Federal Court of Appeal | Cour d'appel fédérale

Date: 20251007

Docket: A-228-24

Citation: 2025 FCA 183

CORAM: **WEBB J.A.**
LOCKE J.A.
MACTAVISH J.A.

BETWEEN:

ARTHUR LIN

Appellant

and

UBER CANADA INC., UBER TECHNOLOGIES, INC., UBER PORTIER CANADA INC., UBER CASTOR CANADA INC., JUST ORDER ENTERPRISES CORP., FAN TUAN HOLDING LTD., FANTUAN TECHNOLOGY LTD.

Respondents

Heard at Vancouver, British Columbia, on September 8, 2025.

Judgment delivered at Ottawa, Ontario, on October 7, 2025.

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

CONCURRED IN BY: WEBB J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] Arthur Lin commenced a proposed class proceeding against Uber Canada Inc., Uber Technologies, Inc., Uber Portier Canada Inc. and Uber Castor Canada Inc. (collectively "Uber"). Mr. Lin alleges that through its "Uber Eats" internet platform, Uber engages in the practice of representing a price for its food delivery service that is not attainable due to additional fees

charged, contrary to the prohibition on “drip pricing” contained in section 52 of the *Competition Act*, R.S.C. 1985, c. C-34.

[2] In a decision reported as 2024 FC 977, the Federal Court stayed Mr. Lin’s action in favour of arbitration, in accordance with the arbitration clause contained in the contract entered into by Mr. Lin when he opened his Uber Eats account. Mr. Lin appeals from the Federal Court’s judgment, asserting that the Federal Court erred in enforcing the arbitration clause, given that it was contrary to consumer protection legislation in several Canadian provinces.

[3] Mr. Lin also argues that section 25 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 operates as a further legislative override preventing the granting of a stay in favour of arbitration. As a result, Mr. Lin submits that the Federal Court should have severed the arbitration clause from the remainder of the contract between Uber and Mr. Lin and allowed his action to proceed in the Federal Court.

[4] Mr. Lin further submits that the arbitration clause in the Uber contract was incapable of performance, as the arbitration institute identified in the arbitration clause does not accept class proceedings. Finally, Mr. Lin submits that Uber’s arbitration clause was unconscionable.

[5] In careful and detailed reasons, the Federal Court rejected each of Mr. Lin’s arguments, concluding that provincial consumer protection legislation has no application to this case, nor does section 25 of the *Federal Courts Act* have any application here. The Federal Court further

found that Mr. Lin had not established that the arbitration clause was incapable of performance or that it was unconscionable.

[6] Consequently, the Federal Court concluded that Mr. Lin's action should be stayed, and that any *bona fide* challenge to the jurisdiction of the arbitrator to address his *Competition Act* claims and to the validity of the arbitration clause should be determined by the arbitrator in accordance with the "competence/competence" principle.

[7] I am satisfied that in staying Mr. Lin's action, the Federal Court made no error that warrants this Court's intervention. Consequently, I would dismiss the appeal.

I. The Process to be Followed in Determining whether a Claim Should be Stayed in Favour of Arbitration

[8] In *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, the Supreme Court confirmed that there is a "legislative and judicial preference for holding parties to arbitration agreements": at para. 10. Moreover, as the Federal Court observed in this case, stays in favour of arbitration where the parties have agreed to mandatory arbitration are inherently in the interest of justice. As a result, Canadian courts will only consider challenges to the jurisdiction of an arbitrator or the enforceability of an arbitration agreement in exceptional circumstances.

[9] The Courts have further held that the "competence-competence" principle mandates that subject to limited exceptions, any challenge to an arbitrator's jurisdiction should be decided by the arbitrator and not by the Courts: *Peace River*, above at paras. 39–41, *Seidel v. TELUS*

Communications Inc., 2011 SCC 15 at paras. 2, 23, 42; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 at paras. 84–86; *Difederico v. Amazon.com, Inc.*, 2023 FCA 165 at para. 33, leave to appeal ref'd 2024 CanLII 43121.

[10] That is, where the invalidity or unenforceability of an arbitration agreement is not clear (but is merely arguable), the matter should be resolved in the first instance by the arbitrator unless certain exceptions apply: *Peace River*, above at paras. 88–89; *Difederico*, above at paras. 34–35, 52.

[11] Courts will only consider adjudicating challenges to arbitration agreements where such challenges raise pure questions of law, or questions of mixed fact and law that require only a superficial consideration of the record: *Dell*, above at paras. 84–86; *Difederico*, above at para. 35.

