File number: 38534

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

BETWEEN:

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

Appellants
(Respondents)

and

DAVID HELLER

Respondent
(Appellant)

and

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Interveners

FACTUM OF THE INTERVENER, CANADIAN FEDERATION OF INDEPENDENT BUSINESS

Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*

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PART I—OVERVIEW AND FACTS

1 Canadian courts continue to reach diverging conclusions on how to enforce arbitration agreements. This uncertainty risks undermining why many independent businesses use arbitration: to structure and simplify dispute resolution, and better allocate resources. This Court has the opportunity to provide needed clarification.

2 Many businesses, rightly or wrongly, prefer arbitration to court litigation. And their freedom to choose arbitration over court litigation exemplifies contractual freedom and party autonomy.

3 In Ontario, the Legislature has limited contractual freedom regarding arbitration agreements by way of the *Consumer Protection Act, 2002,* S.O. 2002, c. 30, Sched. A (*"Consumer Protection Act"*). But it has not restricted this freedom in the *Employment Standards Act, 2000,* SO 2000, c 41 ("*ESA*").

4 Nevertheless, because arbitration agreements are contracts, courts do have a role to play in circumscribing this freedom, specifically, by relying on contract law principles like unconscionability. Indeed, the Ontario Legislature prescribes this power in section 7(2) of the *Arbitration Act*, 1991, SO 1991, c 17 ("*Arbitration Act*") and Article 8 of the *International Commercial Arbitration Act*, 2017 S.O. 2017, c. 2, Sched. 5 ("*ICAA*"). But the Court of Appeal for Ontario's decision neither followed legislative directives nor appropriately applied contract law principles to the arbitration agreement at issue in this case. Instead, it mistakenly interpreted the wording, expressions, and restrictions in the *ESA,* the *Arbitration Act*, and the *ICAA*, thereby severely curtailing contractual freedom and party autonomy.

5 This intervention is about presenting this Court with a framework to know when the *Arbitration Act* or the *ICAA* applies, how these acts interact with other legislation and legislative decisions, how to apply competence-competence, and how to apply unconscionability to arbitration agreements.

6 CFIB adopts the facts as summarized by the Court of Appeal for Ontario ("ONCA").[1]

[1] *Heller* v. *Uber Technologies Inc.*, 2019 ONCA 1 at paras. 2-15 ["ONCA-Uber"].

PART II—STATEMENT OF POSITION ON APPELLANT'S QUESTIONS

7 Deciding whether the *Arbitration Act* or the *ICAA* applies to this dispute is critical. The two acts require a different approach to competence-competence and take different positions on whether parties may arbitrate employment disputes.

8 Consistent with this Court's jurisprudence on arbitration over the past 15 years, the *ESA* does not prohibit using arbitration to resolve employment-related disputes.

9 This Court should apply a modified version of its approach to enforcing exclusion of liability clauses in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* to determine if an arbitration agreement is unconscionable.

PART III—ARGUMENT

10 This Court should ***first*** determine whether the arbitration agreement at issue is subject to the *Arbitration Act* or the *ICAA*. Each act approaches the competence-competence doctrine uniquely. Furthermore, while employment disputes are within the scope of the *Arbitration Act*, they are not within the scope of *ICAA*.

11 ***Second***, this Court should then apply the appropriate competence-competence methodology to determine who should first resolve issues related to the arbitration agreement's validity, the court or the arbitral tribunal.

12 ***Third***, in assessing who is the appropriate decision-maker under the competence-competence doctrine, the Court must determine whether statutory bars to arbitration exist. Specifically, this Court should bear in mind the well-established principle that where the legislature intends to oust arbitration, it does so expressly. Here, unlike the *Consumer Protection Act*, the Legislature did not expressly oust arbitration in the *ESA*.

13 ***Fourth***, if the Court wishes to consider whether the arbitration clause at issue is unconscionable, it should adopt a framework appropriate for arbitration agreements, including which standards should apply when these arbitration agreements are subject to a foreign law.

14 ***Last,*** this Court should respect the Legislature's capability to fully address the matter.

