COURT OF APPEAL FOR ONTARIO

CITATION: Heller v. Uber Technologies Inc., 2019 ONCA 1

DATE: 20190102

DOCKET: C65073

Feldman, Pardu and Nordheimer JJ.A.

BETWEEN

David Heller

Plaintiff (Appellant)

and

Uber Technologies Inc., Uber Canada, Inc., Uber B.V. and Rasier Operations B.V.

Defendants (Respondents)

Michael Wright, Danielle Stampley, Lior Samfiru, Stephen Gillman and James Omran, for the appellant

Lisa Talbot and Sarah Whitmore, for the respondents

Heard: November 27, 2018

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated January 30, 2018, with reasons reported at 2018 ONSC 718.

Nordheimer J.A.:

[1] The plaintiff appeals from the order of the motion judge that stayed the plaintiff's action in favour of arbitration.

I: Background

[2] The appellant resides in Ontario. He has been licenced to use the Uber Driver App since February 2016.[1] The appellant has used the Driver App to provide food delivery services to people in Toronto. He has never used the Driver App to provide personal transportation services. The appellant is 35 years old and has a high school education. He earns approximately $400 to $600 per week based on 40 to 50 hours of work delivering food for UberEATS driving his own vehicle.

[3] The appellant commenced this proposed class action on behalf of "[a]ny person, since 2012, who worked or continues to work for Uber in Ontario as a Partner and/or independent contractor, providing any of the services outlined in Paragraph 4 of the Statement of Claim

pursuant to a Partner and/or independent contractor agreement" (the "Class" or "Class Members"). The Class Members provide food delivery services and/or personal transportation services using various Uber Apps. For convenience, I will refer to them collectively as "drivers" below.

[4] In his proposed class action, the appellant seeks a declaration that drivers in Ontario, who have used the Driver App to provide food delivery and/or personal transportation services to customers, are employees of Uber and governed by the provisions of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "*ESA*"). The claim seeks declarations that Uber has violated the provisions of the *ESA* and that the arbitration provisions of the services agreements entered into between the parties are void and unenforceable. The action also claims damages of $400 million.

[5] Uber App users (drivers and customers) download the Uber Apps to their smartphones. Uber uses GPS to connect customers seeking personal transportation using an App for riders (the "Rider App") with drivers using an App developed for drivers (the "Driver App"). The Rider App allows riders to request rides at their location, track the driver on the way to the location and then rate the driver after the ride is completed.

[6] The UberEATS App allows customers seeking food delivery to order food from restaurants and have it delivered by a nearby driver. The App displays each restaurant's menu, collects each customer's order and transmits the orders to the restaurants. The restaurant updates the App as the food is prepared. Then the App signals to a nearby driver that a delivery is available. Drivers willing to deliver the order accept through the App, which provides his or her identifying information to the restaurant and the customer. After delivering the food, the driver confirms the delivery in the App, which collects the customer's payment and remits payment to the restaurant.

[7] Uber requires drivers to create an account online to access the Apps. After downloading the Driver App, Uber requires drivers in Ontario (performing services by car) to provide copies of the following documents: (i) a valid driver's license; (ii) a valid vehicle registration; (iii) proof of eligibility to work in Canada; and (iv) valid insurance. After reviewing and verifying the drivers' documentation and screening results, Uber activates their account.

[8] The first time a driver logs into the Uber App, he or she must accept a services agreement, which appears on the smartphone screen. Drivers accept by clicking "YES, I AGREE", and confirming acceptance by again clicking "YES, I AGREE" after reading the following: "PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS." Uber's January 4, 2016 Driver service agreement with the appellant is 14 pages. The November 29, 2016 UberEATS service agreement with the appellant is 15 pages.

[9] Uber determines the maximum fares drivers receive for their work according to a base fare amount plus distance (based on GPS data obtained through the App), plus applicable time amounts. Uber collects the fares from customers, provides customers with a receipt, and remits payment periodically to drivers, less Uber's fees.

[10] Drivers can report complaints to Uber through the Apps. Customer Service Representatives ("CSRs") in the Philippines first receive the complaints. If unresolved, they escalate the complaints to CSRs in Chicago, then to Uber's legal team. Drivers may also attend in Ontario at an Uber "Greenlight Hub", which is a support centre staffed with Uber employees, to ask for assistance, although the appellant says that the staff there will likely only refer the driver back to the App for assistance.

