SCC File No. 38534

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

UBER TECHNOLOGIES INC., UBER CANADA INC., and RASIER OPERATIONS B.V.

Appellants
(Respondents)

– and –

DAVID HELLER

Respondent
(Appellant)

and

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Interveners

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(Pursuant to Rules 37 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I – STATEMENT OF RELEVANT FACTS AND OVERVIEW

1. The purpose of Arbitration Place's intervention is to address the principles applicable to the enforceability of international arbitration agreements, not the specific facts of this case. Overarching the principles at issue is the need to develop and apply an approach that respects: (a) the common law imperatives governing the interpretation and application of arbitration agreements *qua* contracts; and (b) the international law imperatives arising from the *Model Law*[1] and the principles it embodies regarding the enforcement of international arbitration agreements.

2. Arbitration Place's core submission is that the *Model Law* (and the *New York Convention*[2]) and the international consensus surrounding the proper interpretation and implementation of those instruments, generally provide the Court with the tools to uphold the parties' commitment to arbitrate, at least in part. That analysis is one that balances the competing, and equally worthy, applicable legal values in a fair and principled manner that does not treat the question as simply being whether the arbitration agreement ought to be enforced as-is, or rescinded in its totality.

3. In particular, even if parties seek to implement their commitment to arbitrate in a deficient manner, it need not always be swept away entirely. In most cases, it will be possible to respect the parties' commitment to arbitrate, while severing or refusing to enforce the aspects of that commitment that infringe upon other legal principles (such as the concept of unconscionability). It need not always be a binary choice of whether to enforce, or not enforce, the parties' commitment to arbitrate as a whole.

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[1] Ontario *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sch 5 (the "***ICAA***") implements the *Model Law on International Commercial Arbitration*, adopted by the United Nations Commission on International Trade Law (**UNCITRAL**) on 21 June 1985 (the "***Model Law***").

[2] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, adopted by the United Nations Conference on International Commercial Arbitration in New York on 10 June 1958 ("***New York Convention***").

4. As discussed further below, international authorities applying the *Model Law*, including by reference to the *New York Convention*, demonstrate that where the parties' commitment to arbitrate their disputes is evident (as is the case here), but they have implemented their commitment in a way that may be legally or practically problematic, their commitment to arbitrate can and should still be upheld, even if on terms.

PART II – STATEMENT OF ISSUES

5. This appeal engages the competence-competence principle – an internationally-recognized principle that generally an arbitral tribunal, not a court, should initially determine matters respecting arbitration agreements – and the concept of unconscionability as it relates to international arbitration agreements. Arbitration Place's submissions are concerned with the following issues of principle that should be taken into account in addressing these issues:

(a) it is important that Canada's *Model Law*-based international arbitration legislation be applied to international arbitrations in Canada on a consistent basis;

(b) whenever possible, courts should adopt a minimally-interventionist approach that respects both the test for unconscionability (however that is determined) and the international law imperative – exemplified by the *ICAA*'s stay provisions and the *Model Law*'s international implementation and interpretation – to enforce international arbitration agreements; and

(c) preserving the internationally accepted principle of *competence-competenc*e, in its full scope, is important for the maintenance of Canada's reputation as a country developing world-leading international arbitration jurisprudence.

6. Arbitration Place submits that these principles should inform the Court's decision with respect to the issues in this appeal.

PART III – STATEMENT OF ARGUMENT

A. Overview

7. Arbitration Place is a leader in Canada's arbitration community operating world-class arbitration hearing centres, currently in Toronto and Ottawa, and with a roster of independent arbitrators and mediators. It actively and regularly promotes Canada to the international arbitration community around the world as a seat for international arbitration. As such, Arbitration Place deals regularly with the consequences of Canadian courts' decisions for Canada's reputation as a respected and reliable jurisdiction in which to seat international arbitrations. With the benefit of that experience, Arbitration Place seeks to assist the Court by underscoring the need to respect competing international and domestic policy objectives concerning the enforcement of arbitration agreements.

