Cassels

The Enforceability of Employment Arbitration Agreements in Question

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Some employers include arbitration clauses in their standard form employment agreements as the arbitration process can be a confidential and cost-effective method of resolving legal disputes with employees. However, the recent decision by the Ontario Superior Court of Justice in *Rhinehart v. Legend 3D Canada Inc.*, 2019 ONSC 3296 (*Rhinehart*), calls into question the enforceability of arbitration clauses in employment agreements. As a result, employers who utilize such should review whether they wish to continue to do so given their limited value in employment relationships.

The Facts

Mr. Rhinehart is a US citizen who worked for Legend 3D Inc., an American company operating in California (Legend USA), from November 2012 until December 2016. During his employment with Legend USA, Mr. Rhinehart entered into several employment and arbitration agreements with Legend USA.

In January 2017, Mr. Rhinehart was transferred to Legend 3D Canada Inc. (Legend CA) and worked for Legend CA in Ontario until his employment was terminated in March 2018. During his employment with Legend CA, Mr. Rhinehart did not execute any employment agreements, nor did he enter into any arbitration agreements with Legend CA.

Following his dismissal, Mr. Rhinehart commenced an action in the Ontario Superior Court of Justice against both Legend CA and Legend USA (the Employers). The Employers brought a motion to stay the action against them on the basis of the arbitration agreements executed by Mr. Rhinehart during his employment with Legend USA. The Employers asserted that, an arbitration agreement requires the Court to stay the proceeding and refer the matter to arbitration.

The Findings

The Court, however, found that the validity of the agreement is a question to be determined by the Court first. Conducting its validity analysis, the Court found as follows:

- There was no arbitration agreement between Mr. Rhinehart and Legend CA and there was no evidence to suggest that Legend CA could rely on Legend USA's rights under its arbitration agreements or that Legend USA assigned it obligations under its arbitration agreements to Legend CA.
- While there were several arbitration agreements between Mr. Rhinehart and Legend USA, none were valid. One agreement was not fully executed. The scope of the other was limited to disputes between Mr. Rhinehart and Legend USA arising from his USA-based employment with Legend USA – not claims related to his Ontario-based employment with Legend CA, which is the subject of the action before the Court.

As a result of these determinations, the Court denied the Employers' motion to stay the action.

The Forerunner

"For the completeness of analysis," the Court also considered whether there were any other reasons to refuse to stay the action. In determining that there were, the Court found the recent Ontario Court of Appeal decision in *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 (*Heller*) to be "directly applicable."

Heller involved an Uber driver, Mr. Heller, who commenced a class action on behalf of all Uber drivers who worked on the Uber platform in Ontario since 2012. Mr. Heller sought a declaration that drivers in Ontario are Uber employees and therefore entitled to the benefits under the ESA.

Uber brought a motion to stay the class action on the grounds that Mr. Heller was bound by an arbitration clause in the Uber Services Agreement. That clause provided, among other things, that any dispute arising out of the Services Agreement must go

through an arbitration hearing held in the Netherlands. The motions judge upheld the Uber arbitration clause and granted its motion for a stay. The Court of Appeal reversed that decision, finding the arbitration clause to be invalid and unenforceable on two grounds: (1) it contracts out of the *Employment Standards Act, 2000* (ESA), and (2) it is unconscionable under common law.

Applying the reasoning in *Heller*, the Court found that the arbitration agreements in *Rhinehart* were "an impermissible contracting out of the ESA" as they eliminate an employee's right to use the complaint process provided for in the ESA to the Ministry of Labour or the civil proceeding exemption to that complaint process. The Court confirmed that Mr. Rhinehart's choice not to pursue the complaint process under the ESA was "immaterial" to its analysis.

Employer Takeaways

In light of the decisions in *Heller* and *Rhinehart*, arbitration clauses in employment agreements that do not permit employees to use the process provided for in the ESA (and potentially other employment statutes such as the *Human Rights Code, Labour Relations Act*, and *Occupational Health and Safety Act*) are likely invalid and unenforceable. Prudent employers who use arbitration clauses in their employment agreements should consider limiting those clauses to claims that would otherwise be determined by a court and excluding claims covered by applicable employment statues. Alternatively, employers may wish to remove their arbitration clauses entirely.