[11] The appellant entered into a Driver services agreement with Rasier Operations B.V. on June 7, 2016, and an UberEATS services agreement on December 15, 2016. Each agreement contains the following arbitration clause (the "Arbitration Clause"):

> Governing Law; Arbitration. Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws. . . . Any dispute, conflict or controversy howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules ("ICC Mediation Rules"). If such dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules"). . . . The dispute shall be resolved by one (1) arbitrator appointed in accordance with ICC Rules. The place of arbitration shall be Amsterdam, The Netherlands. . . .

[12] Under the ICC Mediation Rules, drivers must pay a US$2,000 non-refundable filing fee to initiate mediation proceedings against Uber. For disputes valued under US$200,000, drivers must pay an additional administrative fee, which may be as much as US$5,000. These fees do not cover the mediator's fees or legal fees.

[13] If the parties are unable to resolve their dispute through mediation within 60 days, they must proceed to arbitration under the ICC Arbitration Rules. A driver, and any party wishing to join the arbitration, must each pay a US$5,000 filing fee.

[14] Article 37 of the ICC Arbitration Rules requires the parties to pay an advance on costs "in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative expenses for the claims which have been referred to it by the parties". The payment must be in cash, unless a party's share of the fees and expenses is greater than US$500,000, in which case the party may post a bank guarantee. The initial US$5,000 filing fee is credited against the claimant's portion of this advance but is non-refundable. The administrative fee component of this advance is at least US$2,500 per party for disputes valued at under US$200,000. These fees do not cover counsel fees, travel or other expenses related to participating in the arbitration.

[15] Accordingly, the up-front administrative/filing-related costs for a driver to participate in the mediation-arbitration process in the Netherlands prescribed in the Arbitration Clause is

US$14,500. As an UberEATS driver, the appellant earns about $20,800-$31,200 per year, before taxes and expenses.

II: The decision below

[16] The motion judge granted Uber's motion to stay the action in favour of arbitration. In so doing, the motion judge determined that the dispute is both international and commercial, such that the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5 (the "*ICAA*") and not the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "*Arbitration Act, 1991*") applied. However, the motion judge noted, at para. 35, that "ultimately not much turns on this point," because the appellant was unable to demonstrate that the exceptions under either Act warranted a denial of Uber's stay motion.

[17] Applying the Supreme Court of Canada's decision in *Seidel v. TELUS Communications Inc.,* 2011 SCC 15, [2011] 1 S.C.R. 531 and this court's decision in *Wellman v. TELUS Communications Company*, 2017 ONCA 433, 138 O.R. (3d) 413, the motion judge held that courts must enforce arbitration agreements freely entered into, even in contracts of adhesion. Any restriction on the parties' freedom to arbitrate must be found in the legislation.

[18] The motion judge then concluded that the plain language of the *ESA* does not restrict the parties from arbitrating. He also concluded that the arbitrability of employment agreements was not a question of pure statutory interpretation but instead raised a "complex issue of mixed fact and law," one for the arbitrator to decide at first instance under the competence-competence principle. Finally, the motion judge rejected the unconscionability exception that the appellant advanced under both the *Arbitration Act, 1991* and the *ICAA*.

III: Analysis

[19] I begin with a brief analysis of the standard of review applicable to the motion judge's decision. In my view, the standard of correctness applies to his decision for two reasons. One is that the central questions raised, including the proper application of the provisions of either the *Arbitration Act, 1991* or the *ICAA* are questions of law: *Trade Finance Solutions Inc. v. Equinox Global Limited,* 2018 ONCA 12, 420 D.L.R. (4th) 273, at para. 31. The other is that the court is being called upon to interpret a standard form contract, notably a contract of adhesion, that has ramifications beyond just the case at hand and thus the correctness standard also applies: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.,* 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 46.

[20] For the reasons that follow, I have concluded that the motion judge erred in granting a stay of this action in favour of arbitration. In particular, the motion judge erred in principle in his analysis of the existing authorities on the issue of when it is appropriate to grant a stay in favour of an arbitration provision contained in a contract of adhesion.

