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Supreme Court of Canada rules Uber arbitration clause invalid and a 'classic case of unconscionability'

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Authors: Laura Fric, Lauren Tomasich, Geoffrey Hunnisett, Steven Dickie, Elie Farkas

The Supreme Court of Canada released its decision in the closely watched case of *Uber Technologies Inc v. Heller* (*Heller*) on June 26, 2020. The Supreme Court held that Uber's arbitration agreement with its drivers was unconscionable and invalid — largely on the basis that it prescribed the Netherlands as the place of arbitration and required drivers to pay US$14,500 in upfront fees, even for small disputes.

The Supreme Court made it clear that courts continue to respect arbitration as a valid dispute resolution process "based on it being a cost-effective and efficient method of resolving disputes." But, when that arbitration is "realistically unattainable," courts will intervene.

The Supreme Court's decision clarified the inapplicability of the *International Commercial Arbitration Act* (the ICAA) to labour and employment disputes; provided guidance on when a court, rather than an arbitrator, should determine an arbitrator's jurisdiction over a dispute; and confirmed a flexible two-part test for unconscionability.

A key takeaway from the decision is that parties seeking to have disputes determined by way of arbitration — especially parties contracting through standard form contracts — should take care that the arbitration provisions do not impose highly burdensome hardships or insurmountable procedural barriers.

Background

In 2017, Mr. Heller, an Uber driver in Ontario, commenced a proposed class action against Uber. Mr. Heller asserted that Uber drivers are employees (not independent contractors) under the Ontario *Employment Standards Act* (the ESA) and are therefore entitled to ESA benefits.

The standard form agreement between drivers and Uber contained an arbitration clause. It provided that any dispute arising out of the agreement be mediated and arbitrated through the International Chamber of Commerce, requiring an up-front payment by a complainant of about US$14,500. The provision provided that the dispute be governed by the laws of the Netherlands, and that the place of arbitration be the Netherlands.

Uber brought a motion to stay the proposed class action on the basis of the arbitration clause. As we described in an earlier Update, Uber's motion was initially granted and the action was stayed. On appeal (as discussed here), the Court of Appeal reversed that decision. The Court of Appeal found that the arbitration clause in Uber's services agreement was invalid because it was unconscionable at common law and contracted out of an employment

standard, contrary to the ESA. Uber appealed to the Supreme Court of Canada.

A majority of the Supreme Court of Canada dismissed Uber's appeal, agreeing with the Court of Appeal that the stay of Mr. Heller's class proceeding should be set aside.

Uber's arbitration clause is unconscionable, and therefore invalid

The Supreme Court found that Uber's arbitration clause was unconscionable after applying a flexible two-part test.

First, the Court found an inequality of bargaining power between Uber and Mr. Heller, reasoning that the arbitration clause was part of a standard form contract that was non-negotiable; Uber was more sophisticated than Mr. Heller, and the arbitration clause contained no information about the actual costs of arbitrating in the Netherlands.

Second, the Court found the arbitration clause to be improvident, as it required Mr. Heller to pay up-front administrative fees almost equal to his annual income from Uber, and the clause created the impression that a driver must travel to the Netherlands in order to pursue a dispute.

On the whole, the Court found that the arbitration clause rendered Mr. Heller's contractual rights effectively illusory.

The majority declined to decide whether the arbitration clause was also void because it required Uber drivers to contract out of employment standards imposed by the ESA.

The *Arbitration Act, 1991* applies to international labour and employment disputes

As a preliminary issue, the Court considered whether the Ontario *Arbitration Act, 1991* or the ICAA applied to the parties' dispute. The Court held that the ICAA only applies to arbitration agreements that are both "international" and "commercial." While the Court did not render a decision on whether an employment relationship existed between Mr. Heller and Uber, the majority found that the dispute centred on employment issues in respect of services performed in Ontario, which are not "commercial" disputes for the purposes of the ICAA. As such, the Court found the domestic *Arbitration Act, 1991* applied.

Novel exception to the "competence-competence" principle

Under Canadian law, there is a presumption known as the "competence-competence" principle that, when an arbitration clause exists, any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. In *Dell Computer Corp v Union des consommateurs* and *Seidel v TELUS Communications Inc*, the Supreme Court set out two exceptions, holding that a court is free to rule on arbitral jurisdiction where at issue are (i) pure questions of law, or (ii) questions of mixed fact and law requiring only "superficial consideration" of the evidentiary record.

In *Heller*, the Court established an additional exception based on principles of access to justice. It held that courts should not refer *bona fide* challenges to an arbitrator's jurisdiction to the arbitrator if there is a "real prospect that doing so would result in the challenge never being resolved." A court must determine whether, assuming the facts pleaded to be true, there is a genuine challenge to arbitral jurisdiction and whether, based on the supporting

evidence, there is a real prospect that if the court refuses to determine the arbitral jurisdiction issue the challenge may happen.

The Supreme Court applied this "access" test to Mr. Heller's case, holding that given the disproportionate upfront cost to initiate arbitration, there was a real prospect that the arbitrator's jurisdiction and the validity of the arbitration clause would never be resolved unless the court determined the issue.

A flexible test for unconscionability

The Supreme Court endorsed a flexible two-part test for assessing unconscionability, requiring demonstration of (i) an inequality of bargaining power, and (ii) an improvident bargain.

The Court explained that the "inequality of bargaining power" factor has no "rigid limitations," but is triggered where one party cannot adequately protect its interest in the contract process. Inequality of bargaining power may arise where a weaker party is deeply dependent on a stronger party or where only one party can understand and appreciate the full import of the relevant contractual terms.

Similarly, "improvidence" cannot be "reduced to an exact science" and is to be assessed contextually. Courts must inquire into whether a stronger party has been unduly enriched or whether a weaker party has been unduly disadvantaged.

In what will be of ongoing interest to many commercial parties, the Court stressed that a standard form contract, by itself, does not establish an inequality of bargaining power. The Court cautioned, however, that there is a potential in a standard form contract to enhance the advantage of the stronger party at the expense of the weaker one — which bolsters the significance of communicating the meaning of clauses with unusual or onerous effects.