WeirFoulds LLP

Uber Arbitration Agreement not so Uber

September 29, 2020

By John Buhlman

Uber Arbitration Agreement not so Uber[1]

In my April 16, 2018, blog,[2] I wrote about the Superior Court of Justice's decision upholding the arbitration provisions in an Uber contract, and ordering a stay of a proposed class action.[3] In my blog, I stated that the decision demonstrated that Ontario was an arbitration-friendly jurisdiction. I may have been a little overbroad and premature with my comment. Some two years later, the Supreme Court of Canada,[4] upholding the Ontario Court of Appeal, held the Uber arbitration agreement invalid, bringing to an end the court proceedings over whether or not the plaintiff's claim was to be arbitrated or litigated in the courts. The stay of the plaintiff's proposed class action has been lifted.

To recap, the plaintiff, a resident of Ontario, signed several contracts with Uber. Using the Uber Apps, he delivers food from restaurants to consumers. The plaintiff alleges in the proposed class action that he and the putative class members are employees of Uber and are entitled to the benefits of Ontario's *Employment Standards Act* ("ESA"). The plaintiff seeks $400 million in damages and a declaration that Uber has breached the ESA.

The standard form services agreement that the plaintiff signed, without negotiation, specified that the plaintiff was not an employee of Uber and he was signing a software licensing agreement. The agreement requires the plaintiff to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process requires upfront administrative and filing fees of US $14,500 plus legal fees and other costs of participation.

The judge of first instance determined that he did not have the authority to decide whether the arbitration agreement was valid and held that that decision was for the arbitrator to determine at first instance. In the motion judge's view, the case was *prima facie* a dispute over a commercial licensing agreement covered by the *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2 Sch. 5 ("ICAA").[5]

The Court of Appeal allowed the plaintiff's appeal, holding that the arbitration clause was void both because it was unconscionable and because it contracted out of the ESA. The court found the arbitration clause to be unconscionable because it was an unfair bargain and resulted from significant inequality of bargaining power between the plaintiff and Uber. The Court of Appeal found that Uber intentionally chose the arbitration clause in order to favour itself and take advantage of its drivers who are clearly vulnerable to the market strength of Uber.[6]

There are three sets of reasons (338 paragraphs in total) in the Supreme Court of Canada decision, one by Abella and Rowe JJ. on behalf of the majority, reasons by Brown J. concurring in the result but for different reasons and a dissent by Côté J. The majority found the arbitration agreement unconscionable because it makes it impossible for one party to arbitrate. Brown J. found the arbitration agreement contrary to public policy. Côté J. found the arbitration agreement neither unconscionable nor against public policy and would have issued a stay conditional on Uber paying the initial fee to commence the mediation and arbitration.

The majority reasons

Although the result would be the same under both the *Arbitration Act*, *1991*, S.O. 1991, c. 17 ("AA") and the ICAA, the first issue the majority addressed was which act applies.[7] The parties agreed that the dispute was international, but disagreed on whether the agreement was "commercial". The majority held that the dispute is fundamentally about labour and employment which is not covered by the word "commercial" and, therefore, the AA applies.

What is important about the majority's analysis on this issue is that the majority examined the nature of the parties' dispute to determine whether the ICAA applies and not the parties' relationship. In the majority's view, the decision-maker only has to examine the pleadings to characterize the dispute, whereas characterizing a relationship requires an intensive fact-finding inquiry which would "slow the wheels of an arbitration, if not grind them to a halt."[8]

Having decided that the AA applies, the majority turned to section 7 of the AA and recognized that under s. 7(1), the court is to stay the proceedings unless there is an exception under s. 7(2). The only exception that is relevant to the case is paragraph 2, where the court determines that the arbitration agreement is invalid.[9]

The majority applied the approach set out in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, which creates "a test whereby a court refers all challenges of an arbitrator's jurisdiction to the arbitrator unless they raise pure questions of law, or questions of mixed fact and law that require only superficial consideration of the evidence in the record."[10] To be superficial, facts must be either evident on the face of the record or undisputed by the parties. In addition, the majority stated that the case raises an issue of accessibility which justifies departing from the general rule of arbitral referral.[11]

The majority made several findings regarding accessibility. First, the plaintiff's dispute is a *bona fide* challenge to the arbitrator's jurisdiction. Second, because the costs of proceeding with the arbitration are prohibitive, there is a real prospect that if the stay is granted, the genuine challenge may never be resolved. In these circumstances, the court may resolve whether the arbitrator has jurisdiction over the dispute and, in doing so, may thoroughly analyze the issues and the record.[12]

Having determined that the court can determine the issue of the validity of the arbitration agreement rather than referring it to the arbitrator, the majority then analyzed the doctrine of unconscionability. Unconscionability requires both an inequality of bargaining power and a resulting improvident bargain.[13]

The majority determined that the Uber arbitration agreement meets both criteria of unconscionability. The plaintiff was in an inferior bargaining position because the arbitration agreement was part of a standard form contract that the plaintiff was powerless to negotiate; Uber is more sophisticated, being a large multinational corporation; the agreement contained no information about the costs of mediation and arbitration in the Netherlands; and the Rules for arbitration under the International Chamber of Commerce Mediation Rules were not attached to the contract.[14]

The bargain struck by the plaintiff with Uber was also improvident given the upfront administrative fees which are close to the plaintiff's annual income. "No reasonable person who had understood and appreciated the implication of the arbitration clause would have agreed to it."[15]

Since the majority found that the arbitration agreement was invalid because it was unconscionable, it did not determine whether it had the effect of contracting out of mandatory protections in the ESA.