[21] While I have serious reservations about the motion judge's conclusion that the relationship between the parties here is a commercial one, since I agree with the motion judge that nothing much turns on whether the *ICAA* or the *Arbitration Act, 1991* applies to the Arbitration Clause in issue, I do not intend to deal with that issue. I will deal with the other issues in these reasons using the *Arbitration Act, 1991* since it is the more commonly referred

to statute on these matters. I note that neither party suggested that the result would differ depending on which statute applies. I add that I would reach the same conclusions if I applied the *ICAA*.

[22] As a result, there are two issues that fall to be determined: (i) whether the Arbitration Clause amounts to an illegal contracting out of the *ESA* and is thus invalid and (ii) whether the Arbitration Clause is unconscionable and thus invalid on that separate basis.

(i) Contracting out

[23] Section 7(1) of the *Arbitration Act, 1991*, provides that, if a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court shall stay the proceeding. However, there are a number of exceptions to that mandatory requirement that are found in s. 7(2). One of those exceptions is where the arbitration agreement is invalid.[2] Here the appellant says that the Arbitration Clause is invalid because it amounts to a contracting out of the *ESA* that is, itself, prohibited by the *ESA*.

[24] It is not necessary, in deciding the issues raised, to determine whether the appellant (and others like him) are employees rather than independent contractors. That is the core issue that is to be decided in the action, if it proceeds. Rather, what must be decided is whether the Arbitration Clause is invalid such that the mandatory stay under s. 7(1) of the *Arbitration Act, 1991* does not apply.

[25] In determining that issue, I begin with the structure of the *Arbitration Act, 1991* to which I just referred. The structure of the statute, on the issue of a stay of proceedings in favour of arbitration, is that a court must grant a stay unless one of the five exceptions in s. 7(2) applies. If one of those exceptions applies, then the court has a discretion whether or not to grant a stay.

[26] What is clear from the structure of the *Arbitration Act, 1991* is that it is the court that is charged with making the determination whether one of the exceptions in s. 7(2) applies so that the issue of whether to grant a stay becomes a discretionary decision, not a mandatory one.[3] It is not the arbitrator who makes that call, it is the court – a point that I will discuss in more detail below.

[27] Turning to the exceptions then, it seems to me that one must start with the presumption that the appellant can prove that which he pleads, that is, that he is an employee of Uber. This is a preliminary motion in a proceeding and, like many other preliminary challenges to the court's jurisdiction to entertain a claim, the court normally proceeds on the basis that the plaintiff's allegations are true or, at least, capable of being proven. I note that this is the approach that was taken in *Seidel* where Binnie J. said, at para. 8:

> I should flag at the outset two issues that this appeal does not decide. Firstly, of course, Ms. Seidel's complaints against TELUS are taken to be capable of proof only for the purposes of this application. We are not assuming the allegations will be proven, let alone deciding that TELUS did in fact engage in the conduct complained of.

[28] The question then becomes, if the appellant (and those like him) is an employee of Uber, does the Arbitration Clause constitute a prohibited contracting out of the *ESA*? If it does, then the Arbitration Clause is invalid, the mandatory stay under s. 7(1) does not apply, and the court may then deny a stay under s. 7(2).

[29] In determining that question, heed must be taken of s. 5 of the *ESA*:

> (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.
>
> (2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

[30] Under s. 1(1) of the *ESA*, an employment standard is defined as follows:

> "employment standard" means a requirement or prohibition under this Act that applies to an employer for the benefit of an employee.

[31] As earlier noted, in his proposed class action, the appellant contends that he and his fellow drivers are employees of Uber. If they are employees, then they are covered by the *ESA* and are entitled to the benefits provided by the *ESA*. Most importantly, for the purposes of this matter, if they are employees, then they are not bound by any contractual term that purports to oust those benefits.

[32] Included in the benefits provided by the *ESA* is the right of an employee to make a complaint to the Ministry of Labour that his/her employer has contravened the *ESA*, pursuant to s. 96(1) of the *ESA*:

> A person alleging that this Act has been or is being contravened may file a complaint with the Ministry in a written or electronic form approved by the Director.

