SUPREME COURT OF CANADA'S *UBER* RULING PROVIDES A ROADMAP TO NAVIGATE BETWEEN ARBITRATION AND CLASS ACTIONS

Posted on June 29, 2020

Categories: Insights, Publications

In *Uber Technologies Inc. v. Heller*,[1] the Supreme Court of Canada invalidated a widely used arbitration clause and thereby gave Uber drivers the green light to proceed with a proposed class action. The decision is a cautionary tale for businesses that may assume their arbitration clauses in standard form contracts serve as a roadblock to class action litigation. Businesses that rely on arbitration clauses in standard form agreements should carefully review the wording of these clauses to increase the likelihood that they will survive future challenges by class action plaintiffs.

At the same time, the Supreme Court's careful reasons generally uphold a vital principle of commercial arbitration – the presumption that challenges to an arbitrator's jurisdiction are for the arbitrator to decide in first instance. The Ontario Court of Appeal had severely restricted this principle - known as "*competence-competence*" - in its desire to remedy a perceived injustice to the Uber drivers. By delineating a narrower new exception to the competence-competence principle, the Supreme Court of Canada has confirmed that Canada remains a pro-arbitration jurisdiction for businesses that genuinely seek to take advantage of the benefits of commercial arbitration.

The Arbitration v. Class Action Problem

The statutory frameworks governing arbitrations and class actions address different drawbacks of the traditional litigation process. Arbitration legislation allows parties to reach an enforceable arbitration agreement permitting them to:

- bypass court delays by choosing a dedicated decision-maker with time to hear matters on an expedited basis;
- tailor procedures to fit the case rather than adopting "one size fits all" rules of court;
- preserve business relationships by maintaining confidentiality; and
- select subject matter experts for technical cases that would otherwise be decided by a generalist judge.

In international business transactions, arbitration also allows parties from different legal systems to resolve their disputes in a neutral forum and to enforce the resulting award in many different jurisdictions where the debtor may have assets.

Meanwhile, class action legislation seeks to improve upon traditional litigation by:

- providing access to justice for litigants whose claims cannot be efficiently resolved on an individual basis;
- fostering judicial economy for mass claims that would tax the resources of the legal system; and
- promoting behaviour modification for wrongdoers who may not otherwise be held accountable for actions that cause widespread, but individually small, losses.[2]

The objectives of arbitration and class action legislation are often complementary, but they may conflict where proposed class action plaintiffs bring claims arising out of a standard form contract with an arbitration clause. Until *Uber*, the Supreme Court and other Canadian courts had resolved such conflicts in favour of arbitration unless consumer protection legislation invalidated the arbitration clause. They held that arbitration clauses provide substantive contract rights that cannot be overridden by purely procedural class action legislation.[3]

Only last year, the Supreme Court affirmed this pro-arbitration position by refusing to allow business plaintiffs to "piggyback" on a parallel consumer class action that was proceeding due to consumer protection legislation. Even though the proposed class action was against the same defendant, was based on the same standard form contract and raised the same issues, the arbitration clauses with non-consumers remained valid and were therefore enforced by a stay of the proposed non-consumer class action litigation.[4]

Who Decides Issues of Scope and Validity – Judges or Arbitrators?

In order to continue to bring class proceedings, plaintiffs have challenged the scope and validity of arbitration clauses in a wide range of circumstances. These cases raise the issue of who should decide such jurisdictional challenges in first instance – the arbitral tribunal or the courts? Arbitration statutes give arbitral tribunals the power to rule on their jurisdiction but also allow these questions to be decided by courts.

