



**SUPREME COURT OF CANADA**

**CITATION:** Uber Technologies Inc. v. Heller,  
2020 SCC 16

**APPEAL HEARD:** November 6, 2019  
**JUDGMENT RENDERED:** June 26, 2020  
**DOCKET:** 38534

**BETWEEN:**

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

and

**David Heller**  
Respondent

- and -

**Attorney General of Ontario, 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, United Food and Commercial Workers Canada, Workers'  
Health and Safety Legal Clinic, Montreal Economic Institute, Canadian  
American Bar Association, Chartered Institute of Arbitrators (Canada) Inc.,  
Toronto Commercial Arbitration Society, Canadian Chamber of Commerce,  
International Chamber of Commerce, Consumers Council of Canada,  
Community Legal Assistance Society and ADR Chambers Inc.**  
Intervenors

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,  
Martin and Kasirer JJ.

**JOINT REASONS FOR JUDGMENT:** Abella and Rowe JJ. (Wagner C.J. and Moldaver, Karakatsanis, Martin and Kasirer JJ. concurring)  
(paras. 1 to 100)

**CONCURRING REASONS:** Brown J.  
(paras. 101 to 176)

**DISSENTING REASONS:** Côté J.  
(paras. 177 to 338)

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UBER TECHNOLOGIES INC. v. HELLER

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

*Appellants*

v.

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Don Valley Community Legal Services,  
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Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Contracts — Contracts of adhesion — Arbitration clause — Validity — Unconscionability — Mandatory clause in standard form contract between driver and multinational corporation requiring that disputes be submitted to arbitration in the Netherlands and imposing substantial up-front costs for arbitration proceedings — Driver commencing action in Ontario court against corporation — Corporation seeking stay of proceedings based on arbitration clause — Whether action should be stayed — Whether validity of arbitration agreement should be decided by court or arbitrator — Whether arbitration agreement unconscionable — Arbitration Act, 1991, S.O. 1991, c. 17, s. 7(2).*

H provides food delivery services in Toronto using Uber's software applications. To become a driver for Uber, H had to accept the terms of Uber's standard form services agreement. Under the terms of the agreement, H was required to resolve any dispute with Uber through mediation and arbitration in the

Netherlands. The mediation and arbitration process requires up-front administrative and filing fees of US\$14,500, plus legal fees and other costs of participation. The fees represent most of H's annual income.

In 2017, H started a class proceeding against Uber in Ontario for violations of employment standards legislation. Uber brought a motion to stay the class proceeding in favour of arbitration in the Netherlands, relying on the arbitration clause in its services agreement with H. H argued that the arbitration clause was unconscionable and therefore invalid. The motion judge stayed the proceeding, holding that the arbitration agreement's validity had to be referred to arbitration in the Netherlands, in accordance with the principle that arbitrators are competent to determine their own jurisdiction. The Court of Appeal allowed H's appeal and set aside the motion judge's order. It concluded that H's objections to the arbitration clause did not need to be referred to an arbitrator and could be dealt with by a court in Ontario. It also found the arbitration clause to be unconscionable, based on the inequality of bargaining power between the parties and the improvident cost of arbitration.

*Held* (Côté J. dissenting): The appeal should be dismissed.

*Per* Wagner C.J. and **Abella**, Moldaver, Karakatsanis, **Rowe**, Martin and Kasirer JJ.: Because of the extensive fees for initiating arbitration, there is a real prospect that if the matter is sent to be heard by an arbitrator, H's challenge to the validity of the arbitration agreement may never be resolved. The validity of the

arbitration agreement must therefore be resolved by the court. H's claim that the arbitration clause is unconscionable requires considering two elements: whether there is an inequality of bargaining power and whether there is a resulting improvident bargain. There was inequality of bargaining power between Uber and H because the arbitration clause was part of an unnegotiated standard form contract, there was a significant gulf in sophistication between the parties, and a person in H's position could not be expected to appreciate the financial and legal implications of the arbitration clause. The arbitration clause is improvident because the arbitration process requires US\$14,500 in up-front administrative fees. As a result, the arbitration clause is unconscionable and therefore invalid.

The parties disagreed on the arbitration statute applicable to their dispute. Uber argued that the Ontario *International Commercial Arbitration Act* applies and H argued that the Ontario *Arbitration Act* applies. Whether the *International Commercial Arbitration Act* governs depends on whether the arbitration agreement is international and commercial. That the agreement here is international is not in dispute. Labour or employment disputes are not the type that the *International Commercial Arbitration Act* is intended to govern. The *Arbitration Act* therefore governs.

The Court set out a framework in *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, and *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531, for when a court should decide if an arbitrator has jurisdiction

over a dispute instead of referring that question to the arbitrator. That framework applies to Ontario's *Arbitration Act*. According to that framework, a court should refer all challenges to an arbitrator's jurisdiction to the arbitrator unless they raise pure questions of law, or questions of mixed fact and law that require only superficial consideration of the evidence in the record — that is, if the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties.

In addition to the two exceptions to arbitral referral in *Dell* and *Seidel*, a court may depart from the general rule of arbitral referral if an issue of accessibility arises. The assumption made in *Dell* is that if the court does not decide an issue, then the arbitrator will. *Dell* did not contemplate a scenario wherein the matter would never be resolved if the stay were granted. Such a situation raises obvious practical problems of access to justice that the Ontario legislature could not have intended when giving courts the power to refuse a stay. One way in which the validity of an arbitration agreement may not be determined is when an arbitration agreement is fundamentally too costly or otherwise inaccessible. This could occur because the fees to begin arbitration are significant relative to the plaintiff's claim or because the plaintiff cannot reasonably reach the physical location of the arbitration. Another example might be a foreign choice of law clause that circumvents mandatory local policy, such as a clause that would prevent an arbitrator from giving effect to the protections in Ontario employment law. In such situations, staying the action in favour of arbitration would be tantamount to denying relief for all claims made under

the agreement. The arbitration agreement would, in effect, be insulated from meaningful challenge.

Accordingly, a court should not refer a challenge to an arbitrator's jurisdiction to the arbitrator if there is a real prospect that doing so would result in the challenge never being resolved. To determine whether only a court can resolve the challenge to arbitral jurisdiction, the court must first determine whether, assuming the facts pleaded to be true, there is a genuine challenge to arbitral jurisdiction. Second, the court must determine from the supporting evidence whether there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator. While this second question requires some limited assessment of the evidence, this assessment must not devolve into a mini-trial. The only question at this stage is whether there is a real prospect, in the circumstances, that the arbitrator may never decide the merits of the jurisdictional challenge. If there is a real prospect that referring a challenge to an arbitrator's jurisdiction to the arbitrator would result in the challenge never being resolved, a court may resolve whether the arbitrator has jurisdiction over the dispute and, in so doing, may thoroughly analyze the issues and record. The Court, therefore, should resolve the arguments H has raised.

Unconscionability is an equitable doctrine that is used to set aside unfair agreements that resulted from an inequality of bargaining power. When the traditional assumptions underlying contract enforcement lose their justificatory authority, this doctrine provides relief from improvident contracts. The purpose of unconscionability



is the protection of those who are vulnerable in the contracting process from loss or improvidence in the bargain that was made.

Unconscionability requires both an inequality of bargaining power and a resulting improvident bargain. An inequality of bargaining power exists when one party cannot adequately protect its own interests in the contracting process. A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable. Improvidence is measured at the time the contract is formed and must be assessed contextually. The question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. Although one party knowingly taking advantage of another's vulnerability may provide strong evidence of inequality of bargaining power, it is not essential for a finding of unconscionability. Unconscionability does not require that the transaction was grossly unfair, that the imbalance of bargaining power was overwhelming, or that the stronger party intended to take advantage of a vulnerable party.

The doctrine of unconscionability has particular implications for standard form contracts. The potential for such contracts to create an inequality of bargaining power is clear, as is the potential to enhance the advantage of the stronger party at the expense of the more vulnerable one, particularly through choice of law, forum selection, and arbitration clauses that violate a party's reasonable expectations by depriving them of remedies.

Applying the unconscionability doctrine in this case, there was clearly inequality of bargaining power between Uber and H. The arbitration agreement was part of a standard form contract and a person in H's position could not be expected to understand that the arbitration clause imposed a US\$14,500 hurdle to relief. The improvidence of the arbitration clause is also clear because these fees are close to H's annual income and are disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into.

Respect for arbitration is based on its being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all. In this case, the arbitration clause is the only way H is permitted to vindicate his rights under the contract, but arbitration is out of reach for him and other drivers in his position. His contractual rights are, as a result, illusory.

Based on both the financial and logistic disadvantages faced by H in his ability to protect his bargaining interests and on the unfair terms that resulted, the arbitration clause is unconscionable and therefore invalid.

*Per **Brown J.**:* There is agreement with the majority that the appeal should be dismissed. There is also agreement with the majority that the mandatory arbitration requirement is invalid, but there is disagreement with respect to the majority's reliance upon the doctrine of unconscionability to reach this conclusion. Contractual stipulations that foreclose access to legally determined dispute resolution

— as the arbitration agreement in this case does — are unenforceable not because they are unconscionable, but because they undermine the rule of law by denying access to justice. They are therefore contrary to public policy.

The majority vastly expands the scope of the doctrine of unconscionability's application. This is unnecessary, because the law already contains settled legal principles outside the doctrine of unconscionability which operate to prevent contracting parties from insulating their disputes from independent adjudication. It is also undesirable, because it drastically expands the doctrine's reach without providing any meaningful guidance as to its application. Charting such a course will serve only to compound the uncertainty that already plagues the doctrine, and to introduce uncertainty to the enforcement of contracts generally.

The public policy doctrine is fundamental to Canadian contract law and provides grounds for setting aside specific types of contractual provisions including those that harm the integrity of the justice system. This head of public policy applies when a provision penalizes or prohibits one party from enforcing the terms of their agreement, which serves to uphold the rule of law. At a minimum, the rule of law guarantees Canadian citizens and residents a stable, predictable and ordered society in which to conduct their affairs. Such a guarantee is meaningless without access to an independent judiciary that can vindicate legal rights. There is therefore no good reason to distinguish between a clause that expressly blocks access to a legally determined resolution and one that has the ultimate effect of doing so. While public

policy does not require access to a court of law in all circumstances, any means of dispute resolution that serves as a final resort for contracting parties must be just. Arbitration is an acceptable alternative to civil litigation because it can provide a resolution according to law, but where a clause expressly provides for arbitration while simultaneously having the effect of precluding it, the considerations which promote curial respect for arbitration dissolve. This is where the public policy principle preventing an ouster of court jurisdiction operates.

In evaluating a clause that limits access to a legally determined dispute resolution, the court's task is to decide whether the limitation is reasonable as between the parties, or instead causes undue hardship. A court must show due respect for arbitration agreements, particularly in the commercial setting. It will be the rare arbitration agreement that imposes undue hardship and acts as an effective bar to adjudication. Public policy should not be used as a device to set aside arbitration agreements that are proportionate in the context of the parties' relationship and the possibility for timely resolution but that one party simply regrets in hindsight.

To decide whether a limitation on dispute resolution imposes undue hardship, the first factor to consider is the nature of disputes that are likely to arise under the parties' agreement. Where the cost to pursue a claim is disproportionate to the quantum of likely disputes arising from the agreement, this suggests the possibility of undue hardship. Courts should also consider the relative bargaining positions of the parties. However, to be clear, an imbalance in bargaining power is not

required to find that a provision bars access to dispute resolution. Finally, it may be relevant to consider whether the parties have attempted to tailor the limit on dispute resolution. Here, the arbitration agreement effectively bars any claim that H might have against Uber and is disproportionate in the context of the parties' relationship. This form of limitation on legally determined dispute resolution undermines the rule of law and is contrary to public policy.

While arbitrators should typically rule on their own jurisdiction, an arbitrator cannot reasonably be tasked with determining whether an arbitration agreement, by its terms or effects, bars access to that very arbitrator. It therefore falls to courts to do so. While the question of whether an arbitration agreement bars access to dispute resolution is one of mixed fact and law, and may require more than a superficial review of the record, this limited exception to the general rule of referral — where a clause effectively prevents access to arbitration — is necessary to preserve the public legitimacy of the law in general, and arbitration in particular.

*Per Côté J. (dissenting):* The appeal should be allowed and a stay of proceedings should be granted on the condition that Uber advances the funds needed to initiate the arbitration proceedings. One of the most important liberties prized by a free people is the liberty to bind oneself by consensual agreement. Party autonomy and freedom of contract inform the policy choices embodied in the *Arbitration Act, 1991* and the *International Commercial Arbitration Act* (“*International Act*”), one of which is that the parties to a valid arbitration agreement should abide by their

agreement. The parties to the agreement in this case have bound themselves to settle any disputes arising under it through arbitration. The *Arbitration Act*, the *International Act*, the Court's jurisprudence and compelling considerations of public policy require the Court to respect the parties' commitment to submit disputes to arbitration.

The *International Act*, not the *Arbitration Act*, governs Uber's motion for a stay. However, neither the analysis that follows nor the ultimate conclusions would change if the *Arbitration Act* applied. The *International Act* applies to arbitrations which are international and commercial. The arbitration in this case is international because the parties have their residences or places of business in different countries, so the applicability of the *International Act* turns on whether the parties' relationship is properly characterized as being commercial in nature. A court should approach this issue by analyzing the nature of the parties' relationship on the basis of a superficial review of the record, as opposed to characterizing the nature of the dispute solely on the basis of the pleadings. Focussing the analysis on the nature of the relationship created by the transaction is consistent with the weight of the Canadian jurisprudence on the scope of the UNCITRAL Model Law. In this case, a superficial review of the documentary evidence reveals that the underlying transaction between Uber and H is commercial in nature. The service agreement expressly states that it does not create an employment relationship. Instead, it is a software licensing agreement, a type of transaction identified as coming within the scope of the UNCITRAL Model Law.

A motion for a stay and for referral to arbitration may be dismissed if the arbitration agreement is found to be null and void under the UNCITRAL Model Law or invalid under the *Arbitration Act*. The validity of the arbitration clause in this case should be determined by an arbitral tribunal. There is a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. This is the rule of systematic referral. A court may depart from the rule of systematic referral only if the jurisdictional challenge is based solely on a question of law or a question of mixed law and fact that requires only a superficial review of the documentary evidence, is not a delaying tactic, and will not unduly impair the conduct of the arbitration proceeding. A review is not superficial if the court is required to review testimonial evidence.

H's arguments challenging the validity of the arbitration clause require more than a superficial review of the documentary evidence: H's arguments are dependent upon testimonial evidence regarding his financial position, his personal characteristics, the circumstances of the formation of the contract and the amount that would likely be at issue in a dispute to which the arbitration clause applies.

The Court should not create an exception to the rule of systematic referral. An exception that would apply where an arbitration agreement is deemed to be too costly or otherwise inaccessible is inappropriate for several reasons. First, the rule of systematic referral is the product of an exercise of statutory interpretation, so any exception to it must also be a product of statutory interpretation. The policy

considerations relied on by the majority cannot be used to make the *Arbitration Act* or the UNCITRAL Model Law say something they do not say. Second, the Court has already declined to allow courts discretion to fully entertain a challenge to an arbitration agreement's validity. Third, it has also decided that delaying tactics should be counteracted by confining the scope of review on a motion for a stay to the documentary evidence. Fourth, the ordinary operation of the rule of systematic referral under an agreement governed by a foreign choice of law clause is not a loophole, and there is no basis in the *Arbitration Act* or in the UNCITRAL Model Law for distinguishing between arbitration agreements which include a foreign choice of law clause from those which do not. Fifth, there is no basis for concluding that the mandatory fees for the administration of mediation and arbitration proceedings under the International Chamber of Commerce's ("ICC") *Arbitration Rules, Mediation Rules* ("ICC Rules") are significant relative to H's claim, given that the amount of the claim is unknown and no explanation is given by the majority for concluding that H will be unable to reach the physical location of the arbitration. Furthermore, there is disagreement with Brown J. that the rule of systematic referral would, absent an exception, infringe, or even engage, s. 96 of the *Constitution Act, 1867*. Legislation which facilitates the enforcement of agreements to submit disputes to arbitration neither abolishes the superior courts nor removes any part of their core or inherent jurisdiction. Courts retain an oversight role throughout the arbitration process and afterwards as proceedings commenced in contravention of an arbitration agreement are stayed, not dismissed, and as the stay may set conditions specifying how the parties are to proceed to arbitration.



The issues as to the doctrine of unconscionability, the *Employment Standards Act, 2000* (“*ESA*”), and public policy raise questions of mixed law and fact which cannot be decided on the basis of a superficial review of that documentary evidence and, if the Court could consider the testimonial evidence in the record, it is insufficient to support a finding that the arbitration clause is unconscionable, inconsistent with the *ESA*, or contrary to public policy.

There is agreement with Brown J. with respect to the unconscionability doctrine in the general law of contracts. The unconscionability doctrine applies where there is (1) a significant inequality of bargaining power stemming from a weakness or vulnerability, (2) a resulting improvident bargain, and where (3) the stronger party knows of the weaker party’s vulnerability. The key question in relation to the significant inequality of bargaining power is whether the weaker party had a degree of vulnerability that had the potential to materially affect their ability, through autonomous, rational decision making, to protect their own interests, thereby undermining the premise of freedom of contract. The majority’s claim that vulnerability in the contracting process may arise from provisions in standard form contracts which are dense or difficult to read or understand sets the threshold so low as to be both practically meaningless and open to abuse. This sweeping restriction on arbitration clauses in standard form contracts would be best left to the legislature, especially since the sharing economy — a vital and growing sector of Canada’s economy which depends on standard form contracts that are agreed to electronically

— could be stifled if a reduced threshold for inequality of bargaining power is adopted.

H's claim that the bargain was improvident rests on three propositions: (1) the place of arbitration clause requires him to travel to Amsterdam at his own expense, (2) the choice of law clause excludes the application of the *ESA*, and (3) the selection of the ICC Rules entails the payment of fees which he alleges are disproportionately high. As to the place of arbitration clause, the place of arbitration is a legal concept which denotes the parties' selection of a particular jurisdiction whose arbitration law governs proceedings, and under whose law the arbitral award is made. There is no obligation to actually conduct the arbitration at the place of arbitration. As to the choice of law clause, arguments directed at the alleged unfairness of having the service agreement governed by foreign law are analytically distinct from those concerning alleged unfairness arising from the arbitration clause itself. The separability doctrine holds that arbitration clauses embedded in contracts should be treated as independent agreements that are ancillary or collateral to the underlying contract. The result is that the alleged invalidity of the choice of law clause on the basis that it is unconscionable does not affect the validity of the arbitration clause. As to the selection of the ICC Rules, arbitration agreements involve a mutuality of exchange, so mandatory fees which apply to disputes initiated by either party would make pursuing a claim for a small amount just as uneconomic for Uber as for H. Therefore, if unfairness results from the imposition of the ICC fees on hypothetical claims for small amounts, the unfairness is mutual. In any event, the

actual amount of H's claim is unknown, and establishing that a dispute over a small amount is likely would require the production and review of testimonial evidence. The proportionality of the ICC fees to H's ability to finance a larger claim must be measured as of the time the contract is formed, and the Court has no evidence regarding his financial position at that time.

The evidence does not support a finding that Uber had constructive knowledge of H's alleged peculiar vulnerability. It would have been impossible for Uber to be aware of H's specific income and education level when he decided to become an Uber driver, or that he intended to use the Driver App as his primary source of income. In any event, such questions would require the production and review of testimonial evidence, which would lead the Court to stray impermissibly beyond the documentary record.

The arbitration clause is not invalid under the *ESA*. The ability to file a complaint under the *ESA* is not an employment standard since the relevant section does not require an employer to do or not do anything. As such, the arbitration clause does not unlawfully contract out of an employment standard. In any event, a court cannot determine that an arbitration agreement is invalid pursuant to the *ESA* without first finding that the parties involved are an employer and an employee. Whether H is an employee within the meaning of the *ESA* is a complex question of mixed law and fact which cannot be decided on the basis of a superficial review of the documentary

evidence. The rule of systematic referral applies, and the parties should be referred to arbitration.

The arbitration clause is also not invalid under public policy. The Court should not create a new common law rule that contractual provisions which have the effect of prohibiting access to dispute resolution are contrary to public policy. The *Arbitration Act* and the *International Act* are strong statements of public policy which favour enforcing arbitration agreements. When considering whether, or how, to refashion old common law doctrines regarding arbitration, the Court should continue to embrace a more modern approach to arbitration law which views arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts. The Court should not seek to roll back the tide of history by breathing new life into authorities which are irreconcilable with the modern approach to arbitration. Therefore, doctrines based on the notion that only superior courts are capable of granting remedies for legal disputes should no longer be applied. Additionally, the comparative suitability of litigation, arbitration and other methods of dispute resolution for various classes of persons in various circumstances is a complex, polycentric policy decision that involves a host of different interests, objectives and solutions. Such questions do not fall to be answered by the courts, as they are instead matters for the elected policy-makers who sit in the legislature.

