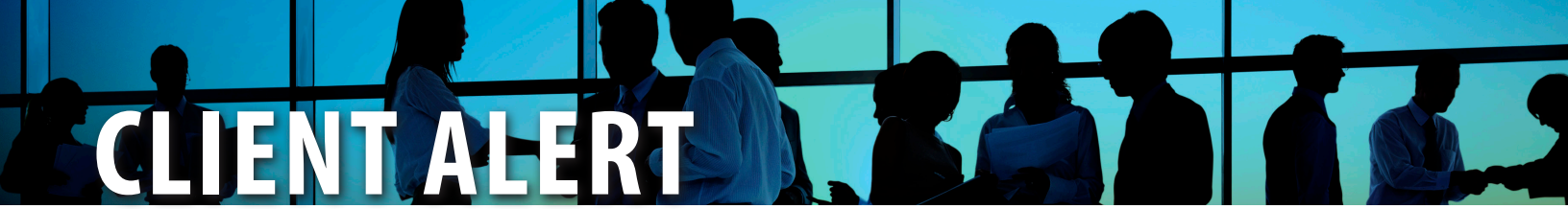


Implications of Uber Technologies Inc. v. Heller
By Brian Radnoff and Lipika Singh

On June 26, 2020, the Supreme Court of Canada ("SCC") released its decision in *Uber Technologies Inc. v. Heller*. The SCC held that the arbitration agreement between Uber and one of its drivers was invalid. This is another important decision regarding the intersection between arbitration and class actions and it highlights the risk of including an onerous arbitration clause in a standard form contract.

Background

David Heller ("Heller") was required to sign a standard form services agreement in order to become an Uber driver in Toronto, Ontario. A provision of the agreement required that all disputes first be submitted to arbitration in the Netherlands in accordance with the International Chamber of Commerce ("ICC") Rules.

The up-front costs of USD$14,500 to begin the proscribed arbitration process were not disclosed in the agreement. The cost to arbitrate was exorbitant when compared to Heller's annual gross earnings of approximately CAD$20,800–$31,200. The arbitration clause created an effective financial barrier for drivers wanting to file a claim against Uber.

In 2018, Heller brought a class action on behalf of Uber drivers. He sought, among other remedies, a declaration that Uber drivers were employees within the meaning of Ontario's *Employment Standards Act* ("ESA"). A finding that the ESA applied to Uber drivers would have significant and expensive consequences regarding Uber's legal obligations to them. Heller also challenged the validity of the arbitration clause. Uber moved to stay the proceeding in favour of the arbitration clause.

Majority Decision

In limited circumstances, a court can decline to stay proceedings in favor of an arbitration agreement. One of the exceptions is for invalid arbitration agreements. The majority relied on the two-part test for unconscionability to determine that the arbitration agreement was invalid. The test requires proof of inequality in the positions of the parties and proof of an improvident bargain. The majority held that it is no longer necessary to demonstrate that the stronger party had knowledge, constructive or objective, of the weaker party's vulnerable position.

Inequality in the bargaining power of the parties was apparent in this case. Heller was unable to negotiate the terms of the contract and was a less sophisticated party than Uber. The agreement was considered improvident because of the disproportionality of the arbitration costs as compared to Heller's annual gross income and any foreseeable award.

For the same reason, the SCC held that the court should determine whether the arbitrator had jurisdiction to resolve the dispute. Normally, the issue of the arbitrator's jurisdiction is determined by the arbitrator. However, because there was no realistic prospect that arbitration could ever be commenced, meaning the challenge to the arbitrator's jurisdiction would never be heard, the court should determine the jurisdiction issue.

Concurring Judgment

Brown J also concluded that the arbitration clause was invalid, but he did so without engaging the doctrine of unconscionability. He found that the arbitration clause was invalid because it violated the public policy imperative to provide meaningful access to justice.

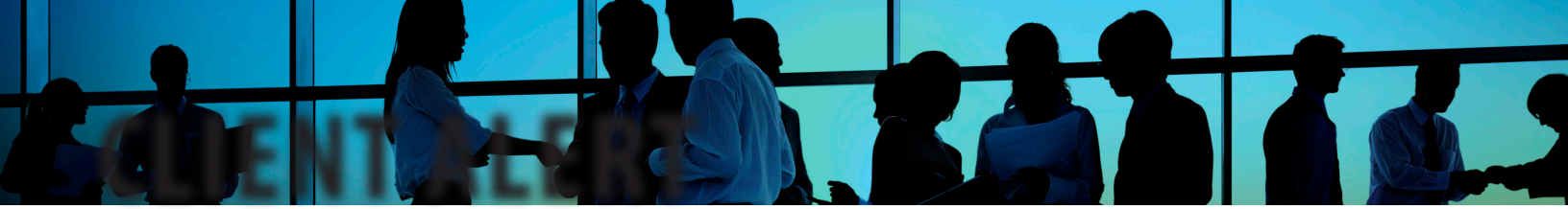
Brown J took issue with the majority's elimination of the knowledge requirement for unconscionability, arguing that it unnecessarily expands the scope of the unconscionability doctrine's application. Without the knowledge requirement, standard form contracts would be sufficient to establish the degree of inequality to trigger the application of unconscionability. He wrote that this approach would create uncertainty and was commercially unreasonable.

Dissenting Judgment

Coté J dissented, finding that there were no exceptions excusing the court from respecting the parties' commitment to submit disputes to arbitration.

Implications

The problem for Uber was that the arbitration clause was too onerous. Whatever the intention, the effect was to make arbitration of the dispute effectively impossible. As a practical matter, the optics of requiring a Toronto employee/contractor to arbitrate in the Netherlands are not good. It is now likely that a court will not uphold any onerous arbitration clause in a standard form contract. Employers must ensure that arbitration clauses are not so one-sided that arbitration is effectively impossible. As a consequence of what happened in



this case, Uber now faces a class action that could have far-reaching and expensive consequences for its legal relationship with its Ontario drivers. This problem likely could have been avoided if the arbitration clause required the arbitration to be in Toronto, as opposed to the Netherlands and/or an arbitration process was specified that did not involve such high upfront costs for the driver.

ABOUT THE AUTHORS

Brian N. Radnoff is a Partner in Dickinson Wright's Toronto office. He can be reached at 416.777.4046 or bradnoff@dickinsonwright.com.

Lipika Singh is a Summer Associate in Dickinson Wright's Toronto office. She can be reached at 416.644.2814 or lsingh@dickinsonwright.com.