S.C.C. 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

and

DAVID HELLER

RESPONDENT

and

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INTERVENERS

FACTUM OF THE INTERVENERS,
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TORONTO COMMERCIAL ARBITRATION SOCIETY
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW OF ARGUMENT AND STATEMENT OF FACTS

A. OVERVIEW OF ARGUMENT

1. The Chartered Institute of Arbitrators (Canada) Inc. and Toronto Commercial Arbitration Society (together, the "Interveners") intervene in this appeal to assist the Court in ensuring that arbitration law and principles are correctly applied in this appeal and the Court's decision is informed by and consistent with domestic and international arbitration jurisprudence and policy.

2. The Interveners submit that the competence-competence principle's application to the validity of an arbitration agreement is well-established domestically and internationally. While courts have jurisdiction to determine validity of an arbitration agreement on a stay application, this jurisdiction is restricted to clear questions of law or questions of mixed fact and law requiring limited factual review. Following this approach is consistent with Canada's arbitration policy, domestic and international jurisprudence and trends, and will foster certainty for parties contracting to have disputes resolved by arbitration.

3. The Interveners further make submissions regarding four principles that must be taken into account when assessing the validity of arbitration agreements. It is important that courts consider the governing law of the arbitration agreement and apply the correct arbitration legislation. It is inappropriate to conflate an arbitration agreement with a forum selection clause. The two are distinct, serve different purposes, and are not subject to the same level of scrutiny by courts. Moreover, a court does not have broader discretion to strike an arbitration agreement in the context of a contract of adhesion. Finally, if there is an inconsistency between an arbitration agreement and a statute, the arbitration agreement is not necessarily invalidated in its entirety, but only to the extent that it is inconsistent with the statute.

4. The Interveners accept the facts as set out at paras. 8-27 of the Appellants' factum.

PART II: POSITION ON THE QUESTIONS IN ISSUE

5. The Interveners submit that the competence-competence principle applies in determining the validity of an arbitration agreement. Further, it is important that correct law and principles are applied when assessing the validity of an arbitration agreement.

PART III: STATEMENT OF ARGUMENT

A. THE COMPETENCE-COMPETENCE PRINCIPLE APPLIES IN DETERMINING THE VALIDITY OF ARBITRATION AGREEMENTS

6. The competence-competence principle is a foundational principle of international arbitration, which holds that an arbitrator is competent to rule on its own jurisdiction.[1] The Court of Appeal held that the competence-competence principle has no application in determining the validity of an arbitration agreement.[2] In doing so, it disregarded Ontario's arbitration legislation and departed from the approach taken by Canadian courts and the approach increasingly adopted internationally. In the interest of proper application of Canadian arbitration law and to promote uniformity in the application of arbitration law internationally – a consistently recognized goal of the international arbitration regime codified in the *International Commercial Arbitration Act, 2017*[3] – this significant error must be corrected.

7. The applicability of the competence-competence principle in Canada, including with respect to the scope and validity of arbitration agreements and in the context of both domestic and international arbitrations, is well established.[4] Both the *ICAA* and the *Arbitration Act, 1991* expressly recognize the application of the competence-competence principle, including with respect to the validity of an arbitration agreement.[5] Legislation in other provinces is similar.[6]

8. There is an area of concurrent jurisdiction between courts and arbitrators and the proper approach, as endorsed by this Court in *Dell*, turns on the nature of the challenge to the arbitrator's jurisdiction. If the challenge involves a pure question of law, or one of mixed fact and law that can