The pro-arbitration stance taken by legislatures across Canada and by the Court supports a generous approach to remedial options which will facilitate the arbitration process. Two such options include ordering a conditional stay of proceedings and applying the doctrine of severance. Although it will usually be unnecessary for a court to order a conditional stay, it may be appropriate to do so to ensure procedural fairness in the arbitration process. Courts should be careful not to impose conditions which impinge on the decision-making jurisdiction of the arbitral tribunal, but a condition which facilitates the arbitration process can protect the tribunal's jurisdiction by ensuring that the parties are able to proceed with the arbitration. In addition, compelling policy considerations support a generous application of the doctrine of severance in cases in which the parties have clearly indicated an intent to settle any disputes through arbitration but in which some aspects of their arbitration agreement have been found to be unenforceable.

In light of the evidence that H cannot afford the ICC fees, Uber should be required to advance the filing fees to enable him to initiate arbitration proceedings. In addition, if the arbitration clause were unconscionable or contrary to public policy, the selection of the ICC Rules and the place of arbitration clause could be severed. The majority does not explain why they have chosen not to address severance in their reasons. Defeating the parties' commitment to submit disputes to arbitration based on a hypothetical case would be commercially impractical and, given that the dispute actually before the Court concerns a proposed class proceeding for CAN\$400,000,000 and that the amount of H's individual claim is as yet unknown,

absurd. Approaching the enforceability of arbitration agreements in this fashion compromises the certainty upon which commercial entities rely in structuring their operations. The arbitration clause should be upheld.

## Cases Cited

By Abella and Rowe JJ.

**Referred to:** *Peterson Farms Inc. v. C&M Farming Ltd.*, [2004] EWHC 121 (Comm.), [2004] 1 Lloyd's Rep. 603; *Crown Grain Company, Limited v. Day*, [1908] A.C. 504; *Re Sutherland and Halbrick* (1982), 134 D.L.R. (3d) 177; *Patel v. Kanbay International Inc.*, 2008 ONCA 867, 93 O.R. (3d) 588; *Borowski v. Fiedler (Heinrich) Perforiertechnik GmbH* (1994), 158 A.R. 213; *Rhinehart v. Legend 3D Canada Inc.*, 2019 ONSC 3296, 56 C.C.E.L. (4th) 125; *Ross v. Christian & Timbers Inc.* (2002), 23 B.L.R. (3d) 297; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921; *Trainor v. Fundstream Inc.*, 2019 ABQB 800; *Alberta Medical Association v. Alberta*, 2012 ABQB 113, 537 A.R. 75; *A. v. B. (No.2)*, [2007] EWHC 54 (Comm.), [2007] 1 All E.R. (Comm.) 633; *Kyrgyz Mobil Tel Limited v. Fellowes International Holdings Limited*, [2005] EWHC 1329, 2005 WL 6514129; *West Tankers Inc. v. Allianz SpA*, [2012] EWHC 854 (Comm.), [2012] 2 All E.R. (Comm.) 395; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Vita Food Products, Inc. v. Unus Shipping Co.*, [1939] A.C. 277; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Das*

*v. George Weston Limited*, 2017 ONSC 4129; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144; *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710; *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166; *Downer v. Pitcher*, 2017 NLCA 13, 409 D.L.R. (4th) 542; *Input Capital Corp. v. Gustafson*, 2019 SKCA 78, 438 D.L.R. (4th) 387; *Cain v. Clarica Life Insurance Co.*, 2005 ABCA 437, 263 D.L.R. (4th) 368; *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573, 284 D.L.R. (4th) 734; *Birch v. Union of Taxation Employees, Local 70030*, 2008 ONCA 809, 305 D.L.R. (4th) 64; *Ayres v. Hazelgrove*, Q.B. England, February 9, 1984; *The Mark Lane* (1890), 15 P.D. 135; *Commercial Bank of Australia Ltd. v. Amadio*, [1983] HCA 14, 151 C.L.R. 447; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751; *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122, 347 D.L.R. (4th) 591; *Roy v. 1216393 Ontario Inc.*, 2011 BCCA 500, 345 D.L.R. (4th) 323; *McNeill v. Vandenberg*, 2010 BCCA 583; *Hess v. Thomas Estate*, 2019 SKCA 26, 433 D.L.R. (4th) 60; *Blomley v. Ryan* (1956), 99 C.L.R. 362; *Bartle v. GE Custodians*, [2010] NZCA 174, [2010] 3 N.Z.L.R. 601; *Janet Boustany v. George Pigott Co (Antigua and Barbuda)*, [1993] UKPC 17; *Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd.*, [1985] 1 W.L.R. 173; *Lloyds Bank Ltd. v. Bundy*, [1975] 1 Q.B. 326; *The Medina* (1876), 1 P.D. 272; *Portal Forest Industries Ltd. v. Saunders*, [1978] 4 W.W.R. 658; *Phoenix Interactive Design Inc. v. Alterinvest II Fund L.P.*, 2018 ONCA 98, 420 D.L.R. (4th) 335; *Davidson v. Three Spruces Realty Ltd.* (1977), 79 D.L.R. (3d) 481; *Williams v.*

*Walker-Thomas Furniture Company*, 350 F.2d 445 (1965); *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.*, [1981] A.C. 909; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69.

By Brown J.

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*Republic*, [1983] 1 S.C.R. 529; *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178; *Sport Maska Inc. v. Zittreer*, [1988] 1 S.C.R. 564; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531; *Ontario Medical Assn. v. Willis Canada Inc.*, 2013 ONCA 745, 118 O.R. (3d) 241; *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666; *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] 1 S.C.R. 249; *Popack v. Lipszyc*, 2009 ONCA 365; *Fuller Austin Insulation Inc. v. Wellington Insurance Co.* (1995), 135 Sask. R. 254; *Fuller Austin Insulation Inc. v. Wellington Insurance Co.* (1995), 137 Sask. R. 238; *Iberfreight S.A. v. Ocean Star Container Line A.G.* (1989), 104 N.R. 164; *Continental Resources Inc. v. East Asiatic Co. (Canada)*, [1994] F.C.J. No. 440 (QL); *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494; *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710; *Input Capital Corp. v. Gustafson*, 2019 SKCA 78, 438 D.L.R. (4th) 387; *Downer v. Pitcher*, 2017 NLCA 13, 409 D.L.R. (4th) 542; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303; *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295; *Dyck v. Manitoba Snowmobile Association*, [1985] 1 S.C.R. 589; *Ayres v. Hazelgrove*, Q.B. England, February 9, 1984; *The Mark Lane* (1890), 15 P.D. 135; *The Medina* (1876), 1 P.D. 272; *Commercial Bank of Australia Ltd. v. Amadio*, [1983] HCA 14, 151 C.L.R. 447; *Chesterfield (Earl of) v. Janssen* (1750), 2 Ves. Sen.

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By Côté J. (dissenting)

*Hofer v. Hofer*, [1970] S.C.R. 958; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531; *National Gypsum Co. Inc. v. Northern Sales Ltd.*, [1964] S.C.R. 144; *Zodiak International Productions Inc. v. Polish People's Republic*, [1983] 1 S.C.R. 529; *Sport Maska Inc. v. Zittner*, [1988] 1 S.C.R. 564; *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178; *Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642, 97 O.R. (3d) 161; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *Borowski v. Fiedler (Heinrich) Perforiertechnik GmbH* (1994), 158 A.R. 213; *Ross v. Christian & Timbers Inc.* (2002), 23 B.L.R. (3d) 297; *Patel v. Kanbay International Inc.*, 2008 ONCA 867, 93 O.R. (3d) 588; *United Mexican States v. Metalclad Corp.*, 2001 BCSC 664, 89 B.C.L.R. (3d) 359; *Kaverit Steel and Crane Ltd. v. Kone Corp.*, 1992 ABCA 7, 120 A.R. 346; *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.*, [1981] A.C. 909; *Heyman v. Darwins, Ltd.*, [1942] A.C. 356; *Prima Paint Corp. v. Flood & Conklin MFG. Co.*, 388 U.S. 395 (1967); *Fiona Trust and Holding Corp. v. Privalov*,

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APPEAL from a judgment of the Ontario Court of Appeal (Feldman, Pardu and Nordheimer JJ.A.), 2019 ONCA 1, 145 O.R. (3d) 81, 430 D.L.R. (4th) 410, 31 C.P.C. (8th) 1, 52 C.C.E.L. (4th) 10, 85 B.L.R. (5th) 1, 2019 CLLC ¶210-027, [2019] O.J. No. 1 (QL), 2019 CarswellOnt 1 (WL Can.), setting aside a decision of Perell J., 2018 ONSC 718, 421 D.L.R. (4th) 343, 17 C.P.C. (8th) 342, 79 B.L.R.

(5th) 136, [2018] O.J. No. 502 (QL), 2018 CarswellOnt 1090 (WL Can.). Appeal dismissed, Côté J. dissenting.

*Linda M. Plumpton, Lisa Talbot and Sarah Whitmore*, for the appellants.

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*Anthony Daimsis*, for the intervener the Canadian Federation of Independent Business.

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*Nabila F. Qureshi* and *Karin Baqi*, for the interveners the Income Security Advocacy Centre and Parkdale Community Legal Services.

*Steven Barrett* and *Joshua Mandryk*, for the intervener the United Food and Commercial Workers Canada.

*Kevin Simms* and *John Bartolomeo*, for the intervener the Workers' Health and Safety Legal Clinic.

*Robert Carson* and *Lauren Harper*, for the intervener the Montreal Economic Institute.

*Alyssa Tomkins* and *James Plotkin*, for the intervener the Canadian American Bar Association.

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*Andres C. Garin* and *Alison FitzGerald*, for the intervener the International Chamber of Commerce.

*Mohsen Seddigh* and *David Sterns*, for the intervener the Consumers Council of Canada.

*Wes McMillan* and *Greg J. Allen*, for the intervener the Community Legal Assistance Society.

*Andrew D. Little* and *Ranjan K. Agarwal*, for the intervener ADR Chambers Inc.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Rowe, Martin and Kasirer JJ. was delivered by

ABELLA AND ROWE JJ. —

[1] In this appeal, the Court determines who has authority to decide whether an Uber driver is or is not an “employee” within the meaning of Ontario’s *Employment Standards Act, 2000*, S.O. 2000, c. 41 (“ESA”): the courts of Ontario or an arbitrator in the Netherlands, as provided for in the contracts of adhesion between Uber and its drivers?

[2] David Heller provides food delivery services in Toronto using Uber's software applications.<sup>1</sup> To become a driver for Uber, Mr. Heller had to accept, without negotiation, the terms of Uber's standard form services agreement. Under the terms of the agreement, Mr. Heller was required to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process requires up-front administrative and filing fees of US\$14,500, plus legal fees and other costs of participation. Mr. Heller earns between \$400-\$600 a week. The fees represent most of his annual income.

[3] Mr. Heller started a class proceeding against Uber in 2017 for violations of the *ESA*. Uber brought a motion to stay the class proceeding in favour of arbitration in the Netherlands. In response, Mr. Heller took the position that the arbitration clause<sup>2</sup> in Uber's services agreements is invalid, both because it is unconscionable and because it contracts out of mandatory provisions of the *ESA*. The motion judge held that he did not have the authority to decide whether the arbitration agreement was valid and stayed Mr. Heller's proceeding (2018 ONSC 718, 421 D.L.R. (4th) 343). The Court of Appeal reversed this order, determining, among other things, that the arbitration agreement was unconscionable based on the inequality of bargaining power between the parties and the improvident cost of arbitration (2019 ONCA 1, 430 D.L.R. (4th) 410).

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<sup>1</sup> We refer to the four appellants collectively as "Uber".

<sup>2</sup> The phrases "arbitration clause" and "arbitration agreement" both refer to that part of the overall contract dealing with the arbitration.

[4] We agree with the Court of Appeal. This is an arbitration agreement that makes it impossible for one party to arbitrate. It is a classic case of unconscionability.

### Background

[5] Uber operates a global business in more than 600 cities and 77 countries, with a customer base of millions of people and businesses. The company has been operating in Ontario for eight years.

[6] Uber's software applications are widely used to arrange personal transportation (the Rider and Driver Apps) and food delivery (the UberEATS App). Customers and drivers can download Uber's Apps onto their smartphones. Customers use the Apps to place requests for transportation or food delivery. Drivers use the Apps to view and respond to customer requests. Payment between the customers and drivers is facilitated through Uber's Apps, and Uber takes a share of the drivers' payments.

[7] The first time drivers log on to an Uber App, they are presented with a standard form services agreement of around 14 pages. To accept the agreement, the driver must click "I agree" twice. Once the driver does so, the Uber App is activated and the services agreement is uploaded to a "Driver Portal", accessible to the driver through an online account. The parties to the services agreement are the driver and Uber subsidiaries incorporated in the Netherlands with offices in Amsterdam.

[8] The services agreement includes mandatory arbitration and choice of law clauses, which state:

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 . . . .

(C.A. reasons, at para. 11)

[9] The choice of law clause requires the agreement to be “governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws”. The arbitration clause requires all disputes to be submitted first to mandatory mediation and, if that fails, then to arbitration, both according to the International Chamber of Commerce (“ICC”)’s Rules. The place of the arbitration is to be in Amsterdam.

[10] The up-front cost to begin an arbitration at the ICC according to the ICC Rules amounts to about US\$14,500. The fees do not include legal fees, lost wages

and other costs of participation. The services agreement provides no information about the cost of mediation and arbitration.

[11] Mr. Heller is an Ontario resident who entered into contracts with corporations that are part of the Uber enterprise to be a driver.<sup>3</sup> He earns approximately \$400-\$600 per week based on 40 to 50 hours of work, or \$20,800-\$31,200 per year, before taxes and expenses. The costs to arbitrate a claim against Uber equal all or most of the gross annual income he would earn working full-time as an Uber driver.

[12] Mr. Heller started this proposed class action against Uber in 2017. He seeks relief for four claims in this proceeding: a claim for breach of the *ESA*, a claim for breach of contract based on either implied terms or the duty of good faith, a claim for negligence, and a claim for unjust enrichment. All of these claims, however, depend on the *ESA* for their success. The essence of Mr. Heller's position is that he is an employee within the meaning of the *ESA*.

[13] Uber, relying on the arbitration clause in its services agreement with Mr. Heller, sought a stay of proceedings in favour of arbitration in the Netherlands.<sup>4</sup>

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<sup>3</sup> On June 7, 2016, Mr. Heller entered into a contract with Rasier Operations B.V. ("Uber Rasier") to use the Ride App. On December 15, 2016, he entered into a contract with Uber Portier B.V. ("Uber Portier") to use UberEATS.

<sup>4</sup> This case was argued on the basis that all four Uber defendants can invoke the arbitration agreement, even though only Uber Rasier is a party to it. Our reasons should not be taken as implying that an arbitration agreement can bind or be invoked by non-parties (see J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure* (3rd ed. 2017), at pp. 74-75; *Peterson Farms Inc. v. C&M Farming Ltd.*, [2004] EWHC 121 (Comm.), [2004] 1 Lloyd's Rep. 603). That is an issue to be decided another day.



Mr. Heller argued that the arbitration clause was invalid on two grounds: it was unconscionable, and it contracted out of mandatory *ESA* protections.

[14] The motion judge stayed the proceeding in favour of arbitration in the Netherlands. He began his analysis by determining which arbitration legislation applied: the *Arbitration Act, 1991*, S.O. 1991, c. 17 (“AA” or “*Arbitration Act*”) or the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5 (“ICAA”). The *ICAA* applies to arbitration agreements that are “international” and “commercial”. The motion judge proceeded on the basis that the *ICAA* applied because Mr. Heller and the contracting Uber companies were based in different jurisdictions, and because there was, in the motion judge’s view, a *prima facie* case that the agreement was a commercial licensing arrangement.

[15] He then determined that the arbitration agreement’s validity had to be referred to arbitration in the Netherlands, in accordance with the principle that arbitrators are competent to determine their own jurisdiction (the “competence-competence” principle). In the alternative, the motion judge held that the arbitration clause was not invalid due to unconscionability or because it contracted out of the *ESA*. He accordingly stayed the proceeding in favour of arbitration in the Netherlands.

[16] The Court of Appeal allowed Mr. Heller’s appeal, finding that the arbitration clause was void both because it was unconscionable and because it contracted out of the *ESA*. Writing for a unanimous court, Nordheimer J.A. concluded

that Mr. Heller's objections to the arbitration agreement did not need to be referred to an arbitrator in the Netherlands and could be dealt with by a court in Ontario. He declined to resolve whether the *AA* or the *ICAA* applied, holding that the result would be the same under either statute. He found the arbitration clause to be unconscionable because it was an unfair bargain and resulted from significant inequality of bargaining power between Mr. Heller and Uber. He further noted that there was minimal chance of Mr. Heller having received legal advice and that it was safe to infer that Uber knowingly and intentionally 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". The court also found the arbitration clause void because it contracted out of the *ESA*.

[17] As a result, the Court of Appeal allowed Mr. Heller's appeal, and set aside the order of the motion judge granting Uber's motion to stay.

### Analysis

[18] Throughout these proceedings, the parties have disagreed on the arbitration statute applicable to their dispute. Uber argued that the *ICAA* applies and Mr. Heller argued that the applicable legislation is the *AA*.

[19] We agree with Mr. Heller. The parties' dispute is fundamentally about labour and employment. The *ICAA* was not meant to apply to such cases.<sup>5</sup>

[20] The *ICAA* and *AA* are exclusive. If the *ICAA* governs this agreement, the *AA* does not, and vice versa (*AA*, s. 2(1)(b)). As the Superior Court correctly identified, whether the *ICAA* governs depends on whether the arbitration agreement is "international" and "commercial". That the agreement here is international is not in dispute. Whether the agreement is commercial is contested. To answer this question, one must understand the legislative scheme of the *ICAA*.

[21] The *ICAA* implements two international instruments: the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Can. T.S. 1986 No. 43, adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958 ("*Convention*") and the *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, Ann. I adopted by the United Nations Commission on International Trade Law on June 21, 1985, as amended by the United Nations Commission on International Trade Law on July 7, 2006 ("*Model Law*"). Only the *Model Law* is relevant here.

[22] Section 5(3) of the *ICAA* states that the *Model Law* applies to "international commercial arbitration agreements and awards made in international

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<sup>5</sup> We note in passing that if the motion judge had issued a stay under the *AA*, no appeal to the Court of Appeal would have been available (*AA*, s. 7(6)). A direct appeal to this Court with leave would still have been permissible (*Crown Grain Company, Limited v. Day*, [1908] A.C. 504 (P.C.), at p. 507; *Re Sutherland and Halbrick* (1982), 134 D.L.R. (3d) 177 (Man. C.A.), at p. 181). In this case, because the motion judge's order was made (in error) under the *ICAA*, the Court of Appeal did have jurisdiction.

commercial arbitrations”. The meaning of “commercial” in this section of the *ICAA* must be the same as the meaning of “commercial” under the *Model Law*, as the latter states that it “applies to international commercial arbitration” (art. 1(1)).

[23] While the *Model Law* does not define the term “commercial”, a footnote to art. 1(1) provides some guidance:

The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

(*Model Law*, art. 1(1), fn. 2)

[24] The *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General* further explains that “labour or employment disputes” are not covered by the term “commercial”, “despite their relation to business”:

Although the examples listed include almost all types of contexts known to have given rise to disputes dealt with in international commercial arbitrations, the list is expressly not exhaustive. Therefore, also covered as commercial would be transactions such as supply of electric energy, transport of liquified gas via pipeline and even “non-transactions” such as claims for damages arising in a commercial context. *Not covered are, for example, labour or employment disputes and ordinary consumer claims, despite their relation to business.*

(United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General*, U.N. Doc. A/CN.9/264, March 25, 1985, at p. 10 (emphasis added); see also p. 11.)

[25] Two points emerge from this commentary. First, a court must determine whether the *ICAA* applies by examining the nature of the parties' dispute, not by making findings about their relationship. A court can more readily decide whether the *ICAA* applies (or an arbitrator can more readily decide whether the *Model Law* applies) by analysing pleadings than by making findings of fact as to the nature of the relationship. Characterising a dispute requires the decision-maker to examine only the pleadings; characterising a relationship requires the decision-maker to consider a variety of circumstances in order to make findings of fact. If an intensive fact-finding inquiry were needed to decide if the *ICAA* or the *Model Law* applies, it would slow the wheels of an arbitration, if not grind them to a halt.

[26] The second point to draw is that an employment dispute is not covered by the word "commercial". The question of whether someone is an employee is the most fundamental of employment disputes. It follows that if an employment dispute is excluded from the application of the *Model Law*, then a dispute over whether Mr. Heller is an employee is similarly excluded. This is not the type of dispute that the *Model Law* is intended to govern, and thus it is not the type of dispute that the *ICAA* is intended to govern.

[27] This result is consistent with what courts have held (*Patel v. Kanbay International Inc.*, 2008 ONCA 867, 93 O.R. (3d) 588, at paras. 11-13; *Borowski v. Fiedler (Heinrich) Perforiertechnik GmbH* (1994), 158 A.R. 213 (Q.B.); *Rhinehart v. Legend 3D Canada Inc.*, 2019 ONSC 3296, 56 C.C.E.L. (4th) 125, at para. 27; *Ross v. Christian & Timbers Inc.* (2002), 23 B.L.R. (3d) 297 (Ont. S.C.J.), at para. 11). It is also consistent with the *Model Law*'s reference to "trade" transactions, which, as Gary B. Born observes, "arguably connot[es] involvement by traders or merchants, as distinguished from consumers or employees" (*International Commercial Arbitration*, vol. I, *International Arbitration Agreements* (2nd ed. 2014), at p. 309). Further, one could draw a negative inference from the definition's omission of "employment" relations (p. 309, fn. 454). It seems unlikely to us that the drafters of the *Model Law* would have included such a thorough list of included commercial relationships and not considered whether to include "employment".

