Case In Point

Supreme Court of Canada Dismisses Uber Appeal – Proposed Class Action Can Now Proceed in Ontario Courts

Date: June 29, 2020

On June 26, 2020, the Supreme Court of Canada released Uber Technologies Inc. v. Heller and dismissed an appeal of the Ontario Court of Appeal's decision which held that the arbitration clause in Uber's standard form services agreement (Agreement) was invalid both because it was unconscionable and because it contracted out of mandatory provisions of the *Employment Standards Act, 2000* (ESA). We previously reported on the Court of Appeal decision.

Abella and Rowe JJ., writing for the majority of the Supreme Court of Canada, agreed that the clause was unconscionable but chose not to decide whether it was also invalid because it had the effect of contracting out of mandatory protections in the ESA. In concurring reasons, Brown J. agreed that the clause was invalid but found so because it undermined the rule of law by denying access to justice and was therefore contrary to public policy. In dissenting reasons, Côté J. held that the appeal ought to have been allowed, finding that the clause was neither unconscionable nor contrary to the ESA.

We review the three sets of reasons in this Case in Point blog post.

Background

This case arose after David Heller, an Uber food delivery services driver, started a proposed class proceeding against Uber in 2017 for violations of the ESA and related damages. The essence of his position was that he was an employee, and not an independent contractor, within the meaning of the ESA.

Uber brought a motion to stay the proposed class proceeding in favour of arbitration in the Netherlands, pursuant to the arbitration clause in the Agreement. Mr. Heller had been required to accept, without negotiation, the terms of the Agreement to become a driver. The Agreement required Mr. Heller to resolve any dispute with Uber through mediation and arbitration in the Netherlands. This process required up-front administrative and filing fees of US$14,500, plus legal fees and other costs of participation. Mr. Heller earned between $400-$600 a week and such fees represented most of his annual income.

The motion judge held that he did not have the authority to decide whether the arbitration clause was valid and stayed Mr. Heller's proposed class proceeding. In doing so, he found that the *International Commercial Arbitration Act* (*ICAA*), rather than the Ontario *Arbitration Act* (*AA*), applied and that an arbitrator in the Netherlands would be competent to determine their own jurisdiction. In the alternative, he held that the arbitration clause was not invalid.The Court of Appeal reversed this order, determining that the arbitration clause was unconscionable based on the inequality of bargaining power between the parties and the improvident cost of arbitration. The Court also found that by mandating arbitration for dispute resolution, the Agreement improperly contracted out of the ESA by precluding the right of an employee to file complaints to the Ministry of Labour as provided for in the ESA.

At the Supreme Court of Canada

Majority Reasons

The majority's reasons addressed two issues: whether the *ICAA* or the *AA* applied and whether the Agreement was unconscionable. The majority declined to decide whether the Agreement violated the ESA.

With respect to the applicable act, the majority held that the *AA* applied. They further held that the *ICAA* did not apply because it is only meant to govern international and commercial agreements. While the parties agreed the Agreement was international, Mr. Heller disputed that it was commercial. The majority agreed, finding that the nature of the dispute was an employment dispute which is not covered by the *ICAA*.

The *AA* directs courts, on motion of a party, to stay judicial proceedings when there is an applicable arbitration agreement except if a court determines that the agreement is invalid. The majority considered the principles courts should consider in exercising their discretion to determine the validity of an arbitration agreement. In doing so, they relied upon the Supreme Court of Canada decisions Dell Computer Corp. v. Union des consommateurs, and Seidel v. TELUS Communications Inc., for when a court should decide if an arbitrator has jurisdiction over a dispute instead of referring that question to the arbitrator. According to that framework, a court should refer all challenges to an arbitrator's jurisdiction to the arbitrator unless they raise pure questions of law, or questions of mixed fact and law that require only superficial consideration of the evidence in the record.

The majority then held that in addition to the exceptions identified in those decisions, a court should not refer a challenge to an arbitrator's jurisdiction to the arbitrator if there is a real prospect that doing so would result in the challenge never being resolved. To determine whether this exception applies, a court must first determine whether, assuming the facts pleaded to be true, there is a genuine challenge to arbitral jurisdiction. Second, the court must determine from the supporting evidence whether there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator. The majority cautioned that this assessment must not devolve into a mini-trial.

The majority held that this exception applied in the circumstances given the prohibitive fees for initiating arbitration and proceeded to consider the issue of unconscionability raised by Mr. Heller. Unconscionability is an equitable doctrine that is used to set aside an unfair agreement. It requires the existence of two elements: an inequality of bargaining power in the contracting process, and a resulting improvident bargain. An inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process. A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable. Unconscionability can be triggered without wrongdoing.