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[1] Gary B. Born, *International Commercial Arbitration*, 2d ed. (Alphen ann den Rijn, Netherlands: Kluwer Law International, 2014) vol. 1 at 1047-1048.
[2] *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 at paras. 38-40 [*Heller CA*].
[3] S.O. 2017, c.2, Sched. 2, Art. 2A ("*ICAA*").
[4] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 at paras. 70, 163-165 [*Dell*]; *Seidel v. Telus Communications Inc.*, 2011 SCC 15 at paras. 28-29 [*Seidel*]; J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 3d ed. (Huntington, NY: Jurisnet, 2017) at 327.
[5] *ICAA* Sched. 2, Arts. 8, 16; *Arbitration Act, 1991*, S.O. 1991, c. 17, ss. 7(2), 17 ("*Arbitration Act*").
[6] See e.g. *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, ss. 8, 16; *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5, Sched. 2, Arts. 8, 16; *The International Commercial Arbitration Act, C.C.S.M.*, c. C151, Sched. B, Arts. 8, 16.

be determined summarily based on a superficial consideration of the documentary evidence, it is appropriately determined by the court. However, when the matter is not clear, challenges to an arbitrator's jurisdiction, including on the basis of the arbitration agreement being invalid or "null and void, inoperative or incapable of being performed", ought to be determined by the arbitrator first.[7]

9. While there is not complete consensus on this issue internationally, recent decisions in other jurisdictions support that the dominant trend is towards recognizing a broader application of the competence-competence principle, allowing arbitrators to initially rule on the scope and validity of an arbitration agreement and limiting court intervention to a *prima facie* review of the arbitration agreement's validity or applicability, rather than embarking on a full review.[8]

10. For example, France has taken a very arbitration-friendly approach, providing arbitrators with near exclusive authority to rule on the scope and validity of an arbitration agreement. French courts apply a strict test and may decline to refer parties to arbitration only if it is manifestly obvious that an arbitration agreement does not exist or is null.[9] This strict test is not met unless the court finds that, on its face, the agreement cannot serve as the basis for a valid arbitration.[10]

11. Singapore and Hong Kong courts have also favoured broad application of the competence-competence principle and explicitly support the *prima facie* approach. The Singapore Court of Appeal has recognized an "unequivocal judicial policy of facilitating and promoting arbitration"[11] and held that a matter should be stayed in favour of arbitration if there is a *prima facie* case that the arbitration agreement is valid, the matter falls within the scope of the agreement, and the agreement is not null and void, inoperative or incapable of being performed.[12] Similarly, the Hong

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[7] *Seidel* at para. 29; *Dell* at paras. 84-85; *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 at para. 22 (C.A.); *Ciano Trading & Services C.T. v. Skylink Aviation Inc.*, 2015 ONCA 89 at para. 7; *Sum Trade Corp. v. Agricom International Inc.*, 2018 BCCA 379 at para. 36; Casey at 328.
[8] *Dell* at paras. 75-77, 83.
[9] *French Code of Civil Procedure*, Book IV, Title 1, c. 1, Art. 1448; Born at 1112; *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 at para. 89, Lord Collins, concurring [*Dallah*].
[10] George A. Bermann, "The 'Gateway' Problem in International Commercial Arbitration" (2012) 37:1 Yale J. Intl L at 17.
[11] *Tjong Very Sumito v. Antig Investments Pte. Ltd.*, [2009] SGCA 41 at para. 28
[12] *Tomolugen Holdings Ltd. v. Silica Investors Ltd.*, [2015] SGCA 57 at paras. 63-64.

Kong Court of Appeal has recognized that the correct approach is for the court to determine on a *prima facie* basis whether there is a valid arbitration agreement.[13]

12. New Zealand, which has adopted the Model Law with the goal of "harmonising the New Zealand regime with other regimes internationally",[14] also strongly supports the competence-competence principle.[15] In the recent case of *Wai-iti Developments Ltd. v. General Distributors Ltd.*, the High Court of New Zealand appears to have adopted the *prima facie* approach, indicating that matters of jurisdiction should be referred to arbitrators unless it is clear that the arbitration agreement is not valid.[16]

13. Courts in some other jurisdictions have adopted nuanced approaches. For example, courts in the United Kingdom and Australia have rejected a rigid application of either the *prima facie* or "full merits" approach. Nevertheless, courts in these jurisdictions have demonstrated respect for the competence-competence principle, acknowledging that arbitrators may rule on their own jurisdiction, including any objection with respect to the validity of the arbitration agreement, and are trending in the direction of minimal court intervention.