[28] Employment disputes, in sum, are not covered by the *ICAA*. The *AA* therefore governs.

[29] The *AA* directs courts, on motion of a party, to stay judicial proceedings when there is an applicable arbitration agreement:

### **Stay**

**7** (1) 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 in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

[30] But a court has discretion to retain jurisdiction and decline to stay proceedings in five circumstances enumerated in s. 7(2):

### **Exceptions**

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. *The arbitration agreement is invalid.*
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

The only relevant exception here is para. 2 of s. 7(2), which gives a court discretion to refuse to grant a stay if the court determines that the arbitration agreement is invalid.

[31] The AA is silent on what principles courts should consider in exercising their discretion to determine the validity of an arbitration agreement under s. 7(2). But some criteria were set out in *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 and *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531, which interpreted similar arbitration regimes in Quebec and British Columbia. In those decisions, this Court set out a framework for when a court should decide if an arbitrator has jurisdiction, instead of referring that question to the arbitrator out of respect for the competence-competence principle.

[32] Under the *Dell* framework, the degree to which courts are permitted to analyse the evidentiary record depends on the nature of the jurisdictional challenge. Where pure questions of law are in dispute, the court is free to resolve the issue of jurisdiction (para. 84). Where questions of fact alone are in dispute, the court must “normally” refer the case to arbitration (para. 85). Where questions of mixed fact and law are in dispute, the court must refer the case to arbitration unless the relevant factual questions require “only superficial consideration of the documentary evidence in the record” (para. 85).

[33] In setting out this framework, *Dell* adopted an approach to the exercise of discretion that was designed to be faithful to what the international arbitration literature calls the “*prima facie*” analysis test as regards questions of fact and questions of mixed fact and law (para. 83). Under this test, the court must “refer the parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or inapplicable” (para. 75). To be so manifestly tainted, the invalidity must be “incontestable”, such that no serious debate can arise about the validity (para. 76, quoting Éric Loquin, “Compétence arbitrale”, in *Juris-classeur Procédure civile* (loose-leaf), fasc. 1034, at No. 105). Rather than adopting these standards literally, *Dell* gave practical effect to what was set out in the arbitration literature by creating a test whereby a court refers all challenges of an arbitrator’s jurisdiction to the arbitrator unless they raise pure questions of law, or questions of mixed fact and law that require only superficial consideration of the evidence in the record (paras. 84-85).



[34] The doctrine established in *Dell* is neatly summarized in its companion case, *Rogers Wireless Inc. v. Muroff*, [2007] 2 S.C.R. 921, at para. 11:

The majority of the Court held that, when an arbitration clause exists, any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone. Where a question concerning jurisdiction of an arbitrator requires the admission and examination of factual proof, normally courts must refer such questions to arbitration. For questions of mixed law and fact, courts must also favour referral to arbitration, and the only exception occurs where answering questions of fact entails a superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration.

[35] The parties agree that the framework from *Dell* and *Seidel* applies to Ontario's *Arbitration Act*. We agree, based on the similarities between the arbitration regimes in Ontario, British Columbia and Quebec. The two exceptions to arbitral referral in *Dell* and *Seidel* therefore apply in Ontario. This case, according to Mr. Heller, engages one of those exceptions because it requires at most only a superficial review of the record.

[36] Neither *Dell* nor *Seidel* fully defined what is meant by a "superficial" review. The essential question, in our view, is whether the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties (see *Trainor v. Fundstream Inc.*, 2019 ABQB 800, at para. 23 (CanLII); see also *Alberta Medical Association v. Alberta*, 2012 ABQB 113, 537 A.R. 75, at para. 26).

[37] Although it is possible to resolve the validity of Uber’s arbitration agreement through a superficial review of the record, we are of the view that this case also raises an issue of accessibility that was not raised on the facts in *Dell* and justifies departing from the general rule of arbitral referral. As *Dell* itself acknowledged, the rule of systematic referral of challenges to jurisdiction requiring a review of factual evidence applies “normally” (para. 85; see also *Muroff*, at para. 11). This is one of those abnormal times.

[38] The underlying assumption made in *Dell* is that if the court does not decide an issue, then the arbitrator will. As *Dell* says, the matter “must be resolved first by the arbitrator” (para. 84). *Dell* did not contemplate a scenario wherein the matter would never be resolved if the stay were granted. This raises obvious practical problems of access to justice that the Ontario legislature could not have intended when giving courts the power to refuse a stay.

[39] One way (among others) in which the validity of an arbitration agreement may not be determined is when an arbitration is fundamentally too costly or otherwise inaccessible. This could occur because the fees to begin arbitration are significant relative to the plaintiff’s claim or because the plaintiff cannot reasonably reach the physical location of the arbitration. Another example might be a foreign choice of law clause that circumvents mandatory local policy, such as a clause that would prevent an arbitrator from giving effect to the protections in Ontario employment law. In such situations, staying the action in favour of arbitration would be tantamount to denying

relief for the claim. The arbitration agreement would, in effect, be insulated from meaningful challenge (see Jonnette Watson Hamilton, “Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?” (2006), 51 *McGill L.J.* 693; Catherine Walsh, “The Uses and Abuses of Party Autonomy in International Contracts” (2010), 60 *U.N.B.L.J.* 12; Cynthia Estlund, “The Black Hole of Mandatory Arbitration” (2018), 96 *N.C. L. Rev.* 679).

[40] These situations were not contemplated in *Dell*. The core of *Dell* depends on the assumption that if a court does not decide an issue, the arbitrator will.

[41] Against these real risks of staying an action in favour of an invalid arbitration, one could pit the risk of a plaintiff seeking to obstruct an arbitration by advancing spurious arguments against the validity of the arbitration. This concern animated *Dell* (see paras. 84, 86).

[42] In our view, there are ways to mitigate this concern that make the overall calculus favour departing from the general rule of referring the matter to the arbitrator in these situations. Courts have many ways of preventing the misuse of court processes for improper ends. Proceedings that appear vexatious can be handled by requiring security for costs and by suitable awards of costs. In England, courts have awarded full indemnity costs where a party improperly ignored arbitral jurisdiction (Hugh Beale, ed., *Chitty on Contracts* (33rd ed. 2018), vol. II, *Specific Contracts*, at para. 32-065; *A. v. B. (No.2)*, [2007] EWHC 54 (Comm.), [2007] 1 All E.R. (Comm.) 633, at para. 15; *Kyrgyz Mobil Tel Limited v. Fellowes International Holdings*

*Limited* [2005] EWHC 1329, 2005 WL 6514129 (Q.B.), at paras. 43-44). Further, if the party who successfully enforced an arbitration agreement were to bring an action, depending on the circumstances they might be able to recover damages for breach of contract, that contract being the agreement to arbitrate (Beale, at para. 32-052; *West Tankers Inc. v. Allianz SpA*, [2012] EWHC 854 (Comm.), [2012] 2 All E.R. (Comm.) 395, at para. 77).

[43] Moreover, *Dell* itself makes clear that courts may refer a challenge to arbitral jurisdiction to the arbitrator if it is “a delaying tactic”, or would unduly impair the conduct of the arbitration proceeding (para. 86). This provides an additional safeguard against validity challenges that are not *bona fide*.

[44] How is a court to determine whether there is a *bona fide* challenge to arbitral jurisdiction that only a court can resolve? First, the court must determine whether, assuming the facts pleaded to be true, there is a genuine challenge to arbitral jurisdiction. Second, the court must determine from the supporting evidence whether there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator.

[45] While this second question requires some limited assessment of evidence, this assessment must not devolve into a mini-trial. The only question at this stage is whether there is a real prospect, in the circumstances, that the arbitrator may never decide the merits of the jurisdictional challenge. Generally, a single affidavit will suffice. Both counsel and judges are responsible for ensuring the hearing remains

narrowly focused (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, at paras. 31-32). In considering any attempt to expand the record, judges must remain alert to “the danger that a party will obstruct the process by manipulating procedural rules” and the possibility of delaying tactics (*Dell*, at para. 84; see also para. 86).

[46] As a result, therefore, a court should not refer a *bona fide* challenge to an arbitrator’s jurisdiction to the arbitrator if there is a real prospect that doing so would result in the challenge never being resolved. In these circumstances, a court may resolve whether the arbitrator has jurisdiction over the dispute and, in so doing, may thoroughly analyze the issues and record.

[47] Turning to the appeal before us, we would first observe that Mr. Heller has made a genuine challenge to the validity of the arbitration agreement. The clause is said to be void because it imposes prohibitive fees for initiating arbitration and these fees are embedded by reference in the fine print of a contract of adhesion. Second, there is a real prospect that if a stay is granted and the question of the validity of the Uber arbitration agreement is left to arbitration, then Mr. Heller’s genuine challenge may never be resolved. The fees impose a brick wall between Mr. Heller and the resolution of any of the claims he has levelled against Uber. An arbitrator cannot decide the merits of Mr. Heller’s contention without those — possibly unconscionable — fees first being paid. Ultimately, this would mean that the question of whether Mr. Heller is an employee may never be decided. The way to cut this Gordian Knot is for the court to decide the question of unconscionability.

[48] We would therefore resolve the arguments Mr. Heller has raised against the validity of Uber's arbitration agreement rather than refer those arguments to arbitration in the Netherlands.

[49] We observe, incidentally, that departing from the general rule of arbitral referral in these circumstances has beneficial consequences. It will prevent contractual drafters from evading the result of this case through a choice of law clause. A choice of law clause could convert a jurisdictional question that would be one of law (and which therefore could be decided by the court) into a question as to the content of foreign law, which would require hearing evidence in order to make findings as to the content of foreign law, something that one would not ordinarily contemplate in a superficial review of the record.

[50] This is a significant loophole for contractual drafters to exploit. Indeed, Uber's contract here includes a foreign choice of law clause. As the intervener Canadian Federation of Independent Business ("CFIB") submitted, this Court should presume that Dutch law governs the question of whether the arbitration agreement is unconscionable because the contracts have a choice of law clause indicating Dutch law (I.F., at para. 34; see also *Vita Food Products, Inc. v. Unus Shipping Co.*, [1939] A.C. 277 (P.C.), at pp. 289-91). Neither party, however, chose to lead evidence of Dutch unconscionability law. Since the parties chose not to lead evidence of Dutch law, this Court must address the issue of unconscionability according to Ontario law (see *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at pp. 853-54; *Das v. George Weston*

*Limited*, 2017 ONSC 4129, at para. 215 (CanLII)). If Uber had adduced evidence of Dutch law, then under the two exceptions to arbitral referral recognized in *Dell*, this Court would have had to grant the stay in favour of an arbitrator determining the unconscionability argument.

[51] As well, even though *this* case could have been resolved based on undisputed facts, such an approach may not be sustainable in future cases. An approach to arbitral referral that depends on undisputed facts would invite parties to dispute facts. Were that standard to apply, unreasonably disputing facts would allow a party to evade any review of the merits, by use of an arbitration clause. There would be no negative consequence, in this context, to a party unreasonably disputing facts if it meant the stay in favour of arbitration would be granted. This differs significantly from the standard civil litigation context, wherein unreasonable disputes as to facts can be deterred by costs awards.

[52] We turn finally to the validity of the arbitration agreement. As mentioned, Mr. Heller raised two independent arguments as to why the arbitration agreement with Uber is invalid: first, the clause is void for unconscionability; and, second, the clause is void because it contracts out of the *ESA*.

[53] We agree with Mr. Heller that the arbitration agreement is unconscionable. The parties and interveners focused their submissions on unconscionability in accordance with this Court's direction in *TELUS Communications Inc. v. Wellman*, [2019] 2 S.C.R. 144, at para. 85, that "arguments

over any potential unfairness resulting from the enforcement of arbitration clauses contained in standard form contracts are better dealt with directly through the doctrine of unconscionability”.

[54] Unconscionability is an equitable doctrine that is used to set aside “unfair agreements [that] resulted from an inequality of bargaining power” (John D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 424). Initially applied to protect young heirs and the “poor and ignorant” from one-sided agreements, unconscionability evolved to cover any contract with the combination of inequality of bargaining power and improvidence (Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 521; see also pp. 520-24; Bradley E. Crawford, “Restitution — Unconscionable Transaction — Undue Advantage Taken of Inequality Between Parties” (1966), 44 *Can. Bar Rev.* 142, at p. 143). This development has been described as “one of the signal accomplishments of modern contract law, representing a renaissance in the doctrinal treatment of contractual fairness” (Peter Benson, *Justice in Transactions: A Theory of Contract Law* (2019), at p. 165; see also Angela Swan, Jakub Adamski and Annie Y. Na, *Canadian Contract Law* (4th ed. 2018), at p. 925).

[55] Unconscionability is widely accepted in Canadian contract law, but some questions remain about the content of the doctrine, and it has been applied inconsistently by the lower courts (see, among others, *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry v. Kreutziger* (1978), 9 B.C.L.R.



166 (C.A.), at p. 177, per Lambert J.A.; *Downer v. Pitcher*, 2017 NLCA 13, 409 D.L.R. (4th) 542, at para. 20; *Input Capital Corp. v. Gustafson*, 2019 SKCA 78, 438 D.L.R. (4th) 387; *Cain v. Clarica Life Insurance Co.*, 2005 ABCA 437, 263 D.L.R. (4th) 368; *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573, 284 D.L.R. (4th) 734; *Birch v. Union of Taxation Employees, Local 70030*, 2008 ONCA 809, 305 D.L.R. (4th) 64; see also Swan, Adamski and Na, at p. 982; McInnes, at pp. 518-19). These questions require examining underlying contractual theory (Rick Bigwood, “Antipodean Reflections on the Canadian Unconscionability Doctrine” (2005), 84 *Can. Bar Rev.* 171, at p. 173).

[56] The classic paradigm underlying freedom of contract is the “freely negotiated bargain or exchange” between “autonomous and self-interested parties” (McCamus, at p. 24; see also Swan, Adamski and Na, at pp. 922-23; P. S. Atiyah, *Essays on Contract* (1986), at p. 140). At the heart of this theory is the belief that contracting parties are best-placed to judge and protect their interests in the bargaining process (Atiyah, at pp. 146-48; Bigwood, at pp. 199-200; Alan Brudner, “Reconstructing contracts” (1993), 43 *U.T.L.J.* 1, at pp. 2-3). It also presumes equality between the contracting parties and that “the contract is *negotiated, freely agreed, and therefore fair*” (Mindy Chen-Wishart, *Contract Law* (6th ed. 2018), at p. 12 (emphasis in original)).

[57] In cases where these assumptions align with reality, the arguments for enforcing contracts carry their greatest weight (Melvin Aron Eisenberg, “The Bargain

Principle and Its Limits” (1982), 95 *Harv. L. Rev.* 741, at pp. 746-48). But these arguments “may speak more or less forcefully depending on the context” (*Wellman*, at para. 53; see also B. J. Reiter, “Unconscionability: Is There a Choice? A Reply to Professor Hasson” (1980), 4 *Can. Bus .L.J.* 403, at pp. 405-6). As Professor Atiyah has noted:

The proposition that a person is always the best judge of his own interests is a good starting-point for laws and institutional arrangements, but as an *infallible empirical proposition* it is an outrage to human experience. The parallel moral argument, that to prevent a person, even in his own interests, from binding himself is to show disrespect for his moral autonomy, can ring very hollow when used to defend a grossly unfair contract secured at the expense of a person of little understanding or bargaining skill.

[Emphasis added; p. 148]

[58] Courts have never been required to take the ideal assumptions of contract theory as “infallible empirical proposition[s]”. Equitable doctrines have long allowed judges to “respond to the individual requirements of particular circumstances . . . . humaniz[ing] and contextualiz[ing] the law’s otherwise antiseptic nature” (Leonard I. Rotman, “The ‘Fusion’ of Law and Equity?: A Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters” (2016), 2 *C.J.C.C.L.* 497, at pp. 503-4). Courts, as a result, do not ignore serious flaws in the contracting process that challenge the traditional paradigms of the common law of contract, such as faith in the capacity of the contracting parties to protect their own interests. The elderly person with cognitive impairment who sells assets for a fraction of their value (*Ayres v. Hazelgrove*, Q.B. England, February 9, 1984); the ship captain

stranded at sea who pays an extortionate price for rescue (*The Mark Lane* (1890), 15 P.D. 135); the vulnerable couple who signs an improvident mortgage with no understanding of its terms or financial implications (*Commercial Bank of Australia Ltd. v. Amadio*, [1983] HCA 14, 151 C.L.R. 447) — these and similar scenarios bear little resemblance to the operative assumptions on which the classic contract model is constructed.

[59] In these kinds of circumstances, where the traditional assumptions underlying contract enforcement lose their justificatory authority, the doctrine of unconscionability provides relief from improvident contracts. When unfair bargains cannot be linked to fair bargaining — when they cannot be attributed to one party’s “donative intent or assumed risk”, as Professor Benson puts it — courts can avoid the inequitable effects of enforcement without endangering the core values on which freedom of contract is based (p. 182; see also Eisenberg, at pp. 799-801; S.M. Waddams, “Good Faith, Unconscionability and Reasonable Expectations” (1995), 9 *J.C.L.* 55, at p. 60). This explains how unconscionability lines up with traditional accounts of contract theory while recognizing the doctrine’s historical roots in equity, which has long operated as a “corrective to the harshness of the common law” (McCamus, at p. 10; see also Rotman, at pp. 503-4).

[60] This Court has often described the purpose of unconscionability as the protection of vulnerable persons in transactions with others (*Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at pp. 405 and 412; *Hunter Engineering Co. v. Syncrude*

*Canada Ltd.*, [1989] 1 S.C.R. 426, at p. 462, per Dickson C.J., and p. 516, per Wilson J.; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at p. 247; see also *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494, at para. 43). We agree. Unconscionability, in our view, is meant to protect those who are vulnerable *in the contracting process* from loss or improvidence to that party in the bargain that was made (see Mindy Chen-Wishart, *Unconscionable Bargains* (1989), at p. 109; see also James Gordley, “Equality in Exchange” (1981), 69 *Cal. L. Rev.* 1587, at pp. 1629-34; *Birch*, at para. 44). Although other doctrines can provide relief from specific types of oppressive contractual terms, unconscionability allows courts to fill in gaps between the existing “islands of intervention” so that the “clause that is not quite a penalty clause or not quite an exemption clause or just outside the provisions of a statutory power to relieve will fall under the general power, and anomalous distinctions . . . will disappear” (S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at p. 378).

[61] Openly recognizing a doctrine of unconscionability also promotes fairness and transparency in contract law (Swan, Adamski and Na, at p. 925; McCamus, at p. 438; Stephen Waddams, *Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment* (2019), at p. 225). There is value in recognizing that “judges are and always will be concerned with unfairness, with arrangements that work harshly and with conduct that is oppressive” (Swan, Adamski and Na, at p. 925). The unconscionability doctrine allows courts to “focus expressly on the real grounds for refusing to give force to a contractual term said to have been agreed to by the parties” (*Hunter*, at p. 462). As Dickson C.J. observed in *Hunter*:

In my view, there is much to be gained by addressing directly the protection of the weak from over-reaching by the strong. . . . There is little value in cloaking the inquiry behind a construct that takes on its own idiosyncratic traits, sometimes at odds with concerns of fairness. [p. 462]

[62] Most scholars appear to agree that the Canadian doctrine of unconscionability has two elements: “an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant and . . . an improvident transaction” (McInnes, at p. 524 (emphasis deleted); see also Swan, Adamski and Na, at p. 986; McCamus, at pp. 424 and 426-27; Benson, at p. 167; Waddams (2017), at p. 379; Stephanie Ben-Ishai and David R. Percy, eds., *Contracts: Cases and Commentaries* (10th ed. 2018), at p. 719).

[63] This Court has long endorsed this duality. In *Hunter*, Wilson J. observed that

[t]he availability of a plea of unconscionability in circumstances where the contractual term is *per se* unreasonable *and* the unreasonableness stems from inequality of bargaining power was confirmed in Canada over a century ago . . . . [Emphasis in original; p. 512; see also p. 462, per Dickson C.J.]

[64] In *Norberg*, La Forest J. described proving the elements of unconscionability as “a two-step process”, involving “(1) proof of inequality in the positions of the parties, and (2) proof of an improvident bargain” (p. 256). The

concurring judgment in *Douez v. Facebook Inc.*, [2017] 1 S.C.R. 751, followed a similar approach in a case involving a standard form consumer contract<sup>6</sup>:

Two elements are required for the doctrine of unconscionability to apply: inequality of bargaining powers and unfairness. Prof. McCamus describes them as follows:

. . . one must establish both inequality of bargaining power in the sense that one party is incapable of adequately protecting his or her interests and undue advantage or benefit secured as a result of that inequality by the stronger party. [Emphasis deleted; para. 115.]