8. Arbitration Place submits that, when faced with an allegation that an international arbitration agreement is unenforceable because it is "unconscionable", and where it is appropriate for the court to decide the question, a Canadian court's task should be to identify any particular aspects of it that are unconscionable, and to tailor the court's findings and the remedy accordingly. In some cases it may not be possible simply to read down in a limited way aspects of an international arbitration agreement that are problematic, while otherwise upholding the parties' commitment to arbitrate their disputes. But Canadian courts, like courts elsewhere, ought to try to reconcile the multiple legal and policy values relating to the validity of international arbitration agreements, and avoid a blunt-instrument approach that potentially trammels international law objectives.

9. In particular, an international arbitration agreement is only unconscionable to the extent of the unconscionability, and no more than that. Accordingly, when it is otherwise appropriate for the courts to decide the question, Canadian courts ought to approach applications in which it is alleged that the arbitration agreement is unconscionable by: (a) rigorously and specifically identifying which particular aspect of the arbitration agreement may be unconscionable, recognizing that the agreement is unconscionable, if at all, only to the extent of the

unconscionability; and (b) in light of that finding, considering whether the balance of the parties' commitment to arbitrate can otherwise be upheld.[3]

10. Put another way, even if it is determined that certain aspects of an international arbitration agreement are unconscionable, the entire provision is not necessarily "null and void, inoperative or incapable of being performed", which is the language contained in the *ICAA*, implementing the *Model Law*. [This is different from the language used in the *Arbitration Act, 1991* (relied on by the Court of Appeal), which refers to whether an arbitration agreement is "invalid"].

B. Importance and Benefit of Consistently Applying the *Model Law* to International Arbitrations in Canada

11. As a threshold matter on any application to stay or dismiss a court proceeding in favour of arbitration, though, the applicable statute must be identified. The application may proceed differently depending on whether the arbitration agreement is international or domestic.

12. For the reasons found by the Ontario Superior Court of Justice, the application underlying this appeal was subject to the *ICAA*, not the *Arbitration Act, 1991*. This appeal accordingly ought to be determined based on the language of the *ICAA*'s stay provision which, as noted, provides that a stay must be ordered unless "the agreement is null and void, inoperative or incapable of being performed".

13. In interpreting and applying the *Model Law*, Canadian courts should take into account the consensus developed among the many jurisdictions around the world that have *Model Law* arbitration statutes, or otherwise have comparable provisions to the *ICCA*. If Canadian courts do not consistently apply the *ICAA* and consider the *Model Law*'s interpretation internationally, the very purpose of the *Model Law*, as model legislation prepared by UNCITRAL is undermined.

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[3] For example, if the court were to find that the venue for the arbitration renders the arbitration agreement at issue unconscionable, it could stay the action in favour of arbitration on the condition that the venue for the arbitration hearing would be at a convenient location in Canada, or on other appropriate terms.

14. By not relying on the *ICAA*, the Court of Appeal was deprived of the guidance arising from the *ICAA*, the *Model Law* (adopted for international arbitration in jurisdictions across Canada), as well as the *New York Convention*, to which Canada is a party.[4]

15. The *New York Convention*'s stated objectives are instructive. Its purposes include: (a) to seek "to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards"; and (b) "to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitration tribunal". Since its inception in 1958, over 160 States have become parties to the *New York Convention*, including Canada as of 1986, the same year Canadian provinces and territories began to adopt the *Model Law*. This is the international context that is required to be brought to bear, in addition to domestic tools of contract interpretation and application.

16. Without considering the international nature of the issues, the analysis is launched from the wrong port. Put simply, identifying the applicable arbitration statute matters.

C. Balancing Common Law Contract Doctrines with International Law Imperatives

17. This case illustrates why identifying the correct arbitration statute matters.

18. The *ICAA*'s stay provisions, interpreted by reference to the *Model Law*'s international implementation, give a court the power, and indeed the obligation, to address challenges to the validity of arbitration agreements in a sophisticated and finely calibrated manner, *i.e.*, there are remedial options available to a court, short of rescinding the parties' clear commitment to arbitrate their disputes in its entirety, when they have made what is alleged to be an unconscionable bargain, at least in part. These same tools are available under the parallel provisions of the *New York*

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[4] The *Model Law* is derived from Article II(3) of the *New York Convention* which states: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

Convention, so international standards arising under the *New York Convention* also provide helpful guidance.

