SCC Court File No. 38534

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

BETWEEN:

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

Appellants
(Respondents)

and

DAVID HELLER

Respondent
(Appellant)

and

YOUNG CANADIAN ARBITRATION PRACTITIONERS, ARBITRATION PLACE, DON VALLEY COMMUNITY LEGAL SERVICES, CANADIAN FEDERATION OF INDEPENDENT BUSINESS, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, INCOME SECURITY ADVOCACY CENTRE, PARKDALE COMMUNITY LEGAL SERVICES, ATTORNEY GENERAL OF ONTARIO, UNITED FOOD AND COMMERCIAL WORKERS CANADA, WORKERS' HEALTH AND SAFETY LEGAL CLINIC, MONTREAL ECONOMIC INSTITUTE, CANADIAN AMERICAN BAR ASSOCIATION, CHARTERED INSTITUTE OF ARBITRATORS (CANADA) INC., TORONTO COMMERCIAL ARBITRATION SOCIETY, CANADIAN CHAMBER OF COMMERCE, INTERNATIONAL CHAMBER OF COMMERCE, CONSUMERS COUNCIL OF CANADA, COMMUNITY LEGAL ASSISTANCE SOCIETY, and ADR CHAMBERS INC.

Interveners

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PARTS I and II – OVERVIEW AND POSITION ON THE QUESTIONS IN ISSUE

1. The United Food and Commercial Workers Canada ("UFCW") advances submissions respecting the illegality of the Uber mandatory arbitration clause in light of the overall purpose of the *ESA* and the structure of its enforcement scheme, canvasses considerations relevant to unconscionability with a focus on the unfair impact of the Uber clause on individual and collective access to justice, and provides brief submissions on the competence-competence principle.

PART III - STATEMENT OF ARGUMENT

A. ILLEGALITY OF UBER'S MANDATORY ARBITRATION CLAUSE

2. Where an interpretation of legislation, informed by its language, structure and purpose, reveals that the Legislature intended that the statutory minimum rights and benefits it provides are to be enforced domestically through accessible and effective procedures accorded under the legislation, a mandatory arbitration clause precluding that very enforcement is inconsistent with the statutory scheme, and therefore invalid and unlawful. This is particularly the case where the minimum statutory protections are aimed at safeguarding vulnerable individuals, and where the legislation provides that these same minimum standards cannot be waived, by contract or otherwise.

3. Thus, where (as in the case of the *ESA*) mandatory legislative norms/minimum statutory protections deliberately restrict freedom of contract in pursuit of an overriding core public policy objective aimed at protecting vulnerable individuals from an imbalance of power in the workplace, mandatory arbitration clauses purporting to override effective and accessible statutory enforcement mechanisms should be regarded as inconsistent with the legislative scheme, and therefore unenforceable. This is even more the case where, as in the case at bar, the mandatory arbitration clause is imposed through a contract of adhesion, and includes imposed choice of foreign law and foreign forum requirements, as well as prohibitive filing fees, all of which make the foreign arbitration process functionally and practically inaccessible.[1] Indeed, in these circumstances, the Uber

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[1] Walsh, "*The Uses and Abuses of Party Autonomy in International Contracts*", University of New Brunswick Law Journal, (2010) 60 R.D. U.N.B. 12-31 at paras 4, 19, 22 and 26 (**UFCW Authorities, tab 2**): "Has ceding power to contracting parties to determine the courts and laws by which they will be bound in the name of international comity come at the expense of an excessive subordination of domestic legal policies aimed at redressing imbalances in bargaining power? …Consumer and individual employment contracts are widely recognized examples of situations in which states impose

mandatory arbitration clause is not only inconsistent with the *ESA* enforcement scheme, but also runs contrary to core public policy values including access to justice and the rule of law.[2]

4. Furthermore, contrary to the Appellants' submissions, explicit legislative override of a mandatory arbitration clause is not a prerequisite to a finding of illegality. For example, in *Seidel v. TELUS Communications Inc.*, [2011] 1 SCR 53 (at paras. 33-34), there was no explicit or express language overriding or voiding the relevant mandatory arbitration clause; rather, the clause was found to be unenforceable, based on an assessment of the overall legislative language and structure, and its underlying policy concerns and purposes.

5. Turning the specific language and scheme of the *ESA*, UFCW submits that the *ESA* provides for accessible domestic enforcement of statutory minimum employment protections. As is common with minimum employment standards legislation across Canada, and as confirmed by this Court in decisions such as *Machtinger v HOJ Industries Ltd.* [1992] 1 S.C.R. 986, and *Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27, contracting out of these protections is void and contrary to public policy (*ESA*, s. 5). For the reasons set out in the Respondent's factum, the Ontario Court of Appeal correctly found that the Ministry complaint enforcement mechanism established by the *ESA* is itself a minimum *ESA* employment standard, that is, "a requirement or prohibition… that applies to an employer for the benefit of an employee". Indeed, this Court has previously recognized that that the

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limits on party autonomy in order to correct a systemic imbalance of bargaining power…. Giving free rein to party autonomy to select the governing law would enable the stronger party to circumvent the protection afforded to the consumer or employee by the law of her home state…"

[2] In *Trial Lawyers Assn of BC v BC (AG)*, 2014 SCC 59, at para 38 to 40, this Court recognized the vital link between access to justice and the rule of law articulating the principle that without an accessible forum, the rule of law is threatened. While the legal context was different, the principle that without an accessible forum to adjudicate disputes, the rule of law is threatened applies equally in the case at bar, since the Uber mandatory arbitration clause, if upheld, effectively denies meaningful access to an adjudicative process for determining and enforcing extra-contractual minimum core public policy statutory protections intended to benefit vulnerable individuals.

ESA enforcement mechanism is intended "to make redress available…expeditiously and cheaply", and that there are "many advantages to the employee" in the *ESA*'s complaint process.[3]

6. However, while the *ESA* provides for the option of enforcement by way of a complaint to the Ministry (in which case the complaint could ultimately be adjudicated by the Ontario Labour Relations Board under Part XXIII of the *ESA*), it also preserves and provides, at the individual complainant's election, for the option of enforcement by way of a civil proceeding (see *ESA*, ss. 8 and 97). In other words, and as recognized by the Court of Appeal (Reasons, para. 43), the *ESA* provides an individual, at her election, with the right to choose to pursue enforcement of a minimum employment standards complaint either through a domestically accessible, Ontario-based Ministry of Labour complaint, or at the employee's option through a domestically accessible Ontario-based civil proceeding. Yet, the Uber mandatory arbitration clause deprives individuals not only of the right to pursue one or the other of these options, but of the right to pursue either. By depriving individuals of the right to pursue either enforcement option contemplated by and provided under the *ESA*, the Uber mandatory arbitration clause is inconsistent with the legislative enforcement scheme, and therefore unlawful.