(See also *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122, 347 D.L.R. (4th) 591, at paras. 29-31; *Roy v. 1216393 Ontario Inc.*, 2011 BCCA 500, 345 D.L.R. (4th) 323, at para. 29; *McNeill v. Vandenberg*, 2010 BCCA 583, at para. 15 (CanLII); *Kreutziger*, at p. 173; *Morrison*, at p. 713)

[65] We see no reason to depart from the approach to unconscionability endorsed in *Hunter, Norberg* and in *Douez*. That approach requires both an inequality of bargaining power and a resulting improvident bargain.

[66] An inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process (see McCamus, at pp. 426-27 and 429; Crawford, at p. 143; Chen-Wishart (1989), at p. 31; *Morrison*, at p. 713; *Gustafson*, at para. 45; *Hess v. Thomas Estate*, 2019 SKCA 26, 433 D.L.R. (4th) 60, at para. 77; *Blomley v. Ryan* (1956), 99 C.L.R. 362 (H.C.A.), at p. 392; *Commercial Bank of Australia*, at pp. 462-63, and 477-78; *Bartle v. GE Custodians*, [2010] NZCA 174, [2010] 3 N.Z.L.R. 601, at para. 166).

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<sup>6</sup> The majority did not discuss the elements of unconscionability.

[67] There are no “rigid limitations” on the types of inequality that fit this description (McCamus, at p. 429). Differences in wealth, knowledge, or experience may be relevant, but inequality encompasses more than just those attributes (McInnes, at p. 524-25). Professor McInnes describes the diversity of possible disadvantages as follows:

Equity is prepared to act on a wide variety of transactional weaknesses. Those weaknesses may be *personal* (*i.e.*, characteristics of the claimant generally) or *circumstantial* (*i.e.*, vulnerabilities peculiar to certain situations). The relevant disability may stem from the claimant’s “purely cognitive, deliberative or informational capabilities and opportunities”, so as to preclude “a worthwhile judgment as to what is in his best interest”. Alternatively, the disability may consist of the fact that, in the circumstances, the claimant was “a seriously volitionally impaired or desperately needy person”, and therefore was specially disadvantaged because of “the contingencies of the moment”. [Emphasis in original; footnotes omitted; p. 525.]

(See also Chen-Wishart (2018), at p. 363.)

These disadvantages need not be so serious as to negate the capacity to enter a technically valid contract (Chen-Wishart (2018), at p. 340; see also McInnes, at pp. 525-26).

[68] In many cases where inequality of bargaining power has been demonstrated, the relevant disadvantages impaired a party’s ability to freely enter or negotiate a contract, compromised a party’s ability to understand or appreciate the meaning and significance of the contractual terms, or both (see Stephen A. Smith, *Contract Theory* (2004), at pp. 343-44; John R. Peden, *The Law of Unjust Contracts: Including the Contracts Review Act 1980 (NSW) With Detailed Annotations*

*Procedure and Pleadings* (1982), at p. 36; Andrew Burrows, *A Restatement of the English Law of Contract* (2016), at p. 210; *Downer*, at para. 54; McInnes, at p. 525).

[69] One common example of inequality of bargaining power comes in the “necessity” cases, where the weaker party is so dependent on the stronger that serious consequences would flow from not agreeing to a contract. This imbalance can impair the weaker party’s ability to contract freely and autonomously. When the weaker party would accept almost any terms, because the consequences of failing to agree are so dire, equity intervenes to prevent a contracting party from gaining too great an advantage from the weaker party’s unfortunate situation. As the Privy Council has said, “as a matter of common fairness, ‘it [is] not right that the strong should be allowed to push the weak to the wall’” (*Janet Boustany v. George Pigott Co (Antigua and Barbuda)*, [1993] UKPC 17, at p. 6 (BAILII), quoting *Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd.*, [1985] 1 W.L.R. 173, at p. 183; see also *Lloyds Bank Ltd. v. Bundy*, [1975] 1 Q.B. 326 (C.A.), at pp. 336-37).

[70] The classic example of a “necessity” case is a rescue at sea scenario (see *The Medina* (1876), 1 P.D. 272). The circumstances under which such agreements are made indicate the weaker party did not freely enter into the contract, as it was the product of his “extreme need . . . to relieve the straits in which he finds himself” (*Bundy*, at p. 339). Other situations of dependence also fit this mould, including those where a party is vulnerable due to financial desperation, or where there is “a special relationship in which trust and confidence has been reposed in the other party”



(*Norberg*, at p. 250, quoting Christine Boyle and David R. Percy, *Contracts: Cases and Commentaries* (4th ed. 1989), at pp. 637-38). Unequal bargaining power can be established in these scenarios even if duress and undue influence have not been demonstrated (see *Norberg*, at pp. 247-48; see also *McInnes*, at p. 543).

[71] The second common example of an inequality of bargaining power is where, as a practical matter, only one party could understand and appreciate the full import of the contractual terms, creating a type of “cognitive asymmetry” (see *Smith*, at pp. 343-44). This may occur because of personal vulnerability or because of disadvantages specific to the contracting process, such as the presence of dense or difficult to understand terms in the parties’ agreement. In these cases, the law’s assumption about self-interested bargaining loses much of its force. Unequal bargaining power can be established in these scenarios even if the legal requirements of contract formation have otherwise been met (see Sébastien Grammond, “The Regulation of Abusive or Unconscionable Clauses from a Comparative Law Perspective” (2010), 49 *Can. Bus. L.J.* 345, at pp. 353-54).

[72] These examples of inequality of bargaining power are intended to assist in organizing and understanding prior cases of unconscionability. They provide two examples of how weaker parties may be vulnerable to exploitation in the contracting process. Regardless of the type of impairment involved, what matters is the presence of a bargaining context “where the law’s normal assumptions about free bargaining either no longer hold substantially true or are incapable of being fairly applied”

(Bigwood, at p. 185 (emphasis deleted); see also Benson, at pp. 189-90). In these circumstances, courts can provide relief from a bargain that is improvident for the weaker party in the contracting relationship.

[73] This leads us to the second element of unconscionability: an improvident bargain.

[74] A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable (see McCamus, at pp. 426-27; Chen-Wishart (1989), at p. 51; Benson, at p. 187; see also Waddams (2017), at p. 303; Stephen Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (2011), at pp. 87 and 121-22). Improvidence is measured at the time the contract is formed; unconscionability does not assist parties trying to “escape from a contract when their circumstances are such that the agreement *now* works a hardship upon them” (John-Paul F. Bogden, “On the ‘Agreement Most Foul’: A Reconsideration of the Doctrine of Unconscionability” (1997), 25 *Man. L.J.* 187, at p. 202 (emphasis in original)).

[75] Improvidence must be assessed contextually (McInnes, at p. 528). In essence, the question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. An undue advantage may only be evident when the terms are read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial

setting or the positions of the parties (see Chen-Wishart (1989), at pp. 51-56; McInnes, at pp. 528-29; Reiter, at pp. 417-18).

[76] For a person who is in desperate circumstances, for example, almost *any* agreement will be an improvement over the status quo. In these circumstances, the emphasis in assessing improvidence should be on whether the stronger party has been unduly enriched. This could occur where the price of goods or services departs significantly from the usual market price.

[77] Where the weaker party did not understand or appreciate the meaning and significance of important contractual terms, the focus is on whether they have been unduly disadvantaged by the terms they did not understand or appreciate. These terms are unfair when, given the context, they flout the “reasonable expectation” of the weaker party (see Swan Adamski and Na, at pp. 993-94) or cause an “unfair surprise” (American Law Institute and National Conference of Commissioners on Uniform State Laws, *Proposed Amendments to Uniform Commercial Code Article 2 – Sales: With Prefatory Note and Proposed Comments* (2002), at p. 40). This is an objective standard, albeit one that has regard to the context.

[78] Because improvidence can take so many forms, this exercise cannot be reduced to an exact science. When judges apply equitable concepts, they are trusted to “mete out situationally and doctrinally appropriate justice” (Rotman, at p. 535). Fairness, the foundational premise and goal of equity, is inherently contextual, not

easily framed by formulae or enhanced by adjectives, and necessarily dependent on the circumstances.

[79] Unconscionability, in sum, involves both inequality and improvidence (Crawford, at p. 143; Swan, Adamski and Na, at p. 986). The nature of the flaw in the contracting process is part of the context in which improvidence is assessed. And proof of a manifestly unfair bargain may support an inference that one party was unable adequately to protect their interests (see Chen-Wishart (1989), at pp. 47-48; *Portal Forest Industries Ltd. v. Saunders*, [1978] 4 W.W.R. 658 (B.C.S.C.), at pp. 664-65). It is a matter of common sense that parties do not often enter a substantively improvident bargain when they have equal bargaining power.

[80] Uber argues, however, that the Court should abandon the classic two-part approach to unconscionability and adopt a stringent test consisting of four requirements:

- a grossly unfair and improvident transaction;
- a victim's lack of independent legal advice or other suitable advice;
- 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

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

(See *Phoenix Interactive Design Inc. v. Alterinvest II Fund L.P.*, 2018 ONCA 98, 420 D.L.R. (4th) 335, at para. 15; see also *Titus*, at para. 38; *Cain*, at para. 32.)

[81] This higher threshold requires that the transaction was “grossly” unfair, that there was no independent advice, that the imbalance in bargaining power was “overwhelming”, and that there was an intention to take advantage of a vulnerable party.

[82] We reject this approach. This four-part test raises the traditional threshold for unconscionability and unduly narrows the doctrine, making it more formalistic and less equity-focused. Unconscionability has always targeted unfair bargains resulting from unfair bargaining. Elevating these additional factors to rigid requirements distracts from that inquiry.

[83] Independent advice is relevant only to the extent that it ameliorates the inequality of bargaining power experienced by the weaker party (see Rick Bigwood, “Rescuing the Canadian Unconscionability Doctrine? Reflections on the Court’s ‘Applicable Principles’ in *Downer v. Pitcher*” (2018), 60 *Can. Bus. L.J.* 124, at p. 136; Spencer Nathan Thal, “The Inequality of Bargaining Power Doctrine: the Problem of Defining Contractual Unfairness” (1988), 8 *Oxford J. Legal Stud.* 17, at

pp. 32-33). It, for example, can assist a weaker party in understanding the terms of a contract, but might not ameliorate a weaker party's desperation or dependence on a stronger party (Thal, at p. 33). Even where advice might be of assistance, *pro forma* or ineffective advice may not improve a party's ability to protect their interests (Chen-Wishart (1989), at pp. 110-11).

[84] Unconscionability, moreover, can be established without proof that the stronger party knowingly took advantage of the weaker. Such a requirement is closely associated with theories of unconscionability that focus on wrongdoing by the defendant (see *Boustany*, at p. 6). But unconscionability can be triggered without wrongdoing. As Professor Waddams compellingly argues:

The phrases 'unconscionable conduct', 'unconscionable behaviour' and 'unconscionable dealing' lack clarity, are unhistorical insofar as they imply the need for proof of wrongdoing, and have been unduly restrictive.

(Waddams (2019), at pp. 118-19; see also Benson, at p. 188; Smith, at pp. 360-62.)

[85] We agree. One party knowingly or deliberately taking advantage of another's vulnerability may provide strong evidence of inequality of bargaining power, but it is not essential for a finding of unconscionability. Such a requirement improperly emphasizes the state of mind of the stronger party, rather than the protection of the more vulnerable. This Court's decisions leave no doubt that unconscionability focuses on the latter purpose. Parties cannot expect courts to enforce improvident bargains formed in situations of inequality of bargaining power;

a weaker party, after all, is as disadvantaged by inadvertent exploitation as by deliberate exploitation. A rigid requirement based on the stronger party's state of mind would also erode the modern relevance of the unconscionability doctrine, effectively shielding from its reach improvident contracts of adhesion where the parties did not interact or negotiate.

[86] In our view, the requirements of inequality and improvidence, properly applied, strike the proper balance between fairness and commercial certainty. Freedom of contract remains the general rule. It is precisely because the law's ordinary assumptions about the bargaining process do not apply that relief against an improvident bargain is justified.

[87] Respecting the doctrine of unconscionability has implications for boiler-plate or standard form contracts. As Karl N. Llewellyn, the primary drafter of the Uniform Commercial Code, explained:

Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.

There has been an arm's-length deal, with dickered terms. There has been accompanying that basic deal another which . . . at least involves a plain expression of confidence, asked and accepted, with a corresponding limit on the powers granted: the boiler-plate is assented to en bloc, "unsight, unseen," on the implicit assumption and to the full extent that (1) it does not alter or impair the fair meaning of the dickered terms when read alone, and (2) that its terms are neither in the particular nor in the net manifestly unreasonable and unfair.

*(The Common Law Tradition: Deciding Appeals (1960), pp. 370-71)*

[88] We do not mean to suggest that a standard form contract, by itself, establishes an inequality of bargaining power (Waddams (2017), at p. 240). Standard form contracts are in many instances both necessary and useful. Sophisticated commercial parties, for example, may be familiar with contracts of adhesion commonly used within an industry. Sufficient explanations or advice may offset uncertainty about the terms of a standard form agreement. Some standard form contracts may clearly and effectively communicate the meaning of clauses with unusual or onerous effects (Benson, at p. 234).

[89] Our point is simply that unconscionability has a meaningful role to play in examining the conditions behind consent to contracts of adhesion, as it does with any contract. The many ways in which standard form contracts can impair a party's ability to protect their interests in the contracting process and make them more vulnerable, are well-documented. For example, they are drafted by one party without input from the other and they may contain provisions that are difficult to read or understand (see Margaret Jane Radin, "Access to Justice and Abuses of Contract" (2016), 33 *Windsor Y.B. Access Just.* 177, at p. 179; Stephen Waddams, "Review



Essay: The Problem of Standard Form Contracts: A Retreat to Formalism” (2013), 53 *Can. Bus. L.J.* 475, at pp. 475-476; Thal, at pp. 27-28; William J. Woodward, Jr., “Finding the Contract in Contracts for Law, Forum and Arbitration” (2006), 2 *Hastings Bus. L.J.* 1, at p. 46). The potential for such contracts to create an inequality of bargaining power is clear. So too is their potential to enhance the advantage of the stronger party at the expense of the more vulnerable one, particularly through choice of law, forum selection, and arbitration clauses that violate the adhering party’s reasonable expectations by depriving them of remedies. This is precisely the kind of situation in which the unconscionability doctrine is meant to apply.

[90] This development of the law of unconscionability in connection with standard form contracts is not radical. On the contrary, it is a modern application of the doctrine to situations where “the normative rationale for contract enforcement . . . [is] stretched beyond the breaking point” (Radin, at p. 179). The link between standard form contracts and unconscionability has been suggested in judicial decisions, textbooks, and academic articles for years (see, e.g., *Douez*, at para. 114; *Davidson v. Three Spruces Realty Ltd.* (1977), 79 D.L.R. (3d) 481 (B.C.S.C.); *Hunter*, at p. 513; Swan, Adamski and Na, at pp. 992-93; McCamus, at p. 444; Jean Braucher, “Unconscionability in the Age of Sophisticated Mass-Market Framing Strategies and the Modern Administrative State” (2007), 45 *Can. Bus. L.J.* 382, at p. 396). It has also been present in the American jurisprudence for more than half a century (see *Williams v. Walker-Thomas Furniture Company*, 350 F.2d 445 (1965), at pp. 449-50).

[91] Applying the unconscionability doctrine to standard form contracts also encourages those drafting such contracts to make them more accessible to the other party or to ensure that they are not so lop-sided as to be improvident, or both. The virtues of fair dealing were explained by Jean Braucher as follows:

Businesses are driven to behave competitively in their framing of market situations or otherwise they lose to those who do. Only if there are meaningful checks on what might be considered immoral behavior will persons in business have the freedom to act on their moral impulses. An implication of this point is that, absent regulation, business culture will become ever more ruthless, so that the distinctions between “reputable businesses” and fringe marketers gradually wither away. . . . [p. 390]

[92] This brings us to the appeal before us and whether Mr. Heller’s arbitration clause with Uber is unconscionable.

[93] There was clearly inequality of bargaining power between Uber and Mr. Heller. The arbitration agreement was part of a standard form contract. Mr. Heller was powerless to negotiate any of its terms. His only contractual option was to accept or reject it. There was a significant gulf in sophistication between Mr. Heller, a food deliveryman in Toronto, and Uber, a large multinational corporation. The arbitration agreement, moreover, contains no information about the costs of mediation and arbitration in the Netherlands. A person in Mr. Heller’s position could not be expected to appreciate the financial and legal implications of agreeing to arbitrate under ICC Rules or under Dutch law. Even assuming that Mr. Heller was the rare fellow who would have read through the contract in its entirety before signing it, he would have had no reason to suspect that behind an innocuous reference to mandatory

mediation “under the International Chamber of Commerce Mediation Rules” that could be followed by “arbitration under the Rules of Arbitration of the International Chamber of Commerce”, there lay a US\$14,500 hurdle to relief. Exacerbating this situation is that these Rules were not attached to the contract, and so Mr. Heller would have had to search them out himself.

[94] The improvidence of the arbitration clause is also clear. The mediation and arbitration processes require US\$14,500 in up-front administrative fees. This amount is close to Mr. Heller’s annual income and does not include the potential costs of travel, accommodation, legal representation or lost wages. The costs are disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into. The arbitration agreement also designates the law of the Netherlands as the governing law and Amsterdam as the “place” of the arbitration. This gives Mr. Heller and other Uber drivers in Ontario the clear impression that they have little choice but to travel at their own expense to the Netherlands to individually pursue claims against Uber through mandatory mediation and arbitration in Uber’s home jurisdiction. Any representations to the arbitrator, including about the location of the hearing, can only be made after the fees have been paid.

[95] The arbitration clause, in effect, modifies every other substantive right in the contract such that all rights that Mr. Heller enjoys are subject to the apparent

precondition that he travel to Amsterdam,<sup>7</sup> initiate an arbitration by paying the required fees and receive an arbitral award that establishes a violation of this right. It is only once these preconditions are met that Mr. Heller can get a court order to enforce his substantive rights under the contract. Effectively, the arbitration clause makes the substantive rights given by the contract unenforceable by a driver against Uber. No reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it.

[96] We add that the unconscionability of the arbitration clause can be considered separately from that of the contract as a whole. As explained in *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.*, [1981] A.C. 909 (H.L.), an arbitration agreement “constitutes a self-contained contract collateral or ancillary to the [main] agreement” (p. 980; see also p. 998, per Lord Scarman). Further support comes from the severability clause of the Uber Rasier and Uber Portier agreements, and s. 17(2) of the AA.<sup>8</sup>

[97] Respect for arbitration is based on it being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all. As our colleague Justice Brown

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<sup>7</sup> We note that Uber’s concession that the arbitration could physically occur in Ontario is of no moment in the context of a standard form contract that stipulates the “place of arbitration shall be Amsterdam, The Netherlands”.

<sup>8</sup> This Court, moreover, has confirmed that a finding of unconscionability can be directed at a contract as a whole or against any severable provisions of it (*Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 S.C.R. 69, at para. 122, citing *Hunter*, at p. 462, per Dickson C.J.; McCamus, at pp. 440-42; Chris D. L. Hunt and Milad Javdan, “Apparitions of Doctrines Past: Fundamental Breach and Exculpatory Clauses in the Post-*Tercon* Jurisprudence” (2018), 60 *Can. Bus. L.J.* 309, at p. 328, fn. 112).

notes, under the arbitration clause, “Mr. Heller, and only Mr. Heller, would experience undue hardship in attempting to advance a claim against Uber, regardless of the claim’s legal merit” (para. 136). The arbitration clause is the only way Mr. Heller can vindicate his rights under the contract, but arbitration is out of reach for him and other drivers in his position. His contractual rights are, as a result, illusory.

[98] Based on both the disadvantages faced by Mr. Heller in his ability to protect his bargaining interests and on the unfair terms that resulted, the arbitration clause is unconscionable and therefore invalid.

[99] Given the conclusion that the arbitration agreement is invalid because it is unconscionable, there is no need to decide whether it is also invalid because it has the effect of contracting out of mandatory protections in the *ESA*.

### Conclusion

[100] We would dismiss the appeal with costs to Mr. Heller throughout.

The following are the reasons delivered by

BROWN J. —

#### I. Introduction

[101] While I agree with my colleagues Justices Abella and Rowe that the mandatory arbitration requirement is invalid, I would not rely upon the doctrine of unconscionability to reach this conclusion. Contractual stipulations that foreclose access to legally determined dispute resolution — that is, to dispute resolution according to law □ are unenforceable *not* because they are unconscionable, but because they undermine the rule of law by denying access to justice, and are therefore contrary to public policy.

[102] The arbitration agreement between Uber and Mr. Heller does just that: it effectively bars Mr. Heller from advancing any claim against Uber, no matter how significant or meritorious. In effect, it is not an agreement *to* arbitrate, but rather *not* to arbitrate. In these exceptional circumstances, a central premise of curial respect for arbitration agreements □ that they furnish an accessible method of achieving dispute resolution according to law □ falls away. On this narrow basis, I would find that the arbitration agreement is unenforceable, and would dismiss the appeal and affirm the judgment of the Court of Appeal.