In the seminal *Dell* case, the Supreme Court of Canada adopted the competence-competence principle to harmonize the concurrent powers of both courts and arbitral tribunals to rule on questions of jurisdiction. The Court recognized that, absent initial judicial deference to arbitral tribunals on jurisdictional questions, a party could circumvent the express power of the arbitral tribunal to rule on the scope or validity of an arbitration agreement by filing an action and invoking the court's power to decide the issue. It therefore created a strong presumption that arbitral tribunals should rule on such jurisdictional challenges at first instance, subject to later judicial review.[5]

At the same time, the *Dell* decision recognized that there will be some exceptional cases where a jurisdictional

issue should be decided by the court in first instance. In particular, if questions of jurisdiction can be resolved quickly by the court, there is no benefit to referring them to the arbitrator only for the court to provide a different answer at a later date. Pure questions of law, and questions of mixed fact and law that can be answered with only a "superficial" review of the evidence, are two instances where courts can make a prompt determination. As a result, they do not require referral to the arbitrator for further court control after the arbitrator's decision.[6]

These narrow exceptions to competence-competence have allowed courts to consider the potential illegality of arbitration clauses based on statutory prohibitions as these cases raise pure questions of law. Thus, courts have definitively interpreted consumer protection legislation as invalidating arbitration clauses and have determined that legislation regulating professional services does not invalidate them.[7]

The Ontario Court of Appeal Takes a Wrong Turn to Reach Its Intended Destination

The *Uber* case arose out of a proposed class action brought by an Uber driver alleging that such drivers are entitled to the benefits of employment standards legislation. Uber's standard terms provided that any dispute with the driver would be submitted to mediation and then arbitration under the rules of the International Chamber of Commerce ("**ICC**"). The ICC handled 842 cases in 2018, making it one of the world's busiest international arbitration institutions. The median amount in dispute in these cases was US$5 million.[8]

Uber used a standard ICC "med-arb" clause that incorporated the ICC rules by reference. Given that the ICC typically administers large, complex disputes, filing for mediation and then arbitration requires administrative fees totalling US$14,500 – almost as much as the annual salary of the plaintiff.[9]

As the driver contracted with an Uber entity based in the Netherlands, Uber's terms also provided that Amsterdam was the seat of arbitration and Dutch law governed the contract. This choice of seat and governing law would give a driver the impression that he would need to travel to Amsterdam for any arbitration and that Ontario's employment standards legislation was ousted in favour of Dutch law – even though that impression may be a mistaken one.

Uber relied on the arbitration clause to obtain a stay of the proposed class action at first instance. However, the Ontario Court of Appeal reversed that decision on the grounds that the arbitration clause was void for both illegality and unconsionability. The illegality arose because the Court of Appeal assumed that employment standards legislation applied and then interpreted it as voiding arbitration clauses for disputes alleging breaches of such standards. The unconscionability followed from the amount of the filing fees and the distant foreign seat of the arbitration, together with foreign governing law.[10]

In reaching this conclusion, the Ontario Court of Appeal relied on two preliminary conclusions of law, namely:

a. that on a motion to request a stay litigation in favour of arbitration, all of the plaintiff's allegations of fact were presumed to be true. This assumption allowed the Uber drivers to be deemed "employees" within the scope of the employment standards legislation even though the facts surrounding this allegation were heavily disputed and could not be resolved on a "superficial" review of the evidence;[11] and
b. that the principle of competence-competence applies only to issues regarding the scope of the arbitration clause and not to issues regarding its validity.[12]

The Court of Appeal's desire to protect Uber drivers from a potential injustice was understandable. However, if the Supreme Court had followed this approach, it would have turned the competence-competence doctrine on its head. It would allow a party to avoid arbitration by strategic pleading of any invalidity allegation even if a final determination of the facts would show that the arbitration clause was valid.

Questions relating to the validity of an arbitration clause can often arise in commercial arbitrations between large, sophisticated parties, even in the absence of a statutory prohibition on arbitration. For example, in a number of international commercial arbitrations, issues have arisen regarding whether a non-signatory to an arbitration agreement signed by a related legal entity is bound by the agreement. These complex issues regarding agency or separate corporate personality give rise to jurisdictional issues regarding the existence or validity of an agreement with the non-signatory.[13] If such issues are raised in an action, they should be deferred to the arbitrator and not be decided by courts on the assumption that the allegations of the party challenging the clause must be taken as true.

