

In the Aftermath of Uber v Heller: Balancing Contractual Freedoms with Access to Justice

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On 26 June 2020, the Supreme Court of Canada released its decision on *Uber Technologies Inc. v Heller* regarding the enforceability of mandatory arbitration clauses in an employment agreement and whether that could preclude a class action. Many have entered into these agreements in order to provide food delivery and rideshare services through the company's mobile applications.

David Heller, an UberEATS driver, entered into a standard form services agreement with Uber in June 2016. Mr. Heller claimed that Uber wrongly classified him as an independent contractor rather than an employee. As a result, Mr. Heller was not entitled to the benefits and protections afforded to employees under Ontario's *Employment Standards Act (ESA)*. In 2017, Mr. Heller commenced a class action against Uber alleging that the company violated the *ESA*. In response, Uber moved to stay the proceedings on the basis that Mr. Heller had signed a services agreement and therefore accepted the clause that requires any future disputes to be resolved through mediation and arbitration in the Netherlands and pursuant to Dutch law. The costs of commencing an arbitration proceeding against Uber would require Mr. Heller to pay an approximately USD \$14,500 administration fee as well as additional legal costs or other costs of participation. This amount represents a large portion of Mr. Heller's annual income.

Mr. Heller's position was twofold: a) the arbitration clause is invalid because it was unconscionable, and b) it purports to contract out of the mandatory provisions of the *ESA*, which directly violates section 5(1) of the *ESA*. The Ontario Court of Appeal held that the agreement was unconscionable based on the inequality of bargaining power between the two parties and the improvident cost of arbitration. The court did not determine the second issue of whether this was contrary to section 5(1) of the *ESA*.

Justices Abella and Rowe, writing for the majority, upheld the Court of Appeal's decision setting aside the arbitration clause in the agreement. The reason for setting aside was that there was an inequality of bargaining power that resulted in an improvident bargain.

The majority first discussed the applicable *Arbitration Act (AA)* in contrast to the *International Commercial Arbitration Act (ICAA)*, as well as who decides and when an arbitrator has jurisdiction or not. In holding that the arbitration in this case was international but not commercial, the majority characterized the dispute as a labour and employment matter. Consequently, the *AA* was the applicable arbitration legislation as labour and employment matters do not fall within the bounds of a commercial dispute under the *ICAA*.

Unconscionability is an equitable doctrine that is used to set aside unfair agreements resulting from an inequality of bargaining power. In this case, the majority held that the clause was unconscionable and set it aside.

The Court found that there was an inequality of bargaining power between Mr. Heller and Uber. Mr. Heller signed a standard form contract without any opportunity to negotiate its terms. Since the service agreement failed to include specific ICC rules outlining the associated fees, Mr. Heller could not have been expected to appreciate the full extent of the legal and financial implications of the arbitration clause. The Court further held that the improvidence of the arbitration clause has made arbitration nearly impossible for Mr. Heller to attend, rendering his contractual rights illusory.

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While the choice of the unconscionability doctrine is compelling, Justice Brown's concurring judgement provides some caution worth noting. The requirement of an inequality of bargaining power can be slightly misleading because rarely does a contract have two parties with equal bargaining power coming together in an agreement. Given that there is at least some difference in bargaining power in every contract, circumstances of mere inequality or substantial inequality are not enough on their own to warrant a finding of unconscionability. Moreover, there is a practical consequence to concluding that Uber's standard form contract has a procedural deficit sufficient to trigger unconscionability. There is a risk that the majority decision could open up every standard form contract to a review of its terms. Without providing further guidance on what an improvident transaction looks like, the majority has widened the judges' discretion when interpreting improvident transactions, inviting them to apply their own subjective understanding of fairness.

In our view, Justice Brown's most valuable contribution is his consideration of the interplay between the principle of access to justice and mandatory arbitration clauses. In particular, the central question became whether the arbitration clause served or prohibited access to dispute resolution. Not only does Uber have superior bargaining power, but the costs of commencing an arbitration impose undue hardship on Mr. Heller.

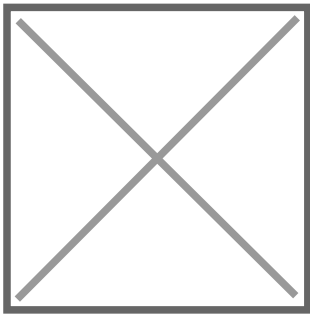
Similarly, the majority recognized access to justice in their conclusion that Mr. Heller would never access a resolution at arbitration due to the high fees of commencing the proceeding. However, Justice Brown's vision of access to justice rests on the foundations of public policy and not unconscionability.

It remains unclear the extent to which the public policy doctrine provides for a judicial overreach into freedom of contract and what the consequences of that may be. In her dissent, Justice Côté provides an alternative approach to access to justice, concluding that access to justice and enforcement of arbitration agreements are often complementary objectives. In that spirit, she concludes that a middle ground can be found that prioritizes arbitration: either staying the arbitration unless Uber paid the up-front costs, or severing the clause to remove the requirement that arbitration proceed according to ICC rules and in the Netherlands in order to avoid declaring the entire arbitration clause invalid. Justice Côté's dissent requires a more detailed review of the facts about whether the operation of the arbitration in terms of up-front costs and location in Europe, renders the arbitration too expensive to permit access to justice on a pure factual analysis. This is too narrow a review and renders the decision less applicable as a principle of law.

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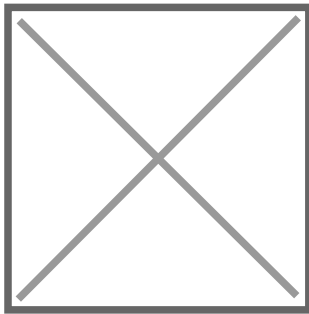


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