7. As the Court of Appeal recognized (Reasons, para 37), and as this Court has consistently recognized (including in *Machtinger* and *Rizzo*), the language and purpose of the *ESA* must be construed in light of its fundamental purpose of protecting employees and guaranteeing them certain minimum substantive standards. In UFCW's submission, this must include the right to choose one or the other of the domestically accessible legal avenues provided under the *ESA* for vindication of their rights, Indeed, the *ESA* prescribed enforcement mechanisms should be regarded as an implicit and integral remedial component to each substantive employment standards minimum protection.[4] Compelling Uber drivers to seek enforcement in a foreign jurisdiction under a mandatory arbitration clause that compels the dispute be resolved under foreign law and that imposes prohibitive filing and

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[3] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, paras 27-29.

[4] See also *Huras v. Primerica Financial Services Ltd.*, [2000] O.J. No. 1474 (Ont Sup Ct.) at para 34 (**Respondent Authorities, tab 8**), where the court held that the *ESA* prohibition against contracting out "implicitly includes any contracting out of the remedy provisions of the *ESA* that enable enforcement of employment standards"; upheld on other grounds 2000 CanLII 16892 (ON CA).

other fees deprives them of their right to resort to *ESA* prescribed enforcement mechanisms (and indeed of any effective enforcement mechanism). In enacting the *ESA* protective legislative regime, the Legislature provided for it to be meaningfully and accessibly enforced, yet the Uber mandatory arbitration clause makes this practically and effectively impossible. Thus, far from promoting access to justice, extending the *ESA*'s protection to as many as possible, and offering faster and cheaper dispute resolution (as the Appellants contend at para. 83), the Uber mandatory arbitration clause diminishes and erodes its drivers' access to justice, and effectively and practically ensures the denial of their enforcement rights under the *ESA* while at the same time insulating Uber from meaningful accountability and liability. The adage that there is no right without a remedy[5] seems particularly apt in this context.

8. The Appellants submit (paras. 74-77, 82-83) that the *ESA* contemplates that an employee can agree to mandatory arbitration as an alternative enforcement mechanism. However, in addition to Court of Appeal's reference (paras. 33-34) to the language of ss. 8(2) and 101(1) of the *ESA* as evidencing a legislative intent that an employee's right to bring a civil proceeding in the courts does not extend to arbitration proceedings, both s. 82(2) and s. 123(1) of the *ESA* expressly distinguish between civil proceedings, on the one hand, and administrative, board or tribunal proceedings, on the other hand.[6] Moreover, since the right to elect to commence civil proceedings lies at the election of the individual claiming the protection of *ESA* minimum standards, this cannot possibly have been contemplated as including a right to unilaterally impose arbitration proceedings on an employee. Finally, the Appellants' abstract appeal to a legislative desire for expeditious, efficient, informal and inexpensive dispute resolution can hardly be said to apply to the Uber mandatory arbitration clause.

9. The Appellants also submit (para 66) that the *ESA* requirement that grievance arbitration is the enforcement mechanism for unionized employees supports a legislative intention to permit mandatory arbitration in the non-unionized context. However, in UFCW's submission, the requirement of arbitration in the unionized context provides strong indication that it was not intended that mandatory arbitration can also be imposed on non-unionized employees, and displace their right to complain to the Ministry or to commence civil proceedings. Moreover, the very reasons that grievance arbitration is legislatively imposed for unionized employees illustrate why the lopsided

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[5] See the ancient but still seminal reasons of Holt, C.J. in *Ashby v. White*, (1703), 2 Ld. Raym. 938

[6] See also the Ministry of Labour's Policy and Interpretation Manual discussion of s. 8(2), online at http://catalogue.owtlibrary.on.ca/owtl/currentawareness/ESA2019Release1.pdf

Uber mandatory arbitration process is not permitted or contemplated under the *ESA*. Not only do unionized employees not face the same imbalance of power their non-unionized counterparts, but grievance arbitrators under collective agreements charged with adjudicating employment standards claims are mutually selected and acceptable, independent, and presumed to be expert in Ontario labour and employment law. As well, unlike Uber drivers, not only are the legal and other costs of grievance arbitration pooled among all unionized employees through union dues, but they also do not face the same financial or geographic barriers imposed under the Uber mandatory arbitration clause.[7] Finally, grievance arbitrators are permitted and indeed required to apply Ontario law, not the substantive law of a foreign jurisdiction.

B. UNCONSCIONABILITY OF UBER'S MANDATORY ARBITRATION CLAUSE

10. In *Douez v. Facebook Inc.* 2017 SCC 33, this Court applied a modified and nuanced approach to forum selection clauses, calibrated to recognition of the distinction between the ordinary commercial context and the standard form contract consumer context; taking into account both the disparity in bargaining power and the nature and importance of the interests at stake; recognizing that there is a public policy interest in ensuring that certain kinds of statutory rights and protections are adjudicated in Canadian courts; considering factors bearing on convenience, fairness and the interests of justice; and having regard to the social and economic policies enacted in the collective interest. Just as the forum selection test was applied contextually in *Douez,* so too should the assessment of the unconscionability in the case at bar be approached contextually.