19. This is not a new proposition. In his authoritative treatise, *International Commercial Arbitration*, author Gary Born observes, "Courts will frequently sever the unconscionable provision (*e.g.*, with regard to payment of fees or selection of arbitrators), while giving effect to the underlying agreement to arbitrate".[5]

20. The solution is therefore not simply to refuse to enforce the arbitration agreement in its entirety, and thereby risk defeating the international consensus (as adopted by this Court) that parties' commitments to arbitrate should be upheld whenever possible. Rather, the internationally-accepted solution is to seek to determine a way that balances the parties' commitment to arbitrate with any legal or practical restrictions on how they attempted to implement that commitment, achieving a result that respects that commitment while also abiding by more general organizing principles of the civil justice system. International jurisprudence is replete with examples of courts striving to achieve this balance. For example:

(a) *KVC Rice Intertrade Co. Ltd. v. Asian Mineral Resources Pte Ltd.*, [2017] SGHC 32 (Singapore High Court) in which the Singapore High Court enforced an arbitration agreement that had no "seat" of arbitration or law applicable to the arbitration and did not specify the number of arbitrators or the mechanism for appointing the arbitral tribunal, nor did the substantive contracts have any governing law clauses. In doing so, the Court stayed the action in favour of arbitration but on certain terms, noting that "the conditions imposed should seek to support and give effect to the parties' intention, and should avoid rewriting the parties' agreement to impose on them an arbitration that was not within the contemplation of either party."

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[5] Gary B Born, *International Commercial Arbitration* (Alphen aan de Rijn, Netherlands: Kluwer Law International, 2009) at 731.

(b) *Insigma Technology Co. Ltd. v. Alstom Technology Ltd.*, [2009] SGCA 24 (Singapore High Court) in which the court upheld an arbitration agreement that provided for one institution to administer an arbitration under the procedural rules of another institution and observed, among other things, that even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars an arbitration agreement should be enforced.

(c) *Lucky-Goldstar Int'l (HK) Ltd. v. Ng Moo Kee Engineering Ltd.*, [1993] 1 HKC 404 (H.K. Ct. First Inst.) in which the Hong Kong High Court held that a reference to the rules of a nonexistent arbitration association did not render the arbitration agreement null and void, inoperative or incapable of being performed. Citing the judgment of the New York Supreme Court in *Laboratories Grossman v. Forest Laboratories*, 295 New York Supp 2nd 756, the Hong Kong Court applied the test of "whether the dominant purpose of the agreement was to settle disputes by arbitration, rather than the instrumentality through which arbitration should be effected." The Court also noted that it had to construe the arbitration agreement using the canons of construction applied by the law of the state exercising jurisdiction under Article 8 of the *Model Law*, in that case Hong Kong law.

(d) *Kwasny Co. v. Acrylicon Int'l Ltd.*, 2010 WL 2474788 (E.D. Mich.) in which, among other things, the District Court enforced an arbitration agreement that named a non-existent entity as the "appointing and administrative body". In doing so, the Court stated: "In the specific context of mistakes in arbitration clauses, the courts have framed the pertinent inquiry as whether the parties' overarching intent to arbitrate a dispute, as evidenced by the language of their arbitration agreement and any relevant surrounding circumstances, *survives and is severable from a particular infirmity or ambiguity within this agreement*" [emphasis added].[6]

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[6] See also *Travelport Global Distribution Systems B.V. v. Bellview Airlines Limited*, No. 12 Civ. 3483 (DLC) (S.D.N.Y., Sept. 10, 2012); *Pricol Ltd. v. Johnson Controls Enterprises Ltd.*, Civil No. 30 of 2014 (Sup. Ct. India).

