KOSKIE MINSKY

JUSTICE MATTERS

Employment Law

This is a summary of employment law matters of interest, from a litigator's point of view.

Choice of Law Clause Enforced

What will an Ontario Court do when faced with a California based employee who is seeking to enforce rights pursuant to a contract against his American employer, for termination of his employment? If his employment contract provides that the contract would be governed by, and construed in accordance with the laws of the Province of Ontario (a "choice of law clause"), it will hear the dispute and decide it as a local matter.

The employee had commenced employment approximately 12 years before his termination. The employee was a Canadian, hired to relocate and work in the U.S. for a U.S. company as its Vice President of Operations, following two and a half years of performing consulting services for the Canadian entity. The employment contract for services in California included a termination provision that detailed entitlements in the event of a termination without cause during the first three years. It provided, should that occur, the employee would receive 12 months' notice. Thereafter, it was silent. However, the agreement contained a choice of law clause. The 63 year old employee, upon termination, commenced proceedings in Ontario, seeking 24 months' notice.

The Court declined to interfere with the intention of the parties and it applied the principles of Ontario common law to award the employee damages for 22 months' reasonable notice. The Honourable Mr. Justice Diamond relied upon the principle established by Justice Cullity of the Court of Appeal that "[a] choice of law clause often bears no relationship to the location in which the contract is to be performed. A governing law can thus be the law intended by the parties. As long as that choice is '*bona fide* and legal, and there is no reason for avoiding the choice on the ground of public policy', then the law will govern the contract."

Justice Diamond held that "granting [the employee] the relief sought would not violate conceptions of essential justice and morality…I cannot conclude that such public policy grounds exist."

The stage is set. In the writer's view, this is not a floodgate to the incorporation of foreign laws into

Canadian employment contracts for those employed here in Canada. They would still need to comply with legislated statutory minimums established by the province in which the employee was employed. Further, no doubt public policy and concepts of justice would derail legal ideology in some other jurisdictions such as perhaps: specific performance, multiple short- term contracts, or "at will" employment.

We are therefore not likely to see Ontario courts willing to enforce employment contracts to be "governed pursuant to the laws of Mexico" any time soon.

The other concept though is that while choice of law and forum for determination are two separate provisions in contract drafting, we could unwittingly become a jurisdiction labored with the cost of determination of disputes between parties who, as here, have no real and substantial connection to Ontario, in order to avoid the use of expert evidence on Ontario law in the jurisdiction in which the contract was entered into and performed.

McMichael v. The New Zealand & Australian Lamb Company, 2018 ONSC 5422 (CanLII)

Uber Class Action Back in Gear

In the Ontario Court of Appeal's first decision of the year, *Heller v Uber*, 2019 ONCA 1, the court held that an arbitration clause in the terms that individual drivers are required to "accept" to become drivers for Uber breached the prohibition on contracting out of the *Employment Standards Act* (*ESA*), and was otherwise unconscionable at common law.

The appeal arose in the context of a proposed class action. The plaintiff Uber driver sought a declaration that Uber drivers are employees of Uber and therefore governed by the *ESA*. The claim also sought damages in relation to alleged breaches of the *ESA*, including with respect to minimum wage, overtime, and vacation pay.

In the decision under appeal, the Superior Court granted a stay of the proceedings due to the arbitration clause. The clause stipulated that the agreement "shall be exclusively governed by and construed in accordance with the laws of The Netherlands", and required that any "dispute, conflict, or controversy" arising out of or relating to the agreement must be submitted for mediation proceedings in the Netherlands. Justice Perell held that there was a *prima facie* case that an arbitrator in the Netherlands had jurisdiction over the dispute. Further, he held that the "competence-competence" principle applied, so the arbitrator had the power to rule with respect to his or her jurisdiction. Justice Perell also rejected the plaintiff's argument that the arbitration clause was unconscionable.

The Court of Appeal overturned the stay. Justice Nordheimer first considered whether the arbitration clause amounted to contracting out of the *ESA*. Section 5 of the *ESA* provides that no employee or

employer may contract out of or waive an employment standard, unless by a provision or contract that provides a greater right in relation to that employment standard. An employee may contract to earn more than minimum wage, for example, but not less.

Justice Nordheimer held that the arbitration clause amounted to a contracting out of an employees' right to make a complaint to the Ministry of Labour regarding an alleged breach of the *ESA*, and to have that complaint investigated by the Ministry. He held that the arbitration process provided for by the arbitration clause did not provide a greater right, and that the clause was therefore a violation of section 5 of the *ESA*.

With respect to unconscionability, the evidence was that the administrative costs for a driver to participate in arbitration were at least US$14,500. This amount did not include legal fees, or accommodation in the Netherlands. The appellant driver earned approximately $20-30,000 per year, before taxes and expenses. Justice Nordheimer also observed that the clause was not a standard arbitration clause. It also amounted to a forum selection provision and a choice of laws provision.

Justice Nordheimer held that the impugned terms met the four-part test for unconscionability set out in *Titus v. William F. Cooke Enterprises Inc.*: (1) a grossly unfair and improvident transaction; (2) a party's lack of independent legal advice or other suitable advice; (3) an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and (4) the other party's knowingly taking advantage of this vulnerability.**[1]** The court did not determine whether a two-part test for unconscionability should apply as either version of the test was made out on the record.

Justice Nordheimer concluded by observing that, for the purposes of his analysis, there is no reasonable distinction to be made between the appellant driver and a consumer. He quotes the Supreme Court in *Douez v. Facebook, Inc.*, which held that "foreign selection clauses often operate to defeat consumer claims,"**[2]** and observes that the same can be said of this clause, "it operates to defeat the very claims it purports to resolve."**[3]** Thus, he concludes that if Uber is correct and their drivers are not employees, the relationship may nevertheless attract protection due to the inequality of bargaining power between the parties.

[1] 2007 ONCA 573 (CanLII), 284 D.L.R. (4th) 734, at para. 38, recently affirmed in *Phoenix Interactive Design Inc. v. Alterinvest II Fund L.P.*, 2018 ONCA 98 (CanLII), 420 D.L.R. (4th) 335.

[2] 2017 SCC 33 (CanLII), [2017] 1 S.C.R. 751 at para 62.

[3] para 70.

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Nancy Shapiro, Partner

Padraigin Murphy, Associate

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