The Supreme Court's Narrow New Exception to Competence- Competence

In its reasons, the Supreme Court of Canada reached the same result as the Court of Appeal, but on narrower grounds. It chose not to limit the competence-competence principle to issues regarding the scope of the clause rather than its validity. Instead, for any genuine jurisdictional objection that depends on complex factual findings, the Supreme Court declared that courts could decide such objections where there is a "real prospect" that an arbitrator may never make such a ruling.[14]

In this case, the Court held that the ICC's filing fees were a "brick wall" for the Uber driver that made it unlikely that an arbitrator would ever rule on the validity of the arbitration clause. It was therefore up to the Court to decide the issue. At the same time, the Court cautioned that jurisdictional challenges that appeared to be delay tactics should still be referred to arbitrators at first instance. Challenges that were heard by a court, and ultimately proven to be unfounded, could be deterred through awards of substantial indemnity costs.[15]

This exception to the competence-competence principle should rarely arise in commercial disputes where a business claimant will typically advance a claim that is many times larger than administrative fees and should therefore have the resources to pay a filing fee or obtain advice on foreign law. As a result, the Supreme Court

maintained Canada's international reputation as a favourable venue for commercial arbitration with a supportive and deferential judicial system.[16] Even though the Supreme Court went on to invalidate Uber's arbitration clause, it did so with little collateral damage to genuine commercial arbitrations involving Canadian parties. [17]

A Warning to Users of Arbitration in Standard Form Contracts

Having found that there was a "real prospect" that an arbitrator would never decide the Uber driver's jurisdictional objection, the Supreme Court went ahead and upheld the objection on the grounds of unconscionability. It chose not to decide the more complex issue of whether employment standards legislation would also invalidate the clause.[18]

The Supreme Court's extensive restatement of the law of unconscionability in Canada will be relevant for all users of standard form contracts, not just those that include arbitration provisions in them. The Court restated a broad, two-pronged test for unconscionability that requires: a) an inequality of bargaining power arising from the characteristics of the claimant generally or the claimant's vulnerability in certain situations; and b) a resulting improvident bargain, measured at the time that the contract is formed.[19] It emphasized that unconscionability can be established without proof that the stronger party knowingly took advantage of the weaker or any other form of wrongdoing.[20]

The Supreme Court then proceed to find that Uber's arbitration clause was unconscionable given that:

- it was in a standard form contract that was not open to negotiation;
- there was a significant gulf in sophistication between the plaintiff, a food deliveryman, and Uber, a multinational corporation;
- the arbitration clause contained no information about the costs of ICC mediation and arbitration;
- these costs included a US$14,500 upfront payment for administrative fees; and
- the foreign seat and foreign governing law created the impression that the plaintiff would need to travel to Amsterdam and would not be able to assert the protections of Ontario's employment standards legislation.[21]

Given the high transaction costs of negotiating contracts, many business need to use standard forms when transacting with counterparties. The *Uber* case raises questions regarding whether arbitration clauses in such contracts will be enforceable even if they provide for lower filing fees and have no foreign seat. Although the Supreme Court had previously enforced a wide range of arbitration clauses in standard form contracts,[22] it is possible that the true problem that it was trying to address was that some disputes are simply too small to be resolved without aggregating claims on a class wide basis. If so, the Court should have addressed that issue

explicitly rather than by putting an undue emphasis on the size of filing fees or the foreign governing law.

While the ICC clause considered in *Uber* did impose relatively high upfront filing fees, the ICC is known for having a high degree of transparency regarding the costs of arbitration. Its arbitrators are paid based on an *ad valorem* tariff that charges smaller fees for smaller amounts in dispute. These fees are competitive for smaller disputes and a party can use the ICC website to calculate its arbitrator fees in advance with high degree of certainty. By contrast, arbitrator fees based on hourly rates can be difficult to predict, especially where there is no institutional control. A party choosing an *ad hoc* arbitration may be able to file a claim without any fee, and possibly even appoint an arbitrator for only a small initial deposit, only to find itself in a position of needing to advance substantial additional deposits as the case progresses and more of the arbitrator's time is needed to resolve the dispute.

