SCC File Number: 38534

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

B E T W E E N:

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 COMMERICAL 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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PART I: OVERVIEW AND STATEMENT OF FACTS

1. The Respondent, David Heller, makes these submissions in reply to the facta filed by the Arbitration Place; the Young Canadian Arbitration Practitioners ("YCAP"); the Canadian Federation of Independent Business ("CFIB"), the Canadian Chamber of Commerce (the "CCC"); the Chartered Institute of Arbitrators (Canada) Inc. and Toronto Commercial Arbitration Society ("CIA/TCAS"); the Canadian American Bar Association ("CABA"); the Montreal Economic Institute ("MEI"); the International Chamber of Commerce ("ICC"); and the ADR Chambers Inc. (collectively the "Arbitration Interest Groups").

2. The Arbitration Interest Groups primarily focus on the following issues: (i) whether the Ontario *Arbitration Act*[1] or the *International Commercial Arbitration Act* ("*ICAA*")[2] applies; (ii) the limits of an Ontario court's authority under competence-competence to deny a stay; (iii) whether to read down the arbitration agreement at issue (the "Arbitration Agreement") if it violates Ontario law or is otherwise invalid; (iv) the correct approach to unconscionability; and (v) whether the Ontario Court of Appeal's decision impermissibly restricts parties' freedom of contract. Mr. Heller addresses each of these issues below.

PART II: STATEMENT OF ARGUMENT

A. *ESA* Claims are not Subject to the *ICAA*

3. The Arbitration Place contends that the *ICAA* applies to the Arbitration Agreement, ignoring that Mr. Heller has pleaded employment standards claims.[3] The CFIB rightly points out that the *ICAA* does not apply to employment disputes because they are not "commercial" under the Model Law commentary,[4] which the *ICAA* adopts.[5] Accordingly, the *Arbitration Act* applies.

4. Either way, despite CIA/TCAS's submissions on the importance of this issue,[6] which arbitration legislation applies is not determinative in this case. The *Arbitration Act* and the *ICAA*

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[1] *Arbitration Act*, SO 1991, c 17 [***Arbitration Act***].
[2] *International Commercial Arbitration Act, 2017,* SO 2017, c 2, Sch 5 [***ICAA***].
[3] Arbitration Place's Factum at para 12.
[4] *ICAA*, Sch 2 (UNCITRAL Model Law on International Commercial Arbitration [**Model Law**]).
[5] CFIB's Factum at paras 20-21; Report of the UN Commission on International Trade Law, *Report of the Secretary-General*, UNGAOR, 18th Sess, UN Doc A/CN.9/264 (1985) at Part II, Art 18, p 10, **Appellants' Book of Authorities** [**ABOA**], Tab 28.
[6] CIA/TCAS' Factum at paras 17-19.

both codify competence-competence as developed under the Model Law.[7] The Model Law allows both courts and arbitrators to determine challenges to arbitration agreements' validity.[8]

B. Competence-Competence Permits Courts to Resolve Issues of Validity

5. The CFIB, Arbitration Place, YCAP, CIA/TCAS, and the ICC urge this Court to consider the international approach to competence-competence.[9] Internationally, rather than restricting courts' review to only issues of law or mixed fact and law that can be determined on a superficial review of the record, many Model Law jurisdictions have determined that courts have the authority to conduct a full review of an arbitration clause to determine its validity.[10]

6. Article 8 of the *ICAA* allows courts to deny a stay where they find that an agreement is "null and void, inoperative or incapable of being performed."[11] This phrase's ordinary meaning allows a court to determine the impugned agreement's validity, without limitation.[12] Indeed, the Model Law drafters rejected a proposal to insert the word "manifestly" before "null and void,", which would have suggested that only a *prima facie* judicial review is appropriate.[13] By rejecting this language, the Model Law drafters gave courts the flexibility to determine when a full review is appropriate and when, for reasons of fairness or efficiency, it is not.[14]

7. The approaches in non-Model Law jurisdictions vary. The French approach to competence-competence, cited by the ICC, contrasts with the Model Law by only allowing courts to deny a stay where an arbitration agreement is "manifestly" void.[15] The U.S. Supreme Court has