## II. Analysis

[103] This appeal was framed by the parties in terms of unconscionability, which presents an unfortunate difficulty since applying unconscionability here amounts to forcing a square peg into a round hole. My colleagues Abella and Rowe JJ. seek to avoid this difficulty by vastly expanding the scope of the doctrine's application and removing any meaningful constraint. As I will explain, their approach

is, in my respectful view, both unnecessary and undesirable. Unnecessary, because the law already contains settled legal principles outside the doctrine of unconscionability which operate to prevent contracting parties from insulating their disputes from independent adjudication. And undesirable, because it would drastically expand the doctrine's reach without providing any meaningful guidance as to its application. Charting such a course will serve only to compound the uncertainty that already plagues the doctrine, and to introduce uncertainty to the enforcement of contracts generally.

A. *Access to Justice and the Rule of Law*

[104] I agree with my colleagues Abella and Rowe JJ. that the *Arbitration Act, 1991*, S.O. 1991, c. 17, applies to this appeal. While the parties' relationship determines which statute applies, the nature of the parties' relationship is the very question to be decided in Mr. Heller's action: is Mr. Heller an employee of Uber? Without subjecting that question to a full trial, the preliminary issue of the statute to apply should be determined by reference to the pleadings (see, e.g., *Kaverit Steel and Crane Ltd. v. Kone Corp.*, 1992 ABCA 7, 120 A.R. 346, at paras. 27-30).

[105] The *Arbitration Act* generally mandates a stay of proceedings when a court action relates to a matter governed by an arbitration agreement (s. 7(1)). Of the few exceptions to this general rule, this appeal requires consideration only of whether Mr. Heller's action should proceed because "[t]he arbitration agreement is invalid" (s. 7(2)). Answering that question is really this simple. As a matter of public policy,

courts will not enforce contractual terms that, expressly or by their effect, deny access to independent dispute resolution according to law. This obviates any need to resort to, and distort, the doctrine of unconscionability.

[106] While the parties did not argue this appeal on the basis of public policy, we are of course not bound by the framing of their legal arguments. The central question to be answered in this appeal is *not* whether Uber’s arbitration agreement is *unconscionable*, but whether it is *invalid* as contemplated by the *Arbitration Act* (i.e., unenforceable as a matter of contract law). Whether that question is viewed through the lens of unconscionability or public policy, the basis for reaching a conclusion on enforceability is substantially the same: the issues raised by the parties remain the focus (*R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 30; see also *1196303 Ontario Inc. v. Glen Grove Suites Inc.*, 2015 ONCA 580, 337 O.A.C. 85, at para. 87). Further, this Court has said that courts may consider issues of public policy on their own motion, and for a good reason that (by happy coincidence) touches on the very basis for my objection to the putative “arbitration agreement” in this case: “public policy and respect for the rule of law go hand in hand” (*Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 59).

[107] My colleague Justice Côté stresses freedom of contract, for which I readily share her enthusiasm. Freedom of contract is of central importance to the Canadian commercial and legal system and, to promote the certainty and stability of contractual relations, often trumps other societal values (*Tercon Contractors Ltd. v.*



*British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 117 (per Binnie J., dissenting (but not on this point))). Indeed, a hallmark of a free society is the freedom of individuals to arrange their affairs without fear of overreaching interference by the state, including the courts.

[108] But while privileging freedom of contract, the common law has never treated it as absolute. Quite simply, there are certain promises to which contracting parties cannot bind themselves. As this Court has stated:

... there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual. It is, in our opinion, important not to forget that it is in this way, in derogation of the rights and powers of private persons, as they would otherwise be ascertained by principles of law, that the principle of public policy operates. [Emphasis added.]

(*In Re Estate of Charles Millar, Deceased*, [1938] S.C.R. 1, at p. 4)

[109] This public policy doctrine has been described by this Court as *fundamental* to Canadian contract law, and its “role in the enforcement of contracts has never been doubted” (*Tercon*, at paras. 113 and 116 (per Binnie J., dissenting (but not on this point))). Of course, and as Côté J. cautions, public policy must not be used as a tool to prioritize idiosyncratic judicial views over the interests of contracting parties. But that is not a live concern under our law: courts have cautioned against the recognition of *new* heads of public policy (*Millar Estate*, at pp. 4-7), and the existing public policy grounds for setting aside specific types of contractual provisions are

narrow and well-established (see B. Kain and D. T. Yoshida, “The Doctrine of Public Policy in Canadian Contract Law”, in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2007* (2007), 1, at p. 17 and fn. 85). This Court has relied on public policy sparingly, and most recently to limit the operation of forum selection clauses and exclusion clauses, which raise concerns relating to the administration of justice, and to limit the operation of restrictive covenants (*Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at paras. 47 and 51-63; *Tercon*, at paras. 117-20; *Elsley v. J. G. Collins Ins. Agencies Ltd.*, [1978] 2 S.C.R. 916, at p. 923; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at paras. 15-22). While the considerations relevant to each type of clause vary, public policy furnishes the common and narrowly framed solution. And by focusing on the specific rationale that suggests a certain type of clause is unenforceable, this Court has sought to ensure a disciplined approach by providing concrete guidance and developing specific principles that apply to similar provisions.

[110] The ground upon which I proceed is that which precludes an ouster of court jurisdiction or, more broadly, which protects the integrity of the justice system. As Lord Atkin stated in *Fender v. St. John-Mildmay*, [1938] A.C. 1 (H.L.), at p. 12, ousting the jurisdiction of the courts is harmful in itself and “injurious to public interests” (see also Kain and Yoshida, at pp. 20-23). A provision that penalizes or prohibits one party from enforcing the terms of their agreement directly undermines the administration of justice. There is nothing novel about the proposition that contracting parties, as a matter of public policy, cannot oust the court’s supervisory

jurisdiction to resolve contractual disputes (see e.g. *Kill v. Hollister* (1746), 1 Wils. K.B. 129, 95 E.R. 532; *Scott v. Avery* (1856), 5 H.L.C. 811, 10 E.R. 1121; *Deuterium of Canada Ltd. v. Burns & Roe Inc.*, [1975] 2 S.C.R. 124). Indeed, irrespective of the value placed on freedom of contract, courts have consistently held that a contracting party's right to legal recourse is "a right inalienable even by the concurrent will of the parties" (*Scott*, at p. 1133).

[111] This head of public policy serves to uphold the rule of law, which, at a minimum, guarantees Canadian citizens and residents "a stable, predictable and ordered society in which to conduct their affairs" (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70). Such a guarantee is meaningless without access to an independent judiciary that can vindicate legal rights. The rule of law, accordingly, requires that citizens have access to a venue where they can hold one another to account (*Jonsson v. Lymer*, 2020 ABCA 167, at para. 10 (CanLII)). Indeed, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (*B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 230). Unless private parties can enforce their legal rights and publicly adjudicate their disputes, "the rule of law is threatened and the development of the common law undermined" (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 26). Access to civil justice is paramount to the public legitimacy of the law and the legitimacy of the judiciary as the institution of the state that expounds and applies the law.

[112] Access to civil justice is a precondition not only to a functioning democracy but also to a vibrant economy, in part because access to justice allows contracting parties to enforce their agreements. A contract that denies one party the right to enforce its terms undermines both the rule of law and commercial certainty. That such an agreement is contrary to public policy is not a manifestation of judicial idiosyncrasies, but rather an instance of the self-evident proposition that there is no value in a contract that cannot be enforced. Thus, the harm to the public that would result from holding contracting parties to a bargain they cannot enforce is “substantially incontestable” (*Millar Estate*, at p. 7, quoting *Fender*, at p. 12). It really is this simple: unless everyone has reasonable access to the law and its processes where necessary to vindicate legal rights, we will live in a society where the strong and well-resourced will always prevail over the weak. Or, as Frederick Wilmot-Smith puts it, “[l]egal structures that make enforcement of the law practically impossible will leave weaker members of society open to exploitation at the hands of, for example, unscrupulous employers or spouses.” (*Equal Justice: Fair Legal Systems in an Unfair World* (2019), at pp. 1-2).

[113] The reference to making enforcement of the law *practically* impossible leads to a further, related point: there is no good reason to distinguish between a clause that *expressly* blocks access to a legally determined resolution and one that has the ultimate *effect* of doing so. That this is so is illustrated by the judgment of Drummond J. in *Novamaze Pty Ltd. v. Cut Price Deli Pty Ltd.* (1995), 128 A.L.R. 540 (F.C.A.). In *Novamaze*, the terms of a franchise agreement permitted the franchisor to

take control of the franchisee's business if either party threatened to commence, or commenced, legal proceedings against the other. This clause, Drummond J. explained, was "capable of operating as a powerful disincentive to the franchisee to take proceedings of any kind against [the franchisor], no matter how strong a case the franchisee may have that it has suffered wrong" (p. 548). Summarizing the relevant principle, Drummond J. continued:

. . . the citizen is entitled to have recourse to the court for an adjudication on his legal rights. A contractual agreement to deny a person that "inalienable right" contravenes this public policy and is void. A disincentive to a person to exercise this right of recourse to the court can, depending upon how powerfully it operates to discourage litigation, amount to a denial of this right just as complete as an express contractual prohibition against litigation. [pp. 548-49]

[114] I agree. At some point, there is no material difference between a provision that discourages dispute resolution and one that precludes dispute resolution altogether. As the Court of Appeal of Alberta recently recognized, "[i]nsurmountable preconditions . . . effectively amount to a total barrier to court access" (*Lymmer*, at para. 67). During the hearing of this appeal, Uber's counsel would not concede that a clause requiring an upfront payment of 10 billion dollars to commence a civil claim would necessarily be equivalent to a brick wall standing in the way of dispute resolution. With respect, the conclusion that independent adjudication would be blocked by such a clause is obvious. Courts have long recognized that upfront payments may effectively drive litigants from the judgment seat (in the context of requiring security for costs, for example).

[115] None of this is to say that public policy requires access to a court of law in all circumstances. As this Court has recognized, “new models of adjudication can be fair and just” (*Hryniak*, at para. 2). But public policy does require access to *justice*, and access to justice is not merely access to a resolution. After all, many resolutions are *unjust*. Where a party seeks a rights-based resolution to a dispute, such resolution is *just* only when it is determined *according to law*, as discerned and applied by an independent arbiter.

[116] The law’s historical view was that arbitration could not yield dispute resolution according to law. Any arbitration agreement that removed contractual disputes from the purview of the courts was unenforceable as a matter of public policy (see *Deuterium*, at pp. 131-36). Courts, in essence, took the view that an agreement to arbitrate had the effect of precluding any legitimate form of dispute resolution. Contracting parties were seen as being unable to access justice without access to the ordinary courts (see *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at para. 48). Given this hostile judicial posture, legislators intervened by enacting modern arbitration legislation, prompting courts to accord due respect to the use of arbitration as a dispute resolution mechanism, particularly in a commercial setting (*Wellman*, at para. 54; *Zodiak International Productions Inc. v. Polish People’s Republic*, [1983] 1 S.C.R. 529, at pp. 533-42). Our conception of access to justice has been modified accordingly, to account for “the other important objectives pursued by the *Arbitration Act*” (*Wellman*, at para. 83). It is now accepted that courts are not the only bodies capable of providing dispute

resolution according to law. Indeed, arbitration is endorsed and encouraged as a means for resolving disputes (*Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178, at para. 38).

[117] Uber’s position requires this Court to accept that the change in judicial posture following the enactment of modern arbitration legislation leaves no room for the operation of public policy. But curial respect for arbitration, and for parties’ choices to refer disputes to arbitration, is premised upon two considerations. First, the purpose of arbitration is to ensure that contracting parties have access to “a ‘good and accessible method of seeking resolution for many kinds of disputes’ that ‘can be more expedient and less costly than going to court’” (*Wellman*, at para. 83, quoting Legislative Assembly of Ontario, March 27, 1991, at p. 245). Second, courts have accepted arbitration as an acceptable alternative to civil litigation because it can provide a resolution according to law. As this Court observed in *Sport Maska Inc. v. Zittner*, [1988] 1 S.C.R. 564, at p. 581:

The legislator left . . . various procedures for settling disputes to be resolved freely by litigants when recourse to the courts was still possible. If judicial intervention was ruled out, however, the legislator had to ensure that the process would guarantee litigants the same measure of justice as that provided by the courts, and for this reason, rules of procedure were developed to ensure that the arbitrator is impartial and that the rules of fundamental justice . . . are observed. The arbitrator will make an award which becomes executory by homologation. This indicates the similarity between the arbitrator’s real function and that of a judge who has to decide a case. [Emphasis added.]

In other words, any means of dispute resolution that serves as a final resort for contracting parties must be *just*. This is important because, unlike the submission of *existing* disputes to arbitration, and contrary to my colleague Côté J.'s assertion, an agreement to submit all *future unknown* disputes to arbitration is not simply a substitute for the parties' negotiations (para. 250). Rather, it serves as a transfer of dispute resolution authority away from public adjudicators (W. G. Horton, "A Brief History of Arbitration" (2017), 47 *Adv. Q.* 12, at p. 14; *Sport Maska*, at p. 581; *Wellman*, at para. 48; *Desputeaux*, [2003] 1 S.C.R. 178, at para. 40). The legitimacy of such a transfer rests upon whether it can provide a comparable measure of justice.

[118] As this Court stated in *Sport Maska*, arbitration *does* provide a comparable measure of justice, which is ensured by modern arbitration legislation. Ontario's *Arbitration Act* serves as an example. Like the *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, addressed in *Sport Maska*, the *Arbitration Act* also contemplates a legally determined outcome. It states that an arbitral tribunal shall resolve disputes according to the rules of law and equity (s. 31). (And, while contracting parties may be able to opt out of this section's application, they are at least entitled to the inalienable benefit of fair and equal treatment (ss. 3 and 19).) The *Arbitration Act* also contemplates court oversight throughout the arbitral process.

[119] Where a clause expressly provides for "arbitration" while simultaneously having the effect of *precluding* it, however, these considerations which promote curial respect for arbitration dissolve □ and *here* is where the public policy principle



preventing an ouster of court jurisdiction continues to operate. The legislature could not have intended that, by enacting the *Arbitration Act*, arbitration clauses whose effect *precludes* access to justice would be untouchable. Yet Uber's position and, I say with respect, my colleague Côté J.'s position require imputing that very intention □ an intention that would defeat the legislature's purpose in enacting the *Arbitration Act* of promoting access to justice. Meaning, a measure intended to enhance access to justice is now to be used as a tool for cutting off access to justice. That cannot be right.

[120] Moreover, access to justice is constitutionally protected through s. 96 of the *Constitution Act, 1867*, which limits the legislature's ability to place restrictions on dispute resolution (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 43). As this Court stated in *Trial Lawyers*, at para. 32:

The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very *raison d'être*. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. [Emphasis added.]

As I have explained, arbitration does not strike at the core of superior court jurisdiction, because arbitration provides a comparable measure of justice to the

superior courts. Preconditions that prevent contracting parties from even *commencing* arbitration, however, have the same effect as hearing fees that cause undue hardship and deter litigants from advancing legitimate claims in the courts (*Trial Lawyers*, at para. 46). It follows that, in the (inconceivable) event that cutting off access to justice was the legislature's intent in enacting the *Arbitration Act*, that *Act* must not be interpreted so broadly as to sanction agreements that impose such preconditions. In this regard, and again with respect, my colleague Côté J.'s assertion that applying the principles articulated by this Court in *Trial Lawyers* poses a risk of permanently restraining legislative competence is not well taken (para. 318). Reports of the death of legislative competence in this area are, like those of the death of freedom of contract, greatly exaggerated.

[121] In sum, applying public policy to determine whether an arbitration agreement prohibits access to justice is neither stating a “new common law rule” as my colleague Côté J. characterizes it, nor an expansion of the grounds for judicial intervention in arbitration proceedings (paras. 307, 312 and 316). Common law courts have long recognized the right to resolve disputes according to law. The law has simply evolved to embrace arbitration as means of achieving that resolution. Contractual stipulations that prohibit such resolution altogether, whether by express prohibition or simply by effect, continue to be unenforceable as a matter of public policy.

- (1) The Rule of Law's Impact on the Competence-Competence Principle

[122] Before commenting on the types of clauses that by their terms or effect foreclose access to legally determined dispute resolution, I pause to comment on the competence-competence principle. There are two aspects to this principle. First, arbitrators are empowered to rule on issues relating to their own jurisdiction. Second, arbitrators generally *should* make such rulings before they are decided by the court. The former aspect is implemented expressly in legislation like the *Arbitration Act*, which states that “[a]n arbitral tribunal may rule on its own jurisdiction” (s. 17(1)). This Court accepted the latter aspect in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, by defining “a general rule that in any case involving an arbitration clause, a challenge to the arbitrator’s jurisdiction must be resolved first by the arbitrator” (para. 84). An exception applies where the challenge is based solely on a question of law or requires only a superficial review of the record (paras. 84-85). But even then, the court must be sure that the jurisdictional challenge is not a delaying tactic and will not unduly impair the conduct of the arbitration proceeding (para. 86).

[123] The Court’s conclusion in *Dell* was based on the provisions of the *Quebec Code of Civil Procedure*, CQLR, c. C-25. As Deschamps J. recognized, art. 940.1 *C.C.P.*, which generally directed the court to refer court proceedings in favour of arbitration, “incorporate[d] the essence of art. II(3) of the New York Convention and of its counterpart in the Model Law, art. 8”, while art. 943 *C.C.P.* “confer[ed] on arbitrators the competence to rule on their own jurisdiction” (para. 80). Thus, the *C.C.P.* “clearly indicate[d] acceptance of the competence-competence

principle incorporated into art. 16 of the Model Law” (para. 80). This Court reached the same conclusion about British Columbia’s arbitration regime, based on comparable provisions (*Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, at paras. 28-29).

[124] Like the legislative schemes in Quebec and British Columbia, Ontario’s *Arbitration Act* adopts the same two features that led to the Court’s conclusion in *Dell*: courts are generally directed to stay proceedings in favour of arbitration (s. 7(1) and (2)) and arbitrators are given the competence to rule on their own jurisdiction (s. 17(1)). It follows that, on this Court’s jurisprudence, the competence-competence principle also applies to Ontario’s legislative scheme (*Ontario Medical Assn. v. Willis Canada Inc.*, 2013 ONCA 745, 118 O.R. (3d) 241, at para. 30). Further, this Court has repeatedly recognized, most recently in *Wellman*, that courts should generally take a “hands off” approach to arbitration (para. 56). The competence-competence principle described in *Dell* accords with that directive.

[125] I agree with my colleagues Abella and Rowe JJ. that *Dell* did not contemplate clauses that effectively prevent access to arbitration. I would therefore recognize a further, narrow exception to the general rule that a challenge to an arbitrator’s jurisdiction should first be resolved by the arbitrator. As I have explained, contracting parties cannot preclude access to legally determined dispute resolution. While arbitrators should typically rule on their own jurisdiction, an arbitrator cannot reasonably be tasked with determining whether an arbitration agreement, by its terms

or effects, bars access *to that very arbitrator*. It therefore falls to courts to do so. Nothing in the *Arbitration Act* suggests any other conclusion. Further, and if there were any doubt, the imperative of ensuring access to justice should inform interpretation of the *Arbitration Act* and its adoption of the competence-competence principle. As this Court held in *Trial Lawyers*, access to justice carries such importance that it maintains a constitutional dimension, which restricts even the legislature's ability to prevent private parties from resolving their disputes.

[126] While the question of whether an arbitration agreement bars access to dispute resolution is one of mixed fact and law, and may require more than a superficial review of the record, this limited exception to the general rule of referral stated in *Dell* is necessary to preserve the public legitimacy of the law in general, and arbitration in particular. Unlike my colleagues, I would limit this exception to cases where arbitration is arguably inaccessible. It should not apply merely because the parties' agreement contains a foreign choice of law provision (Abella and Rowe JJ.'s reasons, at para. 39). Further, and as with any other challenge to an arbitrator's jurisdiction, courts must be satisfied that the challenge "is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding" (*Dell*, at para. 86).

[127] In addition to creating an exception to the framework set out in *Dell*, my colleagues direct a new, contested hearing to consider whether there is "a *bona fide* challenge to arbitral jurisdiction that only a court can resolve" (paras. 44-46). In other

words, my colleagues say that this hearing is necessary because a court must resolve whether there is an issue of validity that a court must resolve.

[128] I say respectfully that this new procedural mechanism is unnecessary and will serve only to complicate and delay proceedings. Indeed, my colleagues appear to recognize this by their warnings that “this assessment must not devolve into a mini-trial”, that “a single affidavit will suffice” and that “[b]oth counsel and judges are responsible for ensuring the hearing remains narrowly focused”. First, it seems to me that any development in contract law that requires a new affidavit from anyone on anything is probably a mistake. More fundamentally, however, and again with respect, my colleagues’ warnings seem to me entirely unrealistic. This Court might as well tell the parties and the motion judge to keep the hearing to 20 minutes, to conduct it on “Zoom” during the morning break or to dispense with cross-examination on the affidavit(s). My colleagues’ exhortations, well-intentioned as they undoubtedly are, are simply futile. Even worse, they will be seen as such; in the face of the realities of litigating the individual motion, it will not matter to anyone what we who dwell on Mt. Olympus think about such matters. The motion that my colleagues direct will proceed in the form in which the parties see fit, and the hearing will be conducted in the manner that the parties and the motion judge think appropriate in the circumstances. It therefore seems reasonable to expect that time savings, if any, will be minimal for those cases in which no genuine issue exists for the court to decide. And where a genuine issue *does* exist, the additional hearing will simply create duplication.