11. Thus, in assessing the unconscionability of the Uber mandatory arbitration clause, similar considerations relating to the inequality of bargaining power arising in contracts of adhesion, involving even more vulnerable individuals, apply. So too, the interests at stake involve minimum non-waivable employment standards protections affecting important personal and dignity interests. Moreover, in assessing the degree of unfairness of the Uber mandatory arbitration clause, it is important to recognize that it imposes various obstacles on access to justice and adjudication: a foreign arbitrator operating in a foreign forum, prohibitive filing fees, and the imposition of Dutch law. Given all of these restrictions and requirements, the practical effect of the Uber mandatory arbitration clause is to profoundly undermine the access to justice interests of Uber drivers in being

[7] The observation of Justice Louis Brandeis is especially relevant in this context: "*The parties to the labor contract must be nearly equal in strength if justice is to be worked out*".

able to seek effective vindication not of mere contractual rights but rather of fundamental minimum non-waivable public policy employment standards protections.[8] These substantive protections cannot, under Ontario law, be bargained away, yet the combined effect of the Uber mandatory arbitration clause is manifestly unfair, rendering effective and meaningful enforcement all but impossible.[9]

12. As well, the Uber mandatory arbitration clause has the effect of precluding class actions in Ontario courts on behalf of Uber drivers. It is widely recognized and accepted that, in addition to serving goals of judicial economy and behaviour modification, the class action vehicle is critical for access to justice and the vindication of the rights of vulnerable and marginalized individuals who, for a variety of different reasons, cannot and will not bring proceedings on their own. Therefore, by also purporting to ban class actions, an Uber type mandatory arbitration clause effectively, and unfairly, prevents most individuals from the opportunity to have their rights determined and enforced.[10] Even if somehow, a few individuals were able to overcome the barriers imposed by Uber-type mandatory arbitration clauses, this leaves most others without access to justice, because of the systemic barriers and obstacles they face and that class actions are intended to overcome[11]. Whether viewed through the lens of unconscionability, or as being contrary to public policy, where a mandatory arbitration clause has the effect of precluding meaningful access to justice on an individual or collective basis, it should not be enforced.[12]

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[8] Reasons of the Court of Appeal, at paras 58 to 59, 68. See also the discussion in Enman-Beech, "*Unconscionable Inaccess to Justice*" (2020) Supreme Court Law Review (forthcoming), esp at pp. 25-37 ["Enman-Beech"] (**UFCW authorities, tab 3**)

[9] As Samuel Gompers once observed: "Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion.

[10] See, for example, in the U.S. context, Jean R. Sternlight "*Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*", (2015) Scholarly Works. Paper 935 (**UFCW authorities, tab 4**), at pp. 1343-52.

[11] This also includes a well-founded fear of reprisal should individuals even try to bring their own individual proceedings: see, for example *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 (CanLII), at paras. 168 to 70

[12] Enman-Beech, *supra*, at pp 40-43.

13. In *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666 and *Dell Computer Corp. v. Union des consommateurs* [2007] 2 SCR 801, this Court found that the right to bring a class action may be overridden by an arbitration agreement precluding individual access to the courts. However, in those cases, the Court was not asked to determine whether a mandatory arbitration clause can be unconscionable. Indeed, as Justice Binnie recognized in *TELUS v. Wellman* 2019 SCC 19 at para 85, the question of whether and under what circumstances mandatory arbitration clauses can be voided for unconscionability has not been determined by this Court. Moreover, as this Court earlier recognized in *Seidel*, mandatory arbitration clauses in contracts of adhesion, in both purpose and effect, can amount to no more than "a guise to avoid liability for widespread low-value wrongs that cannot be litigated individually but when aggregated form the subject of a viable class proceeding".[13]

14. In UFCW's submission, the unconscionability unfairness threshold is met where a mandatory arbitration clause contained in a contract of adhesion imposed in an unequal bargaining relationship has the effect of precluding vulnerable and precarious non-unionized workers from having meaningful access to justice in seeking to enforce core public policy minimum employment standards protections on an individual or class-wide basis. Whether a class action is viewed as a procedural or substantive right, it provides an essential vehicle for vindication of employee rights, one which is unfairly erased when Uber exercises its overwhelming economic power to require its drivers to relinquish important collective rights.[14]

15. The effect of the Uber mandatory arbitration clause in precluding class actions is also inconsistent with constitutional and *Charter* values, including access to justice and this Court's section 2(d) jurisprudence, which now recognizes *Charter* protection for the ability of workers to engage in concerted activities in order to overcome the inherent structural power imbalance with their

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[13] *Seidel v. TELUS Communications Inc.*, supra, at para 1, quoting Sharpe J.A. in *Griffin v. Dell Canada* Inc., 2010 ONCA 29 (CanLII), 98 O.R. (3d) 481, at para. 30. See also Jonnette Watson Hamilton, "*Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice*", (2006) 51 McGill Law Journal, 693, at p. 724 and p. 734 (**UFCW Authorities, tab 5**)

[14] See also *Huras v. Pimerica Financial Services Ltd.*, (**Respondent Authorities, tab 8**) where the lower court found a less intrusive mandatory arbitration clause (not including compelled foreign forum or foreign law) to be unconscionable, insofar as it precluded a class action seeking protection of minimum employment standards legislation: see paras 36 to 50 of its decision.

employer.[15] For non-unionized vulnerable and precarious workers in particular, the class action is the quintessential if not only mechanism through which individuals can collectively seek to enforce their legal rights, in the face of serious and fundamental obstacles to their doing so as individuals.[16] These obstacles are transformed into legal and practical prohibitions in the face of the imposed Uber mandatory arbitration clause. Therefore, permitting mandatory arbitration clauses to prohibit vulnerable non-unionized employees from joining together to pursue employment class actions is inconsistent with these *Charter* and constitutional values.

16. In the U.S., the Supreme Court's approach to unwaveringly enforcing mandatory arbitration clauses to preclude both individual and class court proceedings - especially those contained in standard form contracts of adhesion imposed in the non-unionized employee context - has led to widespread expansion in the imposition of mandatory arbitration clause in non-unionized workplaces. This in turn has had the predictable effect of precluding these individuals from being able to pursue, adjudicate, and enforce their minimum employment protections.[17] This has now

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[15] *Mounted Police Association of Ontario v. Canada (Attorney General),* [2015] 1 SCR 3, 2015 SCC 1 at paras 54-55, 58-59, 62, 66, 70

[16] For a critical discussion of the restrictions on concerted associational legal activity under the U.S. Supreme Court's restrictive approach, see "*Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements, #TimesUp on Workers' Rights*", (2019) 15 Stanford Journal of Civil Rights and Civil Liberties, 43-84 (**UFCW Authorities, tab 6**)

