SCC File Number: 38534

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

BETWEEN:

UBER TECHNOLOGIES INC., UBER CANDADA, INC.
UBER B.V. and RAISER OPERATIONS B.V.

Appellants

-and-

DAVID HELLER

Respondent

FACTUM OF THE INTERVENER
ADR CHAMBERS INC.

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

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I. OVERVIEW AND STATEMENT OF FACTS

1. This appeal raises questions about the institutional role of the court and its relationship to an arbitral tribunal when a party disputes the validity of an arbitration agreement: should the court or the arbitral tribunal decide whether the arbitration agreement is valid?

2. Both the courts and the tribunal have statutory jurisdiction to determine the validity of the arbitration agreement.[1] ADR Chambers Inc. intervenes on this appeal to address the question of who decides or, more precisely, the guidance this Court should provide to lower courts on "how to decide whether to decide" the validity of an arbitration clause. This question has immense practical importance for parties and legal counsel, and for courts and tribunals hearing motions for a stay of court proceedings under both domestic and international arbitration statutes.

3. Canadian courts should use a single, uniform and principled approach to this question, based on this Court's decisions in *Dell* and *Seidel*.[2]

4. In this appeal, the Court of Appeal for Ontario held that the approach set out by this Court in *Dell* and *Seidel* does not apply if the issue is the validity of an arbitration agreement.[3] This Court should not uphold that conclusion.

II. POSITION ON THE QUESTION IN ISSUE

5. ADR Chambers Inc. takes no position on the outcome of this appeal. It intervenes to assist the Court on a single point of law raised by the Court of Appeal's reasons: whether the Ontario court should apply the general rule of competence-competence established in *Dell* and *Seidel*, and its exceptions, when a party challenges the validity of an arbitration clause. This situation arises typically on a motion for a stay under either of the Ontario arbitration statutes.[4]

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[1] *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sch 5, Model Law art 8(1) and 16 [***ICAA or* Model Law**]; *Arbitration Act, 1991*, SO 1991, c 17, s 7(2) and 17(1) [***Ontario Arbitration Act***].

[2] *Dell Computer Corp. v Union des Consommateurs*, 2007 SCC 34, [2007] 2 SCR 801 [***Dell***]; *Seidel v TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 SCR 531 [***Seidel***].

[3] *Heller v Uber Technologies Inc*, 2019 ONCA 1, 145 OR (3d) 81 at ¶39-40 [**Court of Appeal Reasons**].

[4] *Dell* at ¶84-85; *Seidel* at ¶66 (Lebel and Deschamps JJ); *ICAA*, art 8; *Ontario Arbitration Act*, s 7(2).

6. This Court should continue to endorse the "systematic referral" of disputes to arbitration if the parties have agreed to arbitrate, including when a party challenges the validity of an agreement to arbitrate. However, if a validity challenge raises a question of law, or a question of mixed law and fact that requires only a superficial review of factual evidence, the court may decide the validity issue on a motion for a stay.

7. Such a preliminary legal ruling is squarely within the institutional role and core competency of the Ontario courts, particularly when the interpretation and effect of an Ontario statute is at issue. In a putative class proceeding involving an arbitration clause in a contract of adhesion, a court's ruling may also provide a common and binding (or highly persuasive) resolution of a legal issue applicable to all parties to the arbitration clause, promote access to justice, and ensure a consistent resolution of the legal question – whether the matter ultimately remains in court or is referred to arbitration.

III. STATEMENT OF ARGUMENT

8. Relying on an arbitration clause, Uber seeks a stay of this prospective class proceeding under either Article 8 of the Model Law in the *ICAA*, or s. 7(1) of the *Ontario Arbitration Act*. The respondent, Heller, resists Uber's motion for a stay, arguing that the arbitration clause is invalid because: (a) the arbitration clause is an illegal "contracting out" of the Ontario *Employment Standards Act, 2000* (***ESA***), or (b) the arbitration clause is unconscionable at common law.[5]

9. Both the courts and an arbitral tribunal have statutory jurisdiction to determine the validity of an arbitration agreement on a motion to stay court proceedings. Under Article 8(1) of the Model Law, a court may refuse to refer a dispute to arbitration if the arbitration agreement is "null and void, inoperative or incapable of being performed".[6] Section 7(2) 2 of the *Ontario Arbitration Act* provides that the court may refuse to grant a stay of court proceedings if "the arbitration agreement is invalid".[7]

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[5] Court of Appeal Reasons at ¶22.
[6] *ICAA*, art 8(1).
[7] *Ontario Arbitration Act*, s 7(2).