(2) When Does a Contractual Provision Effectively Prohibit Dispute Resolution?

[129] In evaluating a clause that limits access to legally determined dispute resolution, the court's task is to decide whether the limitation is reasonable as between the parties, or instead causes undue hardship. Again, it is helpful to refer to the limitation that the rule of law places on the government's ability to impose hearing fees. As this Court explained in *Trial Lawyers*, at para. 45:

Litigants with ample resources will not be denied access to the superior courts by hearing fees. Even litigants with modest resources are often capable of arranging their finances so that, with reasonable sacrifices, they may access the courts. However, when hearing fees deprive litigants of access to the superior courts, they infringe the basic right of citizens to bring their cases to court. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court.

[130] I pause here to affirm that "courts must show due respect for arbitration agreements and arbitration more broadly, particularly in the commercial setting" (*Wellman*, at para. 54). It will be the rare arbitration agreement that imposes undue hardship and acts as an effective bar to adjudication. Arbitration may require upfront costs, sometimes significant costs and far greater than those required to commence a court action. But those costs may be warranted in light of the parties' relationship and the timely resolution that arbitration can provide. Public policy should not be used as a device to set aside arbitration agreements that are proportionate in the context of the parties' relationship but that one party simply regrets in hindsight.

[131] Several factors should be considered to decide whether a contractual limitation on legally determined dispute resolution imposes undue hardship and is therefore contrary to public policy. The first consideration is the nature of disputes that are likely to arise under the parties' agreement. Where the cost to pursue a claim is disproportionate to the quantum of likely disputes arising from an agreement, this suggests the possibility of undue hardship. This consideration must, however, be situated in the context of the agreement as a whole; a clause that discourages the pursuit of certain low-value claims may be proportionate in light of overall risk allocation between the parties.

[132] The record here shows that Mr. Heller receives \$20,800 to \$31,200 per year while working 40 to 50 hours per week for Uber. One would reasonably anticipate that a claim by Mr. Heller would not exceed his total annual compensation. Indeed, Mr. Heller's evidence is that a typical claim against Uber would be for non-payment of fees of less than \$100. The upfront cost of US\$14,500 to advance a claim represents a significant portion of the total compensation Mr. Heller receives each year under his agreement with Uber, and is grossly disproportionate in light of the sort of dispute that agreement is reasonably likely to generate. It is not the case that, as my colleague Côté J. suggests, Mr. Heller and Uber are simply being discouraged from advancing low-value claims (paras. 283 and 311). The costs of proceeding to arbitration are so prohibitive that the agreement effectively bars *any* claim that Mr. Heller might have against Uber. My colleague describes these costs as comparable to an award of litigation costs (paras. 236 and 319), but in my respectful



view that is simply not so. These costs are payable by Mr. Heller *in advance*, and *irrespective* of the merit of his claim against Uber □ and therefore bear no resemblance to litigation costs awarded at the end of proceedings. Thus, much like the clause addressed in *Novamaze*, the arbitration agreement here is “capable of operating as a powerful disincentive to . . . take proceedings of any kind”. The costs payable by Mr. Heller act as an insurmountable precondition that prevent him from commencing a claim (*Lymer*, at para. 67).

[133] I disagree with my colleague that reaching this conclusion requires further evidence (para. 319). The record in support is ample. Mr. Heller is required to pay US\$14,500 to pursue a claim against Uber. That includes a claim for breach of contract, though Mr. Heller’s agreement with Uber would rarely, if ever, be expected to produce a claim of that magnitude. These facts are unchallenged. While Mr. Heller may be able to pursue a class action by combining his claim with other individuals in a similar position, that is of no moment here. Class actions are a procedural mechanism and their use “neither modifies nor creates substantive rights” (*Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 17). What matters is *Mr. Heller’s* contractual relationship with Uber. Nor, with respect, is the availability of third-party funding a relevant consideration (Côté J.’s reasons, at paras. 236, 286 and 319). A litigant does not need to canvass options for third-party financing □ likely compromising the quantum of their claim in the process □ to benefit from the principle that contracting parties cannot preclude access to dispute resolution according to law.

[134] Courts should also consider the relative bargaining positions of the parties. To be clear, an imbalance in bargaining power is not required to find that a provision bars access to dispute resolution. An outright prohibition on dispute resolution would undermine the rule of law, even in the context of an agreement between sophisticated parties. That said, the hardship occasioned by a limit on legally determined dispute resolution is less likely to be “undue” if it is the product of negotiations between parties of equal bargaining strength. What is reasonable between the parties must be considered in light of the parties’ relationship. The role that bargaining strength plays in this context is comparable to its role in the enforcement of other contractual provisions that raise public policy concerns, including restrictive covenants and forum selection clauses (*Elsley*, at pp. 923-24; *Douez*, at paras. 51-57). Here, which it does not dispute, Uber maintains a vastly superior bargaining position in relation to Mr. Heller. The agreement between the parties was formed through a contract of adhesion, which Mr. Heller had no opportunity to negotiate.

[135] Finally, it may be relevant to consider whether the parties have attempted to tailor the limit on dispute resolution. Arbitration agreements may, for example, be tailored to exclude certain claims or to require the party with a stronger bargaining position to pay a higher portion of the upfront costs. No such nuance is evident, however, in the agreement between Mr. Heller and Uber. It covers any dispute he has with Uber, regardless of its quantum, and requires him to pay all upfront costs required to advance a claim. The ICC Rules that apply to the arbitration agreement

also appear to be specifically designed for large commercial claims. For example, the rules contemplate an expedited process, which applies only to claims valued at less than US\$2 million (International Court of Arbitration and International Center for ADR, *Arbitration Rules, Mediation Rules* (2016), at pp. 35 and 71 et seq.). Far from being tailored to the circumstances, Uber's chosen arbitration procedure tends to affirm that this limitation on dispute resolution is disproportionate.

[136] In short, the arbitration agreement between Uber and Mr. Heller is disproportionate in the context of the parties' relationship. Mr. Heller, and only Mr. Heller, would experience undue hardship in attempting to advance a claim against Uber, regardless of the claim's legal merit. This form of limitation on legally determined dispute resolution undermines the rule of law and is therefore contrary to public policy. It follows that I agree with the Court of Appeal that the arbitration agreement between Uber and Mr. Heller is invalid.

[137] In response to my colleague Côté J.'s critique of this approach, I say that the foregoing represents a straightforward application of the applicable law as stated by this Court. By agreeing to arbitrate, contracting parties transfer jurisdiction to resolve disputes from the courts (*Wellman*, at para. 48; *Horton*, at p. 19; see also *Sport Maska*, at p. 581; *Desputeaux*, at para. 40). The point, to be clear, is not whether curial jurisdiction is ousted: it clearly is. The issue is when such ousting is legally acceptable. And the view of this Court, which I endorse and apply here, is that it is acceptable when it is replaced by a mechanism □ like arbitration □ that provides

a comparable measure of justice (*Sport Maska*, at p. 581). The proposition I advance is therefore modest and, viewed in the light of our jurisprudence, uncontroversial: contracting parties must have access to *some* means of resolving their disputes according to law. Otherwise, “justice cannot be done” (*Scott*, at p. 1138). While the rule of law is perfectly compatible with agreements *to arbitrate*, it is *incompatible* with what is in effect an agreement *not to arbitrate* or to preclude parties from resorting to any form of dispute resolution according to law. It is the rule of *law*, not the rule of *Uber*.

[138] This is the narrow but fundamental point that divides my colleague Côté J. and me. I agree that the *Arbitration Act* is a “strong statemen[t] of public policy which favour[s] enforcing arbitration agreements” (para. 309). Indeed, and as I have explained, contracting parties will generally be held to their commitment to arbitrate, even when arbitration requires significant upfront costs. But the agreement my colleague seeks to uphold is a *non-arbitration* agreement. None of the *Arbitration Act*’s objectives require blindly enforcing an agreement labelled as “arbitration” when its effect, in the context of the parties’ relationship, is to ultimately *bar* access to legal dispute resolution. Indeed, and as I consider below, my colleague appears to recognize as much by granting a conditional stay requiring Uber to pay for the upfront costs of arbitration.

### (3) The Appropriate Remedy

[139] My colleague Côté J. says that, even if the agreement here violates public policy, the appropriate remedy is to “apply blue-pencil severance and strike the selection of the ICC rules” (para. 333). In light of this, and while the parties did not canvass the applicable test, I turn to consider this Court’s approach to severance.

[140] Blue-pencil severance is permissible only where it is possible to draw a line through the illegal portion of the parties’ agreement, “leaving the portions that are not tainted by illegality, without affecting the meaning of the part remaining” (*Shafron*, at para. 29, quoting *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] 1 S.C.R. 249, at para. 57, per Bastarache J., dissenting). It is therefore important to note here that what my colleague Côté J. views as separate “terms” in the agreement between Uber and Mr. Heller are, in fact, drafted as a single provision:

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 [r]equest for [m]ediation 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 to be appointed in accordance with ICC Rules. The place of arbitration shall be Amsterdam, The Netherlands. . . .

(2019 ONCA 1, 430 D.L.R. (4th) 410, at para. 11)

[141] As I have explained, the illegal portion of the parties' agreement is the *cumulative effect* of this provision. Uber and Mr. Heller agreed to submit all future disputes to mediation, which requires a significant upfront cost, following which any unresolved claim would be submitted to arbitration, requiring additional upfront costs. Reducing the costs of dispute resolution could be achieved by selecting between, or combining, several options: the commitment to mediate could be struck; references to the ICC Rules could be struck; and the commitment to arbitrate could be struck. Blue-pencil severance is achieved by “mechanically removing illegal provisions from a contract” (*Transport North American*, at para. 33 (emphasis added)). Here, there is no single component of the arbitration clause that is, on its own, illegal and that could be struck with a blue line, as my colleague Côté J. suggests.

[142] Moreover, the purpose of severance is to “give effect to the intention of the parties when they entered into the contract”, and any application of the doctrine should be restrained (*Shafron*, at para. 32). As my colleague correctly observes, the agreement here may very well embody not just the intention to arbitrate, but also the intention to prohibit either party from advancing claims valued at less than US\$14,500 (para. 311). Barring such claims, however, in the context of *this* agreement between *these* parties, is precisely what makes the arbitration clause illegal. It is therefore impossible to strike any illegal portion of the agreement without “fundamentally alter[ing] the consideration associated with the bargain and do[ing] violence to the intention of the parties” (*Transport North American*, at para. 28).

[143] I also say that the remedy my colleague Côté J. would ultimately award □ granting Uber a conditional stay of proceedings □ is inappropriate here for two reasons. First, it is difficult to conclude from the cases cited by my colleague Côté J. that such a remedy is even available in this context. In *Popack v. Lipszyc*, 2009 ONCA 365, the court directed a proposed arbitrator to set a timetable or advise that it would not take jurisdiction, so that a court could otherwise determine whether the arbitration agreement was unable to be performed (paras. 1 and 3 (CanLII)). In *Fuller Austin Insulation Inc. v. Wellington Insurance Co.* (1995), 135 Sask. R. 254 (Q.B.), the court was not dealing with a stay *in favour* of arbitration proceedings but rather a stay of court proceedings *pending* a related arbitration proceeding. The jurisdiction to stay proceedings did not arise from arbitration legislation and was therefore referred to by the Saskatchewan Court of Appeal as an “extraordinary indulgence” ((1995), 137 Sask. R. 238, at para. 5). And in both *Iberfreight S.A. v. Ocean Star Container Line A.G.* (1989), 104 N.R. 164 (F.C.A.), and *Continental Resources Inc. v. East Asiatic Co. (Canada)*, [1994] F.C.J. No. 440 (QL), the proposed court action was stayed on the condition that the defendant waive any time-related defences in the relevant arbitration proceedings (*Iberfreight*, at para. 5; *Continental Resources*, at para. 5). One might question whether it was appropriate to impose such a condition rather than leaving the availability of any applicable defences to the arbitrator’s discretion. In any event, however, and even on a broad reading, the conditions imposed in *Iberfreight* and *Continental Resources* simply facilitated the intention of the parties’ agreements □ to proceed with arbitration in a timely manner rather than delaying in the courts.

[144] Which brings me to my second point, being that to award a conditional stay is simply to grant notional severance by a different name. There is no bright line of illegality here, and the doctrine of notional severance is therefore inapplicable (*Shafron*, at para 31; Côté J.'s reasons, at paras. 327 and 334). My colleague Côté J. would, however, effectively super-impose such a bright line onto the parties' agreement by reading in a requirement that Uber advance the fees of arbitration. Her view, as I understand it, is that, because Mr. Heller has given sworn evidence that he cannot afford the fees required to pursue his claim, Uber must advance those fees (para. 324). Taking this reasoning to its logical conclusion, Uber will be required to advance the arbitration fees for *any* driver in a comparable financial situation who intends to commence a claim against Uber. While such a claim may be devoid of any merit, Uber is encouraged to take solace in the possibility of recovering its costs (para. 324) □ notwithstanding that any award of costs would be made against a driver who has an already demonstrated inability to pay.

[145] It goes without saying that neither party could have intended such a result. Unlike the conditions imposed in *Iberfreight* and *Continental Resources*, the condition my colleague would impose completely rewrites the parties' agreement in an attempt to render it enforceable. The pathway to reconciling this outcome with my colleague's stress upon party autonomy and freedom of contract is elusive.



[146] The only available remedy in response to the illegality I have identified is to find that the entire arbitration agreement is unenforceable. Any other remedy would require considerable distortion of the intention of the parties.

B. *The Doctrine of Unconscionability*

[147] While the foregoing is sufficient to dispose of the appeal, I offer some observations on the reliance placed by Abella and Rowe JJ. on the doctrine of unconscionability. In my respectful view, the doctrine of unconscionability is ill-suited here. Further, their approach is likely to introduce added uncertainty in the enforcement of contracts, where predictability is paramount.

[148] In *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, Sopinka J. commented that “the doctrine of unconscionability and the related principle of inequality of bargaining power are evolving and, as yet, not completely settled areas of the law of contract” (p. 309). More than 20 years later, this uncertainty persists, even at the most fundamental level of determining the rationale that underpins the doctrine’s existence (C. D. L. Hunt, “Unconscionability Three Ways: Unfairness, Consent and Exploitation” (forthcoming, *S.C.L.R.*); see also M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at pp. 517-19). Rather than unsettling the doctrine further by jamming it with what are in substance public policy concerns, the preferable course in my view would be to develop unconscionability in a manner that places more emphasis on reasoning than results, to ensure that the doctrine is conceptually sound and explicit in its policy underpinnings (R. Bigwood,

“Antipodean Reflections on the Canadian Unconscionability Doctrine” (2005), 84 *Can. Bar. Rev.* 171, at p. 173).

(1) Confusion in Terminology

[149] At least some of the uncertainty surrounding unconscionability can be attributed to varying usage of the term “unconscionable”. Unconscionability, as an independent doctrine, is “a specific concept, like duress and undue influence, that provides a basis upon which a transfer may be reversed” (McInnes, at p. 520). But unconscionability may also refer, in a more general sense, to a unifying theme or organizing equitable principle, or to a constituent element of a distinct legal test (pp. 519-20; Bigwood (2005), at p. 177; *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, at para. 74). Some commentators suggest that unconscionability as a broader principle explains several independent rules in contract law, including those relating to forfeitures, penalties, exclusion clauses, duress, and restraint of trade (S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at c. 14 and p. 306).

[150] While it may be that “unconscionable” is an apt description for multiple and various circumstances, it is important to distinguish unconscionability as an independent basis for setting aside transactions. For example, even though in a generic or lay sense, the arbitration agreement at issue in this appeal might well be considered “unconscionable”, it does not follow that it is unconscionable in the specific sense contemplated by the equitable doctrine of that name. As this Court said in *Ryan*, unconscionability “has developed a special meaning in relation to inequality

of bargaining power”, and use of the term in other contexts therefore has the potential to cause confusion (para. 74). To avoid such confusion, the term “unconscionability” should be used to refer *only* to the independent doctrine of that name (McInnes, at p. 520).

[151] Specificity is critical here, because the same policy rationale does not underlie each of the distinct concepts that unconscionability may be said to explain. Rules relating to *substantive* concerns with specific contractual provisions (such as penalty and exclusion clauses) arise independently from, and address different concerns than, rules that address *procedural* concerns surrounding contract formation. As Professor McInnes explains:

Substantive unconscionability would trigger relief where the *result* of a transaction is intolerable. Procedural unconscionability would trigger relief on the basis of the intolerable *manner* in which a transaction is created. [Emphasis in original; p. 548.]

[152] It is therefore important to elaborate on the criteria that form the basis for reaching the conclusion that a contract or contractual provision should be set aside. Attempting to jam multiple grounds for setting aside contracts and contractual terms into one single principle serves only to obfuscate those criteria. To move forward in a coherent and rational way, “it is absolutely imperative, in connection with the doctrine of unconscionability, to resist appeals to unreasoned intuition” (McInnes, at p. 532; see also Bigwood (2005), at pp. 172-73 and 192). Courts must not develop

contract doctrines that invite “*ad hoc* judicial moralism or ‘palm tree’ justice” (*Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 70).

[153] But unreasoned intuition and *ad hoc* judicial moralism are *precisely* what will rule the day, in my respectful view, under the analysis of my colleagues Abella and Rowe JJ. In their view, judges applying unconscionability are to mete out justice as they deem fair and appropriate, thereby returning unconscionability to a time when equity was measured by the length of the Chancellor’s foot (para. 78, quoting L. I. Rotman “The ‘Fusion’ of Law and Equity?: A Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters” (2016), 2 *C.J.C.C.L.* 497, at p. 535). As Professor Bigwood writes:

... acceptance of such a “free-wheeling” approach is also acceptance of the risk that those subject to Canadian law in this area will lose the very virtues of guidance, transparency and accountability that come with forced specificity in application, justification and analysis. To the extent the test bypasses such natural controlling phenomena of the common law method, it certainly risks decline into unprincipled and undisciplined judicial decision-making, and thus could rightly be viewed as an “enemy” of reason, discipline and the rule of law. [Footnote omitted.]

(Bigwood (2005), at p. 198, citing P. Birks, “Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment” (1999), 23 *Melbourne U.L. Rev.* 1, at pp. 20-21).

(2) Unconscionability as an Independent Doctrine

[154] Focusing squarely on *the doctrine* of unconscionability reveals that it does not apply to this appeal. At the outset, I emphasize that unconscionability

applies to all types of contracts, “indicating, by implication, that its application must be highly exceptional” (S. Waddams, “Abusive or Unconscionable Clauses from a Common Law Perspective” (2010), 49 *Can. Bus. L.J.* 378, at p. 392). Unconscionability is also relevant to unjust enrichment, providing “a means by which an apparent juristic reason (e.g., donative intent, contract) may be negated” (McInnes, at p. 520 (footnote omitted); see also pp. 534-36). Broad ramifications therefore flow from how the doctrine of unconscionability is conceptualized by this Court, and a correspondingly heavy cost arises from applying unconscionability without careful reflection upon the rationale that underpins its existence (Hunt, at pp. 37-39).

[155] A leading statement of the unconscionability doctrine appears in *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.), where Davey J.A. remarked, at p. 713:

[A] plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable or perhaps by showing that no advantage was taken. [Citation omitted.]

[156] Davey J.A.’s statement of the principle reflects the traditional understanding that unconscionability requires both substantive unfairness (an improvident bargain) and procedural unfairness (an inequality of bargaining power

stemming from a weakness or vulnerability affecting the claimant) (*Norberg*, at p. 256; McInnes, at p. 524; P. Benson, *Justice in Transactions: A Theory of Contract Law* (2019), at p. 167; J.A. Manwaring, “Unconscionability: Contested Values, Competing Theories and Choice of Rule in Contract Law” (1993), 25 *Ottawa L. Rev.* 235, at p. 262; Hunt, at p. 54). While both of these elements are typically viewed as necessary, each does not have an equally important role. There is little support in the jurisprudence for the view that unconscionability operates solely, or even primarily, on the basis of substantive unfairness (McInnes, at p. 549; Hunt, at pp. 65-67). To the contrary, the more settled view has been that the mere fact that a court sees a bargain as improvident or unreasonable does *not* make the transaction unconscionable (*Input Capital Corp. v. Gustafson*, 2019 SKCA 78, 438 D.L.R. (4th) 387, at para. 72; *Downer v. Pitcher*, 2017 NLCA 13, 409 D.L.R. (4th) 542, at paras. 24 and 64; see also McInnes, at pp. 549-50).

[157] While this Court has not closely examined unconscionability from a doctrinal standpoint, its references thereto support the view that unconscionability is intended to redress *procedural* deficiencies associated with contract formation □ arising, for example, from abuse of an inequality in bargaining power, or exploitation of a weaker party’s vulnerability (*Norberg*, at pp. 256 and 261; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 412; *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, at paras. 82, 86 and 93, per Bastarache and Arbour JJ., and para. 208, per LeBel J., dissenting; *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at paras. 6 and

58). In *Dyck v. Manitoba Snowmobile Association*, [1985] 1 S.C.R. 589, the Court remarked, at p. 593:

. . . the relationship of Dyck and the Association [does not] fall within the class of cases . . . where the differences between the bargaining strength of the parties is such that the courts will hold a transaction unconscionable and so unenforceable where the stronger party has taken unfair advantage of the other. The appellant freely joined and participated in activities organized by an association. The Association neither exercised pressure on the appellant nor unfairly took advantage of social or economic pressures on him to get him to participate in its activities.