Brown J.'s reasons

Brown J. agreed that the arbitration agreement is invalid, not because it is unconscionable, but because it undermines the rule of law

by denying access to justice and is therefore contrary to public policy. In his opinion, the agreement amounts to an agreement *not* to arbitrate because it does not furnish an accessible method of achieving dispute resolution according to law.[16] According to Brown J., the majority's decision was an expansion of the doctrine of unconscionability that was unnecessary and undesirable. Unnecessary because other settled principles apply, and undesirable because the expansion does not provide any meaningful guidance as to its application. Brown J. stated that the majority's approach was likely to add uncertainty in the enforcement of contracts. [17]

Like the majority, Brown J. looked at the costs required upfront to commence the mediation and arbitration as an insurmountable precondition that, in effect, prevents the plaintiff from commencing a claim. This does not make the agreement unconscionable, but contrary to public policy. In his view, the record in support of the finding that the agreement effectively bars any claim was ample, and the limitation imposed by the costs required upfront undermines the rule of law and is contrary to public policy.[18]

Côté J.'s dissent

Côté J. would have allowed the appeal and granted Uber's motion for a stay of proceedings on the condition that Uber advances the funds needed to initiate the arbitration proceedings.[19] In her view, the bases upon which both the majority and Brown J. decided the issues were dependent upon testimonial evidence which required more that a superficial review of the documentary evidence. Determining unconscionability and whether an agreement contravenes public policy both raise complex issues of mixed law and fact requiring an evidentiary record. For a court to make such a determination represents a departure from the general rule that a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator unless the challenge is based solely on a question of law or a question of mixed law and fact that requires only a "superficial" consideration of the documentary evidence.[20]

While the majority determined that the analysis of whether the dispute is "commercial" depends on an analysis of the dispute based on the pleadings, in Côté J.'s view, the proper approach is to analyze the nature of the parties' relationships based on a superficial review of the record.[21] Based on a superficial review, she concluded that the transaction is commercial in nature because the services agreement states that it is a software licensing agreement and not an employment relationship. According to Côté J., whether the plaintiff is an employee within the meaning of the ESA is a complex question of mixed fact and law which cannot be decided on the basis of the record before the court, nor should it be: the rule of systematic referral applies, and the parties should be referred to arbitration.[22]

The resolution of the complex question of mixed fact and law of the validity of the arbitration clause would involve evidence regarding the plaintiff's financial position, his personal characteristics, the circumstances of the formation of the contract, the amount that would likely be at issue in a dispute, the cost of the arbitration in comparison to the cost of litigation and the availability of third party funding, among other things. In Côté J.'s view, the record was not sufficient for the court to determine these issues. [23] Furthermore, it is the role of the arbitrator to make these determinations based on evidence.

To Be Continued

No doubt, this decision will result in more litigation over the validity of arbitration agreements. The majority's and Brown J.'s reasons provide little guidance on what amounts to unconscionability and what is contrary to public policy in arbitration agreements. Inventive lawyers will use this lack of guidance to construct arguments whenever their clients regret the forum chosen for their arbitration or prefer the court process over arbitration for some other reason. More litigation can also be expected over what is a "superficial" review of the documentary record.

Is Ontario now less arbitration friendly? According to Côté J., "[m]y colleagues threaten to roll back the tide of history and Canadian jurisprudence to the days when judges were overtly hostile to arbitration. They decline to follow the rule of systematic referral to arbitration that was clearly established in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R 801, at paras. 84-85. Instead, they add to the grounds for judicial intervention in the arbitration process by proposing new exceptions to the

rule of systematic referral. […] Canada's role as a world leader in arbitration law may now be in doubt."[24]

[1] Uber -: being a superlative example of its kind or class, *www.merriam-webster.com*

[2] https://commerciallitigationinsights.weirfoulds.com/commercial-litigation/proposed-class-action-uber-stayed-court-enforces-parties-agreement-arbitrate

[3] *Heller v. Uber Technologies Inc. et al.*, 2018 ONSC 718 (Perell, J.)

[4] *Uber Technologies Inc. v. Heller*, 2020 SCC 16.

[5] *Ibi*d. at paragraph 14.

[6] *Ibid.* at paragraphs 3 and 4.

[7] *Ibid.* at paragraphs 16 and 19.

[8] *Ibid.* at paragraph 25.

[9] *Ibid.* at paragraph 30.

[10] *Ibid.* at paragraph 33.

[11] *Ibid.* at paragraph 36.

[12] *Ibid.* at paragraphs 46 and 48.

[13] *Ibid.* at paragraph 66.

[14] *Ibid.* at paragraph 93.

[15] *Ibid.* at paragraphs 94 and 95.

[16] *Ibid.* at paragraphs 101 and 102.

[17] *Ibid.* at paragraph 147 and 174.

[18] *Ibid.* at paragraphs 132, 133 and 136.

[19] Côté J., relies on section 106 of the *Courts of Justice Act* for authority to impose a condition on the stay.

[20] *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at paragraphs 230 and 231.

[21] *Ibid.* at paragraph 211.

[22] *Ibid.* at paragraph 296.

[23] *Ibid.* at paragraph 297.

[24] *Ibid.* at paragraph 209.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:

John Buhlman

Toronto
416.947.5070

Email:
jbuhlman@weirfoulds.com

John Buhlman is an experienced litigator who acts on complex environmental and commercial litigation. A key part of his practice involves advising clients on regulatory compliance with environmental laws.