[17] For a review of the growth of mandatory arbitration clauses and the extent to which the U.S. Supreme Court's approach has undermined the ability of non-unionized employees and others to enforce their rights (including core minimum protections) both individually and collectively, while at the same time exacerbating inequality in access to justice in the workplace and elsewhere, see Economic Policy Institute, "*The growing use of mandatory arbitration*", 2018 (**UFCW Authorities, tab 7**); Cynthia Estlund, "*The Black Hole of Mandatory Arbitration*", April, 2018, NYU School of Law, Public Law and Legal Theory Research Paper Series, Working Paper No. 18-07 (**UFCW Authorities, tab 8**), esp at pp. 125 ff: "It now appears that, by imposing mandatory arbitration on its employees, an employer can ensure that it will face only a miniscule chance of ever having to answer for future legal *ex ante* waiver of substantive rights that the law declares non-waivable" (p. 129) ...[banning] aggregate actions…alone will sound a death knell to most wage and hour claims, and will confer virtual immunity on firms for those claims (p. 130) …If the [Supreme Court] continues on its current pro-

culminated in the US Supreme Court's 2018 5-4 majority decision in *Epic Systems Corp. v. Lewis* 138 S. Ct. 1612.[18] As Professor Colvin has subsequently observed[19]:

> The employment conditions experienced by the American worker have changed dramatically in recent decades as union representation has declined, employment in traditionally high wage blue-collar industries has fallen, and the combination of globalization and financialization has exerted downward pressures on labor costs. Against this backdrop…laws protecting employment rights such as the minimum wage, the right to equal pay, and the right to a safe workplace free of harassment or discrimination based on race, gender, or religion have become increasingly important as a workplace safety net. However, these protections are at risk of being undermined if there is no effective means of enforcing them. For all the limitations of the courts, litigation has been a vital mechanism for enforcing employment rights, particularly in an era of reduced government agency resources.

17. Finally, with respect to the Appellants' contention (para. 107) that selecting Dutch law does not amount to unconscionable behaviour "unless the party making the selection knows that the law would significantly disadvantage the other party", UFCW submits that, absent evidence to the

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arbitration path….it will be complicit in employers' effective nullification of employee rights and protections." (p. 131); Stephanie Greene and Christine Neylon O'Brien, "*The NLRB v. The Courts: Showdown over the Right to Collective Action in Workplace Disputes*", American Business Law Journal, Volume 52, Issue 1, 75–130, Spring 2015 (**UFCW Authorities, tab 9**); Alexander Colvin, "*Mandatory Arbitration and Inequality of Justice in Employment*", 2014 Cornell University ILR Collection (**UFCW Authorities, tab 10**); Charlotte Garden (2018) "*Disrupting Work Law: Arbitration in the Gig Economy*" University of Chicago Legal Forum: Vol. 2017, Article 9, p. 205 (**UFCW Authorities, tab 11**). See also Horton and Campbell, "*Arbitration as an Alternative to Dispute Resolution: Class Proceedings and the Mirage of Mandatory Arbitration*", 2019, forthcoming in Archibald, Annual Civil Procedure Review, at p. 123 (**UFCW Authorities, tab 12**):"… as can be seen from the American example, mandatory arbitration, far from being a form of alternative dispute resolution, has become an alternative to dispute resolution".

[18] Justice Ginsberg's dissenting reasons in the *Epic Systems* decision (see **tab 1**), recognizing that mandatory arbitration clauses should not override the right to bring individual and class proceedings, are more consonant with the Canadian recognition of the imbalance between non-unionized employees and their employer, and the importance of the ability to assert rights on a collective basis.

[19] Colvin, *The Metastasization of Mandatory Arbitration*", (2019) 94 Chi-Kent L.Rev. 3, at pp. 23-24 (**UFCW Authorities, tab 13**)

contrary from the stronger party imposing the foreign law requirement, it should be presumed that an attempt to contract out of mandatory domestic public policy minimum standard protections through the imposition of foreign law is intended to create an undue or known advantage.[20] At the very least, the more knowledgeable and sophisticated party should be presumed to be in a better position to lead evidence about the effect of the imposition of foreign law.

C. THE COMPETENCE-COMPETENCE PRINCIPLE

18. Contrary to the Appellants' submission (para. 40), the Court of Appeal's distinction between an arbitration agreement's scope and validity is supported by the case law of other jurisdictions under the Model Law[21]. Moreover, subsection 6(3) of the *Arbitration Act* specifically empowers a court to intervene in matters governed by the *Act* in order "[t]o prevent unequal or unfair treatment of parties to arbitration agreements," supporting the court's authority to inquire into both illegality and unconscionability. As well, in *Telus* (para. 85), this Court recognized jurisdiction to refuse to stay proceedings if a standard form mandatory arbitration provision was found to be unconscionable (approvingly referring to the approach taken by the Court of Appeal in this case). Finally, vulnerable parties should not be required to have resort to an inaccessible process in order to challenge its legality and unconscionability.

PARTS IV and V – COSTS AND ORDER REQUESTED

19. UFCW requests that the appeal be dismissed, with no order of costs for or against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 18, 2019

Steven Barrett/Ethan Poskanzer/Joshua Mandryk
GOLDBLATT PARTNERS LLP

Counsel for the Intervener, UFCW Canada

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[20] See Harris, "*Understanding public policy limits to the enforceability of forum selection clauses after Douez v. Facebook*", (2019) 15 Journal of Private International Law, pp. 50-96 at 82-84 (**UFCW Authorities, tab 14**).
[21] Born, International Commercial Arbitration, 2d ed., 2014 at pp. 1096-97 (**UFCW Authorities, tab 15**)

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Colvin, Alexander, "*The growing use of mandatory arbitration*", Economic Policy Institute, 2018	16
Enman-Beech, John, "*Unconscionable Inaccess to Justice*" (2020) Supreme Court Law Review (forthcoming)	11

Estlund, Cynthia "*The Black Hole of Mandatory Arbitration*", April, 2018, NYU School of Law, Public Law and Legal Theory Research Paper Series, Working Paper No. 18-07	16
Garden, Charlotte (2018) "*Disrupting Work Law: Arbitration in the Gig Economy*" University of Chicago Legal Forum: Vol. 2017, Article 9, p. 205	16
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PARTS I and II – OVERVIEW AND POSITION ON THE QUESTIONS IN ISSUE

1. The United Food and Commercial Workers Canada ("UFCW") advances submissions respecting the illegality of the Uber mandatory arbitration clause in light of the overall purpose of the *ESA* and the structure of its enforcement scheme, canvasses considerations relevant to unconscionability with a focus on the unfair impact of the Uber clause on individual and collective access to justice, and provides brief submissions on the competence-competence principle.

