



Supreme Court of Canada Puts the Breaks on Uber's Arbitration Clause

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By Victor Krichker and Adam Aucoin

The Supreme Court of Canada recently released its decision in *Uber Technologies Inc. v. Heller*, a dispute between the large ridesharing and food delivery company and one of its drivers. The litigation centered on an arbitration clause in Uber's standard form contract with all of its drivers. Technology companies and web-based services that rely on arbitration clauses to limit their legal liability in their standard form contracts and online terms of service should pay attention to this decision as a cautionary tale.

The dispute began when Mr. Heller, one of Uber's drivers, sought employment benefits from the company under provincial employment legislation. Uber refused and relied on the arbitration clause in their online contract with Mr. Heller. The contract provided that drivers could not sue Uber in the event of any legal dispute with the company. Instead, the contract required Mr. Heller to resolve the dispute by arbitration in the Netherlands and pay almost \$15,000 USD just to start the arbitration process (he would also have to pay travel and legal fees). Mr. Heller argued that the arbitration clause was unconscionable, meaning so unfair that it was unenforceable.

There were two main issues at the Supreme Court of Canada. First, did an Ontario court have jurisdiction to determine the validity of the arbitration clause, or should the arbitrator decide that question? The Supreme Court ruled that an Ontario court could decide this issue. The Court found that Mr. Heller's challenge to the clause might never be resolved if left to the arbitrator due to the significant obstacles Mr. Heller would have to face to start the arbitration. The fees required just to start the arbitration process amounted to most of Mr. Heller's yearly income, even before taking into account the expenses of potentially traveling to the Netherlands and hiring local lawyers. In the Court's opinion, these obstacles had the effect of denying Mr. Heller access to justice if he were forced to comply with arbitration clause.

The second issue was whether the arbitration clause was unconscionable and therefore invalid. A court can decide not to enforce a contract or a particular contractual term where one party occupies a stronger position than the other and uses that position to secure an undue advantage or benefit, even if the stronger party does not do so intentionally. The decision called this a classic case of unconscionability, in part because there was a large imbalance in bargaining power between the parties. The Court found that standard form contracts have clear potential to create an inequality of bargaining power in favor of the party who drafted the contract. This potential was realized due to a significant gap in sophistication between Uber (a large corporation) and a food delivery person who would not have understood the financial and legal implications of agreeing to arbitration in the Netherlands. For example, the arbitration clause did not explain the \$15,000 fee. There was only a reference to arbitration under the Rules of Arbitration of the International Chamber of Commerce. The Court found that Mr. Heller could not have understood that he would be required to pay this fee to start the arbitration at the time he agreed to the standard form contract.

Arbitration clauses can be a useful tool for technology companies and web-based services seeking to reduce liability and avoid the uncertainty of class actions and other lawsuits. However, this decision highlights the risks of overly aggressive arbitration clauses. The Supreme Court has made it clear that courts should be suspicious of arbitration clauses in standard form contracts and should scrutinize such clauses carefully for unduly burdensome terms that create unreasonable barriers to starting and participating in the arbitration process. With respect to the specific aspects at issue in this decision, such standard form contract arbitration clauses should: (i) clearly state all requirements for arbitration; (ii) allow the other party to conduct the arbitration in a jurisdiction close to home and in the language of the country of



residence of the other party, and (iii) not impose financial obligations which could exceed the value of the remedy granted by the arbitrator.

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