Cassels

Uber Decision Does Not Necessarily Deliver Unconscionability to Franchise Arbitrations

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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 have wider ranging impacts for the use of arbitration in franchise agreements.

Background to the Proposed Class Action and Stay Motion

In January 2017, Toronto UberEats driver David Heller 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. The claim seeks a total of $400 million in damages on behalf of the proposed class for alleged breaches of contract, breaches of the ESA, negligence and unjust enrichment.

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 contained in its driver agreement which requires that all disputes be arbitrated in the Netherlands (the Arbitration Clause). 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 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, which involved start-up costs of US$14,500, to have their rights determined independently.

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 US$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 US$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.

Potential Impact on Arbitration Agreements in Franchising

Canadian courts have long upheld arbitration clauses in franchise agreements. In fact, the same motion judge who initially ordered a stay in *Heller*, previously decided a similar motion in a proposed franchise class action, staying the action in favour of arbitration.[1] The *Heller* decision raises questions as to whether the courts' commitment to enforcing arbitration clauses might be eroding. There is good reason, however, to believe that this decision will not impact the enforceability of arbitration clauses in franchise agreements notwithstanding the standard form nature of most franchise agreements.

The protections offered by the *Arthur Wishart Act (Franchise Disclosure), 2000* (the Wishart Act) and similar franchise legislation in other provinces present a compelling factor levelling the playing field between franchisor and franchisee with respect to bargaining power, including extensive up-front disclosure of the arbitration process required by the franchise agreement, which was not present in *Heller*. This up-front disclosure is effectively the *quid pro quo* for the standard form nature of the agreements franchisees are required to sign. No such disclosure was available to the plaintiff in *Heller*. The fact that legislation like the Wishart Act expressly contemplates the use of arbitration clauses by mandating disclosure of arbitration requirements provides evidence that legislatures viewed arbitration clauses as an acceptable term when enacting legislation designed to address a perceived inequality of bargaining power.

The perceived inequality of bargaining power in franchise relationships is also often just that. In many cases, franchisees are sophisticated business operators with substantial resources – in some cases, greater than

the franchisor's. Franchise agreements are also not always the "take it or leave it" contracts of adhesion they are so often made out to be. While a uniform standard contract is preferable for franchise systems, and often the starting point for franchise relationships, it is not uncommon for franchisees to negotiate bespoke amendments suited to their unique circumstances. Finally, it may be the case that Uber's Arbitration Clause 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.

While only time will tell whether *Heller*'s impact will extend to franchise arbitrations, there are good reasons to think it will not. In the meantime, franchisors looking to avoid any potential impact on arbitration clauses in their franchise agreements should consult with their legal counsel to ensure their arbitration processes do not present an unintended obstacle to their franchisees' pursuit of claims.

The author is grateful to colleagues Adrian Jakibchuk and Meghan Rourke who co-authored the previous version of this article which looked at the decision's potential impact on class actions, standard form contracts generally, and employment law.

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[1] *1146845 Ontario Inc. v Pillar to Post Inc.*, 2014 ONSC 7400, <http://canlii.ca/t/gfr6n>.