PART III - STATEMENT OF ARGUMENT

A. ILLEGALITY OF UBER'S MANDATORY ARBITRATION CLAUSE

2. Where an interpretation of legislation, informed by its language, structure and purpose, reveals that the Legislature intended that the statutory minimum rights and benefits it provides are to be enforced domestically through accessible and effective procedures accorded under the legislation, a mandatory arbitration clause precluding that very enforcement is inconsistent with the statutory scheme, and therefore invalid and unlawful. This is particularly the case where the minimum statutory protections are aimed at safeguarding vulnerable individuals, and where the legislation provides that these same minimum standards cannot be waived, by contract or otherwise.

3. Thus, where (as in the case of the *ESA*) mandatory legislative norms/minimum statutory protections deliberately restrict freedom of contract in pursuit of an overriding core public policy objective aimed at protecting vulnerable individuals from an imbalance of power in the workplace, mandatory arbitration clauses purporting to override effective and accessible statutory enforcement mechanisms should be regarded as inconsistent with the legislative scheme, and therefore unenforceable. This is even more the case where, as in the case at bar, the mandatory arbitration clause is imposed through a contract of adhesion, and includes imposed choice of foreign law and foreign forum requirements, as well as prohibitive filing fees, all of which make the foreign arbitration process functionally and practically inaccessible.[1] Indeed, in these circumstances, the Uber

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[1] Walsh, "*The Uses and Abuses of Party Autonomy in International Contracts*", University of New Brunswick Law Journal, (2010) 60 R.D. U.N.B. 12-31 at paras 4, 19, 22 and 26 (**UFCW Authorities, tab 2**): "Has ceding power to contracting parties to determine the courts and laws by which they will be bound in the name of international comity come at the expense of an excessive subordination of domestic legal policies aimed at redressing imbalances in bargaining power? …Consumer and individual employment contracts are widely recognized examples of situations in which states impose

mandatory arbitration clause is not only inconsistent with the *ESA* enforcement scheme, but also runs contrary to core public policy values including access to justice and the rule of law.[2]

4. Furthermore, contrary to the Appellants' submissions, explicit legislative override of a mandatory arbitration clause is not a prerequisite to a finding of illegality. For example, in *Seidel v. TELUS Communications Inc.*, [2011] 1 SCR 53 (at paras. 33-34), there was no explicit or express language overriding or voiding the relevant mandatory arbitration clause; rather, the clause was found to be unenforceable, based on an assessment of the overall legislative language and structure, and its underlying policy concerns and purposes.

5. Turning the specific language and scheme of the *ESA*, UFCW submits that the *ESA* provides for accessible domestic enforcement of statutory minimum employment protections. As is common with minimum employment standards legislation across Canada, and as confirmed by this Court in decisions such as *Machtinger v HOJ Industries Ltd.* [1992] 1 S.C.R. 986, and *Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27, contracting out of these protections is void and contrary to public policy (*ESA*, s. 5). For the reasons set out in the Respondent's factum, the Ontario Court of Appeal correctly found that the Ministry complaint enforcement mechanism established by the *ESA* is itself a minimum *ESA* employment standard, that is, "a requirement or prohibition… that applies to an employer for the benefit of an employee". Indeed, this Court has previously recognized that that the

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limits on party autonomy in order to correct a systemic imbalance of bargaining power…. Giving free rein to party autonomy to select the governing law would enable the stronger party to circumvent the protection afforded to the consumer or employee by the law of her home state…"

[2] In *Trial Lawyers Assn of BC v BC (AG)*, 2014 SCC 59, at para 38 to 40, this Court recognized the vital link between access to justice and the rule of law articulating the principle that without an accessible forum, the rule of law is threatened. While the legal context was different, the principle that without an accessible forum to adjudicate disputes, the rule of law is threatened applies equally in the case at bar, since the Uber mandatory arbitration clause, if upheld, effectively denies meaningful access to an adjudicative process for determining and enforcing extra-contractual minimum core public policy statutory protections intended to benefit vulnerable individuals.

ESA enforcement mechanism is intended "to make redress available…expeditiously and cheaply", and that there are "many advantages to the employee" in the *ESA*'s complaint process.[3]

6. However, while the *ESA* provides for the option of enforcement by way of a complaint to the Ministry (in which case the complaint could ultimately be adjudicated by the Ontario Labour Relations Board under Part XXIII of the *ESA*), it also preserves and provides, at the individual complainant's election, for the option of enforcement by way of a civil proceeding (see *ESA*, ss. 8 and 97). In other words, and as recognized by the Court of Appeal (Reasons, para. 43), the *ESA* provides an individual, at her election, with the right to choose to pursue enforcement of a minimum employment standards complaint either through a domestically accessible, Ontario-based Ministry of Labour complaint, or at the employee's option through a domestically accessible Ontario-based civil proceeding. Yet, the Uber mandatory arbitration clause deprives individuals not only of the right to pursue one or the other of these options, but of the right to pursue either. By depriving individuals of the right to pursue either enforcement option contemplated by and provided under the *ESA*, the Uber mandatory arbitration clause is inconsistent with the legislative enforcement scheme, and therefore unlawful.

7. As the Court of Appeal recognized (Reasons, para 37), and as this Court has consistently recognized (including in *Machtinger* and *Rizzo*), the language and purpose of the *ESA* must be construed in light of its fundamental purpose of protecting employees and guaranteeing them certain minimum substantive standards. In UFCW's submission, this must include the right to choose one or the other of the domestically accessible legal avenues provided under the *ESA* for vindication of their rights, Indeed, the *ESA* prescribed enforcement mechanisms should be regarded as an implicit and integral remedial component to each substantive employment standards minimum protection.[4] Compelling Uber drivers to seek enforcement in a foreign jurisdiction under a mandatory arbitration clause that compels the dispute be resolved under foreign law and that imposes prohibitive filing and

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[3] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, paras 27-29.