14. Arbitration legislation in the United Kingdom is influenced by the Model Law.[17] Further, the U.K. Supreme Court has expressly recognized that an arbitrator "may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."[18] If a party intends to dispute the validity of an arbitration agreement, it bears the burden of proving that the agreement is null and void, inoperative, or incapable of being performed.[19] If it is not clear from the evidence before the court that the arbitration agreement is invalid, the party relying on it merely needs to show an arguable case that the agreement is valid. Courts in the United Kingdom do have discretion to order a trial of the issue of validity, depending

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[13] *PCCW Global Ltd. v. Interactive Communications Service Ltd.*, [2006] HKCA 434 at paras. 49-51.
[14] *Zurich Australian Insurance Ltd. v. Cognition Education Ltd.*, [2014] NZSC 188 at para. 30.
[15] See e.g., *Ursem v. Chung*, [2014] NZHC 436; *Wai-iti Developments Ltd. v. General Distributors Ltd.*, [2019] NZHC 1656 [*Wai-iti*]; *Donaldson v. Donaldson*, [2015] NZHC 3093.
[16] *Wai-iti* at paras. 58-68.
[17] *Arbitration Act 1996* (U.K.), c. 23, ss. 9(4), 30.
[18] *Dallah* at para. 84.
[19] *Microsoft Mobile OY (Ltd.) v. Sony Europe Ltd.*, [2017] EWHC 374 (Ch) at para. 84.

on a number of contextual factors.[20] However, a court is unlikely to rule on validity unless the inquiry can be confined to a "relatively circumscribed area of investigation".[21]

15. The legislative regime in Australia "mandates minimal court 'interference' with arbitral proceedings and decisions and maximum court support and assistance for arbitral processes."[22] Australian courts also recognize the growing trend towards facilitating arbitration and recently, in *Hancock Prospecting Pty. Ltd. v. Rinehart*, the Federal Court of Australia Full Court clearly expressed that questions as to the existence or validity of an arbitration agreement may be decided by the arbitral tribunal.[23] The Court also emphasized that "the competence principle is wide enough to permit the arbitral tribunal to decide any question of jurisdiction" and the provision permitting courts to refer parties to arbitration "should, conformably with its language, be construed to facilitate, not impede, the process of arbitration",[24] though the court may rule on the validity of an arbitration agreement if the challenge involves a question of law.[25]

B. DETERMINING THE VALIDITY OF ARBITRATION AGREEMENTS

(1) Applicable Governing Law and Legislation

16. The Court of Appeal failed to consider whether the proper law governing the validity of the arbitration agreement is the law of The Netherlands. The services agreement includes a governing law clause clearly stating that the agreement "shall be exclusively governed by and construed in accordance with the laws of The Netherlands" and the arbitration clause provides that the seat of the arbitration shall be Amsterdam, The Netherlands.[26] While an arbitration agreement

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[20] *Golden Ocean Group Ltd. v. Humpuss Intermoda Transportasi Tbk Ltd.*, [2013] EWHC 1240 (Comm.) at para. 59.
[21] *Joint Stock Company 'Aeroflot-Russian Airlines' v. Berezovsky & Ors*, [2013] EWCA Civ 784 at para. 79.
[22] *Lin Tiger Plastering Pty Ltd. v. Platinum Construction (Vic) Pty Ltd.*, [2018] VSC 221 at para. 26.
[23] *Hancock Prospecting Pty. Ltd. v. Rinehart*, [2017] FCAFC 170 at para. 372, aff'd [2019] HCA 13.
[24] *Ibid* at para. 378.
[25] *Ibid* at paras. 141-145.
[26] *Heller CA* at para. 11.

is separable from the underlying contract and therefore may be governed by a different law,[27] the law applicable to the contract and the seat of the arbitration are persuasive factors in assessing the proper law governing the arbitration agreement.[28] The court may – in the absence of any evidence – proceed on the basis that the law of The Netherlands is the same as the law of Ontario,[29] however, it should not be presumed that Ontario law will always apply to the question of validity of arbitration agreements.