[12] In *Uber Technologies Inc. v. Heller*, 2020 SCC 16, the Supreme Court identified a third exception to the competence/competence principle, holding that a court should not refer a *bona fide* challenge to the validity of an arbitration agreement or an arbitrator's jurisdiction to the arbitrator where doing so would make it impossible for one party to arbitrate or for the challenge to be resolved: at paras. 38–46.

[13] The Supreme Court identified a two-part test in *Peace River*, above at paras. 76–84, that should be used in determining whether an action should be stayed in favour of arbitration. Under the first part of the test, the party seeking to enforce the arbitration agreement must establish an

arguable case that all four of the technical prerequisites have been satisfied. If the party seeking the stay satisfies this part of the test, the Court should, subject to the second part of the test, stay the action. The second component of the *Peace River* test requires the party resisting arbitration to establish on a balance of probabilities that there is a statutory exception that would prevent staying the judicial proceeding in favour of arbitration.

[14] The first of the four technical prerequisites is that an arbitration agreement must exist, and the second is that a court proceeding must have been commenced by a party to the arbitration agreement. Thirdly, the court proceeding must relate to a matter that the parties had agreed to submit to arbitration, and, finally, the party seeking the stay must apply for the stay prior to taking any step in the court proceeding: *Peace River*, above paras. 81–86.

[15] While Mr. Lin took issue in the Federal Court with these prerequisites insofar as Uber Canada Inc. was concerned, there is now agreement that Uber has established an arguable case that all four of the technical prerequisites to the granting of a stay have been satisfied here. At issue in this appeal is whether Mr. Lin has demonstrated, on a balance of probabilities, the existence of a statutory exception preventing the Court from referring his action to an arbitrator.

[16] As the Federal Court observed in this case, statutory exceptions address more substantive reasons to object to or to invalidate an arbitration agreement. These include matters such as the agreement being “null, void, inoperative, or incapable of performance”, other legislative interventions, or situations where the subject of the dispute is incapable of being the subject of arbitration: Federal Court decision at para. 46, citing *Peace River*, above at paras. 86–87.

[17] If the party resisting arbitration cannot establish the existence of a statutory exception on a balance of probabilities, the Court must grant a stay of the judicial proceeding and cede jurisdiction to the arbitrator: *Peace River*, above at para. 79. The competence-competence principle further requires that where the invalidity or unenforceability of an arbitration agreement is not clear, but is merely arguable, the question should be resolved by the arbitrator: *Peace River*, at paras. 88–89.

[18] In other words, to deny a stay of proceedings, it must be clear from the record before the Court that deferring a matter to arbitration would create a real prospect that there would be a denial of access to justice. The mere possibility of this occurring is not enough to overcome the competence-competence principle. As arbitration clauses are presumptively valid, a clear case must be established to reverse the presumption of validity: *Peace River*, above at para. 89.

[19] With this understanding of the relevant legal principles, I turn next to address Mr. Lin's arguments in relation to the second branch of the *Peace River* test.

II. Mr. Lin's Arguments with Respect to the Second Branch of the *Peace River* Test

[20] As noted earlier, Mr. Lin cites three reasons why he says that the Federal Court erred in granting a stay in favour of arbitration in this case. First, he says that provincial consumer protection operates to preclude the enforcement of Uber's arbitration clause. Second, he submits that the arbitration clause is "incapable of being performed" as the ADR Institute of Canada, Inc. (ADRIC), the arbitral institution designated to decide disputes arising out of the Uber contract,

does not adjudicate class proceedings. Finally, Mr. Lin argues that Uber's arbitration clause is void as it is unconscionable.

[21] Each of these arguments will be addressed in turn.

A. *The Impact of Provincial Consumer Protection on Mr. Lin's Action*

[22] I agree with the parties that the impact of provincial consumer protection legislation on the enforceability of Uber's arbitration clause is a question of law that is reviewable on the correctness standard: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

[23] Given that the contract between Mr. Lin and Uber identifies Ontario law as the law governing the contract, Mr. Lin's submissions focused primarily on the impact of the Ontario *Consumer Protection Act*, 2002, S.O. 2002, c. 30, specifically subsections 7(2) and 8(1) thereof.

[24] Subsection 7(2) of the *Consumer Protection Act* provides that any term in a consumer contract that requires that disputes arising out of the agreement be submitted to arbitration "is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act".

[25] Mr. Lin observes that the text of Uber's arbitration clause states that "[u]nless prohibited by law", all disputes under the Uber Terms and Conditions are to be referred to arbitration. He

contends that the arbitration clause is prohibited by Ontario law, and that Uber is asking the Court to ignore the precondition set out in its own arbitration clause.

