Cassels

Supreme Court Gives Uber's Arbitration Clause Zero Stars, Greenlights Drivers' Employment Class Action

Christopher Horkins, Meghan Rourke

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The Supreme Court of Canada recently found that the arbitration provision used by popular ridesharing service, Uber Technologies, Inc. (Uber), in its standard form agreement with its drivers was invalid and unenforceable under the common law doctrine of unconscionability due to the substantial up-front costs associated with commencing an arbitration which effectively prevent drivers from pursuing claims. The decision paves the way for the drivers to pursue a class action in Ontario courts seeking a declaration that they are employees of Uber and relief for breaches of Ontario's *Employment Standards Act, 2000* (the *ESA*). The Court's reformulation of the test for unconscionability may also have wider ranging impacts on standard form contracts, arbitration clauses, class actions and employment law.

The Proposed Class Action

In January of 2017, David Heller, a Toronto UberEats driver, commenced a proposed class action on behalf of Ontario Uber drivers, which alleged that he and his fellow putative class members are employees of Uber, rather than independent contractors, and therefore entitled to the benefits and protections of the *ESA*. Mr. Heller initiated the class action after he received a cell phone message from Uber requiring that he accept changes to his compensation, while he was out on a delivery.

In the proposed class action, Mr. Heller seeks relief in respect of four claims on behalf of the proposed class: a claim for breach of the *ESA*[1], a claim for breach of contract and the duty of good faith, a claim for negligence and a claim for unjust enrichment. The success of all of Mr. Heller's claims depend on whether Mr. Heller is considered an employee under the *ESA*. The class action claims damages of $400 million against Uber, $200 million of which consists of punitive damages.

Uber's Driver Agreement and Arbitration Clause

Uber requires its Ontario drivers to download Uber's "Driver App", create an account, and provide several documents, including a valid driver's license and vehicle registration, proof of eligibility to work in Canada, and valid insurance. After reviewing the documentation, Uber activates the drivers' accounts.

The first time an Uber driver logs into the activated Uber App, and before they can drive passengers or

deliver food, the driver must accept an online standard form services agreement (the Agreement). Drivers accept the 14-page Agreement by clicking “I agree” twice through the Driver App.

The Agreement contains an arbitration clause which provides that all disputes about the terms of the Agreement must be resolved through arbitration in Amsterdam, the Netherlands, using the International Chamber of Commerce arbitration rules (the Arbitration Clause). The Agreement did not specify, however, that the Netherlands arbitration process required by this provision involved up-front administrative and filing fees of over USD$14,500, in addition to any travel, accommodation, lost wages, and legal costs involved in pursuing a claim through arbitration.

Motion to Stay the Proceedings in Favour of Arbitration

Uber brought a pre-certification motion before the Ontario Superior Court of Justice, seeking to stay the class action in favour of arbitration. Uber argued that the claims captured by the proposed class action were subject to the Arbitration Clause and would have to be arbitrated in the Netherlands. The motion judge agreed with Uber and stayed the class action.

The Ontario Court of Appeal reversed the motion judge’s decision and held that the Arbitration Clause was invalid for two reasons:

a) First, if the drivers are presumed to be employees of Uber as pleaded by Mr. Heller, the Arbitration Clause would constitute a contracting out of their rights under the *ESA*, which includes the ability to pursue certain claims by submitting a complaint to the Ontario Ministry of Labour. The *ESA* provides that any contractual provision purporting to contract out of “employment standards” under the Act is void.

b) Second, the Court of Appeal also reached the separate and independent conclusion that the Arbitration Clause was invalid because it was unconscionable. The common law doctrine of unconscionability applies in limited circumstances to invalidate contracts which involve an improvident bargain between parties with significantly unequal bargaining power. What made the Arbitration Clause improvident, according to the Court of Appeal, was the fact that any driver with a claim that might ordinarily amount to nothing more than a few hundred dollars must undertake an expensive arbitration in the Netherlands to have their rights determined independently.

Uber appealed to the Supreme Court of Canada.

The Supreme Court of Canada Decision

In an 8-1 decision, the Supreme Court of Canada (SCC) upheld the Ontario Court of Appeal’s conclusion

that the Arbitration Clause was invalid. A majority of seven Justices agreed with the Court of Appeal's conclusion that the Arbitration Clause was unconscionable. Justice Brown, concurring in the result, would have found the Arbitration Clause to be invalid for being contrary to public policy. Justice Côté, in dissent, would have allowed the appeal and granted Uber a stay of the proposed class action conditional upon Uber's payment of the plaintiff's up-front arbitration costs.

While Ontario's *Arbitration Act* directs courts to stay judicial proceedings where there is an arbitration agreement, the court retains discretion to decline to stay proceedings in five circumstances – including when an arbitration agreement is invalid. In *Heller*, the SCC expanded this test to provide that the court may also resolve disputes over an arbitrator's jurisdiction in circumstances where referring those disputes to the arbitrator would effectively prevent the dispute from being resolved.

Using this framework, the SCC held that the Arbitration Clause was unconscionable and invalid because it imposed prohibitive fees for initiating arbitration and, as a result, there would be a real prospect that if the stay was granted and the matter sent to arbitration in the Netherlands, Mr. Heller's challenge to the validity of the Arbitration Clause may never be resolved. The majority restated the common law test for determining unconscionability, distilling it to two factors:

1) **An inequality of bargaining power**: the Court held that this exists where one party cannot adequately protect its own interests in the contracting process; and

2) **An improvident bargain**: which is described as a bargain that unduly advantages the stronger party or unduly disadvantages the more vulnerable.

