UBER DRIVERS GIVEN A LOW-ARB DIET: ONTARIO COURT OF APPEAL INVALIDATES ARBITRATION CLAUSES

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In Heller v. Uber Technologies Inc., ("***Heller***"), the Ontario Court of Appeal has permitted a proposed class action against Uber Technologies Inc. to proceed despite the plaintiff agreeing to an arbitration clause when contracting with Uber.

On behalf of the class, the plaintiff sought a declaration that Ontario Uber drivers are employees and governed by the *Employment Standards Act, 2000* ("**ESA**"). Further, the plaintiff sought a declaration that arbitration provisions contained in Uber's services agreements with its contractors were void and unenforceable. The Plaintiff also sought $400 million in damages.

Uber's agreements contain identical arbitration clauses which require drivers to submit to the arbitral jurisdiction of the International Chamber of Commerce in Amsterdam, Netherlands to resolve any dispute with Uber. ICC rules require parties initiating proceedings to pay a US$2,000 non-refundable mediation fee and, for any disputes valued at under US$200,000, an additional administrative fee of up to US$5,000, and, if required to arbitrate, an arbitration fee of US$5,000. By way of contrast, the plaintiff earns $400 to $600 per week based on 40 to 50 hours of work.

In contracting with its drivers, Uber made use of a two-pronged "click-wrap" agreement. Drivers are first required to click "Yes, I agree" to terms displayed on their smartphones, then again click "I agree" following the statement "Please confirm that you have reviewed all the documents and agree to all the new contracts."

Uber brought a motion to stay the proposed class action in favour of arbitration, relying on its contractual arbitration clause. The motion judge agreed with Uber and found that nothing in the ESA prevented parties from opting for private arbitration and that the arbitration clause was not unconscionable.

Contracting Out of the ESA

The Court of Appeal found that the arbitration clause was invalid and unenforceable because it was an unlawful attempt to contract out of the ESA's protections. Section 5(1) of the ESA bars contracting out of the ESA unless a greater benefit has been provided to the employee.

The Court held that if the arbitration clause applied, it would deprive Uber employees (which the plaintiff and the class members allege they are) of their ability to file a complaint about an ESA breach with the Ontario Ministry of Labour under section 96(1) of the ESA.

Uber argued that employees can already procedurally opt out of section 96(1) under section 98(1), which bars complaints where a civil proceeding on the same subject matter has been commenced. The Court of Appeal rejected that argument and found that an arbitration does not fall under the understood meaning of "civil proceeding".

Unconscionability

In addition to finding that the arbitration clause was in breach of the ESA, the Court of Appeal independently held that the arbitration clause was unenforceable because it was legally unconscionable. The Court found that:

1. the clause was an unfair bargain, both because of the high up-front costs which it would require an individual claimant to incur and because the individual accepting the clause was not given any information about the chosen jurisdiction – the Netherlands;
2. the applicable contract was executed without independent legal advice or negotiation;
3. there was a significant imbalance of power; and,
4. Uber chose the arbitration clause to favour itself vis-à-vis the drivers.

Keys for Employers

Ontario employers should be cautious in their use of arbitration clauses in employment contracts. While there may be a distinction to be drawn between broad, standard-form agreements such as the one at issue in *Heller*, which was a contract of adhesion, and a bespoke contract tailored to a specific employee, employers should seek guidance before assuming that an arbitration clause can be relied upon.

In drafting a clause, employers have to consider whether there are certain claims that should not be subject to the arbitration clause, such as claims made under the *Employment Standards Act, 2000* or other statutes where an arbitration clause could be seen as infringing on an employee's statutory right.

Employers will also have to consider the Court of Appeal's finding regarding unconscionability of those provisions, which will likely be used by employee counsel to set aside these types of provisions unless they were included in a negotiated (i.e. with legal counsel) employment agreement. Courts frequently cite the imbalance of bargaining power between an employer and employee, and the Court of Appeal's comments will have an impact on any arbitration provision contained in a standard employment agreement.

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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.