COMMERCIAL AND BUSINESS LITIGATION

WHERE TO NEXT?
ONTARIO COURT OF APPEAL RULES THAT ARBITRATION CLAUSE IS INVALID, CLEARING THE ROAD FOR CLASS ACTION AGAINST UBER

by Dylan E. Augruso and Era Saraci

A recent Ontario Court of Appeal decision may have significant implications on the interpretation of "dispute resolution" provisions contained in employment and independent contractor agreements. On January 2, 2019, the Ontario Court of Appeal released its decision in Heller v Uber Technologies Inc. ("Heller"),[1] overturning the lower court's decision to stay the plaintiff's proposed $400 million class action in favour of arbitration. The Court of Appeal held that the arbitration clause contained in the service agreements between Uber drivers and the company, which compelled Ontario-based drivers to resolve disputes using an arbitration process in the Netherlands, was unconscionable and contravened the Ontario *Employment Standards Act* ("ESA").[2]

Background

In early 2017, Toronto-based UberEats driver, David Heller, commenced a proposed $400 million class action as representative plaintiff against the ride-hailing services giant, Uber. Heller sought, among other things, a declaration that all Uber drivers are employees rather than independent contractors, and are therefore entitled to the employment rights and benefits of the ESA.[3] The defendants, Uber and its affiliated companies (collectively "Uber"), brought a motion to stay the proceeding pursuant to s. 7(1) of the *Arbitration Act*.[4] Uber argued that a dispute resolution clause contained in its service agreements with drivers required the class members to resolve their claims through arbitration in Amsterdam under the *Rules of Arbitration of the International Chamber of Commerce.*

In granting Uber's pre-certification motion to stay the action in January of 2018, Justice Perell rejected the plaintiff's argument that the arbitration clause was invalid. He concluded that the service agreements were "international commercial agreements," which fell squarely within the scope of the *International Commercial Arbitration Act*. Any challenges to the arbitrator's jurisdiction to determine the employment relationship of drivers was to be made before the arbitrator on the basis of the "competence-competence" principle (i.e., that any dispute over an arbitrator's jurisdiction should first be determined by the arbitrator). In finding that Uber drivers could also deal with grievances through the complaints mechanism available through Uber's "In-App Support", Justice Perell also rejected the plaintiff's claim that the arbitration clause was unconscionable.

The Ontario Court of Appeal Decision

The Ontario Court of Appeal unanimously overturned Justice Perell's decision, finding that the arbitration clause was invalid and therefore a mandatory stay was not applicable pursuant to s.7(2) of the *Arbitration Act*.

In permitting the class action to proceed, the Court of Appeal first accepted Heller's argument that the arbitration clause was invalid as it constituted a prohibited contracting-out of the ESA. The Court found that if the action was to proceed, the arbitration clause deprived Uber drivers of their right under the ESA to make a complaint to the Ministry of Labour. Contracting-out of an employment standard is contrary to s.5 of the ESA, rendering the arbitration clause invalid. As well, the Court of Appeal acknowledged that at issue was the arbitration clause's validity and not the scope of the arbitration. In rejecting the applicability of the "competence-competence" principle, the appropriate forum to deal with the impugned clause was found to rest with the Ontario courts.

Independent of the reasons provided above, the Court of Appeal also found the arbitration clause to be unconscionable. Since Uber's "In-App Support" did not resolve complaints through a neutral third party and most drivers did not have local Uber support centers to address their grievances, the Court found that the motion judge erred in dismissing the claim for unconscionability. Relying on the four-part test in *Titus v William F. Cooke Enterprises Inc.*,[5] the arbitration clause was found unconscionable on the basis that:

1. requiring Uber drivers (who earn on average $400-$600 per week) to incur costs of USD $14,500 to initiate arbitration in the Netherlands was an "unfair and improvident bargain";

2. there was no evidence that either the drivers received legal advice prior to entering the service agreement or that the terms of the agreements could be negotiated;

3. there was significant inequality between the drivers and Uber; and

4. Uber knowingly drafted the arbitration clause in its favour.

As a result, the Ontario Court of Appeal set aside the stay, thereby allowing the proposed class action to proceed in Ontario courts.

Key Insights

It remains to be determined whether the proposed class action will be certified and whether Uber drivers are employees rather than independent contractors in Ontario. With the emergence and growing prominence of the "gig" economy, the *Heller* decision confirms that Ontario,

like many U.S. States, may soon need to re-visit and clarify its interpretation of independent contractors and employees.

In light of the decision, employers are encouraged to review their employment and independent contractor agreements to consider their enforceability. Arbitration or dispute resolution provisions should not overreach to the point that they become too onerous on employees or contractors.

[1] 2019 ONCA 1.
[2] 2000, S.O. 2000, c. 41.
[3] Heller v Uber Technologies Inc., 2018 ONSC 718.
[4] 1991, S.O. 1991, c. 17.
[5] 2007 ONCA 573, 284 DLR (4th) 734, at para. 38.

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