[26] The Federal Court rejected Mr. Lin's argument, finding that the Ontario *Consumer Protection Act* did not apply to invalidate the arbitration clause in the Uber contract in this proceeding. This conclusion was unquestionably correct.

[27] Quite apart from the fact that provincial legislation cannot limit the jurisdiction of the Federal Court, subsection 7(2) of the *Consumer Protection Act* expressly states that an arbitration clause is invalid "insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice" [my emphasis]. Mr. Lin's proposed class proceeding was brought in the Federal Court. It is not an action in Ontario's Superior Court of Justice, and subsection 7(2) thus has no application here.

[28] Moreover, subsection 7(2) of the *Consumer Protection Act* expressly deals with the enforcement of rights conferred by that legislation. Mr. Lin's action is brought under the federal *Competition Act* and does not seek to enforce any rights that he may have under the Ontario consumer protection legislation.

[29] Similarly, subsection 8(1) of the Ontario *Consumer Protection Act* provides that a consumer "may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992*". Consumers may also become a member of a class in such a proceeding in relation to a dispute arising from a consumer agreement "despite any term or acknowledgment

in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding".

[30] Mr. Lin argues that the Federal Court failed to address this provision, even though he raised it in argument. That is simply not the case. The Federal Court directly addressed Mr. Lin's argument at paragraph 66 of its reasons, finding that the reference to the "*Class Proceedings Act, 1992*" in subsection 8(1) of the *Consumer Protection Act* "indicate[s] that the Ontario legislature only intended to protect access to Ontario courts", and that it did not extend to address access to the Federal Court or the superior courts of other provinces.

[31] Insofar as the merits of Mr. Lin's argument with respect to subsection 8(1) of the Ontario *Consumer Protection Act* are concerned, suffice it to say that the Federal Court's finding that it had no application in this case was correct. This is not a proceeding under the Ontario *Class Proceedings Act*, 1992, S.O. 1992 c. 6, and Mr. Lin is not trying to start or join a class proceeding under that legislation. Subsection 8(1) of the Ontario *Consumer Protection Act* is thus irrelevant to this case.

[32] As the respondent observed, Mr. Lin could have avoided the arbitration clause in Uber's contract by bringing his proposed class proceeding in the Ontario Superior Court of Justice under the Ontario *Class Proceedings Act*. Having chosen not to do so, he must live with the consequences.

[33] Mr. Lin also argued (for the first time) that Uber's arbitration clause is unenforceable as it is contrary to Alberta and Saskatchewan consumer protection legislation. Once again, this legislation has no bearing on this case.

B. *The Effect of Section 25 of the Federal Courts Act*

[34] Mr. Lin additionally submits that section 25 of the *Federal Courts Act* operates as a further legislative override preventing the granting of a stay in favour of arbitration. Section 25 provides that the Federal Court has original jurisdiction in any case in which a claim for relief is made or a remedy is sought under or by virtue of the laws of Canada "if no other court constituted, established or continued under any of the *Constitution Acts, 1867 to 1982* has jurisdiction in respect of that claim or remedy".

[35] While Mr. Lin raised this issue before the Federal Court and in his Notice of Appeal in this Court, he made no mention of it in the memorandum of fact and law that he submitted in support of his appeal. From this, Uber quite reasonably understood that Mr. Lin had abandoned the argument, noting at paragraph 23 of its memorandum that the Federal Court had dismissed Mr. Lin's section 25 argument and that he was not pursuing the issue on appeal. Mr. Lin did nothing in advance of the hearing to disabuse Uber of this understanding.

[36] One of the principal functions of a memorandum of fact and law is to alert the opposing party to the arguments of the party submitting the memorandum, so as to afford the responding party a fair opportunity to address those arguments.

[37] Consequently, the jurisprudence has clearly established that only arguments contained in a party's memorandum of fact and law should be advanced in oral argument: *Kilback v. Canada*, 2023 FCA 96 at para. 41; *Bridgen v. Canada (Correctional Service)*, 2014 FCA 237 at para. 35; *Sandhu v. Canada (Citizenship and Immigration)*, 2000 CanLII 15526 (FCA), [2000] F.C.J. No 902 at para. 4; *Sibomana v. Canada*, 2020 FCA 57 at para. 6. Accordingly, it would be both unfair to Uber and inappropriate for us to consider Mr. Lin's section 25 argument, which, for the reasons given by the Federal Court at paragraphs 89-103 of its decision, has no merit in any event.