(e) *Robotunits Pty Ltd. v. Juergen Karl Mennel*, [2015] VSC 268 (Sup.Ct.Vic) in which the Supreme Court of Victoria enforced an arbitration agreement that referred to nonexistent "arbitration guidelines" on the basis that "with judicial assistance, the agreement may be rendered effective" because the parties have evinced "a clear intention to submit disputes … to arbitration." To that end, the Court imposed a condition on the stay, allowing the parties to apply if they could not agree on the arbitral seat or the rules of arbitration. The Court also held that courts are not entitled to delve into the merits of the case in the context of a stay application, which it said "is an important illustration of the need for courts to resist the temptation of "domesticity" in approaching matters involving *Model Law* and/or *New York Convention* based legislation."

D. Preserving *Competence-Competence*

21. Users of international arbitration also expect the fundamentally important *competence-competence* principle to be respected and not diluted. That expectation has been endorsed by this Court on numerous occasions.[7]

22. If Canadian courts do not meet those legitimate expectations, it is reasonable to expect a loss of confidence in Canada as an appropriate jurisdiction for international arbitrations. This would be unfortunate, given the importance to Canada of attracting international arbitration and given Canada's leading role in the development of *Model Law* and *New York Convention* jurisprudence.[8]

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[7] See, for example, *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, 2007 SCC 34; *Telus Communications Inc. v. Wellman*, 2019 SCC 19; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35.

[8] The *Model Law* was adopted in Canada in 1986, with Canada being the first country to do so. Canadian *Model Law* jurisprudence in particular has worldwide implications. The Case Law on UNCITRAL Texts public website shows that, as of 2016, approximately 30% of worldwide court judgments pertaining to the *Model Law* had emanated from Canada since the *Model Law* was adopted by UNCITRAL in 1985.

23. Fortunately, this is an instance in which sound policy coincides with the proper principle. The proper *Model Law* approach, as elaborated upon by Arbitration Place above, provides the Court with an avenue to apply the *competence-competence* principle – a cornerstone principle of arbitration reflected in Art. 16, and implicitly in Art. 8, of the *Model Law* (as well as the parallel provisions of the *New York Convention*) – in a manner that is true to Canada's role as a reliable member of the global international arbitration community.

24. By upholding the parties' commitment to arbitrate, which is capable of being performed even with aspects of it read down, the issues properly subject to the doctrine of *competence-competence* could properly be determined by an arbitral tribunal.

PART IV – SUBMISSIONS ON COSTS

25. Arbitration Place does not seek any costs and asks that no costs be awarded against it, subject to the Court's direction with respect to any additional disbursements the Appellants and Respondents may incur as a result of Arbitration Place's intervention.

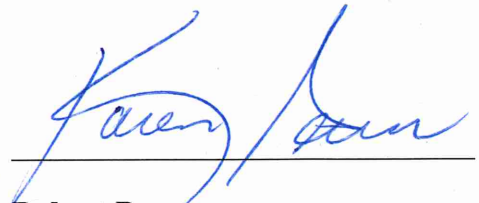
PART V – ORDER

26. Arbitration Place takes no position on the orders sought by the parties.

PART VI – SUBMISSIONS ON PUBLICATION

N/A

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of October 2019.



FOR

Robert Deane
Craig Chiasson
Hugh Meighen

Counsel for the Intervener,
Arbitration Place, a division of ASAP
Reporting Services Inc.

PART VII – AUTHORITIES

NO.	AUTHORITY	PARAGRAPH REFERENCE
1.	*Insigma Technology Co. Ltd. v. Alstom Technology Ltd.*, [2009] SGCA 24 (Singapore High Court)	21(b)
2.	*KVC Rice Intertrade Co. Ltd. v. Asian Mineral Resources Pte Ltd.*, [2017] SGHC 32 (Singapore High Court)	21(a)
3.	*Kwasny Co. v. Acrylicon Int'l Ltd.*, 2010 WL 2474788 (E.D. Mich.)	21(d)
4.	*Lucky-Goldstar Int'l (HK) Ltd. v. Ng Moo Kee Engineering Ltd.*, [1993] 1 HKC 404	21(c)
5.	*Pricol Ltd. v. Johnson Controls Enterprises Ltd.*, Civil No. 30 of 2014 (Sup. Ct. India)	21(d)
6.	*Robotunits Pty Ltd. v. Juergen Karl Mennel*, [2015] VSC 268 (Sup.Ct.Vic)	21(e)
7.	*Travelport Global Distribution Systems B.V. v. Bellview Airlines Limited*, No. 12 Civ. 3483 (DLC) (S.D.N.Y., Sept. 10, 2012)	21(d)