10. Both statutes also expressly confer jurisdiction on the arbitral tribunal to decide preliminary objections, including the "validity of the arbitration agreement".[8]

11. How should a court determine whether to decide the validity issue itself, or refer it to the arbitral tribunal? This Court should reaffirm the general rule of competence-competence and its exceptions discussed in *Dell* and *Seidel.*

A. Express Tribunal Jurisdiction and the Competence-Competence Principle

12. An arbitral tribunal is competent to determine is own competence (or jurisdiction).[9] The competence-competence principle, in essence, maintains that the tribunal has the authority to decide first on preliminary challenges to its jurisdiction.[10] Competence-competence is a foundation of the international commercial arbitration system, through Article 16 of the UNCITRAL Model Law on International Commercial Arbitration (1985)[11] and the *New York Convention* (1958).[12] The ICAA adopts the Model Law and the *New York Convention*. The domestic *Ontario Arbitration Act* is closely based on the Model Law.

13. The *New York Convention* and the Model Law, and the Canadian legislation that implements them, are designed to enforce the parties' agreement to arbitrate and to limit the involvement of courts in the arbitration process.[13] In this way, legislatures and courts contribute to the primacy of alternative dispute resolution mechanisms, uphold the authority of the arbitral tribunal over arbitration agreements, and support party autonomy in contractual dealings.

14. Ontario's domestic and international arbitration legislation both implement the competence-competence principle through the combined operation of: (a) the express statutory jurisdiction of the tribunal to rule on its own jurisdiction –specifically, to rule on objections about

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[8] *Ontario Arbitration Act*, s 17(1); *ICAA*, art 16(1).
[9] *Ontario Arbitration Act*, s 17(1); *ICAA*, art 16(1); *Dell* at ¶70.
[10] *Seidel* at ¶68 (Lebel and Deschamps JJ).
[11] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration* 1985: with amendments as adopted in 2006 (Vienna: United Nations, 2008) [***Model Law***].
[12] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 10 June 1958, United Nations Treaty Series, vol 330, No 4739 [***New York Convention***].
[13] See *e.g.*, *Ontario Arbitration Act*, ss 3, 6, and 7; *Inforica Inc. v CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642, (2009) 97 OR (3d) 151 (CA) at ¶14 [***Inforica***]; *New York Convention*, art 2(3); and *Model Law*, art 5 and 8.

the "existence or validity of the arbitration agreement";[14] and (b) the supporting provisions that require court proceedings to be stayed if the parties have agreed to submit the dispute to arbitration, with specified exceptions (including for an invalid arbitration agreement).[15]

15. To implement the principle of competence-competence, this Court in *Dell* and *Seidel* established a general rule of "systematic referral" of disputes to arbitration. This Court's framework grants chronological priority to the arbitral tribunal to decide challenges to its jurisdiction and establishes guidelines for a court in assessing whether to refer a preliminary challenge to the arbitral tribunal, or decide the matter itself. The general rule in *Dell* and *Seidel*, and its exceptions, are as follows:

- in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator
- a court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law
- if the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts
- where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record
- the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding.[16]

16. In *Seidel*, this Court confirmed that under British Columbia's domestic arbitration legislation, the approach in *Dell* should apply to any challenge to the arbitrator's jurisdiction

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[14] *Ontario Arbitration Act*, s 17(1); *ICAA*, art 16(1). Subsection 17(2) of the Act provides the further caveat that the court may rule on a jurisdictional objection if, within 30 days of the arbitral tribunal making a jurisdictional decision, a party requests that the court do so.
[15] *Ontario Arbitration Act*, ss 7(1) and (2); *ICAA*, art 8.
[16] *Dell* at ¶84-85; *Seidel* at ¶29 (Binnie J) and 114 (Lebel and Deschamps JJ).

