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Supreme Court of Canada Deals Blow to Uber, Declares Arbitration Clauses Invalid as a Result of 'Surge Pricing'

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On June 26, 2020, the Supreme Court of Canada ("**SCC**") released a decision with significant implications for international businesses by placing significant limits on the application of arbitration clauses.

Background

The case, *Uber Technologies Inc. v Heller* (2020 SCC 16) ("***Heller***"), involved a challenge to Uber's standard agreement with drivers requiring disputes to be resolved by private arbitration pursuant to the International Chamber of Commerce's ("**ICC**") rules and in accordance with Netherlands law.

Mr. Heller, an Uber driver, commenced a class action against Uber alleging that it breached the Ontario *Employment Standards Act, 2000* (SO 2000, c 41) ("***ESA***") by not treating drivers as employees and not providing them the benefits and protections employees are entitled to under the *ESA*. He sought over $400 million CAD in damages. Uber moved to stay the class action on the basis that the service agreement between Mr. Heller and the company required all disputes to be resolved by arbitration under the ICC rules. The agreement designated Amsterdam as the place of arbitration and was governed by Dutch law. The administrative fee to commence such a claim before the ICC arbitration is approximately $14,5000 USD, which did not include further administration of the proceedings by the ICC, attorney's fees, or other costs.

The Ontario *Arbitration Act, 1991* (SO 1991, c 17) requires all court proceedings in respect of matters subject to arbitration to be stayed except in limited circumstances – reflecting Ontario's longstanding policy of promoting itself as an arbitration-friendly jurisdiction. One such exception is if the arbitration agreement itself is invalid (ss 7(1) and 7(2), para 2).

Mr. Heller asserted that his arbitration clause with Uber was invalid because it was unconscionable. In the normal course, under Canadian law, a dispute about an

arbitrator's jurisdiction would first be resolved by the arbitrator. There are limited exceptions to this rule, including for so-called "pure" questions of law and questions of mixed fact and law that could be resolved with only "superficial" consideration of the record.

The SCC's Decision

Until *Heller*, Canadian courts were divided 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 and actively take advantage of the other party. The majority at the SCC seemingly resolved the dispute in *Heller*, holding that a party challenging a contract as unconscionable need only show an inequality of bargaining power that results in an improvident bargain.

Applying this test, the majority at the SCC held that the Uber arbitration clause was unconscionable and set it aside. First, it held that there was an inequality of bargaining power, pointing to the fact that the agreement was a standard form "contract of adhesion." Mr. Heller had no say into the terms of and that there was a gulf in sophistication between individuals like Mr. Heller and large, multi-national companies like Uber. In particular, the majority found that a person in Mr. Heller's circumstances likely would not appreciate the financial and legal implications of the arbitration clause, noting that the Uber agreement did not attach a copy of the ICC rules and that Mr. Heller therefore would not have known of the commencement fee even if he had read the agreement in its entirety.

Second, the majority held that the agreement was improvident because the cost to arbitrate effectively deterred any meaningful resolution of the dispute. It noted that the $14,500 USD fee to commence a claim was close to Mr. Heller's annual income and that the costs of traveling to Amsterdam, the place of the arbitration, to assert the claim would generally be well beyond the means of someone in his circumstances.

In arriving at its conclusion, the majority engaged in a lengthy discussion of the traditional bases for respecting freedom of contract generally, noting that the classic paradigm underlying freedom of contract is the "freely negotiated bargain", which presumes a semblance of equality between contracting parties such that the contract is "negotiated, freely agreed, and therefore *fair*" (*Heller*, at para 56, citing Mindy Chen-Wishart, *Contract Law* (6th ed 2018), at p 12 (emphasis in original)).

Regarding arbitration clauses specifically, in addition to freedom of contract arguments, the majority also held that,

> "Respect for arbitration is based on its being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all." (*Heller*, at para 97)

Accordingly, the majority held, when these implicit preconditions are absent, the court need not enforce an arbitration clause. The court can refuse to stay a court proceeding if there is a "real prospect" that referring a challenge to an arbitrator's jurisdiction to the arbitrator would result in the challenge never being resolved, such that the arbitration clause functions to insulate against any meaningful dispute resolution rather than facilitate it. This could occur, for example, because of high commencement fees, if a claimant cannot reasonably reach the physical location of the arbitration, or because other practical factors render the likelihood of resolving the challenge through arbitration unlikely. Notably, it could also be the result of a foreign choice of law clause that circumvents mandatory local policy, such as the clause in Uber's agreements with its local drivers that would prevent an arbitrator from giving effect to the protections in the *ESA* by rendering the agreement subject to the law of the Netherlands.

In separate reasons, the lone dissenting member of the SCC observed that the majority's analysis depended on the kind of individualistic, factual analysis regarding the dispute that the SCC has routinely eschewed in assessing whether to stay a court proceeding in lieu of arbitration. These factors included Mr. Heller's income, his circumstances in entering into the Uber agreement, the likely value of his claim relative to the cost of arbitration, and the extent to which providing for Amsterdam as the place of arbitration would actually require him to travel to Amsterdam for the arbitration. 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 severing the provisions requiring the arbitration to proceed according to the ICC rules and the place of arbitration such that it was unnecessary to declare the entire arbitration clause invalid and greenlight a court proceeding when the parties expressly agreed to resolve their disputes by private arbitration.

Impact of the Decision on Canadian Law and Policies

At a conceptual level, *Heller* pitted the SCC's historical pro-consumer protection and pro-class action stance against its historic respect for and promotion of arbitration as an alternative dispute resolution mechanism that complements the work of 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. Notably, this ignores other reasons parties frequently incorporate arbitration clauses into their agreements: ensuring decision makers with appropriate expertise, the legitimacy of decisions arising from party-controlled processes, and confidentiality.

There is no denying that *Heller* deals a blow to the breadth and strength of arbitration clauses under Canadian law. The inevitable consequence of the SCC's decision will be more frequent challenges to arbitration clauses as a result of the individual and fact-specific nature of the factors Canadian courts will now need to consider in deciding whether to stay court proceedings in lieu of arbitration.

At the same time, one should resist the temptation to be melodramatic. *Heller* is not a death knell for arbitration clauses in Canada. If anything, the decision provides a roadmap for parties to strengthen arbitration clauses and ensure their validity going forward. The SCC's decision is highly fact-specific and future cases will be determined on their own facts. The majority was clearly off put by the notion that an Uber driver should be required to pay close to $20,000 CAD (which, the evidence suggested, was close to Mr. Heller's annual income) and travel to Amsterdam merely to challenge the validity of the arbitration clause in the first place. One may well ask whether the outcome in *Heller* would have been different if the arbitration clause provided for a seat (or even merely place) of arbitration in the same jurisdiction as where the driver was located or virtually, that the commencement fee would be fully recoverable in the event that the claimant was successful, or even, perhaps, if the agreement attached the ICC rules and fee schedule and expressly drew the driver's attention to them. There are, of course, numerous other ways in which the arbitration clause could have been tailored to ensure that arbitration provided an accessible and pragmatic way for disputes to be resolved.

In that respect, *Heller's* true legacy is to remind drafters of commercial agreements to give equal consideration to dispute resolution provisions as they do to the main clauses in their agreements and to challenge and provide an opportunity for arbitral institutions to develop specific rules that promote the underlying policy goals of arbitration relating to flexibility, accessibility, and efficiency.

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