THE IMPORTANCE OF DRAFTING FAIR ARBITRATION AGREEMENTS:

A Brief Overview of the Lessons Learned from Uber Technologies Inc. V. Heller

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In light of COVID-19 and the restrictions placed on court services in Ontario, many litigants are looking to alternative forms of dispute resolution processes, such as, mediation and arbitration, to resolve their disputes.

Currently, motions at the Ontario Superior Court of Justice are being heard remotely and are restricted to matters that are of an urgent nature or matters that can be resolved in writing or matters that are unopposed or on consent. Many court appearances, which were scheduled to proceed in the months of March to July 2020, have been adjourned for the foreseeable future, causing significant backlog to an already overwhelmed system.

Unfortunately, the current limitations to court services will likely result in continued delays for litigants for an indeterminate amount of time. As a result, now is the perfect opportunity to consider making use of one of the alternative dispute resolution processes, such as arbitration, to resolve existing disputes. It is also a good time to consider adding an arbitration clause or arbitration agreement to future contracts to avoid dealing with a backlogged system, and to tailor the dispute resolution process to your own unique needs.

This article will provide an overview of the factors that must be considered in order to draft an enforceable arbitration agreement as set out in the recent decision by the Supreme Court of Canada in *Uber Technologies Inc. v. Heller, 2020 SCC 16*.

Benefits of Arbitration

Arbitration is an attractive dispute resolution process for many reasons. Now, more than ever, arbitration can help parties resolve their disputes in a timely manner and is far more expeditious than the traditional court process. Arbitration offers a private forum, which may or may not be confidential, depending on the parties' agreement. Arbitration also provides the added benefit of having a say in the dispute resolution process and procedure rather than being bound by the cumbersome process set out in the *Rules of Civil Procedure*. For example, in an arbitration, parties have the option to choose their process, such as the manner in which evidence will be tendered, including expert evidence, in a way that is often much more flexible than the traditional court process.

In addition, for some, arbitration can provide more finality as there is less room for appeal, unlike the traditional court process, which allows some appeals as of right. Arbitration also allows parties access to an arbitrator who specializes in their area of need and allows more opportunity for case management. Furthermore, as the parties are paying for the arbitrator's time, unlike a judge's, there is a desire to streamline the proceeding and focus on the real issues.

While there are many benefits to using arbitration, not all arbitration agreements are drafted equally. In some cases, an arbitration agreement may act as a barrier to justice. This issue was recently explored by the Supreme Court of Canada in its decision in *Uber Technologies Inc. v. Heller* [*Heller*], released on June 26, 2020.

Uber Technologies Inc. v. Heller

The Appellant, David Heller, worked as a driver for Uber Eats. In 2017, he commenced a class action lawsuit in the Ontario Superior Court against Uber for various violations of the *Employment Standards Act* [*ESA*]. Uber brought a motion to stay the proceeding on the basis that the issues of the proceeding were covered by an arbitration agreement entered into between the parties. Heller argued that the arbitration agreement was unenforceable as it was unconscionable and because it contracted out of mandatory provisions of the *ESA.*

The Motion to Stay

When Heller agreed to work as a driver for Uber Eats, he signed a standard form services agreement. This agreement contained a clause that provided that any dispute between the parties was to be resolved by way of mediation and arbitration, which was to take place in the Netherlands.[i]

The mediation and arbitration process required an upfront filing fee in the amount of $14,500.00 USD. This fee did not include legal fees and other costs of participating in the mediation and arbitration, such as loss of work and travel costs to the Netherlands.[ii] The services agreement provided no information about the cost of mediation and arbitration. Moreover, the filing fee of $14,500.00 USD, represented almost all of Heller's income for the year.
The motion judge agreed with the position advanced by Uber and stayed the class action lawsuit and determined that the arbitration agreement's validity had to be referred to arbitration in the Netherlands.[iii]

The Court of Appeal and Supreme Court of Canada Rulings

Heller appealed the motion judge's decision to the Court of Appeal for Ontario. On appeal, the Court of Appeal overturned the lower court's decision and held that the arbitration agreement was unconscionable and therefore unenforceable. This ruling was upheld by the Supreme Court of Canada.