17. Further, regardless of the potential application of Dutch law, the court must identify and apply the correct statute. There are important differences between the *Arbitration Act* and the *ICAA*, including in the wording for exceptions when the parties are not obligated to arbitrate. These statutes ought not to be conflated or treated interchangeably. The establishment of a set of uniform rules for international arbitration has been the subject of significant international efforts, and the Model Law has now been adopted by 80 states in a total of 111 jurisdictions.[30] While both the *ICAA* and the *Arbitration Act* incorporate the Model Law to some extent, the *ICAA* does so more comprehensively, including the Model Law as a Schedule and explicitly stating that it "has force of law in Ontario".[31] Importantly, the application of the *ICAA* is mandatory if an arbitration is "international" and "commercial".[32]

18. The purposes of the *ICAA* also provide important context for applying the competence-competence principle. The *ICAA* was intended to modernize Ontario's arbitration rules and make Ontario a more attractive jurisdiction for resolving cross-border and international disputes.[33] The legislature recognized that commercial certainty is a key reason why parties enter into arbitration

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[27] *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, Ann. I (1985), am. U.N. Doc. A/61/17, Ann. I (2006), Art. 16(1) ("Model Law"). See also Born at 475-477.
[28] Redfern et al., *Redfern and Hunter on International Arbitration*, 6th ed. (London: Oxford University Press, 2015) at 158.
[29] *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1053.
[30] *Status of Conventions and Model Laws*, UNCITRAL, 52nd Sess., U.N. Doc. A/CN.9/979 at 2.
[31] *ICAA*, s. 5; *Ontario v. Ontario First Nations Ltd. Partnership* (2004), 73 O.R. (3d) 439 at para. 23 (C.A.); *Ontario v. Imperial Tobacco Canada Limited*, 2011 ONCA 525 at para. 77 [*Imperial Tobacco*].
[32] See: *McHenry Software Inc. v. ARAS 360 Incorporated*, 2018 BCSC 586 at para. 47 [*McHenry*].
[33] Ontario, Legislative Assembly, *Hansard*, 41st Parl., 2nd Sess., No. 49 (2 March 2017) at 2603 (C. Martins).

agreements, and a goal of the *ICAA* was to make it "as easy as possible for investors to understand what they are getting themselves into by coming [to Ontario]" which is "crucial if we want to continue to be a leader in Canada and in North America in terms of attracting foreign direct investment."[34]

19. The *ICAA* promotes the purpose of ensuring "consistency, uniformity and certainty in the resolution of disputes arising out of international commercial arbitration, across jurisdictions" and developing harmonious international economic relations.[35] By declining to apply the correct legislation, courts risk undermining parties' expectations that their arbitration agreement will be treated in accordance with international arbitration law.

(2) Arbitration Agreements and Forum Selection Clauses are Distinct

20. The Court of Appeal suggested that there is "no reason in principle why the same approach" that applies to the validity of a forum selection clause "ought not to be taken to the Arbitration Clause".[36] However, it is well established that forum selection clauses and arbitration agreements are different forms of contractual dispute resolution provisions with fundamental differences between them, both in practical and legal terms.[37] Courts enjoy much wider discretion to refuse to enforce a forum selection clause when they consider it appropriate to do so as opposed to an arbitration agreement.[38]

21. Significant legal consequences arise from characterizing an arbitration agreement as a forum selection clause. For example, international arbitration conventions and national arbitration statutes, such as the *ICAA*, apply only to arbitration agreements and not to forum selection clauses.[39] Moreover, Canadian law and policy strongly favour the enforcement of arbitration clauses, whereas it does not do the same for forum selection clauses.[40] The difference in analysis