Furthermore, while even sophisticated parties can form the impression that the "place of arbitration" is the physical place of hearings and that a choice of foreign contract law excludes other legal rules, this impression would be mostly a mistaken one. International arbitral tribunals routinely hold hearings in a physical location that is more convenient than the legal seat of arbitration (and increasingly hold "virtual" hearings) – thereby limiting most of the role of the seat of arbitration to the selection of the law governing the arbitration clause and the judicial system that can set aside the resulting award on narrow grounds. Furthermore, Uber's choice of Dutch law to govern its contracts could not oust the application of mandatory laws at the place of performance of the contract. International arbitral tribunals frequently apply mandatory third country laws, even in purely commercial disputes between large corporations. For example, export control legislation, competition laws, anti-corruption norms and restrictions on Islamic finance routinely raise issues regarding the application of a mandatory law that differs from the parties' contractual choice of law.[23]

Building an Enforceable Arbitration Clause

Until lower courts provide greater clarity regarding the enforceability of arbitration clauses in standard form contracts with unsophisticated counterparties, drafters of such contracts should consider taking the following steps:

- choose a place of arbitration that is close to the counterparty's residence or place of business;
- choose a governing law based on the jurisdiction where the counterparty resides or maintains its place of business;
- draw the counterparty's attention to the arbitration clause and its implications;
- provide information about the applicable arbitration rules, e.g. by including a link to a website of the institution with the applicable rules;
- agree to pay the counterparty's initial arbitration costs, subject to any later cost shifting if the claim is

dismissed; and
- if paying the counterparty's arbitration costs is not an option, choose an institution that has special rules and fees for smaller cases.[24]

More fundamentally, drafters of standard form contracts should consider whether even a properly drafted arbitration clause will provide an effective alternative for the problem of mass claims. In the United States, businesses that had hoped to avoid class actions through arbitration clauses have found themselves facing "class arbitrations".[25]

Although the US Supreme Court has reduced the risk of class arbitrations by finding that a contract must expressly allow for it,[26] plaintiffs' lawyers have used advances in technology to bring "mass arbitrations". The first wave of such cases focused on contracts similar to Uber's, including those for the food delivery company DoorDash. DoorDash required claimants to use the American Arbitration Association for any claims but promised to pay filing fees. After it faced 6,000 claims and a bill for more than $9 million, DoorDash unsuccessfully tried to switch to a different institution that promised to allow it to arbitrate "test cases" without paying all the fees at once. The US Federal Court rejected this attempt and ordered DoorDash to pay the institution's fees.[27] It remains to be seen whether such plaintiffs' tactics will migrate north of the border.

by Robert Wisner and Paola Ramirez

[1] 2020 SCC 16 ("*Uber* SCC")[ps2id id='1' target='/]
[2] Law Commission of Ontario, *Final Report, Class Actions: Objectives, Experiences and Reforms*, July 2019.[ps2id id='2' target='/]
[3] *Kanitz v. Rogers Cable Inc.*, (2002) 58 O.R. (3d) 299 (Ont. S.C.J.) ; *Dell Computer v. Union des Consomateurs*, 2007 SCC 34 ["Dell"]; Rogers Wireless Inc. Muroff, 2077 SCC 35; *Seidel v TELUS Communications Inc.*, 2011 SCC 15 ["*Seidel*"].[ps2id id='3' target='/]
[4] *Telus Communications Inc. v. Wellman,* 2019 SCC 19 ("**Wellman**"). See McMillan's April 2019 Litigation Bulletin: No Piggybacking to Avoid B2B Arbitration: Supreme Court of Canada Affirms Enforceability of Arbitration Clauses despite Related Class Action.[ps2id id='4' target='/]
[5] *Dell* at para.84[ps2id id='5' target='/]
[6] *Dell* at paras.84-86[ps2id id='6' target='/]
[7] *Seidel v TELUS Communications Inc.*, 2011 SCC 15 [deciding invalidity of arbitration clause]; *Jean Estate v. Wires Jolley LLP*, 2009 ONCA 339 [definitively upholding validity of clause].[ps2id id='7' target='/]
[8] International Chamber of Commerce, *2018 ICC Dispute Resolution Statistics* at p.13.[ps2id id='8' target='/]
[9] The ICC administrative fees, comprised of a $2,000 filing fee for mediation; an administrative fee for mediation that, for a dispute under $200,000, can amount up to $5,000; a $5,000 filing fee for arbitration; and