C. *Conclusion with Respect to the Alleged Legislative Overrides*

[38] I have thus concluded that the Federal Court correctly found that Mr. Lin had not established that there is legislation that would override Uber's arbitration clause, whether it be under the Ontario *Consumer Protection Act,* other provincial consumer protection legislation or section 25 of the *Federal Courts Act*.

[39] Given the Federal Court's finding on this issue, there was no need for it to consider the severance issue, and it did not err in declining to do so.

D. *Was the Arbitration Clause Incapable of Performance?*

[40] Mr. Lin also contends that the arbitration clause in the Uber Eats contract was incapable of performance as ADRIC does not accept class proceedings. Citing the Supreme Court's

decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37 at paras. 19-26, Mr. Lin submits that this is an issue to which the correctness standard of review should be applied. *Ledcor* is, however, clearly distinguishable from this case.

[41] The issue in *Ledcor* was the interpretation of an exclusion clause in a standard form builders' risk insurance policy. It was in this context that the Supreme Court observed that the interpretation of a standard form contract "is of precedential value", and that "there is no meaningful factual matrix that is specific to the parties to assist the interpretation process". Consequently, the Supreme Court determined that such an interpretation "is better characterized as a question of law subject to correctness review": at para. 24.

[42] There is, however, no disagreement between the parties in this case as to the proper interpretation of Uber's arbitration clause. It means exactly what it says. The question that divides the parties is whether the apparent inability of Mr. Lin to pursue a class proceeding through the arbitration process means that the arbitration clause is incapable of performance. This is a question of mixed fact and law – one that is reviewable on the palpable and overriding error standard: *Williams v. Amazon.com Inc*., 2023 BCCA 314, at paras. 54-60.

[43] As noted earlier, Uber's arbitration clause identifies ADRIC as the arbitral institution that is to decide disputes arising out of the Uber contract. Mr. Lin's counsel evidently made inquiries of ADRIC, and was advised by ADRIC's Arbitration Administrator that it cannot accept cases such as Mr. Lin's proposed class proceeding, and that it does not currently offer any support for class arbitrations. As noted earlier, Mr. Lin contends that this renders Uber's arbitration clause

incapable of performance. The Federal Court did not agree, and I have not been persuaded that the Federal Court erred in coming to this conclusion.

[44] In finding that Mr. Lin had not established that Uber's arbitration clause was incapable of performance, the Federal Court observed that courts have repeatedly held that class action procedures cannot override a party's substantive right to arbitrate. For example, in *Murphy v. Amway Canada Corp.*, 2011 FC 1341 at para. 46, aff'd 2013 FCA 38, the Federal Court observed that "class actions cannot serve as a means of circumventing an agreement to arbitrate". Indeed, this Court recently confirmed that mandatory arbitration clauses will be enforced, even where a plaintiff wants to pursue a class proceeding: *Difederico*, above at para. 81.

[45] An arbitration agreement will only be incapable of performance when "it is impossible for the parties to obtain the specific arbitral procedures for which they bargained": *Peace River*, above at para. 145. It would be open to Mr. Lin to have his personal claim under the *Competition Act* arbitrated by ADRIC, which is precisely the process for which he had bargained.

[46] Moreover, class proceedings are procedural vehicles that neither modify nor create substantive rights: *Bisaillon v. Concordia University*, 2006 SCC 19 at para. 17. Indeed, if Mr. Lin's argument were accepted, any plaintiff could avoid any arbitration clause merely by filing a proposed class proceeding.

[47] It should also be noted that the Federal Court did not definitively find that that Uber's arbitration clause is not incapable of performance because ADRIC will not deal with class

proceedings. Rather, it found that Mr. Lin had not established that the arbitration agreement was clearly incapable of being performed. Consequently, the Federal Court found that, at the very least, the question of whether the arbitration clause is incapable of performance should be decided by the arbitrator in accordance with the competence-competence principle.

III. The Unconscionability Arguments

[48] Mr. Lin's final argument is that the Federal Court erred in finding that Uber's arbitration clause was not unconscionable. He makes several submissions in support of this contention, claiming first that the Court erred in considering unconscionability only from the perspective of Mr. Lin himself, and not that of the "average consumer" or the putative class as a whole.

[49] Mr. Lin further argues that there was an inequality of bargaining power and a "gulf in sophistication" between Uber and class members that was sufficient to render the arbitration clause unconscionable. Lastly, Mr. Lin says that the arbitration clause constituted an improvident bargain between Uber and the members of the putative class.