[33] Only two restrictions on that right appear in the *ESA*. One is in s. 98, which provides that an employee who commences a civil proceeding may not concurrently make a complaint that raises the same issue as the civil proceeding. The other is in s. 99(2), which precludes an employee who is a member of a trade union from making a complaint. The latter, of course, does not apply to the appellant. With respect to the former, I do not accept the submission of Uber that a civil proceeding includes an arbitration. There is no reason to interpret the term "civil proceeding" in that fashion. Indeed, the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which applies to all civil proceedings in Ontario, defines both actions and applications as civil proceedings. Notably it does not mention arbitrations. The definitions of actions and applications in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 take the same approach.

[34] Further, there is nothing in the *ESA* that suggests that there was any intention to include arbitrations within the usual meaning of the term "civil proceeding". Indeed, certain provisions suggest a contrary conclusion. One is s. 8(2) that requires an employee who commences a

civil proceeding to give notice of that fact to the Director of Employment Standards. It would seem odd that notice of an arbitration (which is normally private) would have to be given to the Director but that would be the result if arbitrations are included in civil proceedings. In fact, s. 8(2), which requires that notice be given to the Director "before the date the civil proceeding is set down for trial", also seemingly equates civil proceedings with actions. Another is s. 101(1) which refers specifically to "a proceeding before an arbitrator" and thus appears to draw a distinction between that form of proceeding and what the *ESA* otherwise refers to as a "civil proceeding". In any event, what is clear is that the restriction in s. 98 does not apply to the circumstances of this case.

[35] If an employee makes a s. 96 complaint, then an Employment Standards Officer ("ESO") must investigate the complaint. The ESO has certain rights and authorities when doing so. By way of example, under s. 102(1) of the *ESA,* the ESO may require the employee and the employer to attend a meeting with the ESO. The ESO may also require persons to produce documents under s. 102(4). And, in the end result, the ESO may, pursuant to s. 103, issue an order to pay wages against the employer if a contravention of the *ESA* has occurred.

[36] In my view, this investigative process constitutes an employment standard as that term is defined in the *ESA*. The investigative process, once triggered, is mandated by the *ESA* and both the employee and, more importantly the employer, are required to participate in that process. The process is thus a "requirement" that "applies to an employer for the benefit of an employee" and, accordingly, meets the definition of an employment standard. In reaching this conclusion, I read the words, used in the definition of employment standard, in their grammatical and ordinary sense: *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at para. 21.

[37] Uber argued, at the hearing, that s. 96 is not an "employment standard" because, in allowing employees to make a complaint to the Ministry of Labour, it does not establish a "requirement or prohibition…that applies to an employer". There are two problems with this submission. First, it extracts s. 96 from the relevant statutory context and treats it as a stand-alone provision, contrary to the modern approach to statutory interpretation adopted by the Supreme Court of Canada in *Rizzo.* Second, it invites an unduly narrow interpretation of s. 96 which would, if accepted, authorize employers to contract their employees out of s. 96, and thus out of the entire investigative process, without offending s. 5(1). That outcome would undermine the protective purpose of the *ESA*. It would also run afoul of the Supreme Court of Canada's directive regarding the interpretative approach to be taken to the *ESA*. As Iacobucci J. said in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at p. 1003:

> The objective of the Act is to protect the interests of employees by requiring employers to comply with certain minimum standards…Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not.

[38] I return then to the point that it is for the court to decide whether the exceptions in s. 7(2) of the *Arbitration Act, 1991* apply when an order for a stay of a proceeding is sought. Uber argues that this is an issue for the arbitrator to determine because it is an issue going to the

jurisdiction of the arbitrator. Uber invokes the "competence-competence" principle in support of its position.

[39] I do not agree with Uber's position because, in my view, this issue is not about jurisdiction. I am aware of the general approach that any dispute over an arbitrator's jurisdiction should first be determined by the arbitrator but that addresses situations where the scope of the arbitration is at issue. That is not this case. There does not appear to be any dispute that, if the Arbitration Clause is valid, the appellant's claim would fall within it. Rather, the issue here is the validity of the Arbitration Clause. The answer to that question is one for the court to determine as s. 7(2) of the *Arbitration Act, 1991* makes clear.

[40] In light of that conclusion, the competence-competence principle has no application to this case and, consequently, I do not need to address the arguments made with respect to it.