[4] See also *Huras v. Primerica Financial Services Ltd.*, [2000] O.J. No. 1474 (Ont Sup Ct.) at para 34 (**Respondent Authorities, tab 8**), where the court held that the *ESA* prohibition against contracting out "implicitly includes any contracting out of the remedy provisions of the *ESA* that enable enforcement of employment standards"; upheld on other grounds 2000 CanLII 16892 (ON CA).

other fees deprives them of their right to resort to *ESA* prescribed enforcement mechanisms (and indeed of any effective enforcement mechanism). In enacting the *ESA* protective legislative regime, the Legislature provided for it to be meaningfully and accessibly enforced, yet the Uber mandatory arbitration clause makes this practically and effectively impossible. Thus, far from promoting access to justice, extending the *ESA*'s protection to as many as possible, and offering faster and cheaper dispute resolution (as the Appellants contend at para. 83), the Uber mandatory arbitration clause diminishes and erodes its drivers' access to justice, and effectively and practically ensures the denial of their enforcement rights under the *ESA* while at the same time insulating Uber from meaningful accountability and liability. The adage that there is no right without a remedy[5] seems particularly apt in this context.

8. The Appellants submit (paras. 74-77, 82-83) that the *ESA* contemplates that an employee can agree to mandatory arbitration as an alternative enforcement mechanism. However, in addition to Court of Appeal's reference (paras. 33-34) to the language of ss. 8(2) and 101(1) of the *ESA* as evidencing a legislative intent that an employee's right to bring a civil proceeding in the courts does not extend to arbitration proceedings, both s. 82(2) and s. 123(1) of the *ESA* expressly distinguish between civil proceedings, on the one hand, and administrative, board or tribunal proceedings, on the other hand.[6] Moreover, since the right to elect to commence civil proceedings lies at the election of the individual claiming the protection of *ESA* minimum standards, this cannot possibly have been contemplated as including a right to unilaterally impose arbitration proceedings on an employee. Finally, the Appellants' abstract appeal to a legislative desire for expeditious, efficient, informal and inexpensive dispute resolution can hardly be said to apply to the Uber mandatory arbitration clause.

9. The Appellants also submit (para 66) that the *ESA* requirement that grievance arbitration is the enforcement mechanism for unionized employees supports a legislative intention to permit mandatory arbitration in the non-unionized context. However, in UFCW's submission, the requirement of arbitration in the unionized context provides strong indication that it was not intended that mandatory arbitration can also be imposed on non-unionized employees, and displace their right to complain to the Ministry or to commence civil proceedings. Moreover, the very reasons that grievance arbitration is legislatively imposed for unionized employees illustrate why the lopsided

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[5] See the ancient but still seminal reasons of Holt, C.J. in *Ashby v. White*, (1703), 2 Ld. Raym. 938
[6] See also the Ministry of Labour's Policy and Interpretation Manual discussion of s. 8(2), online at http://catalogue.owtlibrary.on.ca/owtl/currentawareness/ESA2019Release1.pdf

Uber mandatory arbitration process is not permitted or contemplated under the *ESA*. Not only do unionized employees not face the same imbalance of power their non-unionized counterparts, but grievance arbitrators under collective agreements charged with adjudicating employment standards claims are mutually selected and acceptable, independent, and presumed to be expert in Ontario labour and employment law. As well, unlike Uber drivers, not only are the legal and other costs of grievance arbitration pooled among all unionized employees through union dues, but they also do not face the same financial or geographic barriers imposed under the Uber mandatory arbitration clause.[7] Finally, grievance arbitrators are permitted and indeed required to apply Ontario law, not the substantive law of a foreign jurisdiction.

B. UNCONSCIONABILITY OF UBER'S MANDATORY ARBITRATION CLAUSE

10. In *Douez v. Facebook Inc.* 2017 SCC 33, this Court applied a modified and nuanced approach to forum selection clauses, calibrated to recognition of the distinction between the ordinary commercial context and the standard form contract consumer context; taking into account both the disparity in bargaining power and the nature and importance of the interests at stake; recognizing that there is a public policy interest in ensuring that certain kinds of statutory rights and protections are adjudicated in Canadian courts; considering factors bearing on convenience, fairness and the interests of justice; and having regard to the social and economic policies enacted in the collective interest. Just as the forum selection test was applied contextually in *Douez,* so too should the assessment of the unconscionability in the case at bar be approached contextually.

11. Thus, in assessing the unconscionability of the Uber mandatory arbitration clause, similar considerations relating to the inequality of bargaining power arising in contracts of adhesion, involving even more vulnerable individuals, apply. So too, the interests at stake involve minimum non-waivable employment standards protections affecting important personal and dignity interests. Moreover, in assessing the degree of unfairness of the Uber mandatory arbitration clause, it is important to recognize that it imposes various obstacles on access to justice and adjudication: a foreign arbitrator operating in a foreign forum, prohibitive filing fees, and the imposition of Dutch law. Given all of these restrictions and requirements, the practical effect of the Uber mandatory arbitration clause is to profoundly undermine the access to justice interests of Uber drivers in being

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[7] The observation of Justice Louis Brandeis is especially relevant in this context: "*The parties to the labor contract must be nearly equal in strength if justice is to be worked out*".

able to seek effective vindication not of mere contractual rights but rather of fundamental minimum non-waivable public policy employment standards protections.[8] These substantive protections cannot, under Ontario law, be bargained away, yet the combined effect of the Uber mandatory arbitration clause is manifestly unfair, rendering effective and meaningful enforcement all but impossible.[9]

12. As well, the Uber mandatory arbitration clause has the effect of precluding class actions in Ontario courts on behalf of Uber drivers. It is widely recognized and accepted that, in addition to serving goals of judicial economy and behaviour modification, the class action vehicle is critical for access to justice and the vindication of the rights of vulnerable and marginalized individuals who, for a variety of different reasons, cannot and will not bring proceedings on their own. Therefore, by also purporting to ban class actions, an Uber type mandatory arbitration clause effectively, and unfairly, prevents most individuals from the opportunity to have their rights determined and enforced.[10] Even if somehow, a few individuals were able to overcome the barriers imposed by Uber-type mandatory arbitration clauses, this leaves most others without access to justice, because of the systemic barriers and obstacles they face and that class actions are intended to overcome[11]. Whether viewed through the lens of unconscionability, or as being contrary to public policy, where a mandatory arbitration clause has the effect of precluding meaningful access to justice on an individual or collective basis, it should not be enforced.[12]

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[8] Reasons of the Court of Appeal, at paras 58 to 59, 68. See also the discussion in Enman-Beech, "*Unconscionable Inaccess to Justice*" (2020) Supreme Court Law Review (forthcoming), esp at pp. 25-37 ["Enman-Beech"] (**UFCW authorities, tab 3**)

[9] As Samuel Gompers once observed: "Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion.

