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The Supreme Court of Canada Charts a Safe Route between the Scylla and Charybdis of Hostility to Arbitration and Competence-Competence Absolutism

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From practically the moment the Supreme Court of Canada's (SCC) decision in *Uber Technologies v Heller* was released, commercial arbitration practitioners and scholars—including on this blog—have criticized it for weakening the cherished competence-competence principle.

We submit that those who defend Uber's problematic arbitration clause in the name of protecting competence-competence love arbitration not wisely, but too well. Given the historical hostility of courts to arbitration—ongoing hostility in some jurisdictions—it is not surprising that many in the international arbitration community jump to defend competence-competence from any perceived threat. But such competence-competence absolutism is ill-suited to the gig economy era, where the line between commercial and employment relationships is particularly unclear. It wrongly assumes that all arbitration clauses are written to be used, and ignores the strategic use of arbitration clauses by stronger parties to effectively insulate themselves from all forms of legal redress. Although we have concerns about the majority opinion in *Uber v Heller*, we write to defend the Court's overall approach and to explain why it will ultimately be good for international arbitration.

Arbitration agreements and online marketplaces

In *Uber v Heller*, an online platform nearly collided with the UNCITRAL Model Law. In deciding that the Uber's standard arbitration clause was unconscionable and therefore unenforceable, the SCC swerved to avoid the crash. The majority opinion, written by Justices Abella and Rowe, steered toward the Ontario *Arbitration Act* and away from Ontario's Model-Law-based *International Commercial Arbitration Act*. The court reasoned that the case involved an employment dispute, and was therefore outside the scope of the Model Law, which applies only to arbitrations that are both international and commercial. Strictly speaking, therefore, *Uber v Heller* should have no bearing on international commercial arbitrations.

Still, a collision between arbitration clauses like Uber's and the Model Law will come sooner or later. Platforms like Uber form two-sided markets, bringing together buyers and sellers of goods or services and taking a cut of each transaction. Consumer protection laws typically cover the buyers, but the position of the sellers is less clear. Some, such as drivers for Uber and DoorDash, might

have claims that they are legally employees. Others, such as Amazon's third-party sellers, might have concerns around business practices and antitrust. In many instances, individuals contracting with these online marketplaces will be bound by arbitration clauses. However, the arbitration clauses in their contracts are often designed not to facilitate arbitration, but rather to inhibit it.

Uber's contract with its Canadian drivers, including Heller, called for mediation and then arbitration, seated in Amsterdam, under the ICC's Mediation and Arbitration Rules. The filing fees alone would have amounted to more than half of Heller's annual income as an UberEats driver. The SCC was unanimous that something was amiss with Uber's arbitration clause. Even Justice Côté, the lone dissenter, would have granted a stay of court proceedings on the condition that Uber "advance the funds needed to initiate the ICC proceedings." (para 199).

Uber has been the subject of driver lawsuits in the US, the UK, France, and Brazil. However, *Uber v Heller* appears to be the first real test of the arbitration clause Uber has used in much of the world. The same clause appeared in a 2015 driver misclassification case in front of an English employment tribunal, but Uber decided not to seek to compel arbitration. In the US, where quite a few courts have tackled the question of whether drivers should be required to arbitrate, Uber's driver agreement arguably made arbitration more accessible than the agreement faced by Heller, by sending drivers to JAMS under rules that require far lower filing fees. However, Uber added a class arbitration waiver in an effort to prevent drivers from combining their claims; drivers would be unlikely to pursue their claims without some form of consolidated proceeding. A majority of the US Supreme Court has made its dislike of class arbitration and support for such clauses clear, yet some form of consolidated proceeding is the only practical way for drivers to access this representation. In response to these class arbitration waivers, creative plaintiffs' lawyers have filed hundreds of identical claims in cases against Uber, Lyft, and DoorDash, in an attempt to trigger *ad hoc* consolidations. Uber responded by refusing to pay its share of JAMS' fees, and the proceedings ground to a halt.

Access to arbitration and competence-competence

Online platforms, like other businesses, want to avoid both regulation and court litigation (especially class actions), so they choose arbitration. Many, like Uber, are tempted to choose arbitration processes that are hard for individuals to access, a fact that the international arbitration community must acknowledge. The Model Law does not anticipate this sort of situation. Instead, the whole structure of the Model Law envisions protecting arbitration against threats that come from outside: courts blocking arbitration *ex ante* or improperly annulling awards or refusing enforcement *ex post*. That is why the Model Law enshrines the competence-competence principle, the main practical effect of which is to ensure that arbitral proceedings go ahead in most cases, even if a court might later decide that the arbitration agreement was invalid. Without competence-competence, any jurisdictional challenge would throw an arbitration off course, giving respondents a powerful tool to delay and deny resolution of a dispute.

