

Goodmans^{LLP} Update

Supreme Court Expands Unconscionability Doctrine to Invalidate Uber's Arbitration Clause

The Supreme Court of Canada released its highly anticipated decision in *Uber Technologies Inc. v Heller* on June 26, 2020. The majority found that the arbitration agreement in Uber's service agreements with drivers was invalid, paving the way for a \$400 million class action against Uber.

While the class action alleged breaches of Ontario's employment standards legislation, the potential implications of the Supreme Court's decision could reach far beyond the case's factual context. In particular, the decision could have consequences for enforcing arbitration agreements and may also influence the interpretation of standard form contracts.

This Update summarizes the Supreme Court's decision and discusses some of its practical implications.

Background and Lower Court Decisions

David Heller was an UberEATS driver. When he started working with Uber, he – like other Uber drivers – accepted a services agreement that included a dispute resolution clause. The provision required any dispute to be resolved by mediation and then arbitration in Amsterdam, under Dutch law and the Rules of Arbitration of the International Chamber of Commerce (ICC). The evidence showed that, to start the ICC arbitration process, Mr. Heller had to pay US\$14,500 in up-front administration and filing fees. The lower court found these fees were equal to a significant portion of his annual income.

Rather than commence arbitration, Mr. Heller sought to certify a class action in the Ontario courts against Uber. Mr. Heller alleged that all Uber and UberEATS drivers in Ontario are employees of Uber and, therefore, entitled to the benefits of Ontario's *Employment Standards Act, 2000* ("ESA"). Uber denied those allegations and sought a stay of proceedings in favour of arbitration, relying on the arbitration clause in the services agreement.

The motion judge granted Uber's motion to stay, but the Ontario Court of Appeal overturned that decision (see our January 15, 2019 Update, *Court of Appeal Invalidates Uber's Arbitration Clause*).

Mr. Heller's case gave the Supreme Court an opportunity to address an ongoing tension in Canadian law between enforcing arbitration agreements and allowing parties with low-value claims to pursue class actions. We discussed this history and tension in our April 8, 2019 Update, *The Future is Arbitration-Friendly: Supreme Court Confirms Arbitration Enforceable for Business Customers in Telus Class Action*, including the Supreme Court's nod to potentially using the doctrine of unconscionability in this context in future cases.

The Supreme Court's Judgment

A seven judge majority of the Supreme Court dismissed Uber's appeal and upheld the Court of Appeal's reasoning that the arbitration agreement was unconscionable and thus invalid. There was a concurring judgment by one judge who agreed with the result but would have invalidated the arbitration agreement on public policy grounds, rather than by expanding the doctrine of unconscionability, as he believed the majority had done. There was also a dissent by a single judge who would have upheld the arbitration agreement but required Uber to front the filing fees.

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New exception to the competence-competence principle

One of the issues before the Supreme Court was whether Mr. Heller's allegation that the arbitration agreement was invalid should be resolved by the courts or by the arbitrator. The Supreme Court previously adopted a general rule known as the "competence-competence" principle, which holds that a challenge to an arbitrator's jurisdiction should "normally" be resolved by the arbitrator. The general rule was subject to limited exceptions, such as when the challenge could be resolved on a question of law alone or on a question of mixed fact and law that required only a superficial examination of the evidence.

The majority of the Supreme Court re-affirmed the competence-competence principle, but added a new exception to the general rule that courts should defer to arbitrators on matters of jurisdiction. They stated that courts should not defer jurisdictional challenges to arbitrators "if there is a real prospect that doing so would result in the challenge never being resolved". The majority explained this could be the case if, among other reasons, the up-front fees to commence arbitration are significant relative to the plaintiff's claim, or the plaintiff cannot reasonably reach the physical location of the arbitration.

To use this new exception, a court must find:

1. a *bona fide* challenge to arbitral jurisdiction, assuming the facts pleaded to be true; and
2. a real prospect that the challenge to the arbitration agreement will never be resolved by the arbitrator if the stay is granted.

In Mr. Heller's case, the Supreme Court found these elements were satisfied. First, Mr. Heller had a *bona fide* claim that Uber's arbitration clause was void for imposing prohibitive up-front fees to start an arbitration. Second, the majority found Mr. Heller's challenge might never be resolved if the Court referred his challenge to arbitration, as the arbitrator could not resolve Mr. Heller's challenge unless Mr. Heller paid the up-front fees which he could not afford.

Framework for the doctrine of unconscionability

The Supreme Court found that Uber's arbitration clause was invalid based on the doctrine of unconscionability, which allows courts to refuse to enforce certain contracts where it finds there was:

1. an inequality of bargaining power; and
2. an improvident or unfair bargain.

The Court found that an inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process. Proving an improvident bargain requires a claimant to establish that the contract "unduly advantages the stronger party or unduly disadvantages the more vulnerable", measured at the time that the contract is formed. The question is contextual, and asks whether the potential for undue advantage created by the inequality of bargaining power has been realized.

Applying this analysis to Mr. Heller's case, the Supreme Court found Uber's arbitration agreement unconscionable.

