Court of Justice in *Haas v. Gunasekaram*, 2015 ONSC 5083 reinforces the approach that Ontario Courts take to defining the boundaries of arbitration clauses.

*Haas* centered around three aspiring restauranteurs who had opened an Italian restaurant together.

The investors had the foresight to enter into a shareholders' agreement while the relationship was still a happy one. Contained within the shareholders' agreement was an arbitration clause that applied to any dispute between the parties "respecting this Agreement or anything herein contained."

Unfortunately, the restauranteurs did not remain on harmonious terms. One of the parties commenced an action for breach of fiduciary duty stemming from alleged involvement with competing restaurants; misrepresentations which induced the plaintiff to enter into the investment; and oppression relating to the non-issuance of shares, director registration issues, and unauthorized salary payments.

The matter before the Court was an application by the defendants to stay the action and refer it to arbitration pursuant to the arbitration clause.

The Court noted that the governing principle in defining what is arbitrable, and what is not, is that to be arbitrable, a dispute must relate to the agreement that contains the arbitration clause. The Court referred to the Ontario Court of Appeal decision in *Woolcock v. Bushert* (2004), 246 D.L.R. (4th) 139, wherein the Court stated at paragraph 23 that:

[the] words 'relating to' enjoy a wide compass. So long as a matter in dispute is referable to the interpretation or implementation of some provision of the Agreement, it is arbitrable.

The Court also applied the analytical approach utilized by the Ontario Court of Appeal to interpret a forum selection clause in *Matrix Integrated Solutions Ltd. v. Naccarato*, 2009 ONCA 593 by examining the "pith and substance" of the plaintiff's claim.

The Court concluded that neither the misrepresentation nor the breach of fiduciary duty claim were contractual in nature and did not rely upon or refer to the shareholders' agreement:

[20] The meat of this case is based on the allegations of representations made by the defendants with the purpose of inducing Haas into joining the business venture. The SHA is pleaded as part of the instrumentality used by the defendants as part of the inducements. The subject matter of these allegations does not, in my view, rely on contractual obligations contained in the SHA. In other words, the claim is not for breach of contract but the fraudulent misrepresentation of facts which caused Haas to enter into the business agreement. ...

[21] The breach of fiduciary duty allegations centre on the defendants working for rival companies at the same time that they were supposed to manage the jointly owned Osteria dei Ganzi. Haas also alleges that two of the defendants, Gunasekaram and Viscardi opened a competing Italian restaurant within one kilometer of Osteria dei Ganzi. Once again, these allegations do not rely upon or refer to the SHA as a basis for their validity and are not contractual in substance ...

The claim for oppression did concern specific contractual clauses. However, as the bulk of the claims asserted fell outside the scope of the arbitration clause, and all claims involved the same factual matrix, carving off some of the claim for arbitration was not appropriate as it would result in duplication, increased costs, and delay.

It should be noted that it is not the categorization of a claim that determines if a dispute is governed by an arbitration clause, but whether the contract in which the arbitration clause resides is engaged in asserting the claim.

The juxtaposition of the decision in *Haas* to the Ontario Court of Appeal decision in *Greenfield Ethanol Inc. v. Suncor Energy Products Inc.*, 2007 ONCA 823 demonstrates this point. The arbitration clause at issue in *Greenfield* provided that it applied to "any dispute or disagreement between the parties hereto either with respect to the interpretation of any provision of the agreement or with respect to the performance of a party." The issue before

the Court was whether a claim for breach of fiduciary duties that were allegedly created by the energy-supply contract that contained the arbitration clause were arbitrable.

The party opposing arbitration argued that because the agreement in question did not contain a specific clause creating a fiduciary relationship, the claim for breach of fiduciary duty was not arbitrable. The Court disagreed, ruling that because the agreement as a whole was being relied upon as creating a fiduciary relationship, the claim for breach of fiduciary duty was “not clearly outside” the scope of the arbitration clause. Thus, in contrast to *Haas*, the claim for breach of fiduciary duty in *Greenfield* was tied-back to the agreement containing the arbitration clause and was thus found to be arbitrable.

The take-away point is that the Court will look to the substance of a claim and whether it engages the agreement in which the arbitration clause resides in order to determine if it is arbitrable. Moreover, the Court will rule against enforcing an arbitration clause where doing so gives rise to a multiplicity of proceedings by allowing some aspects of a claim to be dealt with in arbitration and others within the court system.



**Geoff Janoscik** is a member of the Commercial Litigation Practice.

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### Contact Members of our Commercial Litigation Practice:

**Andy Balaura**

abalaura@pallettvalo.com • (905) 273.3022 ext. 225

**Anna Esposito**

aesposito@pallettvalo.com • (905) 273.3022 ext. 260

**Paul Guaragna**

pguaragna@pallettvalo.com • (905) 273.3022 ext. 281

**Geoff Janoscik**

gjanoscik@pallettvalo.com • (905) 273.3022 ext. 232

**Anne Kennedy**

akennedy@pallettvalo.com • (905) 273.3022 ext. 204

**Scott Price**

sprice@pallettvalo.com • (905) 273.3022 ext. 221

**John Russo**

jrusso@pallettvalo.com • (905) 273.3022 ext. 282

**Marc D. Whiteley**

mwhiteley@pallettvalo.com • (905) 273.3022 ext. 255

**Manpreet Brar**

mbrar@pallettvalo.com • (905) 273.3022 ext. 214

**Ted Evangelidis**

tevangalidis@pallettvalo.com • (905) 273.3022 ext. 250

**Alex Ilchenko**

ailchenko@pallettvalo.com • (905) 273.3022 ext. 203

**Wojtek Jaskiewicz**

wjaskiewicz@pallettvalo.com • (905) 273.3022 ext. 285

**Jeffrey S. Percival**

jpercival@pallettvalo.com • (905) 273.3022 ext. 264

**Maria Ruberto**

mruberto@pallettvalo.com • (905) 273.3022 ext. 206

**Bobby Sachdeva**

sachdeva@pallettvalo.com • (905) 273.3022 ext. 295



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77 City Centre Drive, West Tower, Suite 300, Mississauga, Ontario L5B 1M5 • 1.800.323.3781