Importantly, the Court held that it is not necessary to prove that the stronger party knowingly sought to take advantage of the more vulnerable party to establish unconscionability, nor is it necessary to show that the bargain was grossly unfair or that the inequality of bargaining power between the parties was overwhelming. In this regard, the SCC decision represents a departure from what had been, to that point, the prevailing Ontario approach to the doctrine of unconscionability.

The SCC found that Uber's Arbitration Clause was unconscionable for the following reasons:

- There was a clear inequality of bargaining power – the Arbitration Clause was part of a standard form contract that Mr. Heller was unable to negotiate;
- There was a significant gulf in sophistication between Mr. Heller and Uber, a large multinational corporation;
- The Agreement contained no information about the USD$14,500 up-front costs associated with commencing an arbitration in the Netherlands and Mr. Heller could not have suspected this hurdle to relief when entering into the Agreement, nor could he have been reasonably expected to have received legal advice;

- The costs of commencing an arbitration were disproportionate to any arbitration award that could reasonably have been foreseen when the Agreement was entered into. In this respect, the Court noted that the USD$14,500 up-front cost and related costs would apply to individual disputes likely over hundreds, not thousands, of dollars;
- The Arbitration Clause gave Uber drivers in Ontario the clear impression that they had little choice but to travel to the Netherlands at their own expense to individually pursue claims against Uber; and
- Any representations to the arbitrator, including about the location of the hearing, can only be made after the fees have been paid.

Therefore, the SCC determined that, based on the disadvantages faced by Mr. Heller in his ability to protect his bargaining interests, and on the unfair terms that resulted therefrom, the Arbitration Clause was unconscionable and therefore invalid. As a result, the proposed class action was permitted to proceed to a certification motion before the Ontario Superior Court of Justice.

Importantly, neither the majority nor Justice Brown's concurring reasons addressed the Court of Appeal's finding that the Arbitration Clause was also invalid for purporting to contract out of the *ESA*, nor did they make any finding overturning the Court of Appeal on this point. If the case proceeds beyond the certification stage to a trial of the common issues, the Ontario court will be required to rule on the key question of whether Uber drivers are properly considered "employees" of Uber and therefore entitled to *ESA* protections.

Key Take-Aways and Implications for Arbitration Clauses, Standard Form Contracts, Class Actions and Employment Law Going Forward

The SCC's decision in *Heller* has potentially broad implications for arbitration clauses, employment law, standard form contracts and class actions arising from such contracts.

In reformulating the test for unconscionability, the majority decision potentially opens the door for courts to invalidate arbitration provisions and other onerous contractual terms based on an inequality of bargaining power between the parties and the perception of an improvident bargain. Given that nearly all standard form contracts will, by their nature, involve unequal bargaining power, the application of the majority's test in future cases will likely come down to courts' determinations on whether the resulting contract is improvident. This raises the potential for an expansion of claims seeking to avoid regrettable contractual obligations on the basis of unconscionability. It is possible that Uber's Agreement may have been so uniquely onerous in requiring drivers to pursue an expensive arbitration process in a foreign country that the risk of widespread findings of unconscionability in other standard form contracts will be low, but only time will tell.

The decision marks a departure from the SCC's longstanding commitment to the enforceability of arbitration agreements and the general principle that disputes as to the jurisdiction of an arbitrator should be referred to the arbitrator. In adding to the test a caveat that the court may decide such issues if referral to arbitration poses a risk that the issue may never be decided, the SCC has staked further ground over disputes that parties have agreed to submit to arbitration. Parties seeking to rely on arbitration provisions in their standard form contracts going forward should heed the SCC's warning in *Heller* in drafting their arbitration provisions and ensure that there are no significant financial barriers to their counterparties' commencement of arbitration proceedings.

Heller also raises questions about whether arbitration provisions can continue to be effective deterrents of class actions. Canadian courts have previously been amenable to staying proposed class actions where the putative class members' claims are subject to a valid arbitration clause. While *Heller* does not go as far as finding that any arbitration clause that has the effect of preventing class actions is invalid, the relative access to justice provided by Mr. Heller's class action as compared to Uber's inaccessible arbitration process loomed large in the majority's reasoning. Defendants in future cases should take caution that arbitration provisions may not be a silver bullet and must be prepared to defend the class members' ability to effectively pursue their claims through arbitration.

From an employment law perspective, *Heller* is noteworthy for a couple of key reasons. First, to the extent that some employers opt to include arbitration clauses in employment agreements (or in independent contractor agreements), it is more important than ever that such provisions: (a) do not effectively make the arbitration of disputes inaccessible; and (b) are not drafted in such a way as to preclude employees from seeking recourse through the *ESA* (or other applicable employment standards legislation prohibiting such "contracting out"). A failure to heed such advice may well invalidate the arbitration clause, as it did in *Heller*.

Second, in rejecting the Ontario approach to the doctrine of unconscionability, which required that the contract in question be "grossly unfair", that the inequality of bargaining power be "overwhelming" and that the offending party knowingly take advantage of the vulnerability of the other, the SCC has made it somewhat easier for Ontario employees to challenge other terms in their employment agreements which they might view as unfair. As a consequence, Ontario employers may be wise to re-examine the terms of their standard employment agreements to assess whether there are any that, while not contrary to the *ESA*, may be susceptible to challenge as being "improvident" or "unduly disadvantageous". The *Heller* decision also reinforces the importance for employers to ensure that job applicants have a meaningful opportunity to seek independent legal advice before signing an employment agreement.

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[1] Including failing to ensure that class members were classified as employees, and failure to compensate class members or inform them of their eligibility for the minimum wage, overtime pay, vacation pay and public holiday pay and premium pay under the *ESA*, among other contraventions.

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