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[7] YCAB's Factum at paras 5-10 (citing *Unifund Assurance Co v Insurance Corp of British Columbia*, 2003 SCC 40 at para 36); ADR Chambers' Factum at paras 12-14; *see also Seidel v Telus Communications Inc*, 2011 SCC 15 at paras 28-29 [***Seidel***] (noting that domestic legislation is based on the Model Law).
[8] Gary Born, International Commercial Arbitration, 2d ed (Kluwer Law International 2014) pp 1080-1081 [**Born**], **UFCW Book of Authorities** [**UFCWBOA**], Tab 15.
[8] CFIB's Factum at para 27.
[9] CFIB's Factum at paras 25-26; Arbitration Place's Factum at paras 12-16, 21-23; YCAP's Factum at paras 9-10; CIA/TCAS' Factum at paras 9-15; ICC's Factum at paras 15-17.
[10] Born at pp 1055-1056, 1082-1083, **UFCWBOA**, Tab 15.
[11] *ICAA*, Sch 2, Art 8 (Model Law).
[12] Born at pp 1082-1083, 1085-1087, **UFCWBOA**, Tab 15.
[13] Born at pp 1083-1085, **UFCWBOA**, Tab 15.
[14] Born at pp 1085-1087, **UFCWBOA**, Tab 15.
[15] ICC's Factum at paras 19-20.

held that courts should determine first whether the *Federal Arbitration Act*'s (the "*FAA*")[16] exclusions apply before ordering arbitration, despite competence-competence.[17] In England, courts have the discretion to either determine an arbitration agreement's validity by trial, or to stay the proceeding in favour of arbitration if the party seeking arbitration has shown that the agreement is arguably valid and effective.[18]

8. The approach adopted in *Dell Computer Corp v Union des Consommateurs* ("*Dell*") (affirmed in *Seidel* and *Wellman*), which limits courts' review to issues of law and issues of mixed fact and law that can be determined on a superficial review of the record,[19] is closer to a *prima facie* approach, which is the minority approach among Model Law jurisdictions.[20] Nevertheless, the Court of Appeal's analysis conforms to this approach, and this Court need not revisit these principles to decide in Mr. Heller's favour.

C. *Seidel* and *Wellman* do not Require an Express Prohibition of Arbitration

9. Despite the CFIB's, CCC's, and CABA's assertions,[21] Canadian courts look at more than express language to determine whether legislation evidences a legislative intent to curtail arbitration of certain claims.[22] *Seidel* and *Wellman* confirm that courts may take a "close examination of the law", reading the legislation "textually, contextually and purposively" to determine whether it permits arbitration of the relevant claims.[23]

10. The Court of Appeal's approach was consistent with the principles of competence-competence established in *Dell*, *Seidel*, and *Wellman*.[24] It considered: (i) whether, as a matter of law, the Arbitration Agreement was invalid because it contracted out of the *ESA*;[25] and (ii) based

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[16] 9 USC s 1.
[17] *New Prime v Oliveira,* 139 S Ct 532 (US 2019) at pp 537-538, **ICC Book of Authorities** [**ICCBOA**], Tab 8; *see also Singh v Uber Technologies, Inc*, No 17-1397 (3d Cir Sept 11, 2019).
[18] *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd and Another (The "Barito")*, [2013] EWHC 1240 (Comm) at paras 58-59, **ICCBOA**, Tab 5.
[19] 2007 SCC 34 at paras 84-85 [***Dell***]; *Seidel* at paras 29, 42; *Telus Communications v Wellman*, 2019 SCC 19 at paras 43-46 [***Wellman***]. *See also* ADR Chambers' Factum at paras 14-15.
[20] Born at pp 1086-1087, **UFCWBOA**, Tab 15.
[21] CFIB's Factum at paras 27-28, 37-40; CCC Factum at para 22; CABA's Factum at paras 14-16.
[22] *Seidel* at paras 7, 15, 27-30; *Wellman* at para 43.
[23] *Seidel* at paras 33-40; *Wellman* at para 43.
[24] *Dell* at paras 84-85; *Seidel* at paras 29, 42; *Wellman* at paras 43-46. *See also* ADR Chambers' Factum at paras 29-33.
[25] *Heller v Uber Technologies Inc*, 2019 ONCA 1 at paras 27-51 [***ONCA Reasons***].

on a superficial review of the record, whether the Arbitration Agreement was unconscionable.[26] Although the Court of Appeal had the discretion to decline to decide these issues, deciding issues of law at the start of a proceeding is efficient, and the record does not evidence any improper or dilatory purpose that would weigh against the court exercising its discretion to resolve the matter.[27] Moreover, the interpretation of provincial statutory law is a court's core competency, which will have precedential value to other similarly situated litigants.[28] The same cannot be said for statutory interpretation in a private and confidential arbitration.