an administrative fee for arbitration that is at least $2,500. The charges for a mediator or arbitrator would be approximately $3,000 for a dispute worth less than US$200,000. See *Heller v Uber Technologies*, 2018 ONSC 718 at para 25.[ps2id id='9' target='/]

[10] *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 [“*Uber* ONCA”][ps2id id='10' target='/]

[11] *Uber* ONCA at para.27[ps2id id='11' target='/]

[12] *Uber* ONCA at para.39[ps2id id='12' target='/]

[13] E.g. *Xerox Canada Ltd. v. MPI Technologies Inc.*, 2006 CanLII 41006 (ON SC) at para.30; *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan,* [2010] UKSC 46.[ps2id id='13' target='/]

[14] *Uber* SCC at para.44-46[ps2id id='14' target='/]

[15] *Uber* SCC at paras.42-43, 47[ps2id id='15' target='/]

[16] The sole dissenting judge expressed alarm about the potential damage to Canada’s “leadership role in arbitration law” (*Uber* SCC at para.200), but this could only happen if lower courts permit abusive claims of a “real prospect” of no decision in commercial disputes.[ps2id id='16' target='/]

[17] Indeed, the Supreme Court emphasized that this particular case, despite its international character, was not even a “commercial” arbitration and therefore it was not deciding the case under the UNCITRAL Model Law that applies to international commercial disputes. Instead, the Court declared the dispute related to employment and was governed by domestic arbitration legislation that provides for a right of appeal from an arbitral award in certain circumstances. Uber SCC at para.19[ps2id id='17' target='/]

[18] *Uber* SCC at para.99[ps2id id='18' target='/]

[19] *Uber* SCC at paras.67-68[ps2id id='19' target='/]

[20] *Uber* SCC at para. 84[ps2id id='20' target='/]

[21] *Uber* SCC at para.93[ps2id id='21' target='/]

[22] See *Dell, Rogers, Wellman,* supra. [enforcing both institutional and ad hoc arbitration clauses in standard form contracts].[ps2id id='22' target='/]

[23] See J.W.Rowley and R. Wisner, “Party Autonomy and Its Discontents: The Limits Imposed by Arbitrators and Mandatory Laws”, *World Arbitration and Mediation Review*, (2011), v.5, no.3, 321-337. The dissenting judge was alert to both the limited role of the seat and the fact that mandatory laws continued to apply. See *Uber* SCC at paras.273, 305.[ps2id id='23' target='/]

[24] For example, all cases that the AAA–ICDR considers to be international commercial disputes and are under US$75,000 are subject to special fees: see: ICDR Canada Arbitration Fee Schedule.pdf; for employment related cases with a single arbitrator, the employee claimant pays a filing fee capped at USD$300 while the company pays a fee of USD 1,900. Arbitrator compensation is not included as a part of the administrative fees charged by the AAA and must be paid by the employer/company. See Employment Fee Schedule Nov 1, 2019.pdf.[ps2id

id='25' target='']
[25] The Institute for Conflict Prevention and Resolution even has an Employment-Related Mass Claims Protocol that was created to assist in the arbitration process when many employees bring claims against a single employer. A mediator will oversee a test case to result in a decision. What is the Employment Related Mass Claims Protocol?[ps2id id='25' target='']
[26] *Lamps Plus Inc v Varela*, 139 US 1407 (2019)[ps2id id='26' target='']
[27] See M. Corckery and J. Silver-Greenberg, "Scared to Death by Arbitration: Companies Drowning in their Own System", New York Times, April 6, 2020.[ps2id id='27' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.