I. THE ONCA SHOULD HAVE DISTINGUISHED BETWEEN THE *ARBITRATION ACT* AND THE *ICAA*

15 For this case, it matters whether the *Arbitration Act* or the *ICAA* applies to the arbitration clause in issue. The lower courts, however, did not believe that much turned on whether the *ICAA* or the *Arbitration Act, 1991* applied.[2] The lower courts were incorrect to hold this way. Determining whether the *Arbitration Act* or the *ICAA* applies, however, is essential: the two acts rely on different interpretive sources for the doctrine of competence-competence and different approaches to the unconscionability analysis. Such differences fundamentally affect the outcomes.

16 The approach to interpreting Canadian statues like the *Arbitration Act* and the *ICAA* is settled. Courts first account for the purpose and scheme of the acts. Then, they read the text of the act's provisions in light of their entire context and in their grammatical and ordinary sense, harmoniously with the act's scheme, in a way that is both conscious of and consistent with the legislature's policy choices and other relevant statutes.[3]

17 Concretely, the difference amounts to this: because the ONCA applied the domestic *Arbitration Act*, it relied exclusively on Ontario and Canadian domestic law. This reliance is problematic. The *ICAA* requires decision-makers to interpret it according to its international origin and the need to promote uniformity in its application. The *ICAA* expresses this in two places.

18 First, Schedule 2 to the *ICAA* adopts the *UNCITRAL Model Law on International Commercial Arbitration* ("Model Law"). Model Law Article 2A(1) reads: "In the interpretation of this [Model] Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith."[4] This provision creates a separate interpretation rule distinct from domestic legislation. The wording "international origin and the need to promote uniformity" signals that decision-makers must examine how other Model Law jurisdictions interpret and apply the Model Law.[5]

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[2] ONCA-Uber at para. 21.
[3] Elmer Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87, cited in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21. Both the majority (para. 47) and dissent (para. 107) confirmed this approach in *Telus v Wellman*, although the majority and dissent each placed more or less weight on different elements.
[4] *ICAA*, Schedule 2, Article 2A.
[5] See A/61/17, para. 175, available at:<https://unctad.org/en/Docs/a61d17_en.pdf>.

19 Second, when interpreting the Model Law, its uniformity mandate requires decision-makers to seek guidance from extrinsic materials to better understand the intention and meaning behind the Model Law as a whole and its drafters' intentions in any article's wording and phrasing. The *ICAA*, at s. 6(3), specifically endorses this approach. Taken together, these methods reinforce the uniformity mandate entrenched in Model Law Article 2A, a mandate the Ontario Legislature endorsed when it revised and enacted the current *ICAA* and included Article 2A.

(A) THE ARBITRATION ACT PERMITS ARBITRATING EMPLOYEE DISPUTES; THE ICAA PRINCIPALLY DOES NOT

(i)The Arbitration Act permits employment disputes

20 In Ontario, every collective agreement must include arbitration agreements to settle disputes between employees and employers. This method sees employees designating a union as their bargaining agent. Although less common, nothing under the Canadian legal framework prevents non-unionized employees to sign contracts that include arbitration agreements.[6] When these contracts include arbitration agreements and are subject to Ontario law, the *Arbitration Act* applies.[7]

(ii) Employment disputes are not commercial under the ICAA

21 The *ICAA* applies to arbitrations that are both international and commercial. Although the Ontario Legislature did not define "commercial" (in contrast to the British Columbia Legislature) the Analytical commentary to the Model Law takes the position that the term "commercial" excludes "labour or employment disputes and ordinary consumer claims despite their relation to business".[8] As a model law, lawmakers are free to add or subtract from the Model Law by including or excluding what disputes may or may not use arbitration as a dispute resolution mechanism. Moreover, while some jurisdictions permit limited arbitration of employee disputes entered into in an international framework,[9] they are not Model Law jurisdictions.

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[6] John Manwaring et al, Dispute Resolution: Readings and Case Studies, 4th ed (Toronto: Emond Publishing, 2015) at p. 547.
[7] *Arbitration Act*, s. 2(1).
[8] See A/CN.9/264, para.18 available at: <https://www.mcgill.ca/arbitration/files/arbitration/Commentaireanalytique-en.pdf>; Marina Pavlović & Anthony Daimsis et al, Dispute Resolution: Readings and Case Studies, 4th ed (Toronto: Emond Publishing, 2015) at p. 511.
[9] Thomas H. Webster, Handbook of UNCITRAL Arbitration, 3d (London, Thomson Reuters, 2019) at pp. 67 & 68.