[50] I will deal with each of these arguments in turn. Before doing so, however, it is first necessary to address the standard of review with respect to the unconscionability issue.

A. *The Standard of Review to be Applied to the Unconscionability Issue*

[51] Mr. Lin submits that correctness is the appropriate standard of review to be applied to the question of whether the Uber arbitration clause is unconscionable.

[52] I do not agree.

[53] As the British Columbia Court of Appeal observed in *Williams*, above, a finding that an arbitration agreement is not unconscionable involves a question or questions of mixed fact and law. As a result, it is subject to review on the deferential standard of palpable and overriding error: at paras. 54-56. This is because the unconscionability inquiry is contextual and is necessarily informed by the facts of the case: *Williams*, above at para. 57.

[54] By way of example, the Court noted in *Williams* that in order to assess improvidence (which is a component of the unconscionability analysis), the arbitration agreement "must be 'read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties'": *Williams*, above at para. 57, citing *Heller*, above at para. 75. See also paras. 77, 78, 79, 122, 130, 131, 134, 136 and 170 of *Heller*, which confirm the contextual nature of the unconscionability analysis.

[55] The British Columbia Court of Appeal further observed in *Williams* that the fact that an arbitration clause forms part of a contract of adhesion "does not change the factual and legal

nature of the unconscionability … inquir[y]". Rather, "it introduces a contextual feature to the case that informs the analyses": *Williams*, above at para. 58.

[56] Similarly, in *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, the Supreme Court held that the question of whether an arbitration clause is abusive "is a mixed question of law and fact", the answer to which "would apparently require a probing factual inquiry, including cross-examination", and that it "would go far beyond a superficial examination of the documentary evidence": at para. 15. See also *Irwin v. Protiviti*, 2022 ONCA 533 at para. 12.

[57] Given that the unconscionability inquiry involves a question of mixed fact and law, I find that it is reviewable for palpable and overriding error: *Housen*, above at paras. 8-10.

B. *The Principles Governing Unconscionable Arbitration Agreements*

[58] The Supreme Court addressed the principles that should govern the determination of whether an arbitration agreement is unconscionable in *Heller*, above. There, the Court stated that there are two elements that must be satisfied to establish unconscionability. First, it must be established that there is an inequality in the positions of the parties, and second, that this inequality resulted in the weaker party entering into an improvident bargain: *Heller*, above at para. 64. Both elements must be established to render an arbitration agreement unconscionable and thus invalid: *Heller*, above at para. 74.

[59] Moreover, to succeed in establishing an inequality of bargaining power sufficient to render a contractual term unconscionable, the party seeking to avoid the contractual term must demonstrate that "the law's normal assumptions about free bargaining either no longer hold substantially true or are incapable of being fairly applied": *Heller*, above at para. 72.

[60] Before addressing the questions of inequality of bargaining power and improvidence, however, it is first necessary to address Mr. Lin's claim that the Federal Court erred in considering the question of unconscionability from the wrong perspective.

C. *Whose Perspective is to be Considered in Assessing Unconscionability?*

[61] Mr. Lin submits that the Federal Court erred in assessing the question of whether Uber's arbitration clause was unconscionable solely from the perspective of Mr. Lin himself, and that the Court failed to have regard to the perspective of the typical consumer or that of members of the putative class. In support of this argument, Mr. Lin relies on the decision of the Court of Appeal of Ontario in *Lochan v. Binance Holdings Limited*, 2024 ONCA 784.

[62] Mr. Lin notes that in *Lochan*, the Court held that that the unconscionability analysis "did not require fact-finding specific to the representative plaintiffs" but could instead "be considered on a review of the documentary record and the consideration of the types of disputes likely to arise under the arbitration clause at issue": at para. 23. Mr. Lin further submits that *Lochan* determined that it is correct to consider unconscionability from the perspective of the "average purchasers of cryptocurrency" rather than that of the respondents "who were representative

plaintiffs in the class action and engaged in larger value purchases than the average cryptocurrency buyer”: *Lochan*, above at paras. 25-26.

[63] In order to address Mr. Lin’s argument, it is first necessary to clarify what it was that the Court actually said in *Lochan*.

[64] The Court of Appeal of Ontario did not state in *Lochan* that unconscionability must necessarily be assessed objectively, from the perspective of a “typical consumer”. Rather, the Court held only that the motion judge’s consideration of the average cryptocurrency investor’s perspective in that case did not constitute a palpable and overriding error. Moreover, the motion judge in *Lochan* had considered the perspective of both the representative plaintiffs and that of other investors.