(absent a legislated exception), including challenges that the arbitration agreement is "void, inoperative or incapable of being performed".[17]

17. The general rule and its exceptions in *Dell* and *Seidel* seek to achieve several objectives:

- to support the efficient referral of disputes to arbitration in accordance with the purpose and policy of the arbitration statutes[18]
- to reinforce the legislative mandate of a limited, supervisory role for the court[19]
- to support commercial arbitration as an effective system of dispute resolution, independent of and co-existent with courts[20]
- to respect provincial superior courts' expertise in determining questions of law[21]
- to provide a safeguard against parties using court challenges to the tribunal's jurisdiction as a delay tactic or for other strategic reasons[22] and
- to promote efficiency and effective use of court and litigant resources.[23]

18. Appellate courts in Ontario and other provinces have applied this approach to challenges to the validity of arbitration agreements,[24] and to the more common questions about their scope

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[17] *Seidel* at ¶29 (Binnie J) and 114 (Lebel and Deschamps JJ).
[18] *TELUS Communications Inc v Wellman*, 2019 SCC 19, 433 DLR (4th) 1 at ¶138 [***Wellman***].
[19] *Ontario Arbitration Act*, s 6; William Park, "Challenging Arbitral Jurisdiction: The Role of Institutional Rules" (2015) 1 Boston University School of Law, Public Law Research Paper.
[20] International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, (The Netherlands: International Council for Commercial Arbitration, 2011) at 39 (available online: <www.arbitration-icca.org>).
[21] *Dell* at ¶84; *Seidel* at ¶66 (Lebel and Deschamps JJ).
[22] Stefan Kroll, "Party Autonomy in Relation to Competence-Competence" in Franco Ferrari, ed, *Limits to Party Autonomy in International Commercial Arbitration* (New York: JurisNet LLC, 2016) 165.
[23] W Michael G Osborne and Ted Frankel, *Commercial Arbitration in Canada: Overview* (Toronto: Thomson Reuters Canada Limited, 2019) (Practical Law Canada).
[24] See e.g., *Jean Estate v Wires Jolley LLP*, 2009 ONCA 339, 96 OR (3d) 171; *MDG Kingston Inc. v MDG Computers Canada Inc.*, 2008 ONCA 656, 92 OR (3d) 4 [***MDG***]; *Sum Trade Corp. v Agricom International Inc.*, 2018 BCCA 379, 18 BCLR (6th) 322; *EPCOR Power LP v Petrobank Energy and Resources Ltd.*, 2010 ABCA 378, 499 AR 193; *Hopkins v Ventura Custom Homes Ltd.*, 2013 MBCA 67, 363 DLR (4th) 670.

and existence.[25] If a party resists a motion for a stay on the grounds that the dispute falls within the scope of the arbitration clause, the dispute will be referred to the arbitral tribunal if it is "arguable" that the dispute falls within the terms of the arbitration agreement.[26]

B. A Uniform Approach to the Range of Cases under the Exceptions to a Stay

19. In the present appeal, the Court of Appeal for Ontario concluded that the approach in *Dell* and *Seidel* only applies to issues about the scope of the arbitration clause; it does not apply to the validity of the clause. The court also seems to imply that the validity of an arbitration agreement is solely for the court to decide under s. 7(2) 2 of the *Ontario Arbitration Act*.[27]

20. The Court of Appeal's conclusions are inconsistent with this Court's decisions in *Dell* and *Seidel*. This Court should reaffirm its uniform approach for courts to apply to preliminary objections, including those based on the alleged invalidity of an arbitration agreement, whether arising under s. 7(2) of the *Ontario Arbitration Act* or Article 8 of the Model Law.

21. The approach in *Dell* and *Seidel* provides for consistency, predictability, and greater overall efficiency in deciding whether to refer jurisdiction and other preliminary objections to the arbitral tribunal across a myriad of cases. The existing rule and its exceptions provide an effective and workable framework for courts to assess challenges to the arbitrator's jurisdiction on a uniform basis. There are strong reasons in both law and policy to apply this approach to challenges based on invalidity.