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[34] Ontario, Legislative Assembly, *Hansard*, 41st Parl., 2nd Sess., No. 13 (5 October 2016) at 620 (C. Martins). See also *Depo Traffic v. Vikeda International*, 2015 ONSC 999 at paras. 26-29.
[35] *McHenry* at paras. 71-73.
[36] *Heller CA* at para. 63.
[37] Born at 72.
[38] *Haas v. Gunasekaram*, 2016 ONCA 744 at para. 40 [*Haas*]; *Telus Communications Inc. v. Wellman*, 2019 SCC 19 at para. 54 [*Wellman*].
[39] Born at 258-259.
[40] *Haas* at para. 40; *Wellman* at para. 54.

is rooted in the policy reasons behind each type of clause.

22. An arbitration agreement is a decision by the parties to eschew litigation in favour of private dispute resolution. A forum selection clause, on the other hand, is simply a decision to litigate in a particular court. Forum selection clauses encroach on the public sphere of adjudication by diverting public adjudication of matters out of the provinces, and therefore "cannot bind a court or interfere with a court's jurisdiction."[41] In contrast, arbitration clauses properly infringe on the jurisdiction of the courts, a fact which is supported by both case law and legislation.[42]

23. Courts have much broader discretion in considering whether to enforce a forum selection clause, and may refuse to do so on the basis that it is unreasonable or unjust after taking into account all of the circumstances.[43] Arbitration agreements, however, are not subject to the same broad analysis. In light of the strong legislative direction provided by arbitration legislation, courts must enforce arbitration agreements and refer disputes to arbitration once a party has established that, *prima facie*, there is an arbitration agreement and the dispute is at least arguably within its terms. This is the case unless it is clear that the arbitration agreement is invalid (or one of the other narrow exceptions applies).

24. The *ICAA* serves the important purpose of promoting international trade and commerce through the certainty that comes from a scheme of international arbitration. In service of that purpose, it has codified the competence-competence principle and imposed a mandatory obligation on the courts to refer disputes covered by arbitration agreements to arbitration. In the circumstances, a court's power to refuse to enforce an arbitration agreement and withhold reference to arbitration is very limited[44] and ought not to be conflated with the court's power in the context of a forum selection clause.

(3) <u>The Validity of Arbitration Clauses in the Context of Contracts of Adhesion</u>

25. Arbitration clauses are not subject to a broader analysis on validity in the context of a

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[41] *Douez v. Facebook, Inc.*, 2017 SCC 33 at paras. 25-27 [*Douez*].
[42] *Wellman* at para. 54.
[43] *Douez* at paras. 29-30.
[44] *Kaverit Steel & Crane Ltd. v. Kone Corp.*, 1992 ABCA 7 at paras. 47, 49; *Imperial Tobacco* at paras. 71, 76-78.

contract of adhesion. This Court has made clear that arbitration clauses, even those contained in contracts of adhesion, will generally be enforced absent legislative language to the contrary.[45]

26. While contracts of adhesion raise a number of public policy considerations, these considerations must be weighed against the purposes of arbitration and the clear legislative intent in Ontario to encourage the use of arbitration.[46] In *Wellman* this Court recognized that policy analysis can have a legitimate role in the interpretation of statutes, but ultimately the responsibility for setting policy falls with the legislature, not with the courts.[47] By stating that the arbitration agreement at issue "should be subject to a broader analysis when it comes to the issue of validity, especially in a situation where it is part of a contract of adhesion",[48] the Court of Appeal departed from the approach established by this Court.