[41] Given my conclusion regarding the meaning of "employment standard", it follows that the Arbitration Clause constitutes a contracting out of the *ESA*. It eliminates the right of the appellant (or any other driver) to make a complaint to the Ministry of Labour regarding the actions of Uber and their possible violation of the requirements of the *ESA*. In doing so, it deprives the appellant of the right to have an ESO investigate his complaint. This is of some importance for, among other reasons, if a complaint is made then the Ministry of Labour bears the burden of investigating the complaint. That burden does not fall on the appellant. Under the Arbitration Clause, of course, the appellant would bear the entire burden of proving his claim.

[42] I am aware that the appellant has not, in fact, chosen to make a complaint under the *ESA* but rather has commenced this proposed class action. That fact does not alter the analysis, however, for a few reasons. The first reason is that, if the Arbitration Clause offends s. 5(1) because it contracts out of the investigative process, the provision is invalid, irrespective of what the appellant does or does not do.

[43] A second reason is that it is the appellant's right, under the *ESA*, to avail himself of the "civil proceeding" exception to the complaint process. It is his choice whether to take that route, and he is only barred from making a complaint if he chooses to take it. The Arbitration Clause essentially transfers that choice to Uber who then forces the appellant (and all other drivers) out of the complaints process. I reiterate that, in addressing this issue, we are dealing not just with the appellant but with all persons who might be in the same position as the appellant. The interpretative process must take that into account.

[44] A third reason is that this is a proposed class action. That fact provides the obvious reason why the appellant is availing himself of a civil proceeding over the complaint process. If the class proceeding is certified, then the central issues will be determined, not just for the appellant, but for all persons who find themselves in the same position as the appellant. It is well recognized that this is one of the central benefits of, and reasons for, the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[45] A fourth reason flows from the previous two and that is that under the complaints process, and also under the proposed class proceeding, the central issues will be determined

for everyone who finds themselves in the same position as the appellant. If the Ministry of Labour were to make a finding regarding the appellant, it would be a public finding upon which others could rely. The same is true through the class proceeding, if certified, since any decision in that proceeding would be binding on the members of the class (except for those who opted out). It is clear that there is no ability for a class determination under the Arbitration Clause nor is any determination through the arbitration a matter of public record upon which others can rely.

[46] A fifth reason is that there is no evidence in this record as to what remedy the appellant could expect to obtain if he is successful in the arbitration process. The Arbitration Clause requires that the laws of the Netherlands are to apply to the arbitration. We do not know how the laws of the Netherlands deal with the issues that the appellant has raised. We do not know if the laws of the Netherlands would provide greater, lesser, or equal benefits to the appellant, if it is determined that he is an employee. If he is an employee, then the appellant is entitled to the benefits that are provided by the *ESA*. In other words, as an Ontario resident he is statutorily entitled to the minimum benefits and protections of Ontario's laws. He should not be left in a situation where those benefits and protections are set by the laws of another country.

[47] On that latter point, I should address the position taken by Uber that it was the appellant who should have, but did not, provide any expert evidence as to the laws of the Netherlands and whether an arbitrator there would apply Ontario law to the issues raised. I would first point out that Uber also did not provide any such expert evidence. It would appear self-evident that it would have been a great deal easier for Uber to provide that evidence, if they considered it to be important, than it would be for the appellant to do so.

[48] In any event, expert evidence on this point was not required. As the majority in *Douez v. Facebook, Inc.,* 2017 SCC 33, [2017] 1 S.C.R. 751 pointed out in the context of forum selection clauses, there is no requirement for a party trying to avoid a forum selection clause to prove that his/her claim would fail in that forum: at para 67. Similarly, I find that in this context, there was no requirement for the appellant to prove that his claim would fail, if it was arbitrated in the Netherlands, in order to avoid the application of the Arbitration Clause.

[49] I conclude, therefore, that the Arbitration Clause is invalid because, based on the presumption that drivers are employees of Uber, as pleaded, it constitutes a contracting out of the provisions of the *ESA*, a result that is prohibited by that statute. I am reinforced in that conclusion when public policy considerations are taken into account.