II. COURTS AND ARBITRAL TRIBUNALS SHARE JURISDICTION ON THE QUESTION OF VALIDITY

22 The ONCA held that competence-competence only "addresses situations where the scope of the arbitration is at issue". The issue of validity, in its view, "is one for the court to determine as s. 7(2) of the *Arbitration Act, 1991* makes clear".[10] But neither the *Arbitration Act* nor the *ICAA* contemplates this approach. Instead, without creating a hierarchy between courts and tribunals, both acts endorse a shared jurisdiction between tribunals and courts. Sections 7 and 17 of the *Arbitration Act* and Articles 8 and 16 of Schedule 2 to the *ICAA* (the Model Law) reveal that courts and tribunals *may* address questions about an arbitration agreement's existence or validity as the relevant provisions reveal:

Arbitration Act	*ICAA*
Court: **7 (2) However, the court may refuse** to stay the proceeding **in any of the following cases**: 2. **The arbitration agreement is invalid**. *Arbitral Tribunals:* **17** (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the **existence or validity of the arbitration agreement**.	*Court:* **8 (1)** A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, … refer the parties to arbitration **unless it finds that the agreement is null and void**, inoperative or incapable of being performed. *Arbitral Tribunals:* **16** (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the **existence or validity of the arbitration agreement**.

23 What the acts take no position on is who should first answer the question. Domestically, the Supreme Court of Canada provided the answer in *Dell Computer Corp.* v. *Union des consommateurs* ("*Dell*").[11] Internationally, the approach is different, which is one reason why determining which act applies to this case is vital.

24 Put succinctly, relying on the domestic *Arbitration Act*, the ONCA should have followed the rule in *Dell*. However, relying on the *ICAA*, the ONCA should not have simply followed the rule because the rule in *Dell* is one voice in the global choir and it is not uniformly followed.

[10] ONCA-Uber at para 39.
[11] [2007] 2 S.C.R. 801, 2007 SCC 34 ("*Dell*") at para. 84.

(A) THE RULE IN DELL IS DIFFERENT FROM THE INTERNATIONAL RULE

25 In *Dell*, this Court offered a general rule that jurisdictional objections (including unconscionability) should first go to the arbitral tribunal. The Supreme Court tempered this general rule with an exception tied to the type of objection the party raises: if the objection is a pure question of law, the court may first address the question. If the objection is a question of fact, the tribunal should first address the question. If the objection is a question of mixed law and facts, the tribunal should also first answer the question unless the facts require only a superficial investigation, in which case the court may first address the question. As *Dell* is the leading authority in Canada on the doctrine of competence-competence, the ONCA ought to have followed it. However, the approach in *Dell* is not the approach uniformly adopted in other Model Law jurisdictions.

26 The approach followed by other Model Law jurisdictions and supported by leading arbitration scholars[12] differs from the rule in *Dell* in an important way: a court should first resolve jurisdictional objections but only those based on the existence, validity, and legality of the arbitration agreement; courts must, however, allow arbitrators to first resolve jurisdictional objections based on the scope of arbitration agreements. The rationale behind this approach is not forcing parties into the expense of arbitration they never agreed to while still holding parties to their promises to arbitrate. This approach differs from the rule in *Dell*, which determines who should first address an objection based on whether the question is one of law, fact, or mixed fact and law.

III. THE ESA ADMITS THE ARBITRATION OF EMPLOYMENT-RELATED DISPUTES

27 The *ESA* does not expressly oust arbitration as a dispute resolution mechanism for employment-related disputes. Nowhere in the *ESA* has the Legislature excluded the arbitration of employment-related disputes. In determining whether a statute precludes arbitration, a court should bear in mind this Court's instruction that where a Legislature wishes to exclude arbitration it does so expressly.[13]

28 Consequently, absent preclusionary language, employees and employers may use arbitration to

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[12] Gary Born, International Commercial Arbitration, 2nd, Kluwer Law International, New York 2014, pp 1096-1097.
[13] *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178, 2003 SCC 17, at para. 46; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, at para. 2.

resolve employment-related disputes.[14] This approach is in keeping with this Court's recognition that the Legislature is best placed to protect against abuses of bargaining power, as expanded on in section **V** below.

