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Supreme Court to hear arguments about enforceability of arbitration clauses

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On May 23, 2019, the Supreme Court of Canada granted leave to appeal in *Uber Technologies Inc., et al. v. David Heller* (the Uber Class Action). At issue is an arbitration clause in the Uber driver service agreement that requires all claims be arbitrated in the Netherlands, regardless of size.

Canadian courts have long enforced arbitration agreements freely entered into, even in contracts of adhesion, subject to legislative restrictions. The Supreme Court's decision has the potential to clarify the extent of exceptions to this principle in the context of contracts where there may be power imbalances. Therefore, the decision may have important implications beyond the employment context in scenarios where the power of the contracting parties may be unequal, but applicable legislation does not preclude mandatory arbitration — for example, consumer contracts (other than in Ontario, where mandatory arbitration clauses are precluded by the *Consumer Protection Act*) or franchise contracts.

On appeal is the decision of the Ontario Court of Appeal (ONCA) in *Heller v. Uber Technologies Inc.,*[1] where the Court found the arbitration clause to be invalid and unenforceable. In a previous Osler Update, we discussed some of the implications of the ONCA decision as well as some practical measures that employers and companies who engage independent contractors and consultants should consider with respect to updating their arbitration clauses.

Background

In the Uber Class Action, the plaintiffs seek $400 million in damages in addition to a declaration that Uber drivers are employees of Uber and therefore entitled to the benefits and protections afforded by the *Employment Standards Act* (ESA).

The agreements between the plaintiffs and Uber include an agreement to arbitrate disputes pursuant to the *International Commercial Arbitration Act*, 2017 or, if necessary, the *Arbitration Act*, 1991. To arbitrate a dispute, Canadian drivers were required to pay US$14,500 in filing and administrative fees and arbitrate in the Netherlands.

At first instance

Accordingly, in 2018 Uber successfully moved to have the proposed class action stayed in favour of arbitration. In granting the stay, Justice Perell relied on the Supreme Court of Canada's decision in *Seidel v. TELUS Communications Inc.*,[2] as well as the ONCA's decision in

Wellman v. TELUS Communications Company,[3] that absent legislation to the contrary, freely entered arbitration agreements must be enforced by the courts, even in contracts of adhesion.

On appeal

On appeal, the stay was reversed. The ONCA held the arbitration clause to be invalid and unenforceable on two grounds: 1) it contracts out of the ESA, and 2) it is unconscionable under common law.

With respect to the first ground — contracting out of the ESA — it was held that section 5 of the ESA prevents parties from contracting out of employment standards. Specifically, employees cannot contract out of the provisions of the ESA that allow complaints about labour standards to be brought before and investigated by the Ministry of Labour.

The second ground — unconscionability — is more far reaching, as it questions the enforceability of arbitration clauses generally. The ONCA applied the test for unconscionability from *Titus v. William F. Cooke Enterprises Inc.*[4] and held the arbitration clause to be unconscionable because

1. it represents a substantially improvident or unfair bargain;
2. there is no evidence that the appellant had any legal or other advice prior to entering into the services agreement nor is it realistic to expect that he would have;
3. there is a significant inequality of bargaining power between the appellant and Uber; and
4. Uber knowingly and intentionally chose the arbitration clause in order to favour its interests over those of its drivers.

The ONCA decision relied on the Supreme Court decision in *Douez v. Facebook, Inc.*[5] (*Douez*). In *Douez*, the Supreme Court considered the enforceability of a forum selection clause and set out an approach to determine whether such a clause should be enforced. First, the party relying on the clause must establish that the clause is valid, clear and enforceable, and that it applies to the cause of action before the court. It is at this first stage that questions regarding unconscionability arise. Second, once a valid clause has been found, the onus shifts to the opposing party to demonstrate strong reasons why the forum selection clause should not be enforced. This turns on factors including convenience of the parties, fairness between the parties and the interests of justice.

Before the Supreme Court

The hearing of this matter will provide the Supreme Court with an opportunity to determine the breadth of application of its holdings in *Douez*. Additionally, the Supreme Court may choose to revisit the competing, though arguably consistent, tests for unconscionability from *Titus v. William F. Cooke Enterprises Inc.*[6] and *Morrison v. Coast Finance Ltd.*[7] Hopefully, this decision will bring much-needed clarity to all parties seeking to contract on the basis of alternative dispute resolution mechanisms, such as arbitration clauses.

[1] 2019 ONCA 1

[2] 2011 SCC 15

[3] 2017 ONCA 433

[4] 2007 ONCA 573

[5] 2017 SCC 33

[6] 2007 ONCA 573

[7] 1965 CanLII 493 (BC CA)