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Canada's Top Court Invalidates Uber's Arbitration Clauses and Clarifies the Doctrine of Unconscionability

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The Supreme Court of Canada has released its highly anticipated decision in *Uber Technologies Inc. v David Heller (Uber)*, ruling that a proposed class action on behalf of Uber drivers can proceed despite an arbitration clause contained in the standard form agreement between drivers and Uber. The Court ruled that the arbitration clause contained in Uber's contracts was unconscionable and invalid.

This decision, which was released on June 26, has significant implications not only for the enforceability of arbitration clauses but also more generally for standard form agreements.

Key Takeaways

- **Unconscionability and enforceability of arbitration clauses.** Businesses may need to revisit arbitration clauses in their agreements to assess the risk of these clauses being found to be unconscionable by Canadian courts. The Supreme Court held that unconscionability exists when (i) there is an inequality of bargaining power between the parties; and (ii) the resulting bargain is improvident. This is a fact-specific inquiry.
- **Implications for standard form contracts more generally.** In light of *Uber*, businesses that use standard form agreements should consider whether provisions other than arbitration clauses might be challenged for unconscionability. The Supreme Court did not limit its analysis to arbitration clauses alone and stated that the doctrine of unconscionability has implications for the enforceability of provisions in standard form contracts more broadly.
- **Employees or contractors?** Watch for class actions in the "gig economy." The Supreme Court's decision in *Uber* has cleared the way for the representative plaintiff, Mr. Heller, to pursue his proposed class action to claim employee benefits and protections on behalf of Uber drivers. This proposed class action is one of many that could potentially redefine the relationship between gig economy businesses and their workers.
- **Additional exception where courts should hear a challenge to arbitral jurisdiction.** The Court clarified that Canadian courts can and should hear challenges to an arbitrator's jurisdiction if (i) the challenge is "genuine"; and (ii) there is a real prospect that referring it to the arbitrator would result in the challenge never being resolved.

Background

Mr. Heller is an Uber driver. He commenced a proposed class action on behalf of a class of similarly situated individuals against a number of Uber entities, seeking \$400 million in damages and a declaration that Uber drivers are employees of Uber and therefore entitled to the benefits and protections afforded by the *Employment Standards Act* in Ontario (ESA).

In order to become licensed to use the Uber driver app, Mr. Heller accepted Uber's standard form Canadian service agreement, which contains an arbitration clause. The clause requires all disputes connected to the agreement to be resolved by way of binding arbitration in Amsterdam under the Rules of Arbitration of the International Chamber of Commerce (ICC). The commencement fee for an ICC arbitration is approximately US\$14,500, which does not include other legal costs involved in pursuing an arbitration.

In defending the claim by Mr. Heller, Uber relied on the arbitration clause in successfully obtaining a stay of the proposed class action from the Ontario Superior Court of Justice.

The Ontario Court of Appeal reversed the Superior Court's decision. The Court of Appeal held that the arbitration clause was invalid because (i) it purported to illegally contract out of the ESA; and (ii) it was unconscionable.

Decision of the Supreme Court of Canada

Governing Arbitration Legislation and the Competence-Competence Principle

Before considering Mr. Heller's challenge to the arbitration clause, the Court first had to resolve two preliminary issues: (i) which arbitration legislation governs; and (ii) whether the Court should hear the challenge to the arbitration clause or defer to the competence of the arbitrator to determine their own jurisdiction under the "competence-competence principle."

On the first question, the majority concluded that the governing arbitration legislation in the context of this case was the Ontario *Arbitration Act*. The majority held that the *International Commercial Arbitration Act* applies only to arbitration agreements that are "international" and "commercial" in nature. Although the arbitration in this case was clearly international, it was not commercial in nature because it concerned essentially a labour and employment dispute.

Regarding the ability of a court to hear a challenge to an arbitrator's jurisdiction (whether for unconscionability or any other reason), the majority expanded the exceptions to the competence-competence principle. This principle dictates that arbitrators have competence to determine their own jurisdiction. The law pre-*Uber* recognized two scenarios in which the Court should nevertheless decide a challenge to the arbitrator's jurisdiction: when the challenge raises a pure question of law or a question of mixed fact and law requiring only a superficial consideration of the evidence in the record.

The majority in *Uber* added a third scenario: the Court may hear a challenge to arbitral jurisdiction if there is a real prospect that referring the challenge to the arbitrator would result in the challenge never being resolved, including because of the costly or inaccessible nature of arbitration.

Unconscionability

A seven-judge majority of the Supreme Court of Canada held that on the facts of this particular case, the arbitration clause was unconscionable and therefore invalid. In reaching this conclusion, the Supreme Court revisited the test for unconscionability.

The Court held that unconscionability exists when the following criteria are met:

1. **Inequality of bargaining power.** Inequality occurs when one party cannot adequately protect its interests in the contracting process. There are no rigid limitations on the types of inequality that fit the description.
2. **A resulting improvident bargain.** A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable party. The bargain should be measured at the time that the contract is formed and assessed contextually, given that an improvident bargain can take many forms.

Prior to the decision in *Uber*, the case law was at times inconsistent regarding whether certain factors should be essential to successfully establishing unconscionability. These factors included the following: whether the transaction was grossly unfair; whether the imbalance of bargaining power was overwhelming; and whether the stronger party intended to take advantage of a vulnerable party. According to the majority in *Uber*, these factors may provide strong evidence of either or both of the two elements of the test for unconscionability, but none of them are essential.

On the facts of this case, the majority found that the arbitration clause was unconscionable. There was unequal bargaining power because (i) the arbitration agreement was part of a standard form contract; and (ii) a person in Mr. Heller's position could not be expected to understand that he would face a US\$14,500-hurdle just to commence an arbitration in the event of a dispute. The majority also

considered the arbitration clause to be improvident because the commencement fees would be close to Mr. Heller's annual income and disproportionate to the size of an arbitration award that could reasonably have been foreseen at the time Mr. Heller entered into the contract with Uber.

Notably, the majority did not endorse the Ontario Court of Appeal's alternative holding that the arbitration clause illegally contracted out of the protections to workers afforded by the *Employment Standards Act*.

In concurring reasons, Justice Brown disagreed that the analysis should focus on unconscionability. He instead relied on the same factual and policy considerations described above to conclude that the arbitration clause was contrary to public policy for denying access to justice, and therefore invalid.

In a forceful dissent, Justice Côté argued that the majority's approach is inconsistent with the principle that on a motion to stay proceedings in favour of arbitration, the Court should only engage in a superficial consideration of the evidence. Justice Côté noted that the majority's findings regarding unconscionability would and should have required more extensive evidence than what was permitted at this early stage of the proceedings. She disagreed that the majority could properly consider Mr. Heller's financial position, his personal characteristics, the circumstances of the formation of the contract and the likely value of his claim. She would have allowed the arbitrator to consider such challenges to the standard form contract.

Conclusion

The Court's decision in *Uber* has clarified the law of unconscionability and has opened the door to potential future challenges not only to arbitration clauses but to all other clauses included in standard form contracts, which are frequently employed by companies in the digital age. The decision has set the stage for further class actions commenced by individuals who operate in the gig economy and who seek to set aside their bargains.

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