22. First, the statutory grounds to oppose a stay of court proceedings may raise an array of legal and factual circumstances, and the general rule and its exceptions are designed to be flexible to these diverse scenarios.

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[25] See e.g., *Haas v Gunasekaram*, 2016 ONCA 744, 272 ACWS (3d) 21 at ¶30-39; *Dancap Productions Inc. v Key Brand Entertainment Inc.*, 2009 ONCA 135, 175 ACWS (3d) 218; *Dalimpex Ltd v Janicki*, [2003] OJ No 2094, 64 OR (3d) 737 (CA) at ¶21 [***Dalimpex***].

[26] In *Dalimpex*, at ¶21, Charron JA adopted this as "the proper approach" to art 8(1) of the *ICAA*. This approach is also applied in Ontario to cases involving domestic arbitration clauses: see e.g., *Greenfield Ethanol Inc. v Suncor Energy Products Inc.*, 2007 ONCA 823, 159 ACWS (3d) 474 at ¶9; aff'd 2007 ONCA 823; *Woolcock v Bushert*, [2004] OJ No 4498, 246 DLR (4th) 139 (CA) at ¶12.

[27] Court of Appeal Reasons at ¶39-40.

- The *legal* grounds to challenge the invalidity of an arbitration agreement coincide generally with fundamental challenges to contracts at common law, such as duress, illegality or other inconsistency with a statute, and unconscionability. These arguments may concern the central notion of party autonomy and a party's genuine consent or agreement to arbitrate a dispute—concepts at the very heart of commercial arbitration in Canada and internationally.

- At the same time, the grounds to resist a stay exist on a diverse *factual* continuum. Just as a challenge based on legal incapacity under s. 7(2) 1 may be factually straightforward (*e.g.*, the person was underage when the agreement was entered) or complex (*e.g.*, an aging person who may suffer from dementia), similarly, invalidity challenges under s. 7(2) 2 based on duress or unconscionability may be nuanced factually and require the decision-maker to hear live witnesses, find facts, and assess and weigh conflicting evidence about the allegedly exploitative circumstances.

- There are also *practical* concerns. In common with other exceptions to a mandatory stay, invalidity arguments may focus only on the arbitration clause, or equally apply to the entire agreement in which a clause is found. If invalidity arguments are integral to the main dispute, they may be better determined by the tribunal together with the overall merits.

23. There should not be an unbending rule that all invalidity arguments must go to the arbitral tribunal, nor a rule requiring the court to make all such determinations. Rather, a court's approach to "who decides" must accommodate the range of possible invalidity arguments and ensure that the decision-maker is the correct one for the arguments raised and decisions to be made. The approach in *Dell* and *Seidel* provides the necessary direction to lower courts.

24. Second, the existing rule and exceptions in *Dell* and *Seidel* have proven effective and workable, and have enabled courts to identify cases in which it is (at a high level) unfair or impractical to refer the dispute to arbitration.[28] The courts' role in preliminary jurisdiction

[28] *Wellman* at ¶65, citing *MDG* at ¶36. See also the cases at footnotes 24-25, above.

objections is restricted to legal questions and matters that are not complex on the evidence, a familiar standard that can be applied consistently across all kinds of invalidity objections.

25. Third, the approach in *Dell* and *Seidel* enables a court to exercise a core aspect of its jurisdiction: the interpretation of provincial statutes. Assessing the possible inconsistency between a statute and an arbitration clause is an example of this role of the court.[29] Deciding questions of law is consistent with the court's limited, supervisory role in the arbitration process.

26. Fourth, there may be additional benefits in class proceedings if the parties (including all putative plaintiffs) are parties to the same or similar arbitration clause. A court's ruling on a question of law promotes access to justice and efficiency, by providing an early, authoritative and binding (or strongly persuasive) determination of a common issue for all parties. Doing so in class proceedings may advance the parties closer to a resolution of the overall dispute; avoid duplicative preliminary objections or legal arguments that would occur if the individual disputes are sent to arbitration; and promote consistency of outcomes across all individual cases.