[10] See, for example, in the U.S. context, Jean R. Sternlight "*Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*", (2015) Scholarly Works. Paper 935 (**UFCW authorities, tab 4**), at pp. 1343-52.

[11] This also includes a well-founded fear of reprisal should individuals even try to bring their own individual proceedings: see, for example *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 (CanLII), at paras. 168 to 70

[12] Enman-Beech, *supra*, at pp 40-43.

13. In *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666 and *Dell Computer Corp. v. Union des consommateurs* [2007] 2 SCR 801, this Court found that the right to bring a class action may be overridden by an arbitration agreement precluding individual access to the courts. However, in those cases, the Court was not asked to determine whether a mandatory arbitration clause can be unconscionable. Indeed, as Justice Binnie recognized in *TELUS v. Wellman* 2019 SCC 19 at para 85, the question of whether and under what circumstances mandatory arbitration clauses can be voided for unconscionability has not been determined by this Court. Moreover, as this Court earlier recognized in *Seidel*, mandatory arbitration clauses in contracts of adhesion, in both purpose and effect, can amount to no more than "a guise to avoid liability for widespread low-value wrongs that cannot be litigated individually but when aggregated form the subject of a viable class proceeding".[13]

14. In UFCW's submission, the unconscionability unfairness threshold is met where a mandatory arbitration clause contained in a contract of adhesion imposed in an unequal bargaining relationship has the effect of precluding vulnerable and precarious non-unionized workers from having meaningful access to justice in seeking to enforce core public policy minimum employment standards protections on an individual or class-wide basis. Whether a class action is viewed as a procedural or substantive right, it provides an essential vehicle for vindication of employee rights, one which is unfairly erased when Uber exercises its overwhelming economic power to require its drivers to relinquish important collective rights.[14]

15. The effect of the Uber mandatory arbitration clause in precluding class actions is also inconsistent with constitutional and *Charter* values, including access to justice and this Court's section 2(d) jurisprudence, which now recognizes *Charter* protection for the ability of workers to engage in concerted activities in order to overcome the inherent structural power imbalance with their

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[13] *Seidel v. TELUS Communications Inc.*, supra, at para 1, quoting Sharpe J.A. in *Griffin v. Dell Canada* Inc., 2010 ONCA 29 (CanLII), 98 O.R. (3d) 481, at para. 30. See also Jonnette Watson Hamilton, "*Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice*", (2006) 51 McGill Law Journal, 693, at p. 724 and p. 734 (**UFCW Authorities, tab 5**)

[14] See also *Huras v. Pimerica Financial Services Ltd.*, (**Respondent Authorities, tab 8**) where the lower court found a less intrusive mandatory arbitration clause (not including compelled foreign forum or foreign law) to be unconscionable, insofar as it precluded a class action seeking protection of minimum employment standards legislation: see paras 36 to 50 of its decision.

employer.[15] For non-unionized vulnerable and precarious workers in particular, the class action is the quintessential if not only mechanism through which individuals can collectively seek to enforce their legal rights, in the face of serious and fundamental obstacles to their doing so as individuals. [16] These obstacles are transformed into legal and practical prohibitions in the face of the imposed Uber mandatory arbitration clause. Therefore, permitting mandatory arbitration clauses to prohibit vulnerable non-unionized employees from joining together to pursue employment class actions is inconsistent with these *Charter* and constitutional values.

16. In the U.S., the Supreme Court's approach to unwaveringly enforcing mandatory arbitration clauses to preclude both individual and class court proceedings - especially those contained in standard form contracts of adhesion imposed in the non-unionized employee context - has led to widespread expansion in the imposition of mandatory arbitration clause in non-unionized workplaces. This in turn has had the predictable effect of precluding these individuals from being able to pursue, adjudicate, and enforce their minimum employment protections.[17] This has now

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[15] *Mounted Police Association of Ontario v. Canada (Attorney General),* [2015] 1 SCR 3, 2015 SCC 1 at paras 54-55, 58-59, 62, 66, 70

[16] For a critical discussion of the restrictions on concerted associational legal activity under the U.S. Supreme Court's restrictive approach, see "*Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements, #TimesUp on Workers' Rights*", (2019) 15 Stanford Journal of Civil Rights and Civil Liberties, 43-84 (**UFCW Authorities, tab 6**)

[17] For a review of the growth of mandatory arbitration clauses and the extent to which the U.S. Supreme Court's approach has undermined the ability of non-unionized employees and others to enforce their rights (including core minimum protections) both individually and collectively, while at the same time exacerbating inequality in access to justice in the workplace and elsewhere, see Economic Policy Institute, "*The growing use of mandatory arbitration*", 2018 (**UFCW Authorities, tab 7**); Cynthia Estlund, "*The Black Hole of Mandatory Arbitration*", April, 2018, NYU School of Law, Public Law and Legal Theory Research Paper Series, Working Paper No. 18-07 (**UFCW Authorities, tab 8**), esp at pp. 125 ff: "It now appears that, by imposing mandatory arbitration on its employees, an employer can ensure that it will face only a miniscule chance of ever having to answer for future legal *ex ante* waiver of substantive rights that the law declares non-waivable" (p. 129) ...[banning] aggregate actions…alone will sound a death knell to most wage and hour claims, and will confer virtual immunity on firms for those claims (p. 130) …If the [Supreme Court] continues on its current pro-

culminated in the US Supreme Court's 2018 5-4 majority decision in *Epic Systems Corp. v. Lewis* 138 S. Ct. 1612.[18] As Professor Colvin has subsequently observed[19]:

> The employment conditions experienced by the American worker have changed dramatically in recent decades as union representation has declined, employment in traditionally high wage blue-collar industries has fallen, and the combination of globalization and financialization has exerted downward pressures on labor costs. Against this backdrop…laws protecting employment rights such as the minimum wage, the right to equal pay, and the right to a safe workplace free of harassment or discrimination based on race, gender, or religion have become increasingly important as a workplace safety net. However, these protections are at risk of being undermined if there is no effective means of enforcing them. For all the limitations of the courts, litigation has been a vital mechanism for enforcing employment rights, particularly in an era of reduced government agency resources.

