Paul-Erik Veel
416-865-2842
pveel@litigate.com

June 26, 2020

Supreme Court Sides with Drivers in Uber Case; Deals Blow to Arbitration Clauses

The Supreme Court of Canada has released its highly anticipated decision in *Uber Technologies Inc v Heller*.

As previously discussed on our blog (here, here and here), the case involves a challenge to the provision in Uber's standard agreement with drivers requiring all disputes to be resolved by private mediation/arbitration.

Mr. Heller, an Uber driver, commenced a class action against Uber alleging that it had breached the Ontario *Employment Standards Act, 2000* (the "*ESA*") by not treating drivers as employees and providing them with the benefits and protections that employees are entitled to under the *ESA*. Uber moved to stay the class proceeding on the basis that the service agreement Mr. Heller entered into with Uber when he became a driver requires all disputes to be resolved by mediation or, if mediation fails, arbitration, under the International Chamber of Commerce's ("ICC") mediation and arbitration rules, respectively. The agreement further provides that the place of the arbitration shall be Amsterdam, Netherlands. The agreement also contains a choice of law clause providing that the agreement will be governed by and construed in accordance with the laws of the Netherlands, excluding its rules on conflicts of laws. Under the ICC's rules, the administrative fee to commence an arbitration works out to approximately $14,5000 USD. This is in addition to legal costs and other costs of the proceeding.

At first instance, the Superior Court granted Uber's motion and stayed the arbitration. On appeal, the Ontario Court of Appeal overturned the decision and permitted the action to proceed.

The majority at the Supreme Court upheld the Court of Appeal's decision permitting the action to proceed. The majority's decision addresses a number of important procedural and substantive legal issues, including the test applicable to staying an arbitration in lieu of court proceedings, the fault line between Ontario's *Arbitration Act, 1991* and the *International Commercial Arbitration Act, 2017*, and when a contract or contractual provision will be void for unconscionability.

The majority of the court set aside the arbitration provision in

the agreement because there was a “real potential” that Mr. Heller’s case would never be resolved if he was forced to proceed to arbitration due to the “extensive fees” involved in commencing the arbitration.

The first issue the court had to decide is whether the motion to stay the action should be decided according to the *Arbitration Act* or the *International Commercial Arbitration Act, 2017*, which permit arbitrations to be stayed in different situations. An arbitration falls within the *International Commercial Arbitration Act* when it is both “international” and “commercial” in nature. The arbitration in this case was clearly international in nature given the choice of law and place of arbitration provisions relating to the Netherlands. However, the majority held that it was not a “commercial” dispute. In so holding, the majority characterized the agreement between Mr. Heller and Uber as a matter labour and employment instead of a licensing agreement (as Uber would have it), and held that labour and employment issues do not fall within the ambit of a “commercial” dispute under the *International Commercial Arbitration Act*. Accordingly, the motion was subject to the domestic *Arbitration Act*.

Pursuant to Section 7(2), paragraph 2 of the *Arbitration Act*, a court proceeding regarding a matter that is subject to arbitration will be stayed by the court unless the arbitration agreement is invalid.

Mr. Heller asserted that the arbitration clause in the Uber agreement was invalid because it was unconscionable. Canadian courts have split on the proper test to determine whether a contract or contractual provision is void for unconscionability, including on the extent of unfairness required and whether a party has to know of and actively take advantage of the other party, among other matters. The majority of the Supreme Court seemingly resolved this dispute, holding that a contract or contractual provision will be void for unconscionability where there is an inequality of bargaining power that results in an improvident bargain. In this case, the Court found that the arbitration provision in the Uber agreement was unconscionable and set it aside. First, it held that there was an inequality of bargaining power. The contract was a standard form contract that was not the result of any negotiation and that Mr. Heller had no say into the terms of. There was a gulf in sophistication between Mr. Heller, on the one hand, and a large, multi-national corporation like Uber, on the other. In particular, the majority held, a person in Mr. Heller’s circumstances likely would not appreciate the financial and legal implications of the arbitration provision. The

agreement did not attach a copy of the ICC's rules, so Mr. Heller would not have known of the $14,500 USD fee even if he had read the Uber agreement in its entirety. Second, the majority held that the agreement was improvident because the $14,500 USD fee just to commence the claim was close to Mr. Heller's annual income and may be far less than the amount at issue in the arbitration, let alone the costs of being required to travel to Amsterdam for the arbitration.