[65] In *Heller*, the Supreme Court examined the situation of Mr. Heller himself in its unconscionability analysis. The Court compared Mr. Heller’s annual income to the cost of arbitration, confirming that the unconscionability analysis requires a consideration of the situation of the parties themselves: above at paras. 65-79.

[66] Similarly, in *Difederico*, this Court considered whether there was evidence of the plaintiff contracting party’s dependence on the services provided by the defendant, and not whether there was evidence of the average contracting party’s dependence on the services provided: above at paras. 55-56.

[67] That said, the more fundamental problem with Mr. Lin's argument is that there is no evidence in the record as to the perspective of the "typical consumer" or that of members of the putative class. Nor is there any evidence that would suggest that Mr. Lin's personal situation differed in any way from that of the "typical consumer" or class member.

[68] Thus, the analysis would not have changed in this case, whether the perspective to be considered in assessing unconscionability was that of Mr. Lin or that of members of the putative class. Mr. Lin has therefore failed to clearly establish that the Federal Court committed a palpable and overriding error in this regard.

D. *Was there an Inequality of Bargaining Power Between Uber and the Members of the Putative Class?*

[69] Mr. Lin's second unconscionability argument is that the Federal Court erred in finding that he had not established that there was an inequality of bargaining power between Uber and its customers that would justify a finding that the arbitration clause was unconscionable.

[70] Mr. Lin observed that in *Heller*, the Supreme Court had no difficulty in finding that there was a clear inequality of bargaining power between Uber and its drivers. In contrast, Mr. Lin says that in this case, the Federal Court erred in focusing its analysis on two specific situations where an inequality of bargaining of power will arise: where there is a relationship of dependency and cases where there is an inability on the part of a party to comprehend the full import of the contractual terms.

[71] According to Mr. Lin, the Federal Court failed to consider whether "there was a gulf in sophistication" between Mr. Lin as a consumer and Uber - a publicly traded international company. This was an error, he says, given that the "gulf in sophistication" appears to be the basis on which the Supreme Court found an inequality of bargaining power in *Heller*.

[72] Mr. Lin submits that the Federal Court further erred by requiring evidence from him as to his understanding of the Uber contract, and as to whether he had read it at the time that he contracted with Uber. The Federal Court also erred, Mr. Lin claims, by overlooking a material passage from the Manitoba Court of Appeal's decision in *Pokornik v. SkipTheDishes Restaurant Services Inc*., 2024 MBCA 3 at para. 23, which stated that the nature of the contract is a significant factor in the unconscionability analysis.

[73] Mr. Lin argues that it is unclear how the Federal Court could have assumed that a typical class member would read a 20-page contract for a food delivery service that cost only a few dollars. He contends that a contract with Uber for its food delivery service is like a purchase at a fast-food restaurant, and that it would not be reasonable or feasible to expect a customer to read and understand a 20-page contract while waiting in line for a hamburger.

[74] Finally, Mr. Lin argues that although the Uber arbitration clause states that "[y]ou are free to get advice or representation from a lawyer about this arbitration requirement", this statement is illusory. No reasonable person would seek legal advice or representation to review a food delivery service contract, just as no reasonable consumer would seek legal advice or representation for a fast-food transaction.

[75] I have not been persuaded that the Federal Court erred as alleged.

[76] As the Supreme Court observed in *Heller*, for there to be an inequality of bargaining power, one party must be in a position where they "cannot adequately protect their interests in the contracting process": above at para. 66. While differences in "wealth, knowledge, or experience" might constitute inequality in some cases, "inequality encompasses more than just those attributes": *Heller*, above at para. 67.

[77] In cases where an inequality of bargaining power is established, the Court will often have found that the relevant disadvantages "impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both": *Heller*, above para. 68. Citing a "rescue at sea" scenario, the Court found that this will be especially so where the weaker party is so dependent on the stronger party that they would suffer serious consequences if they did not to agree to the contract.

[78] That is, where the weaker party would accept almost any terms in a contract because the consequences of failing to agree are so dire, "equity intervenes to prevent a contracting party from gaining too great an advantage from the weaker party's unfortunate situation": *Heller*, above at para. 69.

[79] Applying these principles in this case, the Federal Court found that there were material differences between this situation and *Heller*. The Court observed that the unconscionability analysis "focuses on the vulnerability of the weaker party and any potential unfairness within a

contract or its terms", finding that no such vulnerability or unfairness existed in this case: Federal Court reasons at para. 166.