11. Contrary to YCAP's and the CCC's contention,[29] the Court of Appeal did not err in assuming that Mr. Heller could prove what he pleads for the purposes of its *ESA* analysis. That assumption is both consistent with *Seidel* and logical where a court is asked to consider if an agreement contracts out of legislation under which a party is seeking relief.[30] This approach does not encourage artful pleading. Parties who attempt to plead around arbitration agreements by relying on remedial legislation will be sorely disappointed when they are later found ineligible for relief. Their artful pleading would lead them nowhere.[31] On the other hand, if they are eligible for relief under the pleaded legislation, the pleading is not artful at all. There is no danger here.

D. The *ESA* Restricts Arbitration of Employment Standards Claims

12. CABA and other Arbitration Interest Groups argue that the Ontario legislature should decide whether *ESA* claims are arbitrable.[32] The Ontario legislature has already determined how Ontario employment standards are enforced. Private, confidential arbitration is not one of the methods. The *ESA* provides for three public enforcement mechanisms: (i) a complaint to the Ministry of Labour; (ii) a civil proceeding in Superior Court; and (iii) for unionized workers, arbitration under a collective agreement.[33] When considered in light of the *ESA*'s notice requirements (which ensure the Ministry is aware of employment standards contraventions)[34] and

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[26] *ONCA Reasons* at paras 28-73.
[27] *See Dell* at para 84.
[28] *Dell* at para 84; *Douez v Facebook*, 2017 SCC 33 at paras 58-60 [***Douez***]. *See also* ADR Chambers' Factum at paras 23-26.
[29] YCAP's Factum at para 21-30; CCC's Factum at paras 5, 16, 21-22.
[30] *Seidel* at para 8. *See also* Respondent's Factum at paras 35-37.
[31] *See* Respondent's Factum at paras 38-44.
[32] CABA's Factum at paras 17-33.
[33] *ESA*, ss 96-101. *See also* Respondent's Factum at paras 62-75.
[34] *ESA*, ss 8, 100(5); *ESA Policy and Interpretation Manual*, s 8(2).

the public nature of labour arbitration in Ontario,[35] these mechanisms leave no room for mandatory, private arbitration of Ontario *ESA* claims.[36] Moreover, the Arbitration Agreement violates the *ESA* by entirely contracting out of it, which the legislature has expressly prohibited.[37]

13. The CFIB's reliance on *Ross v Christian & Timbers Inc*[38] is misplaced.[39] That decision does not consider whether the *ESA* prohibits arbitration of *ESA* claims or entirely contracting out of the *ESA* and is thus of no assistance. On the other hand, the Ontario Superior Court considered this question in *Huras v Primerica Financial Services Ltd* and concluded that the *ESA* prohibits parties from contracting out of its standards in favour of private arbitration.[40] Other provinces have likewise rejected attempts to contract out of similar employment standards legislation.[41]

14. France, Germany, Switzerland, Italy, Hong Kong, England, and Belgium all limit the arbitrability of employment claims in some way, generally to limit mandatory arbitration for individual employees.[42] The U.S. approach is inapposite because the U.S. Supreme Court has held that the *FAA*[43] supersedes any state laws that limit arbitration in any respect (unlike in Canada where the provinces may determine arbitrability).[44] If anything, the resulting proliferation of arbitration agreements containing class action waivers in U.S. employment contracts, which have made it impractical for workers to bring misclassification claims in any forum, reinforces the importance of Ontario courts applying Ontario employment law in this case.[45]

