Uber v. Heller: Can Third-Party Funding Limit Unconscionable Arbitration Agreements?

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Uber Technologies Inc. v. Heller raises questions on the possibility of third-party funding limiting unconscionable arbitration agreements. This post examines (**I)** how third-party funding could reduce the amount of unconscionable arbitration clauses and **(II)** how it could promote more specific criteria for the doctrine of unconscionability. Finally, this post offers some concluding remarks.

I. Third-Party Funding Relationship with the Doctrine of Unconscionability

Some parties use arbitration agreements to implement standard terms or one-sided arbitration clauses to disincentive the other party from initiating a dispute. It has been considered that such clauses "tilt the scales of justice in their favor". Usually, this is the case because these agreements are too troublesome or demanding for the other party to initiate arbitral proceedings. Under this thought, the doctrine of unconscionability has flourished.

When it is too unfair for a party to access justice, the arbitration agreement is deemed invalid. The latter is the conception in the recent judgment in *Uber v. Heller*, where the Supreme Court of Canada ("SCC") held that Uber's arbitration

clause in its delivery services agreement was unconscionable after Heller started a class proceeding. The SCC concluded that the arbitration agreement must be affected by two factors to be unconscionable: first, the inequality of bargaining power between the parties and, second, the improvident cost of the arbitration. (Prior posts on the blog have analysed the decision from different perspectives.)

As noted by the ICCA-Queen Mary Task Force on Third-Party Funding, third-party funding has developed gradually but steadily in international arbitration. While the doctrine of unconscionability rests under the idea that an arbitration clause is profligate, third-party funding has been endorsed for its pro-access to arbitration capacity. Third-party funding does not promote frivolous lawsuits. On the contrary, its modern conception is that it "enables claimants to proceed with their arbitration claims while delaying payment until the issuance of any resulting arbitration award."

In *Uber v. Heller*, the arbitration clause required arbitration under the ICC rules, with the seat of the arbitration in Amsterdam, and an administrative fee to commence the proceedings of $14,500.00 USD. Heller's annual income was close to this amount, excluding the costs of traveling to Amsterdam and attorney fees. Notwithstanding, Heller's case could have been an attractive investment for a third-party funder because he claimed $400 million in damages. For comparison, DeepNines, a Texas-based security company, obtained an $8 million loan from a third-party funder, which resulted in a $25 million settlement. The third-party funder for DeepNines received more than $10 million in return. While third-party funders do not routinely invest in disputes with low potential for damage awards, Heller's case, due to the amount claimed, could have been attractive because it represented a possible high return on investment.

However, the merits of the case – which are pertinent when a third-party funder values an investment – would not have favored Heller. The SCC determined that the "agreement expressly states that it does not create an employment relationship." Thus, Heller's contention that the Ontario Employment Standards Act grants benefits to Uber's delivery service drivers might not provide good prospects of success for potential investors.

The analysis that follows considers whether third-party funding can eradicate impediments of access to justice, on the one hand, and improvident costs of arbitration (such as conditions or criteria to declare an unconscionable arbitration

agreement), on the other.

Third-party funding as a means to promote access to justice

The argument that investors "do not seem to invest in the types of cases where plaintiffs need access to justice" focuses on one main idea. That parties only seek third-party funding because they might prefer to use their existing assets to further their investment activities but not in arbitration per se. The industry should reject the latter argument. While it is true that funders invest in cases with "the most likely to be successful scenarios" and high potential damage awards, these criteria do not correlate with cases in need of access to justice. Lack of access to justice is not equivalent to low damage awards or meritless claims. A more probable explanation for less investment in access to justice-related cases would be the potential claimant's lack of knowledge to request such funding.

Third-party funding inclusion to reduce improvident arbitration clauses

The SCC declared it unreasonable to impose the burden of improvident costs as a condition for arbitration on a party that cannot finance its share of the proceedings (¶ 47). However, how would this analysis change if the claimant could obtain third-party funding? Would the clause still be unconscionable? The relevant factor in releasing the claimant from an improvident arbitration clause is whether the claimant could not have acknowledged such an agreement's implications. In this sense, the SCC determined that this is appropriate when it "could not be expected a person in Heller's position to appreciate the financial and legal implications of the arbitration clause" (¶ 3). Thereby, there must be a lack of knowledge of the consequences of the arbitration agreement by one side before it is rendered invalid.

As an example, to prevent this outcome, in *AT&T Mobility v. Concepcion*, the Supreme Court of the United States (SCOTUS) partially declared invalid an arbitration agreement, only up to the characteristics that were improvident. In that case, the arbitration agreement stated that any party who brings a claim against AT&T would have had to pay AT&T the costs of their attorney fees, regardless of the outcome of the arbitration. SCOTUS noted the unfairness of such condition and

determined it was inoperative, while still maintaining arbitration as the proper procedure on the merits. Gary Born pointed out that it might not have been declared unconscionable at all if AT&T had been more careful in the drafting of their arbitration clause. Similarly, in *Uber v. Heller*, some drafting modifications, such as a more notorious arbitration clause in a standard agreement, could have saved the arbitration clause.

If Heller's arbitration clause had required arbitration in Canada instead of the Netherlands, the outcome could have been different. Canada is known for being a third-party funding friendly jurisdiction, particularly with class proceedings such as Heller's claim. Therefore, Heller could have had access to multiple international litigations funders, reducing the arbitration clause's possibility of being classified as improvident.

Suppose the arbitration clause had required that any party unable to pay for the arbitration had first to attempt to obtain funding. In that case, the arbitration clause might have been upheld as valid, regardless that Amsterdam was the seat of the arbitration. As Justice Coté stated in a dissenting opinion in the case, the arbitration seat is not synonymous with the place of the hearings. Moreover, today more than ever, we understand the usefulness of online hearings in arbitration.

II. Developing the Criteria for the Doctrine of Unconscionability

The inclusion of third-party funding before determining its legitimacy in an arbitration clause would develop the doctrine of unconscionability into a more concrete concept, have pro-arbitration effects, and prevent dilatory tactics.

Third-party funding could clarify the role of "bargaining power" in unconscionable clauses. To assume that all arbitration clauses which are not negotiable are unconscionable would conclude that all adhesion and most concession contracts are not arbitrable. The latter should not be the case.

Third-party funding in this context would advocate the usage of litigation investments while encouraging parties to enroll in arbitral procedures. The fact-sensitive character of unconscionability would give room for third-party funding to be included on a case-by-case basis. Only the particular position of a claimant would trigger unconscionability and not an ambiguous perception that all

unilaterally burdensome clauses are automatically invalid.

To this point, we should lastly bear in mind the following questions:

- What if the arbitration clause had reflected the costs of the administrative and filing fees?
- What if the arbitration clause required or suggested that parties unable to commence the arbitration should seek a third-party funder before attending local courts?
- Consequently, would Heller have been forced to seek funding for his claim?
- Would Heller still be able to argue a lack of knowledge of the implications of such an arbitration agreement?

Conclusion

In conclusion, for an arbitration agreement to be unconscionable, it must be: (i) too onerous to exercise, (ii) the party must not have acknowledged the implications of the clause, and (iii) if there existed a possibility to bargain, there must have been inequality of bargaining power. However, third-party funding would give room for parties to steer clear of these conditions.

The relationship between third-party funding and the doctrine of unconscionability can be mutually beneficial. While third-party funding will not automatically bypass unconscionability, it could help rebalance the scale of justice by serving as an empowering instrument that facilitates access to arbitration (and thereby justice) for all users of arbitration.