NO.	SECONDARY SOURCE	PARAGRAPH REFERENCE
1.	Gary B Born, *International Commercial Arbitration* (Alphen aan de Rijn, Netherlands: Kluwer Law International, 2009) at 731.	20

PART VII – STATUTES, REGULATIONS, RULES, ETC.

NO.	STATUTE, REGULATION, RULE, ETC.	SECTION, RULE, ETC.
1.	*Arbitration Act, 1991*, S.O. 1991, c. 17	Full version
	arbitrage (Loi de 1991 sur l'), L.O. 1991, chap. 17	Version complète
2.	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")	Art. II(3)
3.	*International Commercial Arbitration Act 2017*, SO 2017, c 2, Sch 5	Full version
	arbitrage commercial international (Loi de 2017 sur l'), L.O. 2017, chap. 2, Annexe 5	Version complète
4.	UNCITRAL Model Law on International Commercial Arbitration (1985) (as adopted by the United Nations Commission on International Trade Law on 21 June 1985	Art. 8 Art. 16

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of bargaining power between the consumer and the seller.[855] It is also of some importance that a substantial number of the relatively few decisions that do uphold unconscionability claims have involved consumer or employment disputes,[856] a category of disputes that are non-arbitrable in a number of jurisdictions.[857]

Like other challenges to the validity of international arbitration agreements, claims of unconscionability present choice-of-law issues. In principle, the law generally applicable to the substantive validity of the parties' arbitration agreement should govern claims of unconscionability,[858] subject to any applicable validation and international non-discrimination principle.[859] Nonetheless, some national courts have suggested that issues of unconscionability, at least as directed to the parties' arbitration agreement, implicate national public policies which mandatorily apply to protect local nationals.[860]

A decision holding one or more aspects of an arbitration agreement unconscionable does not necessarily entail invalidation of the entire agreement. Courts will frequently sever the unconscionable provision (*e.g.*, with regard to payment of fees or selection of arbitrators), while giving effect to the underlying agreement to arbitrate.[861] On the other hand, where unconscionable portions of the

855. *Kanitz v. Rogers Cable Inc.*, [2002] O.J. No. 665 (Ontario S.Ct. of Justice); *Grow Biz Int'l Inc. v. D.L.T. Holdings, Inc.*, XXX Y.B. Comm. Arb. 450 (Prince Edward Island S.Ct. 2001) (2005).

856. *See* authorities cited *supra* pp. 726-730.

857. The non-arbitrability of consumer disputes in some jurisdictions is discussed below. *See infra* pp. 820 *et seq.*

858. *See supra* pp. 425 *et seq.*; *Restatement (Second) Conflict of Laws* §201 (1971); Rome Convention, Arts. 10(1), 10(1)(d).

859. *See supra* pp. 497-504, 504-516, 558-559, 568-569, 673.

860. *Judgment of 17 February 1989*, XV Y.B. Comm. Arb. 455 (Hanseatisches Oberlandesgericht Hamburg) (1990).
Most lower U.S. courts appear to apply federal common law to issues of unconscionability (even in domestic cases). *See, e.g.*, *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282 (9th Cir. 1988); *Bayma v. Smith Barney, Harris Upham & Co.*, 784 F.2d 1023, 1024 (9th Cir. 1986); *Hall v. Prudential-Bache Sec., Inc.*, 662 F.Supp. 468, 471 (C.D. Cal. 1987); *E.F. Hutton & Co. v. Schank*, 456 F.Supp. 507, 510 (D. Utah 1976). *Compare Webb v. Investacorp, Inc.*, 89 F.3d 252 (5th Cir. 1996) (unconscionability governed by state law); *S+L+H SpA v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518 (7th Cir. 1993) (duress governed by state law); *24 Hour Fitness, Inc. v. Superior Court*, 66 Cal.App.4th 1199 (Cal. Ct. App. 1998).
Following *First Options*, it appears likely that generally-applicable state law unconscionability rules will apply to unconscionability challenges under the domestic FAA. Federal common law standards likely govern international arbitration agreements subject to the New York Convention. *See supra* pp. 485-497.