[50] The issue of whether persons, in the position of the appellant, are properly considered independent contractors or employees is an important issue for all persons in Ontario. The issue of whether such persons are entitled to the protections of the *ESA* is equally important. Like the privacy issue raised in *Douez*, the characterization of these persons as independent contractors or employees for the purposes of Ontario law is an issue that ought to be determined by a court in Ontario. As the majority in *Douez* said, at para. 37:

> After all, the strong cause test must ensure that a court's plenary jurisdiction only yields to private contracts where appropriate.

[51] It follows from my conclusion on this issue that the mandatory stay provided for in s. 7(1) does not apply. Once the Arbitration Clause is found to be invalid under s. 7(2), the remedy of a mandatory stay no longer has any application.

(ii) Unconscionability

[52] Independent of that first conclusion, I would, in any event, find the Arbitration Clause to be invalid on the basis of unconscionability. This conclusion would also bring the Arbitration Clause within the invalidity exception in s. 7(2).

[53] The motion judge dismissed the unconscionability argument on the basis that there was no evidence that Uber "preyed or took advantage of Mr. Heller or the other Drivers or extracted an improvident agreement by inserting an arbitration provision" (para. 70). The motion judge's conclusion on this issue is flawed because, in reaching it, he made palpable and overriding errors of fact.

[54] Chief among those errors is the motion judge's finding that "most grievances or disputes between Drivers and Uber can be dealt with by the dispute resolution mechanisms readily available from Ontario and that it will be a substantial dispute that entails arbitration in the Netherlands" (para. 70).

[55] What the factual record actually shows is that there is no dispute resolution mechanism either in Ontario, or elsewhere, short of the Arbitration Clause. The other avenues available to a driver, who has a complaint, are located in the Philippines or in Chicago. Though accessible from Ontario, they are procedures run by Uber personnel and are completely controlled by Uber. They are not, in any way, independent grievance or adjudication procedures.

[56] It is also not correct that only a "substantial" dispute requires arbitration in the Netherlands. To the contrary, all disputes require arbitration in the Netherlands unless the driver resolves his/her complaint voluntarily with Uber. The reason that only a substantial dispute would go to arbitration is a direct result of the financial barriers that the arbitration process erects which would dissuade drivers with lesser disputes from pursuing that process.

[57] It was also an error for the motion judge to evaluate the impact of the Arbitration Clause, in this context, by looking at the collective claim in the proposed class action, as opposed to the individual claim of the appellant. The motion judge held that there is a "significant" claim for $400 million, which does not make the agreement improvident, in a comparative sense, with the costs of an arbitration in the Netherlands.

[58] However, the proposed class action is just that, a proposed class action. It has not yet been certified. Until it is certified, it remains, in essence, a single claim by the appellant. What makes the Arbitration Clause clearly improvident is the fact that any driver with a claim, that might ordinarily amount to nothing more than a few hundred dollars, must undertake an arbitration in the Netherlands in order to have their rights determined independently. That arbitration must be held in Amsterdam, under the law of the Netherlands, and must be conducted in accordance with the ICC Rules.

[59] It must be remembered, in this regard, that the evidence shows that the cost of initiating the arbitration process alone is US$14,500. This does not include the costs of travel, accommodation and, most importantly, counsel to participate in the arbitration. These costs are to be contrasted with the appellant's claim for minimum wage, overtime, vacation pay and the like brought by a person earning $400-$600 per week.

[60] I pause at this juncture to address the proper test to be applied in determining whether a contractual provision is unconscionable. In Ontario, the existing case law establishes that there are four elements to the test. Those elements are set out in *Titus v. William F. Cooke Enterprises Inc.,* 2007 ONCA 573, 284 D.L.R. (4th) 734, at para. 38, recently affirmed in *Phoenix Interactive Design Inc. v. Alterinvest II Fund L.P.,* 2018 ONCA 98, 420 D.L.R. (4th) 335. They are:

1. a grossly unfair and improvident transaction;

2. a victim's lack of independent legal advice or other suitable advice;

3. an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and

4. the other party's knowingly taking advantage of this vulnerability.

[61] In contrast to the Ontario approach, there is some suggestion that the test for unconscionability requires only two elements: inequality of bargaining power and unfairness. This is the test applied by the British Columbia Court of Appeal in *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C. C.A). It is also the test applied by Abella J. in her concurring reasons in *Douez,* at para. 115, and appears to be the test applied by the dissenting judges in *Douez*, at para. 145. The majority in *Douez* did not address the issue of unconscionability and, consequently, did not address the elements of the test.