[80] This was a finding that was open to the Federal Court on the record before it, and no palpable and overriding error has been established in this regard. In contrast to the employment context that existed in *Heller*, where the parties contracting with Uber were dependent on the company for their livelihood, no situation of dependence had been demonstrated here. There was no evidence that either Mr. Lin or the members of the putative class were dependent on the Uber Eats platform for food delivery services. Indeed, Mr. Lin does not take issue with the Court's finding in this regard.

[81] Rather, Mr. Lin asserts that the Federal Court erred in failing to have regard to the "gulf in sophistication" between members of the class and Uber, submitting that it was such as to render Mr. Lin and others unable to understand and appreciate the contractual terms.

[82] There is no merit to this argument.

[83] As the respondent suggests, Mr. Lin is essentially arguing that whenever a standard form contract is entered into between a consumer and a multinational corporation, it will inherently be the result of an inequality in bargaining power. This argument has, however, been repeatedly rejected by the Courts; see, for example, *Heller*, above at para. 88; *Difederico*, above at para. 55-56; *Petty v. Niantic Inc*., 2023 BCCA 315, paras. 59-66, leave to appeal ref'd 2024 CanLII 43098.

[84] Moreover, the Federal Court expressly addressed Mr. Lin's "gulf in sophistication" argument, noting that it was not enough to simply assert that a standard form contract was used to establish that it was unconscionable. The Court found that the record before it did not demonstrate that Mr. Lin was unable to understand the arbitration agreement when he agreed to it, or that there was a "material information deficit" between the parties: Federal Court reasons at para. 171. Mr. Lin has not identified a palpable and overriding error in the Court's finding in this regard. Indeed, the Manitoba Court of Appeal has held that the presence of a standard form contract that includes an arbitration clause is not, by itself, determinative of the unconscionability question: *Pokornik*, above at para 85.

[85] The Federal Court was also not persuaded that there was any misunderstanding as to the Terms and Conditions of the Uber contract, or any cognitive asymmetry between the parties. It concluded that Mr. Lin had access to the Uber Terms and Conditions and the ADRIC Rules, that those documents sufficiently and adequately described the arbitration process, and that Mr. Lin could have understood them. Mr. Lin has not identified a palpable and overriding error on the part of the Federal Court in coming to those conclusions.

[86] There is no evidence before the Court that Mr. Lin was vulnerable or dependent in any way on Uber's food delivery services as a source of nourishment, or that other class members were vulnerable or so dependent. There is also nothing in the record to suggest that the "typical consumer" or members of the putative class would misunderstand the arbitration clause. Nor is there evidence in the record to support Mr. Lin's claim that there is a "gulf in sophistication"

between Uber and members of the putative class that was sufficient to render the arbitration clause unconscionable.

[87] As the respondent observes, Mr. Lin's real complaint appears to be that it was unreasonable for the Federal Court to assume that any user of Uber Eats' food delivery services would ever read the Terms and Conditions in the Uber contract. But that is not what the Federal Court did. The Court concluded that Mr. Lin could have read and understood the effect of the Terms and Conditions and the ADRIC Rules (which were attached to the Terms and Conditions by reference or by clicking on a link). Whether he read the documents or not is beside the point. The law does not require a defendant to prove that a party actually read a contract they agreed to. What matters for the unconscionability analysis is whether the contract was available and understandable, and not whether it was read.

[88] I am thus not persuaded that the Federal Court erred in finding that Mr. Lin had failed to establish that there was an inequality of bargaining power in this case that would justify a finding that the arbitration clause in the Uber contract is unconscionable.

[89] Given that a party seeking to avoid an arbitration agreement must establish both that there was an inequality of bargaining power and that this resulted in an improvident bargain, Mr. Lin's failure to establish that there was an inequality of bargaining power in this case provides a sufficient basis for dismissing his unconscionability argument. I have, however, also not been persuaded that the Federal Court erred in finding that the Uber contract did not result in an improvident bargain. This issue will be addressed next.

E. *Does the Uber Contract Result in an Improvident Bargain?*

[90] As noted earlier, the second branch of the unconscionability analysis asks whether the bargain created by the contract in question is improvident. A contract will be improvident if it unduly advantages the stronger party or unduly disadvantages the weaker party: *Heller*, above at para. 74. Improvidence is measured at the time of contract formation, and not from the time that a party files a claim: *Heller*, above at paras. 74–75.

[91] Where, as here, it is argued that a party did not appreciate the significance of a contractual term, the focus is on whether that term is objectively unfair, having regard to the surrounding context: *Heller*, above at paras. 74-77.