17. Finally, with respect to the Appellants' contention (para. 107) that selecting Dutch law does not amount to unconscionable behaviour "unless the party making the selection knows that the law would significantly disadvantage the other party", UFCW submits that, absent evidence to the

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arbitration path….it will be complicit in employers' effective nullification of employee rights and protections." (p. 131); Stephanie Greene and Christine Neylon O'Brien, "*The NLRB v. The Courts: Showdown over the Right to Collective Action in Workplace Disputes*", American Business Law Journal, Volume 52, Issue 1, 75–130, Spring 2015 (**UFCW Authorities, tab 9**); Alexander Colvin, "*Mandatory Arbitration and Inequality of Justice in Employment*", 2014 Cornell University ILR Collection (**UFCW Authorities, tab 10**); Charlotte Garden (2018) "*Disrupting Work Law: Arbitration in the Gig Economy*" University of Chicago Legal Forum: Vol. 2017, Article 9, p. 205 (**UFCW Authorities, tab 11**). See also Horton and Campbell, "*Arbitration as an Alternative to Dispute Resolution: Class Proceedings and the Mirage of Mandatory Arbitration*", 2019, forthcoming in Archibald, Annual Civil Procedure Review, at p. 123 (**UFCW Authorities, tab 12**):"… as can be seen from the American example, mandatory arbitration, far from being a form of alternative dispute resolution, has become an alternative to dispute resolution".

[18] Justice Ginsberg's dissenting reasons in the *Epic Systems* decision (see **tab 1**), recognizing that mandatory arbitration clauses should not override the right to bring individual and class proceedings, are more consonant with the Canadian recognition of the imbalance between non-unionized employees and their employer, and the importance of the ability to assert rights on a collective basis.

[19] Colvin, *The Metastasization of Mandatory Arbitration*", (2019) 94 Chi-Kent L.Rev. 3, at pp. 23-24 (**UFCW Authorities, tab 13**)

contrary from the stronger party imposing the foreign law requirement, it should be presumed that an attempt to contract out of mandatory domestic public policy minimum standard protections through the imposition of foreign law is intended to create an undue or known advantage.[20] At the very least, the more knowledgeable and sophisticated party should be presumed to be in a better position to lead evidence about the effect of the imposition of foreign law.

C. THE COMPETENCE-COMPETENCE PRINCIPLE

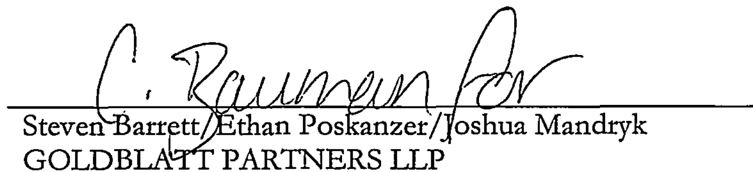
18. Contrary to the Appellants' submission (para. 40), the Court of Appeal's distinction between an arbitration agreement's scope and validity is supported by the case law of other jurisdictions under the Model Law[21]. Moreover, subsection 6(3) of the *Arbitration Act* specifically empowers a court to intervene in matters governed by the *Act* in order "[t]o prevent unequal or unfair treatment of parties to arbitration agreements," supporting the court's authority to inquire into both illegality and unconscionability. As well, in *Telus* (para. 85), this Court recognized jurisdiction to refuse to stay proceedings if a standard form mandatory arbitration provision was found to be unconscionable (approvingly referring to the approach taken by the Court of Appeal in this case). Finally, vulnerable parties should not be required to have resort to an inaccessible process in order to challenge its legality and unconscionability.

PARTS IV and V – COSTS AND ORDER REQUESTED

19. UFCW requests that the appeal be dismissed, with no order of costs for or against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 18, 2019



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[20] See Harris, "*Understanding public policy limits to the enforceability of forum selection clauses after Douez v. Facebook*", (2019) 15 Journal of Private International Law, pp. 50-96 at 82-84 (**UFCW Authorities, tab 14**).

[21] Born, International Commercial Arbitration, 2d ed., 2014 at pp. 1096-97 (**UFCW Authorities, tab 15**)

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Case	**Paragraph**
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Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27	5, 7
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Secondary Authorities	**Paragraph**
Born, Gary*, International Commercial Arbitration*, 2d ed., 2014 at pp. 1096-97	18
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Colvin, Alexander "*The Metastasization of Mandatory Arbitration*", (2019) 94 Chi-Kent L.Rev. 3	16
Colvin, Alexander, "*The growing use of mandatory arbitration*", Economic Policy Institute, 2018	16
Enman-Beech, John, "*Unconscionable Inaccess to Justice*" (2020) Supreme Court Law Review (forthcoming)	11

Estlund, Cynthia "*The Black Hole of Mandatory Arbitration*", April, 2018, NYU School of Law, Public Law and Legal Theory Research Paper Series, Working Paper No. 18-07	16
Garden, Charlotte (2018) "*Disrupting Work Law: Arbitration in the Gig Economy*" University of Chicago Legal Forum: Vol. 2017, Article 9, p. 205	16
Greene, Stephanie and Christine Neylon O'Brien, "*Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements, #TimesUp on Workers' Rights*", (2019) 15 Stanford Journal of Civil Rights and Civil Liberties	15
Greene, Stephanie and Christine Neylon O'Brien, "*The NLRB v. The Courts: Showdown over the Right to Collective Action in Workplace Disputes*", American Business Law Journal, Volume 52, Issue 1, 75–130, Spring 2015	16
Harris, Liam, "*Understanding public policy limits to the enforceability of forum selection clauses after Douez v. Facebook*", (2019) 15 Journal of Private International Law, pp. 50-96	17
Horton, William and David Campbell, "*Arbitration as an Alternative to Dispute Resolution: Class Proceedings and the Mirage of Mandatory Arbitration*", 2019, forthcoming in Archibald, Annual Civil Procedure Review	16
Ministry of Labour's Policy and Interpretation Manual discussion of s. 8(2), online at http://catalogue.owtlibrary.on.ca/owtl/currentawareness/ESA2019Release1.pdf	8
Sternlight, Jean R., "*Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*", (2015) Scholarly Works. Paper 935	12
Walsh, Catherine, "*The Uses and Abuses of Party Autonomy in International Contracts*", University of New Brunswick Law Journal, (2010) 60 R.D. U.N.B. 12-31	3
Watson Hamilton, Jonnette, "*Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice*", (2006) 51 McGill Law Journal, 693,	13

Legislation	**Paragraph**
Arbitration Act, 1991, S.O. 1991, c. 17, s. 6(3) *arbitrage* (Loi de 1991 sur l'), L.O. 1991, chap. 17, s. 6(3)	18
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