[62] I do not consider it necessary to resolve the question of whether the decision in *Douez* has changed the proper elements to be applied in determining unconscionability in Ontario because, under either test, I find that the Arbitration Clause is unconscionable.

[63] In approaching that issue, I start with the approach taken by the majority in *Douez*. While I recognize that the clause in question in *Douez* was a forum selection clause, I see no reason in principle why the same approach ought not to be taken to the Arbitration Clause in this case. I say that because the Arbitration Clause here is not, strictly speaking, simply an arbitration provision. It is also a forum selection provision and it is a choice of laws provision. It covers much more than just the method through which disputes will be resolved. It establishes both a foreign forum for the adjudication and a foreign law that will be applied in that adjudication. Consequently, the Arbitration Clause 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.

[64] The majority in *Douez* set out the approach to determining whether to enforce such a clause. The majority applied a two-step approach. At the first step, the party relying on the

clause must establish that the clause is valid, clear, and enforceable, and that it applies to the cause of action before the court (para. 28). In this step, the court applies the principles of contract law to determine the validity of the clause, including issues such as unconscionability, undue influence, and fraud.

[65] If the clause is found to be valid, then, at the second step, the onus shifts to the opposing party who must demonstrate strong reasons why the court should not enforce the forum selection clause and stay the action. At this stage, the court must consider all the circumstances including the "convenience of the parties, fairness between the parties and the interests of justice" (para. 29).

[66] Although, in my view, the two step approach taken in *Douez* has application to this case, that approach has to be adjusted to take into account the statutory requirements that flow from the *Arbitration Act, 1991*. One of those requirements is found in s. 7(2) which clearly places the onus on the person, who seeks to avoid the mandatory stay, to establish that the arbitration provision in issue is invalid. So in this case, the onus falls on the appellant to establish unconscionability and thus invalidity. It is not Uber's onus to establish validity.

[67] Another requirement is that, because the exception in s. 7(2) requires a finding of invalidity, there does not appear to be any room for the second step of the analysis in *Douez* to apply. That is, if the appellant cannot establish that the Arbitration Clause is invalid, the *Arbitration Act, 1991* would not allow for a separate finding that the Arbitration Clause is unenforceable for other reasons. Indeed, the majority in *Douez* appears to proceed on the basis that the forum selection clause was valid but, nonetheless, the majority would not enforce it for the reasons they gave. That latter remedy is not provided for under the *Arbitration Act, 1991* as a mechanism to avoid the mandatory stay.

[68] In any event, in my view, the Arbitration Clause here fails at the first step of this analysis. Contrary to the conclusion reached by the motion judge, I find that the Arbitration Clause is unconscionable when it is viewed properly and in the context in which it is intended to apply. Applying the four elements from *Titus*, I conclude as follows:

1. The Arbitration Clause represents a substantially improvident or unfair bargain. It requires an individual with a small claim to incur the significant costs of arbitrating that claim under the provisions of the ICC Rules, the fees for which are out of all proportion to the amount that may be involved. And the individual has to incur those costs up-front. Uber's submission that the individual might recover those costs, if successful, does not change the impact that flows from the fact that these costs must be paid up-front. Further, it should be self-evident that Uber is much better positioned to incur the costs associated with the arbitration procedure that it has chosen and imposed on its drivers. Additionally, the Arbitration Clause requires each claimant to individually arbitrate his/her claim and to do so in Uber's home jurisdiction, which is otherwise completely unconnected to where the drivers live, and to where they perform their duties. Still further, it requires the rights of the drivers to be determined in accordance with the laws of the Netherlands, not the laws of Ontario, and the drivers are given no information as to what the laws of the Netherlands are.

2. There is no evidence that the appellant had any legal or other advice prior to entering into the services agreement nor is it realistic to expect that he would have. In addition, there is the reality that the appellant has no reasonable prospect of being able to negotiate any of the terms of the services agreement.