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[35] *See Serco DES (Drivetest) v United Steelworkers*, 2018 CanLII 64969 (ONLA) at paras 71-76.
[36] *See* Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at pp 153-154, **ABOA**, Tab 25; *Gladstone v Canada (Attorney General)*, 2005 SCC 21 at paras 9-10; *Grey-Owen Sound Health Unit v ONA*, 1979 CarswellOnt 824 (ONSC App Div) at paras 13-20.
[37] *ESA*, s 5(1). *See* Respondent's Factum at paras 82-84.
[38] 2002 CanLII 49619 (ONSC).
[39] CFIB's Factum at paras 20, 28.
[40] *Huras v Primerica Financial Services Ltd*, [2000] OJ No 1474 (ONSC) at paras 26-35, **Respondent's Book of Authorities** ["**RBOA**"], Tab 8, *aff'd on other grounds*, [2001] OJ No 3318 (ONCA).
[41] *Houston v Exigen* (*Canada) Inc*, 2006 NBQB 29 at paras 7-12; *Nowak v Biocomposites Inc*, 2018 BCSC 785 at paras 32-98.
[42] CABA's Factum at paras 23-34.
[43] 9 USC s 1.
[44] *See American Express Co v Italian Colors Restaurant*, 133 S Ct 2304 (2013); Margaret Jane Radin, "Access to Justice and Abuses of Contract" (2016) 33 Windsor YB Access to Jus 177 at p 189, **RBOA**, Tab 33.
[45] Charlotte Garden, "Disrupting Work Law: Arbitration in the Gig Economy" [2017] 2017 U Chicago Legal F 205 at pp 205-206, 225, **RBOA**, Tab 22; Judith Resnik, "Diffusing Disputes: The

E. Reading Down the Arbitration Agreement is not Appropriate in this Case

15. The CIA/TCAS argues that courts should read down arbitration agreements where they conflict with statutory law.[46] The Arbitration Place contends that when a court holds that an international arbitration agreement is unconscionable, the court should read down the putative agreement to preserve arbitration if possible.[47] Uber has not made this second argument.

16. In any event, though reading down illegal or unconscionable terms may be appropriate in some cases, it is not here. This Court has held that where a contract conflicts with the *ESA*, it is void for all purposes because reading down such agreements is antithetical to the *ESA*'s objectives.[48] Further, notional severance, *i.e.*, reading down, is used sparingly in Canada because it asks courts to re-write the parties' agreement.[49] Courts will decline to do so where the revisions required to remedy the contract's flaws are so extensive that it no longer resembles the original.[50]

17. Reading down the Arbitration Agreement to conform to the *ESA* would require substantial revisions to apply Ontario law, allow proceedings in Ontario, and exempt *ESA* claims from mandatory arbitration. Removing the unconscionable parts would likewise render the agreement unrecognizable. The Court would need to remove: (i) the requirement to apply the ICC Rules to relieve Mr. Heller of the $14,500 USD in fees required to initiate the proceedings; (ii) the application of the law of the Netherlands because Mr. Heller has no connection or knowledge of that law and works in Ontario; and (iii) the requirement that the arbitration take place in Amsterdam. Only the requirement that the parties mediate and then arbitrate their dispute would remain. This approach in no way gives parties certainty in their agreements.[51]

18. Courts will also decline to read down contracts of adhesion to ensure that the drafters do not unfairly benefit and are deterred from drafting similarly unconscionable agreements in the

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Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights" (2015) 124:8 Yale LJ 2804 at pp 2808-2810, **RBOA**, Tab 34; *see also Douez* at paras 58-60.

[46] CIA/TCAS' Factum at paras 27-28.

[47] Arbitration Place's Factum at paras 7-10, 19-20.

[48] *Machtinger v HOJ industries Ltd*, [1992] SCR 986 (SCC) at pp 1001-1005. *See also* Respondent's Factum at paras 90-98.

[49] *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6 at paras 29-32.

[50] *See Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6 at paras 38-39.

[51] *See Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6 at paras 38-39.

future.[52] Here, Uber will have no incentive to draft conscionable agreements if, on the rare occasion when a driver challenge them, courts simply read them down.

19. The cases the Arbitration Place relies on are distinguishable.[53] None of them refers to an unconscionable agreement. Instead, they refer to errors or ambiguities in drafting that do not otherwise undermine an identifiable commitment to arbitration. Moreover, these cases primarily involve disputes between corporations, unlike Mr. Heller and other Uber drivers who agree to arbitration as part of a 14-page contract viewed on their phone.[54]