Accordingly, the majority held that under the *Arbitration Act*, a court hearing a motion to stay a court proceeding in lieu of arbitration should refer the challenge to the arbitrator to decide unless it raises (1) a pure question of law, or (2) a question of mixed fact and law requiring only a superficial consideration of the documentary evidence, in the sense that the necessary conclusions of law can be drawn from facts evident on the face of the record or that are otherwise undisputed. The court can also refuse to stay the court proceeding if the arbitration clause function to insulate any meaningful challenge because, for example, high commencement fees or other factors render the likelihood of the arbitration actually proceeding unlikely.

Of note, Justice Brown issued a concurring decision, arriving at the same conclusion as the majority but on the basis that the arbitration provision was void for being contrary to public policy because its practical effect was to limit any meaningful dispute resolution mechanism, not because it was unconscionable.

Justice Cote was the lone dissenting judge. In lengthy (and, at times, persuasive) reasons, she observed that the majority's analysis engaged in, depended on, and encouraged the kind of factual analysis that the Supreme Court has routinely eschewed in assessing whether to stay a proceeding in lieu of arbitration (for example, regarding the extent of Mr. Heller's income, his circumstances in entering into the Uber agreement, and the likely value of his claim). She also observed that, even if the majority's analysis was correct, its concerns could be addressed by conditionally staying the arbitration unless Uber paid the commencement fee or by otherwise severing the provisions requiring the arbitration to proceed according to the ICC Rules and the place of arbitration such that it was not necessary to declare the entire arbitration clause invalid and greenlight a court proceeding when the parties expressly agreed to resolve their disputes by private arbitration.

As we have previously described, the case pits the Supreme Court's historical pro-consumer protection and pro-class action stance against its historical respect for and promotion of arbitration as a legitimate alternative dispute resolution mechanism that complements the work of the courts. In

seemingly prioritizing the former over the latter, the majority held that the courts' respect for arbitration is based on it being a cost-effective and efficient procedure, such that when it does not provide those benefits, arbitration provisions need not be enforced. The majority does not address the other major reasons parties frequently incorporate arbitration clauses into their agreements: the ability to control and tailor the decision maker to ensure appropriate expertise, the legitimacy attached to decisions in party-controlled processes, and confidentiality.

While, on its face, the decision seemingly deals a blow to the breadth and strength of arbitration clauses in Canadian law, it is important to be clear about precisely what the Court did and did not decide. In particular, the Supreme Court's decision is not a general pronouncement that arbitration clauses that would have the effect of precluding class actions are necessarily void. While the particular arbitration clause and process at issue in Uber was void for being unconscionable, other cases will have to be assessed on their own facts.

Indeed, if anything, the Supreme Court of Canada's decision may provide parties with a roadmap for strengthening such clauses and ensuring their validity going forward. For example, it may well be that the clause would have been upheld if it had provided that the arbitration would proceed in the same jurisdiction as the driver was located, or perhaps that the commencement fee would be fully recoverable in the event that the claimant was successful. Certainly, if the Defendant specified in the clause that they would pay any filing fees associated with an arbitration, that would make it more likely that an arbitration clause will be enforced. Even further, perhaps just attaching the ICC Rules and expressly drawing to the attention of the driver the commencement fee and place of arbitration provisions might have been sufficient, though admittedly the quantum of the fees that the claimant would have to pay would still be a relevant factor there.

As a practical matter, dispute resolution provisions in commercial agreements tend not to get the same level of consideration as the main provisions in an agreement. Perhaps *Uber v Heller* will thus serve as a wake up call for drafters in Canada and beyond.