3. There is a significant inequality of bargaining power between the appellant and Uber – a fact that Uber acknowledges.

4. Given the answers to the first three elements, I believe that it can be safely concluded that Uber chose this Arbitration Clause in order to favour itself and thus take advantage of its drivers, who are clearly vulnerable to the market strength of Uber. It is a reasonable inference that Uber did so knowingly and intentionally. Indeed, Uber appears to admit as much, at least on the point of favouring itself when drafting the Arbitration Clause. Its rationale in support of that favouring, i.e. that it chose this particular arbitration process in order to provide consistency of results, is an unpersuasive one.

[69] Consequently, all four elements of the *Titus* test for unconscionability are present in this case. It follows that, if the two-step test found in *Douez* were to apply, it would also be met.

[70] It seems to me that the fundamental flaw in the approach adopted by the motion judge to this issue is to proceed on the basis that the Arbitration Clause is of the type involved in normal commercial contracts where the parties are of relatively equal sophistication and strength. That is not this case. As the majority in *Douez* noted, “forum selection clauses often operate to defeat consumer claims” (para. 62). The same can be said of the Arbitration Clause here – it operates to defeat the very claims it purports to resolve. And I reiterate that this Arbitration Clause is much more than just a simple arbitration provision.

[71] I would add that, for the purposes of this analysis, I do not see any reasonable distinction to be drawn between consumers, on the one hand, and individuals such as the appellant, on the other. Indeed, I would note that, if Uber is correct and their drivers are not employees, then they are very much akin to consumers in terms of their relative bargaining position. Alternatively, if Uber is wrong, and their drivers are employees, we are not speaking of employees who are members of a large union with similar bargaining power and resources available to protect its members. Rather, the drivers are individuals who are at the mercy of the terms, conditions and rates of service set by Uber, just as are consumers. If they wish to avail themselves of Uber’s services, they have only one choice and that is to click “I agree” with the terms of the contractual relationship that are presented to them.

[72] Finally on this point, I should mention that the motion judge, in coming to his conclusion, relied in part on my decision in *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299 (S.C.). *Kanitz* is entirely distinguishable from the situation here. First, in *Kanitz*, there was no evidence as to what the costs of initiating the arbitration process would be, nor evidence that any particular customer had been dissuaded from arbitrating because of the expense. The arbitration provision in *Kanitz* required the arbitration to proceed where the consumer resided and on mutually agreeable terms. Consequently, there was no evidence of any significant financial or geographic barriers to initiate the arbitration process, as there are in this case. I

would also note that, subsequent to the decision in *Kanitz*, consumer protection legislation in Ontario was amended to preclude arbitration in such situations.

[73] In the end result, for the reasons I have given, I conclude that the Arbitration Clause is unconscionable and therefore invalid. The invalidity exception in s. 7(2) of the *Arbitration Act, 1991* again applies to the Arbitration Clause.

IV: Conclusion

[74] I conclude that the Arbitration Clause amounts to an illegal contracting out of an employment standard, contrary to s. 5(1) of the *ESA*, if the drivers are found to be employees as alleged by the appellant. I reach the separate and independent conclusion that the Arbitration Clause is unconscionable at common law. On the basis of each finding, the Arbitration Clause is invalid under s. 7(2) of the *Arbitration Act, 1991*. The remedy of a mandatory stay has no application.

[75] The appeal is therefore allowed and the stay is set aside. The respondent will pay to the appellant his costs of the appeal in the agreed amount of $20,000 inclusive of disbursements and HST.

[76] The parties did not make submissions on what should happen to the costs of the motion should the appeal be successful. If the parties cannot resolve that issue, they may make brief written submissions. The appellant shall file his submissions within 15 days of the date of these reasons and the respondent shall file its submissions within 10 days thereafter. No reply submissions are to be filed and each party's submissions shall not exceed five pages.

Released: January 2, 2019 "K.F."

"I.V.B. Nordheimer J.A."

"I agree. K. Feldman J.A."

"I agree. G. Pardu J.A."

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[1] Since it does not appear necessary, for the purposes of these reasons, to differentiate between the various respondents, I will refer to them collectively as "Uber".

[2] Similar provisions are found in the *ICAA*.

[3]The structure of the *ICAA* is essentially the same with the result that the approach to the two statutes should be the same: *Ontario Medical Association v. Willis Canada Inc.*, 2013 ONCA 745, 118 O.R. (3d) 241, at para. 26.