This view, however, rests on the assumption that both parties—at one point at least—wanted to resolve their disputes by arbitration. But under an arbitration clause like Uber's, the arbitration is a mirage,[1)] an oasis in the desert that lulls a party into thinking they have access to a remedy, but always disappears over the horizon. In such a context, competence-competence is rendered pointless. For arbitrants, the tribunal's power to determine its own jurisdiction has no value if it

will never have an opportunity to exercise that power. For employees and consumers who are promised access to justice then presented with a barrier to it, such clauses engender only resentment, and resentment is likely to yield backlash and over-regulation of all types of arbitration. The SCC's invalidation of Uber's arbitration clause should thus be seen as a pro-commercial arbitration decision.

Accordingly, to the extent that the Model Law aims to facilitate arbitration as a legitimate alternative to litigation, its provisions on stays of litigation should be interpreted to give courts space to act in the rare event that a commercial dispute is unlikely ever to reach an arbitrator. One could argue that such arbitration agreements are "incapable of being performed", and therefore unenforceable under Article 8(1) of the Model Law. However, in commercial disputes this provision has rightly been interpreted narrowly, to apply only to exceptional situations in which performance of the arbitration agreement as written is not practically possible. Some other principled basis is needed on which courts can allow litigation to proceed when an arbitration clause is made deliberately inaccessible.

The Supreme Court of Canada navigates toward a solution

The *Uber v Heller* majority's approach was animated by two sets of concerns arising from the facts of the case. The first was the nature of the claim in the litigation: that Mr. Heller was an employee, an issue that he is entitled to have determined according to Ontario law. The best solution to this problem is legislation that creates certainty for contracting parties, which has been acknowledged by the Supreme Court in previous decisions involving consumer relationships. The second was the selection of arbitration rules designed for commercial disputes, when the case was not between commercial parties who could both access arbitration under those rules. Although the first concern was one that could be adequately addressed by a commercial arbitrator using tools such as mandatory rules of law and public policy, the second concern meant that no arbitrator would ever be in a position to address the first.

The majority opinion invalidated Uber's arbitration agreement—and justified doing so before a tribunal had a chance to rule on the question of validity—on the basis that the arbitration clause was unconscionable. Accordingly, it ruled that litigation could proceed. Justice Brown concurred in the result but would have based the exception to competence-competence on public policy rather than unconscionability. In a "stable, predictable and ordered society", he wrote, the rule of law requires that parties have actual, not just theoretical, access to a legal remedy (para 111). Courts should therefore intervene to invalidate arbitration agreements that act to prevent arbitration on the ground that these violate public policy.

Both the majority and concurring opinions in *Uber v Heller* share the virtue of acknowledging the problem created when arbitration, although agreed to, will not be effective in resolving the parties' disputes. Both approaches serve to protect commercial arbitration from being harmed amidst a backlash to employment and consumer arbitration—a backlash that has begun in Canada and is already widespread in the US. If we empower courts to protect those who are subject to adhesive, inaccessible arbitration agreements like Uber's, we can better hold the line on competence-competence in the kind of commercial disputes for which the Model Law was designed.

That said, Justice Brown's concurring decision has the better approach, and should be the model

that courts in other jurisdictions follow. Even accepting that the clause was an unfair one—as the SCC unanimously agreed—unconscionability is a poor basis for an exception to competence-competence because it invites extensive fact-finding and argument on the fairness of arbitration clauses before courts can decide on stay applications. Public policy draws a clearer line around what courts can consider at this initial stage, and accords with the Model Law's approach in viewing national courts as a necessary support for arbitration, not just a threat to it.

International commercial arbitration is a privileged form of dispute resolution, whose privilege rests on a foundation of the rule of law. It has achieved almost universal acceptance as an alternative to litigation because it provides an effective and fair method of enforcing contractual rights. This notion of public policy should be seen as universal, as it is essential to commercial certainty; its application by courts should result in predictable outcomes rather than greater uncertainty. In addition, public policy is already embedded in the New York Convention and national arbitration legislation (including the Model Law) as an accepted but narrow exception to competence-competence and to the enforceability of awards. Courts in most jurisdictions are familiar with it and have a similar sense of its limited scope.

Access to arbitration as access to justice

International commercial arbitration faces continuing challenges to its legitimacy in the consumer, employment, and investor-state contexts. An approach that reminds us of the fundamental reasons for commercial arbitration's widespread acceptance should therefore be welcomed and not feared. A limited exception to competence-competence where the arbitration clause itself makes arbitration inaccessible is appropriate. As Justice Brown put it: "It really is this simple: unless everyone has reasonable access to the law and its processes where necessary to vindicate legal rights, we will live in a society where the strong and well-resourced will always prevail over the weak" (para 112). Insisting on absolute adherence to competence-competence means accepting such injustice, which will only generate hostility to all forms of arbitration in the long run. The route charted by the SCC passes safely between the Scylla and Charybdis of hostility to arbitration and competence-competence absolutism.

References

?1 William G. Horton and David Campbell, “Arbitration as an Alternative to Dispute Resolution: Class Proceedings and the Mirage of Mandatory Arbitration” [2019] Ann. Rev. Civ. Litig. 93.

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