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Justice Perell Stays Proposed Class Proceeding against Uber, in Favour of Arbitration in the Netherlands - Heller v Uber Technologies Inc.

A long-standing issue in Canadian class actions law relates to the ability of parties to contract out of class actions and instead require that any disputes be submitted to arbitration. For class counsel and class members, such clauses are anathema, representing an attempt by sophisticated organizations to thwart class actions by requiring individual claims to proceed to arbitration. For businesses, such clauses have significant value; they can result in individual cases being resolved quickly and efficiently, without the complications and attendant costs of a class action.

In its 2011 decision in *Seidel v TELUS Communications Inc.,* the Supreme Court of Canada established that arbitration clauses are generally valid and will preclude class actions, unless legislation has explicitly removed the ability of parties to agree arbitration in some or all cases. In many domains, legislatures have done precisely that. For example, in Ontario, the *Consumer Protection Act, 2002*, S.O 2002, c. 30, Sched. A, precludes arbitration where the dispute arises out of “consumer agreements”, which would include most types of agreements between suppliers and consumers, unless the parties specifically agreed to arbitration after the dispute arises. As such, consumer class actions in Ontario generally remain viable and will seldom be stayed in favour of arbitration.

In other domains, the legal landscape is less clear. For example, under the *Employment Standards Act, 2000*, S.O. 2000, C. 41, there is no general prohibition against the arbitration of disputes arising under employment contracts. This has given rise to the question of whether proposed class actions under the *ESA* should be stayed in favour of arbitration where the agreement allegedly creating the employment relationship contains a clause requiring arbitration of disputes. This was precisely the issue that arose in the recent case of *Heller v Uber Technologies,* 2018 ONSC 718.

In his proposed class action against a series of companies

within the Uber group of companies, David Heller, an Ontario resident and Uber driver, sought $400 million dollars on behalf of the proposed class, alleging that he and the proposed class members had been improperly classified as “independent contractors” instead of “employees” and that they were thus deprived of the statutory benefits provided by the *ESA*. In order to become an Uber driver, Mr. Heller had entered into two contracts with two different Uber companies, each of which contract contained a clause requiring that disputes be submitted to arbitration.

Uber brought a pre-certification motion to stay the proceedings on the basis that Mr. Heller’s agreements required him to submit any disputes arising under his agreements to arbitration in the Netherlands. In a decision released in January of 2018, Justice Perell accepted Uber’s position and stayed the proposed class proceeding in favour of arbitration in the Netherlands.

Justice Perell began by holding that the *International Commercial Arbitration Act, 2017* applied to the agreements. That Act only applies to “international commercial agreements”, and Mr. Heller argued that his agreements with Uber were not commercial agreements. Justice Perell disagreed. The Court noted that the term “commercial” was to be given a very broad interpretation. Justice Perell noted that even if Mr. Heller’s agreement was an employment agreement as he contended, this did preclude the agreement from being a “commercial agreement” that could be subject to arbitration under the *ICAA*.

Applying the Competence-Competence principle, Justice Perell held that the question of whether an arbitrator has jurisdiction over the dispute should generally be decided at first instance by the arbitrator herself. Justice Perell noted that the Court should only preempt an arbitrator’s decision where it is clear that the dispute before the court is outside the terms of the arbitration agreement or that the parties are not subject to the agreement. Here, because the agreements contained language indicating that an employment relationship had not been created, Justice Perell held that it was not clear that the disputes were not subject to arbitration. Consequently, he held that the question of jurisdiction should be deferred to an arbitrator.

Finally, Justice Perell considered Mr. Heller’s claim that the arbitration agreement was void because it was unconscionable. While acknowledging that there was an inequality of bargaining power between Mr. Heller and Uber, Justice Perell held that Uber had not preyed upon nor taken advantage of Mr. Heller or other Uber drivers. Justice Perell held that the mere fact that the agreements contained arbitration clauses did not render

those agreements improvident. Consequently, Justice Perell found that there was no unconscionability that would void the arbitration clauses.

Heller v Uber Technologies has significant implications for all organizations that face class action risk. For employers in particular, it confirms that employment disputes may be properly subject to arbitration as opposed to class actions. More generally, *Heller* confirms that unless the legislature has specifically provided that such clauses are unenforceable, courts will be willing to enforce arbitration clauses and stay potential class actions, even if doing so will effectively deprive the potential class members of any remedy, as was arguably the case in *Heller.* However, from the perspective of individuals with potential claims, *Heller* is disappointing. By requiring the adjudication of disputes by arbitration in the Netherlands rather than through a single class action in Ontario, the Court's decision raises concerns about access to justice.

Heller has appealed Justice Perell's decision, so the Ontario Court of Appeal will weigh in on this issue. However, regardless of what the Court of Appeal decides, legislatures will likely have to address this issue as well. The *Heller* decision highlights the tension between two competing adjudicative mechanisms, each of which legislatures have encouraged. On the one hand, legislatures have enacted generous class proceedings legislation in order to further the goals of access to justice, behaviour modification, and judicial economy. On the other hand, legislatures have enacted arbitration statutes that specifically confirm the wide scope that parties are granted to resolve their disputes by private arbitration. Identifying the optimal demarcation line between those two regimes is a policy issue that is better settled by legislatures rather than courts.

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