F. The Court of Appeal Applied the Correct Unconscionability Test

20. The CFIB wrongly contends that the Court of Appeal's approach to unconscionability was incorrect in that it failed to consider the facts at the time the parties entered the service agreement.[55] The Court of Appeal's unconscionability analysis focused on the following facts, which were true when Mr. Heller received the service agreement: (i) the only independent dispute resolution process under the Arbitration Agreement is not in Ontario; (ii) the Arbitration Agreement requires resolution of all disputes by arbitration under ICC Rules, regardless of size, unless the driver voluntarily resolves the dispute with Uber; (iii) the ICC Rules impose up-front costs of $14,500 USD; (iv) the Arbitration Agreement requires arbitration under the law of the Netherlands, of which Mr. Heller had no knowledge; (v) Mr. Heller had no legal advice; and (vi) the parties' significant inequality in bargaining power.[56]

21. Justice Binnie's dissent in *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*,[57] on which the CFIB relies, does not apply a different unconscionability analysis. Instead, Justice Binnie's approach to addressing challenges to a contract's enforceability considers unconscionability and, separately, whether an overriding public policy interest precludes enforcement.[58] The Court of Appeal did not conduct this separate public policy analysis.

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[52] *See Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6 at paras 40-41.
[53] Arbitration Place's Factum at para 20.
[54] *ONCA Reasons* at para 8.
[55] CFIB's Factum at paras 29-30.
[56] *ONCA Reasons* at paras 55-59, 68.
[57] 2010 SCC 4 [***Tercon***].
[58] *Tercon* at paras 122-123.

22. The CFIB further contends that the Court of Appeal erred by failing to consider unconscionability under the law of the Netherlands.[59] Uber has not argued that Dutch law of unconscionability should apply or would lead to a different result. The Court should disregard the CFIB's submissions on this point.

G. The Court of Appeal did not Lower the Unconscionability Threshold

23. The CCC and MEI contend that the Court of Appeal's unconscionability analysis should be set aside because: (i) Uber could not have reasonably foreseen that the agreement would be set aside as unconscionable; and (ii) the court's analysis relied too heavily on the parties' unequal bargaining power and insufficiently considered the issue of vulnerability.[60] These submissions misinterpret the law and the Court of Appeal's decision.

24. First, Canadian courts have considered whether arbitration agreements are unconscionable.[61] Moreover, unconscionability is an equitable doctrine that may apply to any contract, and a party's expectations about whether an agreement will be enforceable is not part of the test. Certainly, a party who drafts a contract hopes to enforce it.

25. Second, the Court of Appeal properly weighed the parties' unequal bargaining power and Mr. Heller's vulnerability. The Court of Appeal considered all four elements of the unconscionability test, including these factors. Then, it reasonably determined that Uber had drafted an agreement that only it could afford to arbitrate disputes under, unfairly taking advantage of Mr. Heller's limited education and limited financial means and giving Uber an illegitimate, *i.e.*, unconscionable, advantage.[62]

26. Contrary to the CIA/TCAS's and MEI's assertions,[63] the Court of Appeal's decision does not threaten the enforceability of contracts of adhesion. The court's acknowledgement that contracts of adhesion generally involve unequal bargaining power is relevant to the

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[59] CFIB's Factum at paras 34-36.
[60] CCC's Factum at paras 23-29; MEI's Factum at paras 20-29.
[61] *Kanitz v Rogers Cable Inc*, [2002] OJ No 665 (ONSC) at paras 36-42; *Huras v Primerica Financial Services Ltd*, [2000] OJ No 1474 (ONSC) at paras 36-49, **RBOA**, Tab 8, *aff'd on other grounds*, [2001] OJ No 3318 (ONCA).
[62] *ONCA Reasons* at paras 52-69. *See* Respondent's Factum at paras 108-127.
[63] CIA/TCAS' Factum at paras 25-26; MEI's Factum at paras 6-16.

unconscionability analysis but was not determinative.[64] Here, that inequality coincided with a contract of adhesion that prevents weaker, economically vulnerable and less-informed parties from vindicating their rights by ousting local law, requiring adjudication in a far-away jurisdiction, and imposing prohibitive fees, which the Court of Appeal determined is unconscionable.

27. Despite MEI's concerns, the Court of Appeal's decision does not the jeopardize the use of standard contracts in the "sharing economy",[65] which is also called the "platform economy" because software platforms distribute work and the "gig economy" because workers often have to cobble together "gigs" to earn a livable income.[66] Many platforms are designed to avoid employment law and shift the costs of employment benefits to workers.[67] These companies are free to rely on standard form contracts for efficiency, so long as they comply with the law.