861. *See, e.g., Judgment of 22 March 2007*, DFT 4P.172/2006 (Swiss Federal Tribunal) (invalidating clause providing for waiver of right to seek annulment of arbitral award, but leaving remainder of arbitration agreement in effect); *Judgment of 3 April 2001*, 4 Ob 37/01x, 2001 ecolex 350 (Austrian Oberster Gerichtshof) ("Even if the cost provisions of an arbitration clause are *contra bonos mores* ..., the arbitration clause itself is not invalid"); *Vegter v. Forecast Fin. Corp.*, 2007 WL 4178947 (W.D. Mich. 2007) (severing unconscionable provision designating arbitral situs and enforcing remainder of arbitration agreement). *See infra* pp. 1451-1453.

clause cannot be disentangled from the remainder of the agreement to arbitrate, then the entire arbitration clause will be invalidated.[862]

A variation to the approach of holding an arbitration clause invalid on the grounds that it contains unconscionable provisions is to provide for judicial correction of such provisions. The German version of the UNCITRAL Model Law takes this approach, at least in a limited respect, by providing that a party may apply for judicial appointment of the arbitrators if the parties' arbitration agreement grants one party unacceptably "preponderant" rights in selecting the tribunal.[863]

e. Asymmetrical or Non-Mutual Arbitration Agreements[864]

A recurrent argument which is related to the unconscionability doctrine involves so-called "asymmetrical" or "non-mutual" arbitration agreements. These clauses permit one party to commence either arbitration or litigation, at its option, but do not allow the other party to do so; they are most frequently used in lending or similar transactions, where the lender seeks to maximize its options to recover unpaid sums from a defaulting borrower.[865]

Challenges to the validity of such "non-mutual" arbitration provisions are directed specifically at the arbitration agreement and do not therefore ordinarily implicate the separability doctrine.[866] In most cases, national court decisions have considered the merits of such claims, rather than referring them to arbitration, but a decisive majority of recent decisions have rejected these arguments, upholding the substantive validity of asymmetrical or non-mutual arbitration agreements.

Some early national court decisions concluded that an arbitration agreement would only be valid if both parties were granted mutual rights to refer disputes to arbitration. Confronted with a clause granting one party (but not the other) a unilateral right to commence arbitration, an English court reasoned in the 1960s that:

> "It seems to me that this is about as unlike an arbitration clause as anything that one could imagine. It is necessary in an arbitration clause that either

862. *See, e.g., Murphy v. Check 'N Go of Cal., Inc.*, 2007 WL 3016414 (Cal. Ct. App. 2007) (unconscionable waiver of class action rights rendered entire agreement to arbitrate invalid).

863. German ZPO, §1034(2). *See* Geimer, in R. Zöller (ed.), *Zivilprozessordnung* §1034, ¶¶9-10 (26th ed. 2007); Voit, in H.-J. Musielak (ed.), *Kommentar zur Zivilprozessordnung* §1034, ¶8 (5th ed. 2007). The Netherlands Code of Civil Procedure is similar. Netherlands Code of Civil Procedure, Art. 1028. *See also infra* p. 1453.

864. For commentary, *see* Drahozal, *Nonmutual Agreements to Arbitrate*, 27 J. Corp. L. 537 (2002); Nesbitt & Quinlan, *The Status and Operation of Unilateral or Optional Arbitration Clauses*, 22 Arb. Int'l 133 (2006); Nidam, *Unilateral Arbitration Clauses in Commercial Arbitration*, 1996 Arb. & Disp. Res. L.J. 147.

865. Nesbitt & Quinlan, *The Status and Operation of Unilateral or Optional Arbitration Clauses*, 22 Arb. Int'l 133, 134-35 (2006).

866. *See supra* pp. 357 *et seq.*