IV. THE ONCA'S APPROACH TO UNCONSCIONABILITY IS ILL-SUITED TO ARBITRATION

(A) BETTER CASES EXIST TO ANALYZE THE UNCONSCIONABILITY OF ARBITRATION AGREEMENTS

29 The ONCA relied on *Titus v. William F. Cooke Enterprises Inc.*[15] (which itself relied on *Cain v. Clarica Life Insurance Co.*[16]) to analyze whether the arbitration agreement between Uber and Mr. Heller was unconscionable and thus invalid. Those cases, however, dealt with parties who effectively entered into release agreements. But the facts surrounding a release agreement are quite different from facts surrounding agreements to resolve future disputes *via* arbitration. In the former, facts are mostly *known*; in the latter, the facts are mostly *unknown*. Accordingly, arbitration agreements more closely resemble exclusion clauses—not release agreements—since they exclude certain, unknown future disputes from the judicial process. Consequently, assessing whether an arbitration agreement is valid should more closely emulate how courts assess whether an exclusion clause is valid.

30 To explain further, the danger in applying a test designed for known facts (like release agreements) to a clause about unknown facts (like arbitration agreements) is the real risk of falling prey to outcome bias. One reason the ONCA found the arbitration agreement was a substantially improvident or unfair bargain (and thus unconscionable) related to the ratio between the low amount in dispute to the high cost to commence arbitration. That fact appears to have driven the ONCA's reasoning.[17] However, if the ratio had been inverted and the cost to commence the dispute was substantially lower than the amount in dispute would the ONCA have still held the bargain substantially improvident or unfair on that point? This one reason evidences why it is risky to apply an unconscionability test designed to assess known facts to circumstances about unknown facts.

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[14] *Ross* v. *Christian & Timbers Inc.*, 2002 CanLII 49619 (ON SC) at paras. 24-28.
[15] 2007 ONCA 573 (CanLII), 284 D.L.R. (4th) 734, at para. 38.
[16] (2005), 384 A.R. 11 (CA); 367 W.A.C. 11.
[17] ONCA-Uber at para. 68.

(B) A BETTER TEST TO ENFORCE ARBITRATION AGREEMENTS

31 Drawing a straight line between invalidity, under s. 7(2) of the *Arbitration Act*, and unconscionability, when dealing with dispute clauses relating to future, knowable but specifically unknown facts is dangerous. Exclusion clauses are similar to arbitration agreements: they also seek to address breaches of future knowable, but specifically unknown facts. If Canadian courts are searching for an appropriate test to apply when seeking to enforce (or not) arbitration agreements, they should look to this Court's decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*[18] where Justice Binnie offered a helpful three-part test, which includes an unconscionability component at stage two. Importantly, under this test, unconscionability is assessed at the time of contracting, thus purging outcome bias when assessing a transaction's fairness.

32 Adapting Justice Binnie's test to arbitration agreements promotes what invalidity under s. 7(2) (and Model Law Article 8 under the *ICAA*) seeks to address: 1. Does the agreement apply to the dispute? 2. If so, at the time of signing, was it unconscionable (or another invalidity issue) to include this arbitration agreement? 3. If not, do any policy reasons justify refusing to enforce the arbitration agreement?

33 Applying this modified test to this case's facts would have forced the ONCA to ask the right question: was it unconscionable for Uber and Mr. Heller to agree to resolve disputes *via* arbitration even with the potential that the arbitration cost could exceed the claim's value. Importantly, the arbitration agreement's fairness is assessed at the time the parties entered into their agreement, in light of all circumstances, regardless of the future ratio between the cost to commence arbitration and the amount in dispute.