[92] Mr. Lin contends that the Uber arbitration clause results in improvident bargains with consumers because the size of individual claims are small, it would be uneconomic to litigate individual claims, and the cost of arbitration would greatly outweigh any potential recovery.

[93] Mr. Lin further notes that Uber's arbitration clause directs consumers to ADRIC's website, where the only arbitration fee that is explicitly identified is the initial filing fee of $350.00 for claims of less than $10,000.00. The full cost of an arbitration is not disclosed on the website, which states that "individual practitioners, not the Institute, set their own fees for mediation or arbitration (generally an hourly rate) based on their experience, skill and profession, and on the matters in dispute".

[94] This, Mr. Lin says, effectively asks the consumer to sign a blank cheque in favor of the arbitrator.

[95] The Federal Court found that while the Uber arbitration clause could be improved to make it more favorable to consumers, it was not persuaded that the clause unduly advantaged Uber or unduly disadvantaged Mr. Lin, or that it effectively denied him access to justice: Federal Court reasons at para. 175.

[96] In coming to this conclusion, the Federal Court noted that the arbitration clause in this case was materially different from the arbitration agreement that the Supreme Court found to be invalid in *Heller*. In particular, the filing fees in *Heller* were $14,500.00 (USD), whereas they were $350.00 in this case. Moreover, the laws of the Netherlands governed disputes under the *Heller* arbitration agreement, whereas the laws of Ontario govern disputes under the arbitration clause in this case.

[97] In addition, arbitration hearings held in accordance with the *Heller* arbitration agreement had to take place in person in the Netherlands, whereas in this case, hearings and meetings under the Uber arbitration clause could be held in any location the arbitrator considered to be convenient or necessary. Such hearings could also be conducted by telephone, email, the internet, videoconferencing, or other communication methods, if the parties agreed or the arbitrator so directed.

[98] While acknowledging that the fees for the arbitrator were not explicitly spelled out in the arbitration clause, the Federal Court found that there were good reasons for this as there were many factors that could affect an arbitrator's fees. Examples cited by the Federal Court included the fact that an arbitrator may agree to hear a case on a fixed-fee basis, a case may be summarily dismissed, or a plaintiff may lead irrelevant evidence that must be dispensed with.

[99] Mr. Lin asserts that the Uber arbitration clause is unconscionable because it is an uneconomic way of resolving disputes, submitting that a class action is the only viable way of proceeding in a case such as this. However, the relevant consideration for the Court on a stay application in such circumstances is not whether the costs of deciding the dispute on its merits is an economic way of resolving the matter. The question is whether, based on a limited review of the evidence, the party resisting the stay has established that, if the stay is granted, there is a real prospect that the jurisdictional challenge may never be resolved by the arbitrator under the competence-competence principle: *Heller*, above at para. 44; *Spark Event Rentals Ltd. v. Google LLC*, 2024 BCCA 148 at paras. 57-63; *Difederico v. Amazon.com, Inc*., 2022 FC 1256 at para. 110.

[100] There was little evidence before the Federal Court with respect to Mr. Lin's financial situation. His affidavit simply states that he had been advised by his counsel that "the cost of pursuing this Action individually would be hundreds of thousands of dollars" and that he "could not afford to pay for legal counsel, and even if [he] could, it would not be economic for [him] to do so". Mr. Lin provided no other information with respect to his financial circumstances.

[101] As noted, the question at this stage is not whether it would be economic for Mr. Lin to pursue the merits of his claim against Uber through the arbitration process, but rather whether he had established that, if the stay were granted, there is a real prospect that the jurisdictional challenge would never be resolved by the arbitrator.

[102] In such circumstances, the Federal Court did not err in finding that Mr. Lin had not established that the arbitration fees that would be incurred in resolving the challenge to the arbitrator's jurisdiction would create a brick wall, thereby creating a real prospect that the jurisdictional question would not be resolved.

F. *Conclusion on Unconscionability*

[103] As was the case with respect to whether the arbitration clause was incapable of performance, the Federal Court did not finally decide question of unconscionability. It merely found that Mr. Lin had not established that the Uber arbitration agreement was clearly unconscionable. Consequently, the Federal Court did not err in determining that the unconscionability question should be decided by the arbitrator, in accordance with the competence-competence principle.

IV. Overall Conclusion

[104] Given my finding that Mr. Lin has not established that the Federal Court erred in granting a stay of his action, I would dismiss this appeal. In accordance with Rule 334.39 of the *Federal Courts Rules*, S.O.R./98-106, I would make no order as to costs.

"Anne L. Mactavish"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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