What Makes an Agreement Unconscionable?

An agreement will be found to be unconscionable when there is an inequality in bargaining power that results in an improvident or unfair bargain.[iv]

In *Heller*, the Supreme Court found that there was an inequality in bargaining power because:

1. The arbitration agreement was part of a standard form contract which Heller was incapable of negotiating;

2. There was a significant gulf in sophistication between the parties;

3. The arbitration agreement contained no information about the costs of mediation and arbitration in the Netherlands; and,

4. A person in Heller's position could not be expected to appreciate the financial and legal implications of agreeing to the arbitration agreement.[v]

The Supreme Court also held that the arbitration agreement was improvident because of the $14,500.00 USD filing fee, which was to be paid upfront by Heller. Specifically, the Court found that cost of the mediation and arbitration was disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into.[vi]

An Arbitration Agreement Must Not Act as a Barrier to Justice

Generally, courts take the position that arbitrators are competent to determine their own jurisdiction and can therefore make their own ruling as to whether a particular proceeding falls under the scope of an arbitration agreement.[vii] However, in *Heller,* the Supreme Court found that courts should not refer a challenge of jurisdiction to an arbitrator in circumstances where there is a bona fide challenge to an arbitrator's jurisdiction and there is a real likelihood that doing so would result in the challenge never being heard.[viii] The Supreme Court held that in these circumstances, "*…a court may resolve whether the arbitrator has jurisdiction over the dispute and, in so doing, may thoroughly analyze the issues and record*."[ix]

In *Heller* the Supreme Court found that the costly filing fee and the added expense and inconvenience of travelling to the Netherlands meant that the Applicant would likely not proceed with the jurisdictional challenge before the arbitrator. The Supreme Court found that if the jurisdictional challenge was referred to the arbitrator, the Applicant would be barred from using the court process to challenge jurisdiction and the Applicant would effectively be barred from using the arbitration process as the costs and mechanism for doing so were prohibitive. Ultimately, the Supreme Court held that the arbitration agreement, which Uber sought to enforce was, "*…an arbitration agreement that makes it impossible for one party to arbitrate.*"[x]

The Supreme Court went on to state, *"[r]espect for arbitration is based on it being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all*."[xi]

Things to Consider When Drafting an Arbitration Agreement:

- Is there unequal bargaining power between the parties to the agreement?
- Is the agreement a standard form agreement incapable of being negotiated?
- Does the agreement impose foreign law or attempt to contract out of mandatory provisions of the *ESA*?
- Are the expected costs of the arbitration, including any upfront costs, specified in the agreement?
- Are there terms in the agreement that may create a barrier to arbitration? For example:
    - Are there disproportionately expensive fees?

- Is the location of the arbitration in an area that makes it difficult or unreasonable for one party to attend and participate?

- Is the arbitration inaccessible for some other reason?

- Have both parties had the opportunity to obtain independent legal advice?

For the full text of the Supreme Court of Canada's decision in *Uber Technologies Inc. v. Heller, see:* https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18406/index.do

We Are Ready to Help

If you have questions about the enforceability of an arbitration agreement our Commercial Litigation team is here to help.

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[i] *Uber Technologies Inc. v. Heller,* 2020 SCC 16, [*Heller*] at paragraph 2.
[ii] *Heller,* at paragraph 2.
[iii] *Heller,* at paragraph 15.
[iv] *Heller,* at paragraph 64.
[v] *Heller,* at paragraph 93.
[vi] *Heller,* at paragraph 94.
[vii] *Heller,* at paragraph 15, 34 and 35.
[viii] *Heller,* at paragraph 46 and 47.
[ix] *Heller,* at paragraph 46.
[x] *Heller,* at paragraph 4.
[xi] *Heller,* at paragraph 97.