HELLER v UBER: A TURNING POINT IN COMMERCIAL ARBITRATION?

In January, the Ontario Court of Appeal permitted a proposed class action by David Heller, an Ontario resident, to proceed against Uber Technologies. Heller was one of a number of drivers who had signed a commercial arbitration agreement with Uber that provided for disputes to be arbitrated in the Netherlands. The Court of Appeal gave two reasons for doing so and may have inadvertently narrowed the scope of deference usually given by the courts to private arbitration. The critical question for arbitrators is whether commercial arbitration agreements will be enforced where there is evidence of a power imbalance between the parties.

In a unanimous judgment, the Court of Appeal held that the arbitration agreement was invalid under section 7 of the Ontario Arbitration Act because it contracted out potential, non-waivable employee rights under section 5 of Ontario's Employment Standards Act [ESA]. The Court expressed its concern that the rights of proposed class members such as Heller might be compromised if the arbitration agreement did not meet the minimum standards imposed under the ESA.

Secondly, and more significantly for arbitrators and counsel, the Court held that the agreement was unconscionable at common law because of a series of four power imbalances. While citing its own decision in *Wellman v Telus Communications Company 2017 ONCA 433* and Supreme Court of Canada decisions affirming judicial deference to arbitration, it held that this arbitration agreement was unconscionable and therefore unenforceable under section 7(2) of the Ontario Arbitration Act. Every Canadian province has this provision in its arbitration statute. So this decision does not merely affect Ontario.

The Court rested its decision on the following four power imbalances. Firstly, it held that the agreement was "grossly unfair and improvident". This finding reflected the fact that Uber drivers generally earn between $400.00 and $600.00 per week, and compared their income to the cost of simply initiating the arbitration application of $14,500.00, without taking into account counsel fees, travel, and accommodation.

Secondly, the Court found that the drivers lacked “independent legal advice or other suitable advice”. Thirdly, it found that there was an “overwhelming imbalance in bargaining power due to ignorance of business and illiteracy.” Lastly, the Court found that Uber “had taken advantage of this vulnerability.”

However, in making these four fact findings, the Court went further and stated that “the arbitration clause is of the type involved in normal commercial contracts where the parties are of relatively equal sophistication and strength.” Although the Court’s decision on its facts deals strictly with the issue of independent contractor vs. employee, the stakes now seem suddenly higher for private commercial arbitration. What happens if the parties are not relatively equal in sophistication and strength?

For example, if a major corporation contracts with a well established, substantial supply chain provider that is neither its equal in strength or sophistication, is an arbitration agreement between them at risk of being unenforceable? For that matter, how are we to measure ‘strength and sophistication’? Moreover, if one party is financially weaker but not unsophisticated, will their arbitration agreement survive? Does financial inequality imply a lower degree of business sophistication?

It is worth noting that in three specific sectors; namely, motor vehicle manufacturers, stock and bond brokerages, and property/casualty insurers, customers, both institutional and individual, have the option to go to arbitration rather than to proceed with litigation. The Canadian Motor Vehicle Arbitration Plan [CAMVAP] provides arbitration to every buyer as part of each new motor vehicle purchase. The limited issues which may be arbitrated are specified in the Plan, and the buyer alone has the option to arbitrate.

Similarly, the Investment Industry Regulatory Organization of Canada [IIROC] also provides optional arbitration to any investment brokers with complaints against another broker, or sales representative, and to institutional and individual consumers. While the complainants may be polar opposites when viewed through the lense of “strength and sophistication”, arbitration is strictly optional and the parties retain the right to litigate. Parties who hold property and casualty insurance have a similar right to arbitrate claims or to go to litigation. Because arbitration in these specific circumstances

is optional and is often invoked by the weaker party, whatever the ruling in Heller v Uber really means will not matter.

Unresolved is the question as to whether commercial arbitration is safe only among contractors who are ‘relatively equal’ however equality may be measured. On the one hand, since this terse comment contained in 76 paragraphs of reasons was un-necessary on the particular facts in play, perhaps it should be viewed as commentary. In any event the decision is appealable. On the other hand, if the Court is signaling change, counsel would be well advised to be pro-active and ensure that reasonable steps are taken in advance so that future commercial arbitration agreements are not faced with allegations of power imbalance.

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