[158] The procedural focus of unconscionability has been similarly emphasized in the most recent appellate decisions giving thorough consideration to the doctrine (*Downer*, at paras. 35-37; *Input Capital*, at paras. 29-37).

[159] Although it is not necessary to decide it here, I note that some commentators have even argued that substantial improvidence in the resulting bargain should not itself be a requirement to establish unconscionability, as it simply serves as a hallmark of a procedurally flawed transaction (McInnes, at pp. 550-52; Bigwood (2005), at p. 176; see also R. Bigwood, “Rescuing the Canadian Unconscionability Doctrine? Reflections on the Court’s ‘Applicable Principles’ in *Downer v. Pitcher*” (2018), 60 *Can. Bus. L.J.* 124). This position was adopted in *Downer*, at para. 35:

Jettisoning the requirement of a resulting improvident bargain as a requirement for the application of the unconscionability doctrine, and affirming it, instead, as an important consideration in determining whether a position of inequality existed and whether it was unfairly taken advantage of will bring the doctrine into line with the early English cases which placed emphasis on vulnerability resulting from a disparity of

bargaining positions and the taking advantage of that vulnerability. See for example, *Chesterfield v. Janssen* (1751), 2 Ves. Sen. 125 (Eng. Ch.) where Lord Hardwicke stressed the need to “prevent taking surreptitious advantage of the weakness or necessity of another.”

[160] All this leads, unavoidably, in my respectful view, to the conclusion that unconscionability primarily addresses procedural concerns surrounding contract formation. In that sense, I agree with my colleagues (Abella and Rowe JJ.’s reasons, at para. 60). It also leads me to the conclusion, however, that a *significant* degree of procedural unfairness is required to invite unconscionability’s application. While the procedural component of unconscionability is often stated as simply requiring an “inequality of bargaining power”, this phrasing is “inadequate, if not misleading” (McInnes, at p. 524 (emphasis deleted)). Almost every contract involves some difference in bargaining power. Mere inequality — even substantial inequality — is, therefore, insufficient on its own to warrant application of unconscionability to set aside the transaction. Instead, unconscionability has traditionally been understood as requiring a *particular* vulnerability on the part of the plaintiff. As the Newfoundland and Labrador Court of Appeal concluded in *Downer*, at para. 39:

It is not any inequality of position that will do . . . . It must be such that it has the potential for seriously affecting the ability of the relief-seeker to make a decision as to his or her own best interests and thereby allows the other party an opportunity to take advantage of the claimant’s personal or situational circumstances. That is why terms such as “overwhelming” or “substantial” or “special” have been used . . . . I would venture to say that what is meant by such terminology is that the inequality must relate to a special and significant disadvantage that has the potential of overcoming the ability of the claimant to engage in autonomous self-interested bargaining.



(See also McInnes, at pp. 524-28; Bigwood (2005), at pp. 199-204.)

[161] Hence the cases cited by my colleagues, which deal with elderly persons suffering from cognitive impairments (*Ayres v. Hazelgrove*, Q.B. England, February 9, 1984), ship captains stranded at sea (*The Mark Lane* (1890), 15 P.D. 135; *The Medina* (1876), 1 P.D. 272), and elderly persons with limited competency in written English and no understanding of the transaction they have agreed to (*Commercial Bank of Australia Ltd. v. Amadio*, [1983] HCA 14, 151 C.L.R. 447). Each requires a degree of vulnerability particular to the claimant.

[162] By contrast, the only alleged procedural deficit in the agreement between Uber and Mr. Heller is the nature of Uber's contract terms, as they were presented to Mr. Heller through a standard form contract of adhesion. The argument is effectively that *any* party contracting with Uber would be in a position to raise unconscionability because they were unable to negotiate the contract's terms. While my colleagues readily accept this deficit as sufficient (paras. 87-91), this Court has never before accepted that a standard form contract denotes the degree of inequality of bargaining power necessary to trigger the application of unconscionability. My colleagues see "no reason to depart from the approach to unconscionability endorsed in . . . . [*Douez*]" (para. 65). And, indeed, they do not depart from Abella J.'s separate *concurring* reasons in *Douez*. But they *do depart* from *the majority's* approach in that case. Specifically, in *Douez* the Court *declined* to address unconscionability in the context of a consumer contract of adhesion, and instead considered the matter through

the lens of public policy. And the majority's view □ that standard form agreements are not inherently flawed □ is consistent with our liberal conception of freedom of contract, a value that accords great respect to individual autonomy. Though one may be required to accept a standard form agreement without negotiation to use a service, that fact "affects neither party's ability to bargain effectively from the standpoint of legal autonomy, choice and responsibility" (Bigwood (2005), at pp. 199-200). *Douez* is, of course, a precedent of our Court.

[163] The stakes are undoubtedly high here. Concluding that a standard form contract is sufficient to satisfy unconscionability's procedural requirement would open up the terms of every such contract for review on a measure of substantive reasonableness. This would represent a radical and undesirable change in the law, particularly considering the complexity and range of transactions to which unconscionability applies (see Bigwood (2005), at pp. 208-9). The result of the inevitable, undisciplined application by courts of such an undisciplined expansion of the scope of unconscionability will be profound uncertainty about the enforceability of contracts.

[164] My colleagues further expand the scope of unconscionability by eliminating knowledge as a requirement. Unconscionability is generally viewed as requiring the stronger party to have at least constructive knowledge of the weaker party's vulnerability (see e.g. *McInnes*, at pp. 537 and 544-48; *Downer*, at

paras. 44-49; Bigwood (2005), at p. 195; Hunt, at pp. 58-59). As Professor McInnes writes:

Even more clearly than its equitable cousin, undue influence, unconscionability involves an element of impropriety. The gist of the doctrine is the *exploitation* of vulnerability, the “. . . unconscientious use of power by a stronger party against a weaker [party].” And while there is some debate as to the precise nature of the mental element, the best view is that relief is premised upon proof that the defendant *knew* of the claimant’s weakness. [Emphasis in original; footnotes omitted; p. 537]

A recent confirmation of this requirement appears in *Downer*, where the Newfoundland and Labrador Court of Appeal concluded that knowledge of either the claimant’s vulnerability or “of circumstances that pointed to special and significant disadvantage created or flowing from an inequality of bargaining relationship” must be proven to make out the claim (paras. 46-49).

[165] Without accounting for or even acknowledging this controversy, my colleagues state that knowledge is not essential (paras. 84-85), despite a majority of scholars concluding that *at least* constructive knowledge is required. To reach this conclusion, my colleagues equate knowledge with wrongdoing (paras. 85-86). There is, however, a distinction between the two concepts in matters of unconscionability (see e.g. McInnes, at p. 540; C. Rickett, “Unconscionability and Commercial Law” (2005), 24 *U.Q.L.J.* 73, at pp. 78 and 80). While there is clear support for the proposition that unconscionability can be established without wrongdoing □ that is, conduct rising to the level of intention, actual fraud, dishonesty, or active overreaching □ the same cannot be said of knowledge (see *Chesterfield (Earl of) v.*

*Janssen* (1750), 2 Ves. Sen. 125, 28 E.R. 82, at pp. 100-101; *Earl of Aylesford v. Morris* (1873), L.R. 8 Ch. App. 484, at pp. 490-91; *Lloyds Bank Ltd. v. Bundy*, [1975] 1 Q.B. 326 (C.A.), at pp. 339-40; *Waters v. Donnelly* (1884), 9 O.R. 391 (Ch. Div.), at pp. 401-6; *Morrison*, at p. 714; *Woods v. Hubley* (1995), 146 N.S.R. (2d) 97 (C.A.), at paras. 28-33). Even viewed as a plaintiff-sided doctrine, there can be no claim unless the defendant exploits the plaintiff's vulnerability (McInnes, at pp. 540-43). Accordingly, "there is very little support for the direct application of [strict liability] in the context of unconscionability", which is what my colleagues would impose (McInnes, at p. 544 (footnote omitted)).

[166] There is clear merit in a knowledge requirement, at least when applied to contractual dealings, as opposed to gratuitous transfers. Where the relationship between plaintiff and defendant is contractual, equity's interest in protecting those who are vulnerable must be balanced against the countervailing interests of commercial certainty and transactional security (McInnes, at p. 541; Rickett, at p. 80). Equity therefore demands an explanation as to why the defendant should suffer the consequences of the plaintiff's vulnerability (McInnes, at p. 541, citing P. Birks and C. Mitchell, "Unjust Enrichment" in P. Birks, ed., *English Private Law* (2000)). Requiring knowledge on the part of the defendant makes it possible for *both* parties to know whether their agreement is enforceable at the time of contracting and provides a compelling reason for holding the stronger party accountable.

[167] The wholesale shift in the law that my colleagues advance by removing knowledge as a requirement, seemingly in response to the equities of this particular case, drastically expands the scope of unconscionability. It is neither supported by the jurisprudence nor counselled by academic commentary, and rightly so. Not only is eliminating the knowledge requirement a recipe for further uncertainty in the doctrine of unconscionability, it is commercially unworkable. Contracting parties are left to wonder whether an unknown state of vulnerability will someday open up their agreement to review on grounds of “fairness”. This alone should give pause, but my colleagues do not stop there. Under their approach, a party who contracts exclusively with individuals who have received independent legal advice *still* cannot take comfort in the finality of their agreements. According to my colleagues, only *competent* legal advice will ameliorate an imbalance in bargaining power (para. 83). A potential defendant therefore cannot be assured of finality unless it knows the content of the advice its counterparty has received.

[168] Moreover, this expansion of unconscionability is entirely unnecessary in the context of this appeal. Ultimately, the concern underlying my colleagues’ approach is simply that Mr. Heller cannot access any form of dispute resolution (paras. 94-95). As I have explained, this concern is already guarded against by a long-standing rule of public policy. And this Court’s decisions clearly demonstrate that where the concern with enforcing a contract relates primarily to the *substance* of a particular provision, unconscionability is not the appropriate doctrine for granting relief. This Court has adopted specific rules to respond to the public policy

considerations suggesting that the substance of a particular type of provision is cause for concern. For example, in *Douez*, the Court declined to apply the doctrine of unconscionability to a forum selection clause appearing in a consumer contract of adhesion. Instead, inequality of bargaining power was raised as a relevant consideration in relation to public policy (paras. 47 and 51-63). In its reasons, the Court provided specific guidance and directly addressed the mischief relating to a forum selection clause in the consumer context. The Court has taken a similar approach to restrictive covenants that operate in restraint of trade, viewing those provisions through the lens of public policy (*Elsley*, at p. 923; see also *Shafron*, at paras. 15-23; *Benson*, at p. 203). In both contexts, imbalance in bargaining power is a relevant consideration, but the degree of vulnerability necessary to establish unconscionability is not required (*Elsley*, at pp. 923-24; *Douez*, at paras. 51-53). This reflects that the inquiry is grounded in public policy, addressing the substance of the provision at issue.

[169] By addressing substantive provisions of contracts through specific rules designed to address particular types of provisions, courts can provide, and have provided, concrete guidance addressing the relevant mischief. This Court has approached the enforcement of contracts in a principled and rational manner by attempting to “ascertain the existence and the exact limits” of the overriding public policy considerations that prohibit enforcement (*Fender*, at p. 22). The nature of the inquiry varies, depending on the policy issue raised by the provision in question; different considerations will apply in considering exclusion clauses (*Tercon*, at

paras. 117-20, per Binnie J., dissenting (but not with regards to the analytical approach to be followed with regards to the applicability of an exclusion clause)), forum selection clauses (*Douez*, at paras. 51-62), restraints of trade (*Elsley*, at pp. 923-24), and clauses that limit access to legally determined dispute resolution (as I have explained in these reasons). While these types of provisions might all be described as improvident in certain circumstances, it is critical to explain *why* that is so. Applying unconscionability in the manner suggested by my colleagues invites the conclusion that well-established rules relating to the enforcement of specific clauses should be swept aside in favour of a unified *ad hoc* and unprincipled approach to enforceability. This is why I say that, while unconscionability is appropriate for remedying procedural concerns that arise during contract formation, applying its generally-framed requirements to address what are ultimately concerns of public policy will serve only to obfuscate the criteria for granting relief. In turn, commercial certainty is undermined.

[170] Indeed, the approach adopted by my colleagues embodies this concern by failing to provide concrete guidance for determining what substantive unfairness □ or an improvident transaction □ looks like. My colleagues assert that improvidence arises whenever a bargain “unduly advantages the stronger party or unduly disadvantages the more vulnerable” (para. 74). Their approach is, they say, “contextual” and incapable of being framed precisely (para. 78). My colleagues therefore invite judges to apply their own subjective, even idiosyncratic understandings of “[f]airness” and “situationa[l] . . . appropriate[ness]” in deciding

whether a contract should be enforced (para. 78, quoting Rotman, at p. 535). It is difficult to imagine a judicial approach more likely to undermine commercial certainty. Professor Rickett's comments are apposite:

Judges ought not to announce principles at so abstract a level that they are devoid of clear ordinary meaning. Still less should they attempt to apply them as *legal* principles. That there is no generally accepted meaning for unconscionability should immediately warn us off its use. It is not good enough to trumpet the rule of law, and then to apply the rule of men's hearts. The rule of law requires juridically applicable principles. [Emphasis in original; p. 87].

[171] Further, my colleagues say that terms may be unconscionable when a party does not “understand or appreciate” them (para. 77). This suggests that Uber's agreement with Mr. Heller could have been remedied if the US\$14,500 fee for commencing a claim was spelled out expressly. As I have explained, however, even a contract that imposes express consequences for commencing a civil claim □ like the contract in *Novamaze* □ will be contrary to public policy if those consequences rise to the level of undue hardship. It may be relevant to consider whether the stronger party obfuscated the limit on dispute resolution, but it cannot be determinative. Directly addressing the public policy concern at issue in this appeal, rather than obscuring it through the lens of unconscionability, allows for a more appropriate response to the problem.

[172] Finally, the doctrine of unconscionability was never meant to apply to individual provisions of a contract. Unlike public policy considerations that target a specific contractual provision, unconscionability's substantive inquiry must consider



the entire bargain — that is, the entire exchange of value between the parties (Benson, at pp. 176-82). Indeed, my colleagues seem to agree that a contract appearing to be unfair may be explained by showing that it is accounted for in the assumption of risk between the parties (para. 59; Benson, at p. 182). And yet, nowhere in their analysis do they consider the overall exchange of value and assumption of risk between Mr. Heller and Uber, which may very well justify what appears to be substantial “improvidence” solely from Mr. Heller’s perspective. While Mr. Heller was unable to negotiate the terms of his agreement with Uber, he did receive the benefit of working as an Uber driver and receiving income. The contract was in no way foisted upon him. In failing to even consider the value exchange between the parties, my colleagues ultimately create a doctrine of contract enforcement that rests entirely on grounds of distributive justice. I see no justification for this development, and agree with Professor Benson, who writes:

Unconscionability represents a conception of fairness in transactions or commutative justice, not justice in distributions. It treats parties as equal by recognizing and protecting in each the power to receive something of equal value from the other in return for what he or she gives. [Footnote omitted; p. 190]

(See also Waddams (2017), at p. 304.)

[173] Instead of examining the entire bargain, my colleagues assert that unconscionability can be alleged against specific provisions of a contract, rather than the contract as a whole (para. 96 and fn. 8). In my view, however, this is a novel proposition. Some support for their position could possibly be drawn from this

Court's decision in *Tercon*, which requires courts to consider whether an "exclusion clause was unconscionable at the time the contract was made" (para. 122, per Binnie J., dissenting (but not on this point)). But nothing in *Tercon*, or *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 (where the reference to unconscionability in the context of exclusion clauses first appeared) suggests an intention to adopt a novel approach to unconscionability that targets individual terms (J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 442). In my view, use of the term "unconscionability" in *Hunter Engineering* (and later in *Tercon*) is explained by the fact that unconscionability is often used loosely to refer to a number of different concepts. In any event, the test set out in *Tercon* ultimately reflects a similar approach to that taken in *Douez*, which I find compelling: if a specific contractual term is properly incorporated into a valid agreement (considering the general doctrines of contract enforcement), then that provision should be held enforceable, absent compelling public policy reasons.

[174] In sum, my colleagues' approach drastically expands the scope of unconscionability, provides very little guidance for the doctrine's application, and does all of this in the context of an appeal whose just disposition requires no such change.

[175] Here, there is no allegation that Mr. Heller suffered from any specific vulnerability that would traditionally ground a claim in unconscionability. It follows that there is no procedural deficit warranting the application of unconscionability to

the agreement between Uber and Mr. Heller. The true concern is one of substance: Uber's arbitration agreement bars access to justice, undermining the rule of law. As I have explained, that concern is best addressed by considering whether the limitation on access to justice is reasonable in the circumstances or, instead, imposes undue hardship.

### III. Conclusion

[176] The arbitration agreement between Mr. Heller and Uber effectively bars Mr. Heller from accessing a legally determined dispute resolution, thereby imposing undue hardship on Mr. Heller and undermining the rule of law. The arbitration agreement is unenforceable. I would dismiss the appeal, with costs to Mr. Heller in this Court and the courts below.

The following are the reasons delivered by

CÔTÉ J. —

#### I. Introduction

[177] One of the most important liberties prized by a free people is the liberty to bind oneself by consensual agreement: *Hofer v. Hofer*, [1970] S.C.R. 958, at p. 963. Although times change and conventional models of work and business

organization change with them, the fundamental conditions for individual liberty in a free and open society do not. Party autonomy and freedom of contract are the philosophical cornerstones of modern arbitration legislation. They inform the policy choices embodied in the *Arbitration Act, 1991*, S.O. 1991, c. 17, and the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5 (“*International Act*”), one of which is that the “parties to a valid arbitration agreement should abide by their agreement”: *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at para. 52.

[178] The parties to the agreement at issue in this appeal have bound themselves to settle any disputes arising under it through arbitration. My colleagues Abella and Rowe JJ. and Brown J. advance competing theories which impugn, to varying degrees, the choice of the law that governs the parties’ contractual arrangements, the designated seat of the arbitration, and the selection of an international arbitral institution’s procedural rules. My colleagues do not impeach the parties’ agreement to submit disputes to arbitration, yet they find that the parties’ commitment to do so is invalid. I cannot reconcile this result with the concepts of party autonomy, freedom of contract, legislative intent, and commercial practicalities. These important considerations — which ought to be taken into account — are disregarded in the majority’s reasons.

[179] As I explain below, the *Arbitration Act*, the *International Act*, this Court’s jurisprudence and compelling considerations of public policy require this Court to

respect the parties' commitment to submit disputes to arbitration. I would therefore allow the appeal.

## II. Background

[180] The appellants, Uber Technologies Inc., Uber Canada, Inc., Uber B.V. and Rasier Operations B.V. (collectively, "Uber"), form part of a corporate group with strong connections to the Netherlands, including the corporate headquarters of Uber B.V. and Rasier Operations B.V. The corporate group has global operations in what has been styled the "sharing economy".

[181] Uber develops and operates software applications ("Apps" or an "App") for users of GPS-enabled smartphones, which connect ride-seeking passengers with drivers and allow customers to have food delivered from restaurants. The food delivery business is known as "UberEATS", and the App developed for it is known as the "UberEATS App".

[182] Uber licenses another App — the "Driver" App — to David Heller, the respondent. Mr. Heller delivers food from restaurants to customers who have ordered food through UberEATS and is paid through the Driver App. A person in his position is commonly referred to as an "Uber driver". He earns CAN\$400 to CAN\$600 per week driving for 40 to 50 hours.

[183] To become an Uber driver, Mr. Heller was required to enter into a service agreement with Rasier Operations B.V. through the Driver App. He was periodically required to agree to new versions of the service agreement and of an agreement subsequently signed with Uber Portier B.V., which is not a party to this appeal. To accept the service agreement, Mr. Heller was required to scroll through the entire contract and to click two buttons to indicate his acceptance. The Driver App does not limit the time an Uber driver may take to review the service agreement before accepting.

[184] The parties do not suggest that there were any meaningful substantive differences between the various service agreements for the purposes of this appeal. I refer to the agreements collectively throughout these reasons as the “Service Agreement”.

[185] The Service Agreement includes a clause that provides that any dispute, conflict or controversy arising in connection with the agreement is to be first submitted to mediation and, if mediation is unsuccessful, is to be finally resolved by arbitration (“Arbitration Clause”). The Arbitration Clause adds that the International Chamber of Commerce’s (“ICC”) *Arbitration Rules, Mediation Rules* developed by the International Court of Arbitration (“ICA”) and the International Centre for ADR, as amended from time to time (“ICC Rules”), are to apply, and designates Amsterdam, the Netherlands, as the place of arbitration (“Place of Arbitration Clause”). The Service Agreement also includes a clause that provides that it is to be

governed by and construed in accordance with the laws of the Netherlands (“Choice of Law Clause”).