(4) Statutory Interpretation and Validity of an Arbitration Agreement

27. In the absence of clear legislation to the contrary, courts must enforce arbitration agreements and refrain from voiding them.[49] A court has jurisdiction to determine whether there is clear statutory basis to override or invalidate an arbitration agreement on a stay application. However, the proper approach, where the statute does not clearly preclude arbitration agreements, is to uphold it to the extent possible as opposed to invalidating the agreement in its entirety. If the court finds that an arbitration agreement violates or is inconsistent with a statutory requirement, it would be invalid but only to the extent of the inconsistency with the statute and only to that extent it should be read down or severed from the remaining agreement.[50]

28. Courts have adopted the tools of severance and reading down contracts to avoid unjust results where the invalid parts of a contract can be severed from the rest, such that the valid portions of the contract can still be given effect.[51] Policy considerations and the context of the agreement

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[45] *Wellman* at para. 46; *Seidel* at paras. 2, 169; *Dell* at para. 228.
[46] *Wellman* at para. 54; *Haas* at paras. 10-14.
[47] *Wellman* at para. 79.
[48] *Heller CA* at para. 63.
[49] *Wellman* at para. 46.
[50] See e.g., *Seidel* at paras. 7, 31; *Wellman* at paras. 4, 97.
[51] Gerald H.L. Fridman, *The Law of Contract in Canada,* 6th ed (Toronto: Thomson Reuters, 2011) at 338.

will inform the court's decision on whether severance is appropriate.[52] As noted, arbitration agreements have been the subject of strong legislative and judicial direction that they are to be enforced to the greatest extent possible. As such, where parties have agreed to arbitrate their disputes, that decision should be upheld to the extent possible; the Court should void an agreement wholesale only where the statute clearly prohibits arbitration. An approach of severing the agreement only to the extent of the invalidity preserves the bargain entered by the parties and provides a more principled and pragmatic means of addressing the issue of statutory invalidity.

PART IV: SUBMISSIONS REGARDING COSTS

29. The Interveners seek no costs and ask that no costs be awarded against them.

PART V: REQUEST FOR ORAL ARGUMENT AND POSITION

30. By Order dated October 8, 2019, the Court granted the Interveners leave to present oral argument not exceeding 5 minutes at the hearing of this appeal.

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

Joe McArthur

Rahat Godil

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for:

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Andrew Kavanagh

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[52] *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152 at para. 37.

PART VI: SUBMISSIONS ON CASE SENSITIVITY

Not applicable.

PART VII: TABLE OF AUTHORITIES

	AUTHORITIES – CASE LAW	Paragraph(s) Cited
1.	*2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152	28
2.	*Ciano Trading & Services C.T. v. Skylink Aviation Inc.*, 2015 ONCA 89	8
3.	*Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737	8
4.	*Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46	10, 14
5.	*Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34	7, 8, 9, 25
6.	*Depo Traffic v. Vikeda International*, 2015 ONSC 999	18
7.	*Donaldson v. Donaldson*, [2015] NZHC 3093 (Unreported)	12
8.	*Douez v. Facebook, Inc.*, 2017 SCC 33	22, 23
9.	*Golden Ocean Group Ltd. v Humpuss Intermoda Transportasi Tbk Ltd.*, [2013] EWHC 1240 (Comm.)	14
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11.	*Hancock Prospecting Pty. Ltd. v. Rinehart*, [2017] FCAFC 170, aff'd [2019] HCA 13.	15
12.	*Heller v. Uber Technologies Inc.*, 2019 ONCA 1	6, 16, 20, 26
13.	*Joint Stock Company 'Aeroflot-Russian Airlines' v. Berezovsky & Ors*, [2013] EWCA Civ 784	14
14.	*Kaverit Steel & Crane Ltd. v. Kone Corp.*, 1992 ABCA 7	24
15.	*Lin Tiger Plastering Pty Ltd. v. Platinum Construction (Vic) Pty Ltd.*, [2018] VSC 221	15
16.	*McHenry Software Inc. v. ARAS 360 Incorporated*, 2018 BCSC 586	17, 19
17.	*Microsoft Mobile OY (Ltd.) v. Sony Europe Ltd.*, [2017] EWHC 374 (Ch)	14
18.	*Ontario v. Imperial Tobacco Canada Limited*, 2011 ONCA 525	17, 24

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