27. Fifth, on a practical level, the approach in *Dell and Seidel* maintains the primary role of the arbitral tribunal as a trier of fact, by ensuring that validity questions are not determined by a court when they involve complex questions of fact, hearing witnesses, or reviewing extensive documentation. Complex, evidence-based invalidity issues and invalidity arguments that are bound up with the overall merits should be determined by the arbitral tribunal.

28. Lastly, the application of the approach in *Dell* and *Seidel* to invalidity challenges implements the policy of the domestic and international arbitration statutes. It upholds the legal primacy of the arbitral tribunal through the systematic and presumptive referral of disputes to arbitration if the parties have so agreed.[30] To do otherwise would frustrate the purpose of the referral process by denying swift resort to arbitration and undermining the autonomy of arbitral institutions. The fact that the arbitration statutes empower the courts to determine the validity of an arbitration agreement at other stages of the arbitration process – on an appeal to the court from a tribunal ruling, on an application to set aside an award, and on an application to recognize and

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[29] *Dell* at ¶84.
[30] *Ontario Arbitration Act*, s 7(1); *ICAA*, art 8.

enforce an arbitral award – does not imply that the approach in *Dell* and *Seidel* should be set aside or diluted for invalidity cases arising at an early stage under s. 7(2) or Article 8.[31]

C. Application of the *Dell* and *Seidel* Approach in Practice

29. Applying these principles to this appeal as an example, the Ontario courts were not required to decline to determine the invalidity of the arbitration clause. An exception to the general rule applies to both arguments about invalidity, as both involve questions of law and require only a superficial examination of evidence.

30. The determination of the first invalidity argument in this appeal involves the interpretation of Ontario legislation and possibly reconciling the objectives of different statutes, matters within the undoubted expertise of the Ontario courts. The analysis must determine whether the effect of the ESA provisions is to vitiate the plaintiffs' agreement to arbitrate in the Uber arbitration clause. The determination may also address whether and how to account for access to justice, which is one objective of all the statutes – the ESA, both arbitration statutes and the Ontario class proceedings legislation. The efficiency benefits of an early determination of these issues, common to all putative class members, are apparent.

31. The court's invalidity analysis on this issue is akin to determining whether a dispute falls within the scope of an arbitration clause. To make that determination, the court compares the causes of action and facts pleaded in a statement of claim with the terms of the agreement to arbitrate. Here, the court considers the impact of the ESA on the arbitration clause.

32. On the second argument about invalidity, the Ontario courts could determine whether the Uber arbitration clause was invalid because it was unconscionable, applying legal principles and the limited evidence in the record. A court determination will provide a common authoritative resolution of a question of law (the required common law elements to invalidate an arbitration

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[31] See *Ontario Arbitration Act*, ss 17(1), (2), (5), (7) and (8) and *ICAA*, art 16(1) and (3) (appeal to court from tribunal ruling on a preliminary question of law); *Ontario Arbitration Act*, s 46(1) 2 and *ICAA*, art 34(2)(i) (motion to set aside); *Ontario Arbitration Act*, s 48(1)(b) and *ICAA*, art 36(1)(a)(i) (resisting recognition and enforcement on the basis of invalidity).

clause due to unconscionability), and support a consistency of outcomes across individual disputes.

33. By providing a limited but discernable role for courts to decide questions of law and straightforward questions of mixed fact and law, the approach in *Dell* and *Seidel* respects the tribunal as the presumptive decision-maker and implements the goals of the arbitration statutes, while enabling efficient, common and authoritative court rulings on certain questions of validity. This Court should confirm that this approach properly applies in this appeal.

IV. SUBMISSIONS CONCERNING COSTS

34. ADR Chambers does not seek costs and asks that it not be liable to pay the costs of any party or intervener.

V. PERMISSION TO PRESENT ORAL ARGUMENT

35. The Court granted ADR Chambers permission to present oral argument not exceeding five minutes at the hearing of the appeal.

DATED at Toronto this 17th day of October, 2019.

Andrew D. Little
Ranjan K. Agarwal
Charlotte Harman

BENNETT JONES LLP

Counsel for the Intervener, ADR Chambers Inc.

PART I - TABLE OF AUTHORITIES

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PART II - STATUTORY PROVISIONS

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