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Ontario Court of Appeal hits the brakes on arbitration clauses

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A recent decision from the Ontario Court of Appeal involving Uber throws into doubt the enforceability of certain arbitration clauses in employment (and independent contractor) agreements — and potentially consumer and other agreements. The Court found the arbitration clause at issue was invalid due to statutory non-compliance and unconscionability, in part because it required Uber drivers to arbitrate even small claims in the Netherlands.

Employers who rely on arbitration agreements to resolve employment-related disputes through a confidential process should review their agreements in light of the Court's decision — some specific suggestions are set out below. In general, arbitration clauses that do not provide accessible and effective processes and remedies may not preclude class actions.

Background

In *Heller v. Uber Technologies Inc.*, 2019 ONCA 1, an Uber driver, Mr. Heller, commenced a proposed class action on behalf of all Uber drivers who have worked on the Uber platform in Ontario since 2012. Mr. Heller sought a declaration that drivers in Ontario are employees of Uber and therefore entitled to the benefits under the *Employment Standards Act, 2000* (the ESA).

Uber brought a motion to stay the class action proceeding on the grounds that Mr. Heller was bound by an arbitration clause in the Uber Services Agreement, to which all drivers must agree before performing services on the Uber platform. That clause provides, among other things, that any dispute arising out of the Services Agreement must go through an arbitration hearing to be held in the Netherlands at an up-front cost to the driver of US$14,500 in filing fees. The motions judge upheld the Uber arbitration clause and granted its motion for a stay. The Court of Appeal reversed that decision and found that the arbitration clause is invalid and unenforceable on two grounds: 1) it contracts out of the ESA, and 2) it is unconscionable under common law.

Contracting out of the ESA

Section 5 of the ESA prevents parties from contracting out of employment standards. The Court of Appeal said that a preliminary motion in a proceeding such as this should proceed on the basis that the plaintiff's allegations are true or, at least, capable of being proven. From this premise, the Court of Appeal reasoned that if Uber drivers are in fact employees, they would be covered under the ESA, which gives employees the right to make a complaint to the Ministry of Labour, which in turn must investigate the complaint.

The Court of Appeal concluded that

- the investigative process under the ESA is a "requirement" that "applies to an employer for the benefit of an employee" and, accordingly, meets the definition of an "employment standard" under the ESA; and
- the arbitration clause is invalid as it contracts out of this employment standard by denying drivers the right to make a complaint to the Ministry of Labour.

Unconscionability

The Court of Appeal also found that the arbitration clause is invalid because it meets the following four elements of unconscionability: 1) a grossly unfair and improvident transaction; 2) one party's lack of independent legal or other advice; 3) the other party's overwhelming bargaining power; and 4) the other party knowingly taking advantage of the first party's vulnerability. Applying these four criteria, the Court of Appeal found

1. the arbitration clause is an unfair bargain as it requires a driver with a small claim to incur significant up-front costs of arbitrating in Uber's home jurisdiction of the Netherlands in accordance with the laws of the Netherlands;
2. there was no evidence that Mr. Heller had any legal or other advice prior to entering into the Services Agreement nor was it reasonable to believe he could have negotiated any of its terms;
3. there is a significant inequality of bargaining power between Mr. Heller and Uber; and
4. Uber knowingly and intentionally chose the arbitration clause in order to favour itself and take advantage of drivers who are clearly vulnerable to the market strength of Uber.

What does this mean for parties looking to rely on arbitration clauses?

Based on the Court of Appeal's decision, arbitration clauses in employment agreements that do not permit employees in Ontario to make complaints to the Ministry of Labour with respect to alleged violations of the ESA are potentially unenforceable. Employers should therefore consider moving quickly to amend arbitration clauses so as not to preclude an employee from seeking remedies under applicable employment standards legislation.

To address the Court of Appeal's concerns regarding unconscionability or unfairness with respect to arbitration clauses, companies should consider drafting or revising such clauses to include the following features:

- The arbitration process should be subject to the local law of the jurisdiction in which the services are provided.
- Arbitration hearings should be held in the jurisdiction in which the services are provided.
- The employer should be responsible for paying any initial filing fees.
- The employee should have a reasonable opportunity to obtain independent legal advice before entering into the agreement.

Finally, the Court's decision to strike Uber's arbitration clause on the grounds of unconscionability has potential implications beyond the context of class actions and independent contractor/employment cases. For an arbitration clause to be enforceable, the Court found there must be a *real* dispute resolution procedure. An arbitration clause in consumer, service or other agreements that do not provide accessible and effective

processes and remedies may therefore be insufficient to preclude class action proceedings.