The majority did not suggest that a standard form contract, by itself, establishes an inequality of bargaining power resulting in an improvident bargain, but rather that the potential for them to unconscionable is clear. With respect to Uber's Agreement, the majority held that there was clearly inequality of bargaining power because: Mr. Heller was powerless to negotiate any of its terms, there was a "significant gulf in sophistication," there was no information about the costs of mediation and arbitration in the Agreement, and the applicable rules for arbitration were not attached. The majority also held that the improvidence of the arbitration clause was clear given the upfront administrative fees and the requirement to arbitrate in the Netherlands.

Concurring Reasons

Brown J., in concurring reasons, acknowledged the importance of freedom of contract but emphasized that it was not absolute. Rather, he held that as a matter of public policy courts, by their own motion, may not enforce contractual terms that, expressly or by their effect, deny access to independent dispute resolution according to law. He noted that this head of public policy serves to uphold the rule of law which, at a minimum, guarantees access to justice. With respect to arbitration clauses in particular, which transfer dispute resolution authority away from public adjudicators to private ones, he emphasized that the legitimacy of such a transfer rests upon whether it can provide a comparable measure of access to justice. This requires an assessment of whether the limitation on dispute resolution is reasonable as between the parties, or instead causes undue hardship.

Brown J. would have limited the exception the *AA* to cases where arbitration is arguably inaccessible. He found that the test pronounced by the majority would, despite their warnings, only complicate and delay proceedings.

He also found that Uber's Agreement was contrary to public policy because the cost to pursue a claim was disproportionate to the quantum of likely disputes and the nature of the relationship between the parties. Brown J. found that there was, in

effect, no material difference between a provision that discourages dispute resolution and one that precludes dispute resolution altogether. He disagreed with the suggestion raised by Côté J. that the appropriate remedy was to blue-pencil sever the offending provisions of the Agreement.

With respect to the doctrine of unconscionability. Brown J. disagreed with expanding the scope of the doctrine's application, noting that the majority did so without any meaningful guidance as to its application.

Dissenting Reasons

Côté J. delivered lengthy dissenting reasons which, at their core, emphasize the importance of freedom of contract. She found that both the majority and Brown J. disregarded this concept, in addition to the concepts of party autonomy, legislative intent and commercial practicalities. She also feared that their reasons risk abdicating Canada's leadership role in arbitration law.

Côté J. disagreed that the nature of the dispute informed the issue and held that it ought to be the nature of the parties' relationship that did so. In this case, she found that the underlying transaction between Uber and Mr. Heller was commercial in nature and therefore that the *ICAA* applied. The Agreement expressly stated that it did not create an employment relationship; instead, it is a software licensing agreement. Côté J. found it improper to consider Mr. Heller's argument that he was an employee as that was a complex question of mixed fact and law which required more than a superficial review of the record.

With respect to the arbitration clause in the Agreement, Côté J. found that the doctrine of separability applied such that the arbitration clause could be analyzed as a separate agreement that was ancillary or collateral to the underlying contract. This would immunize the clause and protect it from flaws or defects in the underlying contract.

Côté J., like Brown J., was also concerned that the expanded exception pronounced by the majority would result in a mini-trial with production and review of considerable testimonial evidence. She also found that public policy considerations, expressed by both the majority and Brown J., ought not to be applied to the interpretation of the *AA.* Moreover, she emphasized that it was not the role of the courts to establish policies where the legislature has declined or omitted to do so. Had the legislature ben concerned about arbitration agreements in standard form digital contracts, it could have amended the ESA to restrict them.

With respect to the doctrine of unconscionability, Côté J. agreed with Brown J. that the majority set the threshold for a finding of inequality of bargaining power so low as to be practically meaningless in the case of a standard form contract. She was further unconvinced that in applying the majority's new exception and the doctrine of unconscionability, the record before the Court supported that Mr. Heller was vulnerable throughout the contracting process or that he could not fund an arbitral challenge which Uber conceded could take place in Ontario.

Finally, Côté J. found that Mr. Heller's ESA argument suffered from a fatal flaw: namely, that it relied on an assumption that Mr. Heller was an employee. She emphasized that a court could not determine that an arbitration clause was invalid pursuant to the no-contracting out provisions of the ESA without first finding that the parties involved are in an employer – employee relationship. This was a complex question of mixed fact and law that could not be determined on the record sufficient to invalidate the arbitration clause. She also found that the right to file a complaint under the ESA was not an employment standard and therefore the no-contracting out prohibition did not apply to that section.

Next Steps

Mr. Heller may now attempt to certify his proposed class proceeding. This is done through a motion for certification where, among other things, a court must appoint a representative plaintiff and certify common issues to be determined at trial before a case can proceed as a class proceeding.