First, the Court found there was an inequality of bargaining power because the arbitration agreement was set out as a unilaterally drafted term in a standard form contract. The Court found that, not only was Mr. Heller unable to negotiate the arbitration agreement's terms, but there was a "significant gulf in sophistication" that prevented Mr. Heller from appreciating the financial and legal implications of agreeing to arbitrate in Amsterdam under Dutch law and the ICC's Rules of Arbitration. As Uber did not reproduce these Rules within the arbitration agreement, the Court also found Mr. Heller could not have appreciated their significance without searching them out for himself.

Second, the Court found Uber's arbitration agreement led to an improvident bargain. The Supreme Court agreed with the Court of Appeal that Mr. Heller would need to incur significant up-front financial fees disproportionate to the size of the potential arbitration award. But the Supreme Court also went further: "The arbitration clause, in effect, modifies every other substantive right in the contract such that all rights that Mr. Heller enjoys are subject to the apparent precondition" of enforcing these rights through the arbitration agreement.

Practical Implications of the Supreme Court's Decision

Ensuring access in arbitration agreements

Organizations that use arbitration agreements for relatively small disputes or standard form contracts should review their material agreements and terms of service to ensure they are not prone to attack based on unconscionability.

In particular, organizations using arbitration agreements should consider:

1. if the chosen arbitration process effectively limits access to adjudication on the merits, through relatively high filing fees, the location of the arbitration, or other practical factors;
2. if the applicable law of the agreement makes adjudication on the merits unlikely; or
3. if the language of the agreement is opaque.

More generally, organizations should ensure their choice of law, forum selection, and arbitration agreements – particularly when in standard form contracts – do not “violate the adhering party’s reasonable expectation by depriving them of remedies”. When there are indicia of an inequality of bargaining power, and particularly for anticipated low-value disputes, organizations should consider reviewing their arbitration agreements to avoid what the Court called an “illusory” dispute resolution process. In these cases, options include having the company cover up front procedural costs, ensuring the arbitration takes place in the jurisdiction where the dispute arose, or by creating alternative mechanisms for smaller claims under a certain threshold (among others).

A cautionary tale for organizations agreeing to pay the up-front arbitral fees, is the recent experience of DoorDash in the US. Recently, around 5000 DoorDash delivery drivers coordinated demands for individual arbitrations under a mandatory arbitration clause in the standard contract DoorDash gave its drivers, leading to nearly \$12 million dollars in fees being billed to DoorDash by the institution handling its arbitrations. In an unusual reversal of roles, DoorDash sought to stay the arbitration proceedings pending the approval of a class settlement addressing potentially overlapping matters, while the delivery drivers petitioned the court to compel DoorDash to arbitrate. The [US District Court](#) ultimately granted the drivers’ motion to compel arbitration and denied DoorDash’s request to stay the proceeding, noting with irony that DoorDash originally sought to dismiss the class action because the delivery drivers had a duty to arbitrate.

Guarding against unconscionability in standard form contracts

Although decided in the context of an arbitration provision, the Supreme Court’s decision may have broader application to standard-form contracts (also known as contracts of adhesion). The Supreme Court was clear that standard form contracts, by themselves, do not establish an inequality of bargaining power, noting, for example, that sophisticated commercial parties may be familiar with standard form contracts common within an industry.

However, the Supreme Court also noted that standard form contracts “can impair a party’s ability to protect their interests in the contracting process and make them more vulnerable”. For example, many standard form contracts are drafted by one party without input from the other and they may contain provisions that are difficult to read or understand.

Organizations should consider reviewing their standard form contracts in light of the Supreme Court’s comments. Particular attention should be paid to any potentially onerous terms that could be interpreted as evidence of an improvident bargain. As much as possible, standard form contracts should contain plain language, rather than overly legal or “dense or difficult to understand terms”, and should clearly draw attention to terms that may be unexpected or potentially harsh.

Unknown future for employment arbitration

One of the key findings of the earlier Ontario Court of Appeal’s decision was that a mandatory arbitration provision constituted an illegal contracting out of the *ESA* because it had the potential to prevent an employee from using the complaint mechanism provided by the *ESA* (even though Mr. Heller had not sought to access that complaint mechanism).

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Following the Court of Appeal's decision, some Ontario courts have invalidated mandatory arbitration clauses in employment contracts (see, for example, *Rhinehart v. Legend 3D Canada Inc.*). In contrast, BC courts have rejected the Ontario Court of Appeal's reasoning and enforced arbitration clauses in employment contracts (see, for example, *A-Teck Appraisals Ltd. v. Constandinow*).

Because the Supreme Court determined the arbitration agreement was unconscionable, it declined to decide whether the arbitration agreement also conflicted with the *ESA*, leaving potential uncertainty about the effect of the Ontario Court of Appeal's decision on employment law. Given this potential uncertainty, parties should consider revising their arbitration agreements to exclude disputes that cannot be arbitrated by law to prevent an entire arbitration clause being held invalid.

For more information, or to discuss whether any of your arbitration agreements or standard form contracts should be reviewed as a result of this decision, please contact any member of our [Litigation Group](#).

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