H. The ICC Rules are not *per se* Prohibitive to all Litigants

28. The Court of Appeal's decision does not undermine the availability of the ICC Rules to consenting parties. As the ICC points out, the ICC Rules may apply to any category of dispute and allow for expedited proceedings involving disputes valued at less than $2 million USD.[68] Here, these advantages do not lessen the $14,500 USD in up-front mediation and arbitration fees that Mr. Heller is required to pay. Likewise, the parties' freedom under the ICC Rules to agree to various mechanisms to make the process more convenient and efficient is illusory because these fees are prohibitive and Uber has such superior bargaining power. Any agreement in respect of this process would be at Uber's discretion. The ICC Rules are likely effective for many large commercial entities, but they are simply a barrier for Mr. Heller.

I. The Court of Appeal Decision does not Compromise Freedom of Contract

29. Contrary to the CCC's and CIA/TCAS's contentions, the Court of Appeal's decision does not threaten parties' freedom to contract or Canada's reputation as an arbitration-friendly jurisdiction.[69] These arguments derive from a time when arbitration agreements were suspect, and

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[64] *ONCA Reasons* at paras 70-71; *see Douez* at paras 33-36.
[65] MEI's Factum at paras 6-11, 23-29.
[66] *See* Ruth Berins Collier, VB Dubal & Christopher Carter, "Labor Platforms and Gig Work: The Failure to Regulate" (2017) Institute for Research on Labor and Employment, Working Paper No 106-17 at pp 1-3 [**Gig Work**].
[67] Gig Work at pp 3-6.
[68] ICC's Factum at paras 24-35.
[69] CCC's Factum at paras 5-6, 9-16; CIA/TCAS' Factum at paras 18-19.

courts would not enforce them even when sophisticated commercial parties had agreed.[70] Now, courts routinely enforce valid arbitration agreements, and commercial entities can rely on them.[71]

30. Yet, where a party is challenging an arbitration agreement's validity, "it is impossible" to exclude a court's jurisdiction to consider the dispute on the basis of an "agreement".[72] Instead, courts' jurisdiction and limits thereof derive from arbitration legislation.[73] This Court has delineated when courts may decline to enforce an invalid agreement in *Dell*, *Seidel*, and *Wellman*. As set out above, the Court of Appeal's approach conforms to these decisions.

31. CIA/TCAS asserts that the Court of Appeal should have applied the law of the Netherlands to determine the Arbitration Agreement's validity (which Uber has never asserted) because the parties agreed to it.[74] The *Arbitration Act* provides that courts may deny a stay where an arbitration agreement purports to apply to a "dispute [that] is not capable of being the subject of arbitration under Ontario law".[75] Moreover, parties are not free to agree to exclude the application of local laws the legislature has said cannot be waived, *i.e.*, mandatory law.[76] In Canada and internationally, courts routinely enforce mandatory law—particularly consumer and employment laws—despite contractual provisions to the contrary.[77]

32. Equitable doctrines, such as unconscionability, are likewise well-settled common law limitations on parties' freedom of contract.[78] Their application cannot reasonably be construed as undue interference with parties' freedom of contract.

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[70] *See* Jonnette Watson Hamilton, "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice" (2006) 51 McGill LJ 693 at pp 699-702, **UFCWBOA**, Tab 5; William Horton & David Campbell, "Arbitration as an Alternative to Dispute Resolution: Class Proceedings and the Mirage of Mandatory Arbitration" at p 6 (2019) *forthcoming* in Archibald, Annual Civil Procedure Review, **UFCWBOA**, Tab 12.

[71] Likewise, if the parties' s relationship and dispute is truly commercial, then the *ICAA* will apply. Despite the CIA/TCAS's concerns (para 19), parties need not worry.

[72] Born at p 1071, **UFCWBOA**, Tab 15.

[73] Born at pp 1071, 1074, **UFCWBOA**, Tab 15.

[74] CIA/TCAS' Factum at para 16.

[75] *Arbitration Act*, s 7(2).

[76] Catherine Walsh, "The Uses and Abuses of Party Autonomy in International Contracts," (2010) 60 UNBLJ 12 at paras 12-18 [**Walsh**], **UFCWBOA**, Tab 2.

[77] Walsh at paras 19-26, **UFCWBOA**, Tab 2.

[78] *Bhasin v Hrynew*, 2014 SCC 71 at para 74.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23rd DAY OF OCTOBER, 2019.

Michael D. Wright / Danielle E. Stampley
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