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Commercial and Labour Law Considerations in the Uber Litigation

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Ontario Court of Appeal © David Mangan

The law of obligations and SMEs

With its first released decision of 2019, the Ontario (Canada) Court of Appeal added itself to the growing list of Uber litigation *Heller v Uber Technologies Inc* 2019 ONCA 1. Most often, Uber drivers challenge their employment status. Largely, courts have found against Uber; drivers fall into some aspect of the employment status framework. Beyond the negative, an accurate definition of their status remains to be made. In the UK, for example, Uber drivers have been found to be workers. Although the question remains in Ontario, *Heller* attends to the private law aspects that have so far not been considered.

Arbitration Clause

Heller (brought as a class action) raised another familiar question, the dispute resolution or arbitration clause. For Uber drivers in Ontario, the clause (reproduced in part below and found at [11] of the decision) applied Dutch law and referred any arbitration to Amsterdam:

‘Governing Law; Arbitration. Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws. . . . Any dispute, conflict or controversy howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules (“ICC Mediation Rules”). If such dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce (“ICC Arbitration Rules”). . . . The dispute shall be resolved by one (1) arbitrator appointed in accordance with ICC Rules. The place of arbitration shall be Amsterdam, The Netherlands. . . .’

Costs of arbitration compared to earnings

Pursuant to ICC Rules, drivers would be required to pay a non-refundable filing fee of $3000 USD in order to initiate mediation proceedings. If the dispute was valued at under $200,000 (USD), an additional administrative fee of $5000 (USD) would be applied. The cost of initiating the arbitration process was found to be approximately $14,500 CAD. Heller made between $400 and $600 CAD per week based upon weekly work hours totalling between 40 to 50. Annually he would earn between $20,800 to $31,200 CAD. If one thought the arbitration clause was unconscionable (or unreasonable), then you are following the Uber drivers' line of argument.

Heller brought out an important question in the *Uber* litigation: if we accept Uber's argument that these drivers are their own commercial entities, is this an instance of a larger entity taking advantage of a smaller and more vulnerable one? Much focus has been on classification of these drivers as employees (or workers); underscoring the paucity of thought to the question of common law argument that may be used by these drivers if they are commercial enterprises. This question must be viewed as one worth considering further because it has broader implications. *Heller* highlights an interesting conflict in the aims in commercial law as compared to labour law.

Commercial Law and SMEs

The Sale of Goods Act 1893 remains pivotal legislation for commercial law. The product of Sir Mackenzie Chalmers, this Act has formed the basis for commercial legislation in many common law jurisdictions. Ireland still relies upon it as current law (with many amendments); while the UK has brought in the 1979 successor. This longevity illustrated how Chalmers codified the lex mercatoria into the Act in a manner that was seen to serve commercial parties effectively. In doing so, a decision was made: to facilitate instead of regulate commercial agreements. Today, we see some strains on this founding ethos. Commercial parties have long been treated as homogenous; viewed as relatively equal parties for the purposes of contract. *Heller* draws attention to how this may not consistently be the case. Small to medium sized enterprises (SMEs) range from 1 to 250 employees. Their domestic economic importance stands out. They account for two-thirds of employers in the EU and 99.3%of private sector employers in the UK. As with the Uber drivers in *Heller*, what tools do these smaller entities have at common law?

Redress in Obligations

Looking at *Heller*, there is a hint of an argument in unconscionability, but the law remains unclear. Recall that the trial judge dismissed the unconscionability argument. This arbitration clause. was more of a forum selection as well as a choice of law provision. Therefore, this clause warranted broader interpretation.

For a Canadian matter, the addition of Dutch law raised questions. Had Uber simply relied upon geography to dissuade these Ontario drivers? Or, was there something advantageous to Dutch law? The latter consideration seems questionable. Civil law jurisdictions contain a more developed concept of good faith. Common law jurisdictions, such as Canada, do not. In fact, the Canadian Supreme Court only recognised an obligation of good faith performance of contracts in 2014. While Dutch Law does not have the concept of unconscionability as it was outlined in *Heller*, it has a robust interpretation of good faith: "Article 6:233 provides that a stipulation in general conditions may be annulled (either through an informal declaration by a party to the contract addressed to the other party or by judgment) if, taking into consideration all the circumstances of

the case, it is unreasonably onerous to the other party. But where that chapter is not applicable, e.g., because the unreasonable clause is not part of general conditions or because it is included in an international contract or in a labor contract to which that chapter does not apply (art. 6:245 and 247), the general rule of good faith regains its strength." And so, if reference to Dutch Law served only to complicate (put lightly) the dispute resolution process, *Heller* as a matter of the law of obligations prompts further thought on the question of the position of parties in facilitating contractual relations.

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