(C) THE ONCA DID NOT ACCOUNT FOR THE POSSIBLE RELEVANCE OF DUTCH LAW

34 The ONCA did not account for the parties' agreement to use Dutch law to govern their contract and their arbitration agreement. This uncontested fact is significant both under the *Arbitration Act* and under the *ICAA*. For example, a court assessing the unconscionability of any term must tether its

[18] 2010 SCC 4, [2010] 1 S.C.R. 69, at 127-141.

analysis to a community standard.[19] The contract's applicable law conveys the standard unless the choice of law clause is itself the subject of an unconscionability analysis. But those facts do not apply here. At no time was the choice of Dutch law called into question.

35 Indeed, Ontario law does not prohibit employees from entering into contracts that contain a foreign law to govern their employment. However, if Ontario legislation like the *ESA* is not respected in the arbitration proceedings an Ontario resident may have further remedies to positively pursue in Ontario to enforce the minimum standards to which the employee is entitled.[20] And defensively, if the *ESA* is not respected in the arbitration proceedings, an Ontario court may refuse to enforce an award on public policy grounds.[21]

36 Alternatively, and at the very least, the ONCA could have applied Ontario law but only after determining that inserting Dutch law was an attempt to evade the *ESA*. This approach is entirely different from analysing, as the ONCA did, whether including an arbitration agreement—as a device—was an attempt to evade the *ESA*. This is particularly true given that the *ESA* does not forbid using arbitration to resolve employment disputes.

V. THE LEGISLATURE IS BEST PLACED TO PROTECT AGAINST POTENTIAL ABUSES OF BARGAINING POWER

37 When the Ontario Legislator realized companies could use arbitration agreements in their contracts with consumers to minimize or eliminate a consumer's right to access courts, the Legislator acted. It amended the *Consumer Protection Act* by rendering arbitration clauses in consumer contracts invalid if they had the effect of denying a consumer the right to access courts for, *inter alia*, class proceedings. The Legislator has protected before; it can protect again.

38 When the Legislator amended the *Consumer Protection Act*, it balanced party autonomy with access to justice, and its carefully drafted amendment did not forbid using arbitration to resolve consumer disputes. Section 7 of the *Consumer Protection Act* specifically allows consumers to

[19] Daimsis, Anthony "ONCA misses Arbitration Target", (2019) 1:1 Can J Comm Arb, September 2019 at p. 126.
[20] *Ross* v. *Christian & Timbers Inc.*, 2002 CanLII 49619 (ON SC) at para. 28.
[21] This reasoning is similar to the one used by the US Supreme Court in the seminal *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (more)105 S. Ct. 3346; 87 L. Ed. 2d 444 at para. 21.

arbitrate their disputes but only after becoming aware that a dispute exists. Agreements of this kind, which allow parties to agree to arbitrate present, known disputes, are submission agreements.

39 By amending s. 7 of the *Consumer Protection Act* in this way, the Legislator chose not to entirely invalidate arbitration as a procedure to resolve consumer disputes; it merely restricted how parties could agree to arbitrate: they could use submission agreements. This Court should provide the Legislator the opportunity to amend the *ESA* to address any perceived access to justice concerns.

40 This case raises issues that affect small businesses entering into contracts, in particular when these contracts include arbitration agreements. And while CFIB is sympathetic to any small business or contractor hoping to access a proceeding it deems more favourable to it, this sympathy should not come at the cost of certainty. As matters stand, courts interpreting the provisions in question have created uncertainty. By offering clarity, the Court will add certainty to small businesses and contractors who seek to rely on and plan around the contractual terms they sign.

PART IV– SUBMISSIONS REGARDING COSTS

41 CFIB seeks no order for costs and asks that this Court award no costs against it.

PART V– ORDER SOUGHT

42 CFIB takes no position on the disposition of the appeal.

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

Anthony Daimsis
Counsel for the Proposed Intervener,
Canadian Federation of Independent Business (CFIB)

PART VI– TABLE OF AUTHORITIES

	Authority	Reference in Argument
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16	Thomas H. Webster, Handbook of UNCITRAL Arbitration, 3d (London, Thomson Reuters, 2019)	21
17	Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session 19 June-7 July 2006 https://unctad.org/en/Docs/a61d17_en.pdf	18
18	United Nations General Assembly: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration https://www.mcgill.ca/arbitration/files/arbitration/Commentaireanalytique-en.pdf	21
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