[186] Uber offers a free internal dispute resolution mechanism which connects Uber drivers to customer support representatives. Ontario-based drivers may also visit a local support centre referred to as a Greenlight Hub to resolve disputes. It is noteworthy that Mr. Heller has raised over 300 complaints through Uber’s internal procedure, most of which were resolved within 48 hours.

[187] The selection of the ICC Rules in a mediation or arbitration agreement entails the administration of the proceedings by the ICC’s autonomous dispute resolution bodies: the ICA and the International Centre for ADR. The ICC Rules provide for the payment of mandatory fees to these dispute resolution bodies for the administration of mediation and arbitration proceedings, which total US\$14,500 for a claim under US\$200,000 (“ICC Fees”).

[188] Mr. Heller commenced a proposed class proceeding in Ontario for CAN\$400,000,000, alleging that Uber drivers such as himself have been misclassified by Uber because they are employees who are entitled to the benefits and protections of Ontario’s *Employment Standards Act, 2000*, S.O. 2000, c. 41 (“ESA”).

[189] Uber brought a motion to have Mr. Heller’s proceeding stayed in favour of arbitration pursuant to the Arbitration Clause and the *International Act* or, alternatively, the *Arbitration Act*.

[190] Applying the *International Act*, the Ontario Superior Court stayed Mr. Heller’s action in favour of arbitration: 2018 ONSC 718, 41 D.L.R. (4th) 343. The Court of Appeal allowed the appeal and set the stay aside, holding that, if the drivers are employees, as is alleged, then the Arbitration Clause illegally contracted out of an employment standard. In addition, the Arbitration Clause was found to be unconscionable at common law. Either conclusion meant that the Arbitration Clause is invalid under s. 7(2) of the *Arbitration Act* such that the mandatory stay does not apply.

### III. Legislation

[191] The *ESA* includes the following provisions:

#### **Definitions**

1. (1) In this Act,

...

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

...

#### **No contracting out**

5. (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.

#### **Greater contractual or statutory right**

(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.

### **No treating as if not employee**

**5.1.** (1) An employer shall not treat, for the purposes of this Act, a person who is an employee of the employer as if the person were not an employee under this Act.

...

### **Complaints**

**96.** (1) 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.

...

### **When complaint not permitted**

**98.** (1) An employee who commences a civil proceeding with respect to an alleged failure to pay wages or to comply with Part XIII (Benefit Plans) may not file a complaint with respect to the same matter or have such a complaint investigated.

[192] The *Arbitration Act* includes the following provisions:

### **Court intervention limited**

**6.** No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

1. To assist the conducting of arbitrations.
2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
3. To prevent unequal or unfair treatment of parties to arbitration agreements.

4. To enforce awards.

...

### **Stay**

7. (1) 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 in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

### **Exceptions**

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

...

### **Arbitral tribunal may rule on own jurisdiction**

17. (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

### **Independent agreement**

(2) If the arbitration agreement forms part of another agreement, it shall, for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the main agreement is found to be invalid.

...

### **Review by court**

(8) If the arbitral tribunal rules on an objection as a preliminary question, a party may, within thirty days after receiving notice of the ruling, make an application to the court to decide the matter.

[193] The *International Act* includes the following provisions:

#### **Application of Model Law**

5. (1) Subject to this Act, the Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the United Nations Commission on International Trade Law on 7 July 2006, set out in Schedule 2, has force of law in Ontario.

...

#### **Stay of proceedings**

9. Where, pursuant to article II (3) of the Convention or article 8 of the Model Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

[194] Schedule 2 of the *International Act* implements the United Nations Commission on International Trade Law's *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, Ann. I, June 21, 1985 ("UNCITRAL" and "UNCITRAL Model Law", respectively), which includes the following provisions:

#### **Article 1. Scope of application**

(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.

...

### **Article 8. Arbitration agreement and substantive claim before court**

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

...

### **Article 16. Competence of arbitral tribunal to rule on its jurisdiction**

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(pp. 1, 5 and 8)

[195] The *Courts of Justice Act*, R.S.O. 1990, c. C.43, includes a provision which addresses stays of proceedings:

### **Stay of proceedings**

**106.** A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

[196] The part of the ICC Rules that deals with arbitration (“ICC Arbitration Rules”) include the following provisions:

### **Article 18**

### **Place of Arbitration**

1. The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.
2. The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.
3. The arbitral tribunal may deliberate at any location it considers appropriate.

...

### **Article 22**

#### **Conduct of the Arbitration**

1. The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

...

4. In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

...

### **Article 38**

#### **Decision as to the Costs of Arbitration**

...

3. At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.
4. The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

[197] Appendix VI to the ICC Arbitration Rules contains a set out of procedural rules for the expedited conduct of arbitration (“ICC Expedited Rules”), which include the following provisions:

### **Article 3**

#### **Proceedings**

...

4. The arbitral tribunal shall have discretion to adopt such procedural measures as it considers appropriate. In particular, the arbitral tribunal may, after consultation with the parties, decide not to allow requests for document production or to limit the number, length and scope of written submissions and written witness evidence (both fact witnesses and experts).

5. The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts. When a hearing is to be held, the arbitral tribunal may conduct it by videoconference, telephone or similar means of communication. [pp. 71-72]

#### IV. Issues

[198] The overall issue in this appeal is whether Uber’s motion for a stay of Mr. Heller’s proceeding should be granted pursuant to either s. 9 of the *International Act* or s. 7(1) of the *Arbitration Act*. A number of related questions arise:

- Which arbitration legislation governs Uber’s motion for a stay?

- Is the Arbitration Clause null and void under the *International Act*, or invalid under the *Arbitration Act*?
  
- Should a court or an arbitral tribunal rule first on the validity of the Arbitration Clause?
  
- What conditions, if any, should the Court impose on the stay of proceedings?

## V. Analysis

### A. *Overview*

[199] I would allow the appeal and grant Uber's motion for a stay of proceedings, on the condition that Uber advances the funds needed to initiate the ICA arbitration proceedings.

[200] I begin my analysis by considering historical trends in Canadian arbitration law, which was initially characterized by a judicial attitude of overt hostility to arbitration. In recent decades, though, Canadian arbitration law has seen a dramatic reversal, as arbitration has been embraced and Canada has been transformed into a world leader in arbitration jurisprudence. I fear, however, that, in taking the approaches they do, my colleagues risk abdicating Canada's leadership role in arbitration law.

[201] Next, I turn to the concrete doctrinal problems posed by this appeal. I consider which arbitration legislation governs Uber's motion for a stay. While I conclude that the *International Act* applies, the ultimate conclusions I reach would be the same under the *Arbitration Act*. I then consider whether the Arbitration Clause is either null and void or invalid, depending on which legislation is concerned. A primary sub-issue is whether a court or the arbitral tribunal should rule first on these questions, and this turns on whether Mr. Heller's arguments can be characterized as raising questions of law or questions of mixed law and fact which require only a superficial review of the documentary evidence in the record in order to establish the relevant factual aspects. I find that his arguments based on the doctrine of unconscionability and on the *ESA* raise questions of mixed law and fact which cannot be decided on the basis of a superficial review of that evidence and should therefore be decided by the arbitrator.

[202] These conclusions would be sufficient to decide the appeal, but, because my colleagues go further and consider Mr. Heller's arguments on their merits, I also comment on the merits of his challenge in respect of the validity of the Arbitration Clause. I find that the testimonial evidence before the Court is insufficient to support a finding that the Arbitration Clause is unconscionable. I also find that the Arbitration Clause is neither inconsistent with the *ESA*, nor contrary to public policy, as Brown J. would find.



[203] I conclude by considering the possible remedies on a motion for a stay. The majority appears to believe that the courts face a stark choice between rigidly enforcing what they perceive to be a one-sided arbitration agreement and finding that the entire arbitration agreement is invalid. I suggest that at least two remedies are available to a court hearing a motion for a stay in order to alleviate any perceived unfairness: (1) a conditional stay of proceedings and (2) severance of an unenforceable term of an arbitration agreement. These remedies would enable courts to safeguard procedural fairness in a manner consistent with the principle of party autonomy and with the legislature's intent.

[204] I turn now to the broader historical and jurisprudential context of this appeal.

B. *Historical Trends in Canadian Arbitration Law: From Overt Hostility to World Leadership*

[205] Until the 1980s, Canadian courts displayed hostility to arbitration, treating it as a second-tier class of dispute settlement: *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, at paras. 89-96, per LeBel and Deschamps JJ. (dissenting, but not on this point). The Canadian judiciary's hostility was inherited from the English common law, which held that arbitration agreements had the effect of ousting the jurisdiction of the courts and were therefore void on the basis that they were contrary to public policy: *Seidel*, at paras. 89-90; *Wellman*, at para. 48. This hostility was exemplified by *National Gypsum Co. Inc. v.*

*Northern Sales Ltd.*, [1964] S.C.R. 144, in which this Court held that an agreement to submit disputes to arbitration in New York was unenforceable on the basis of public policy.

[206] Beginning in the 1980s, however, this Court recognized that the prevailing attitude was misconceived and began to chart a new course for arbitration law jurisprudence in Canada. In *Zodiak International Productions Inc. v. Polish People's Republic*, [1983] 1 S.C.R. 529, this Court distanced itself from the approach it had taken in *National Gypsum* and advanced a more favorable position on arbitration. In *Sport Maska Inc. v. Zittner*, [1988] 1 S.C.R. 564, it recognized that the judiciary's hostility to arbitration had unfortunately inhibited the legal community's interest in arbitration, thereby inhibiting the growth of this form of dispute resolution. Around the same time, legislatures began to intervene to further promote the use of arbitration: *Wellman*, at para. 49.

[207] Over time, courts, including this Court, began to take notice that the legislatures had adopted a pro-arbitration stance. In *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178, at paras. 38 and 40-41, this Court acknowledged that arbitration is a legitimate form of dispute resolution and that this had been fully recognized and endorsed by the legislature and in its own jurisprudence. In *Seidel*, at para. 2, this Court stated that, “[a]bsent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration

clause”. It added that it had both recognized and welcomed the virtues of commercial arbitration: *Seidel*, at para. 23. Finally, in *Wellman*, this Court endorsed “the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts”: *Wellman*, at para. 56, quoting *Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642, 97 O.R. (3d) 161, at para. 14.

[208] As a result of legislative and judicial encouragement, Canada is now a world leader in arbitration law. The jurisprudence of Canadian courts features prominently with that of other leading UNCITRAL Model Law jurisdictions, such as Germany, Australia, Hong Kong and Singapore, in the United Nations Commission on International Trade Law’s *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (2012). Canada sits on the cusp of becoming a world-class seat for arbitration, with modern arbitration legislation and a thriving community of dedicated practitioners, scholars, and arbitrators: J. Walker, “Canada’s Place in the World of International Arbitration” (2019), 1 *Can. J. Comm. Arb.* 1.

[209] My colleagues threaten to roll back the tide of history and Canadian jurisprudence to the days when judges were overtly hostile to arbitration. They decline to follow the rule of systematic referral to arbitration that was clearly established in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34,

[2007] 2 S.C.R. 801, at paras. 84-85. Instead, they add to the grounds for judicial intervention in the arbitration process by proposing new exceptions to the rule of systematic referral. Finally, they suggest that, regardless of the legislative intent embodied in the *Arbitration Act* and the *International Act*, judicial respect for arbitration is predicated upon the accessibility of arbitration in a given case: *Wellman*, at paras. 48-56 and 82; Abella and Rowe JJ.'s reasons, at para. 97; Brown J.'s reasons, at para. 117. As a result, my colleagues' approaches call into question this Court's commitment to encouraging the use of arbitration and to the modern "hands-off" approach to arbitration it so recently endorsed in *Wellman*. Canada's role as a world leader in arbitration law may now be in doubt.

C. *Which Arbitration Legislation Applies to Uber's Motion for a Stay?*

[210] Mr. Heller argues that the *Arbitration Act* applies because employment disputes are excluded from the scope of the UNCITRAL Model Law, which is incorporated into Ontario law by the *International Act*.

[211] The *International Act* applies to arbitrations which are "international" and "commercial": UNCITRAL Model Law, art. 1(1). In this appeal, the arbitration is "international" because the parties have their residences or places of business in different countries: UNCITRAL Model Law, art. 1(3)(a) and (4)(b). Therefore, the applicability of the *International Act* turns on whether the parties' relationship is properly characterized as being "commercial" in nature. In my view, a court should approach this issue by analyzing the nature of the parties' relationship on the basis of

a superficial review of the record, as opposed to characterizing the nature of the dispute solely on the basis of the pleadings.

[212] An interpretive footnote in the UNCITRAL Model Law explains that the term “‘commercial’ is to be given a wide interpretation so as to cover all matters arising from all *relationships* of a commercial nature”: fn. 2 (emphasis added). The footnote also contains a non-exhaustive list of covered transactions, which includes licensing agreements. This implies that the focus of the analysis is on the nature of the relationship created by the transaction: see J. K. McEwan and L. B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (loose-leaf), at pp. 1-36 to 1-40.

[213] The weight of the Canadian jurisprudence on the scope of the UNCITRAL Model Law has focused on the nature of the relationship and not of the dispute. For example, in *Borowski v. Fiedler (Heinrich) Perforiertechnik GmbH* (1994), 158 A.R. 213 (Q.B.), Murray J. found that the UNCITRAL Model Law did not apply to the case before him, because the evidence established that the relationship between the parties was that of master and servant (i.e., an employment relationship): para. 30. In other cases, the UNCITRAL Model Law was found to be inapplicable because the plaintiff’s status as an employee was not in dispute, thereby obviating any need to characterize the relationship: *Ross v. Christian & Timbers Inc.* (2002), 23 B.L.R. (3d) 297 (S.C.J. Ont.); *Patel v. Kanbay International Inc.*, 2008 ONCA 867, 93 O.R. (3d) 588. In *United Mexican States v. Metalclad Corp.*, 2001

BCSC 664, 89 B.C.L.R. (3d) 359, at para. 46, by contrast, Tysoe J. found that the UNCITRAL Model Law did apply despite the fact that the *dispute* was not itself commercial in nature, because the *relationship* between the parties was commercial. Similarly, in *Kaverit Steel and Crane Ltd. v. Kone Corp.*, 1992 ABCA 7, 120 A.R. 346, at para. 26, Kerans J.A. held that a dispute over liability in tort falls within the scope of the UNCITRAL Model Law despite its non-contractual nature, “so long as the relationship that creates liability is one that can fairly be described as ‘commercial’”.

[214] Labour and employment disputes are said to be excluded from the scope of the term “commercial”: United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General*, U.N. Doc. A/CN.9/264, March 25, 1985. However, this does not shift the focus of the analysis from the nature of the relationship to the nature of the dispute between the parties. Rather, its effect is to exclude arbitrations arising in the context of employment and labour relationships from the scope of the UNCITRAL Model Law. The focus of the analysis is still on the nature of the relationship.

[215] My colleagues, Abella and Rowe JJ., take the opposite position, arguing that the analysis turns on the nature of the dispute, not of the relationship: para. 25. However, the author of the learned treatise upon which Abella and Rowe JJ. rely in support of their view actually takes a position diametrically opposed to their approach

to the applicability of the UNCITRAL Model Law: Abella and Rowe JJ.'s reasons, at para. 27. Gary B. Born does present the proposition that consumer and employment disputes are excluded from the UNCITRAL Model Law, but as an alternative to his own view. He then rebuts it by pointing to the fact that the list of covered transactions is non-exhaustive and “expressly extends to the ‘carriage of . . . passengers’ and ‘consulting’ agreements, which very arguably include at least certain consumer or employment relations”: *International Commercial Arbitration*, vol. I, *International Arbitration Agreements* (2nd ed. 2014), at p. 309. Born’s assessment is that “the Model Law includes within its coverage both consumer and employment matters, subject to any specific nonarbitrability rules adopted in particular states”: p. 309. His work is therefore of no assistance to my colleagues on this point. On the contrary, he expresses the opinion that the term “commercial” applies “without regard to the nature or form of the parties’ claims and looks only to the character of their underlying transaction or conduct”: p. 308.

[216] A superficial review of the documentary evidence reveals that the underlying transaction between Uber and Mr. Heller is commercial in nature. The Service Agreement expressly states that it does not create an employment relationship. Instead, it is a software licensing agreement, which, as I mentioned above, is a type of transaction that is identified as coming within the scope of the UNCITRAL Model Law.

[217] But Mr. Heller submits that he is an employee of Uber. While the parties' characterization of their relationship is not determinative in a dispute as to whether an employment relationship has been misclassified, a court hearing a motion for a stay should not decide complex questions of mixed law and fact which require more than a superficial review of the documentary evidence in the record: *Dell*, at paras. 84-85. This Court cannot decide that the Service Agreement creates an employment relationship without usurping the role of the arbitral tribunal. I therefore agree with the motion judge, Perell J., that "until the arbitrator rules otherwise, the court should take the parties at their word that the Service Agreements are not employment contracts": para. 49.

[218] On the basis of a superficial review, I am satisfied that the parties' relationship is both commercial and international within the meaning of the UNCITRAL Model Law. As a result, I conclude that the *International Act* applies to Uber's motion for a stay. Because my colleagues are of the view that the *Arbitration Act* applies, however, I will continue to address both statutes, where relevant. I reiterate that the analysis that follows would not change were I to conclude that the *Arbitration Act* applied instead of the *International Act*.

D. *Is the Arbitration Clause Null and Void Under the International Act, or Invalid Under the Arbitration Act?*

[219] Mr. Heller does not contest that this dispute falls within the scope of the Arbitration Clause, which means that the criteria for a stay under both the



*International Act* and the *Arbitration Act* are met. A court hearing a motion for a stay and for referral to arbitration may, nonetheless, dismiss the motion if the arbitration agreement is found to be null and void, or invalid: UNCITRAL Model Law, art. 8(1); *Arbitration Act*, s. 7(2). Mr. Heller submits that the Arbitration Clause is invalid, or null and void, because it amounts to an unlawful contracting out of the *ESA* and because it offends the doctrine of unconscionability. I will address his arguments below after first considering some preliminary questions concerning the correct analytical approach to such a challenge.

(1) Doctrine of the Separability of Arbitration Agreements

[220] Mr. Heller challenges the validity of the Arbitration Clause itself, and not of the Service Agreement as a whole. He rests his argument on the proposition that arbitration clauses embedded in contracts should be treated as independent agreements: R.F., at para. 101. Mr. Heller's submission therefore gives this Court an occasion to recognize and affirm the doctrine of the separability of arbitration agreements. I would do so readily.

[221] The doctrine of separability is "one of the conceptual and practical cornerstones" of arbitration law which plays an important role in ensuring the efficacy and efficiency of the arbitration process: Born, vol. I, at pp. 350-51 and 401. According to this doctrine, an arbitration clause should be analyzed as a separate agreement that is ancillary or collateral to the underlying contract: *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.*, [1981]

A.C. 909 (H.L.), at p. 980; see also *Heyman v. Darwins, Ltd.*, [1942] A.C. 356 (H.L.); *Prima Paint Corp. v. Flood & Conklin MFG. Co.*, 388 U.S. 395 (1967), at pp. 402 and 404; *Fiona Trust and Holding Corp. v. Privalov*, [2007] UKHL 40, [2007] 4 All E.R. 951. Put another way, an arbitration clause should be considered “autonomous and juridically independent from the main contract in which it is contained”: A. J. van den Berg, ed., *Yearbook Commercial Arbitration 1999* (1999), vol. XXIVa, at p. 176, as quoted in Born, vol. I, at p. 350.

[222] The separability doctrine is a logical extension of the rule created by this Court in *Dell* which states that a challenge to an arbitral tribunal’s jurisdiction should be considered first by the tribunal itself because arbitral tribunals have the competence to determine their own jurisdiction: paras. 84-85. I will refer to this holding as the “rule of systematic referral”. The same statutory provisions which ensure an arbitral tribunal’s competence to determine its own jurisdiction also ensure its competence to determine the invalidity of the underlying contract by providing that the arbitration agreement should be treated as an independent agreement for the purposes of such a determination: *Arbitration Act*, s. 17(1) and (2); UNCITRAL Model Law, art. 16(1). Given that the legislature saw fit to give the arbitral tribunal the competence to decide these questions, the legislative choice embodied in s. 17(2) should receive the same respect as the one embodied in s. 17(1). The relationship between this “competence-competence” principle and separability is highlighted by the fact that they are both provided for in art. 16(1) of the UNCITRAL Model Law.

[223] National courts around the world nearly uniformly recognize the separability doctrine, even where no legislation provides for it: Born, vol. I, at p. 361 and 390; R. Feehily, “Separability in international commercial arbitration; confluence, conflict and the appropriate limitations in the development and application of the doctrine” (2018), 34 *Arb. Intl.* 355, at pp. 356-57. In addition, some superior and appellate courts in Canada have already recognized the doctrine: see, e.g., *Krutov v. Vancouver Hockey Club Ltd.*, 1991 CanLII 2077 (B.C.S.C.); *NetSys Technology Group AB v. Open Text Corp.*, 1 B.L.R. (3d) 307 (S.C.J. Ont.), at para. 21; *Cecrop Co. v. Kinetic Sciences Inc.*, 2001 BCSC 532, 16 B.L.R. (3d) 15, at para. 25; *James v. Thow*, 2005 BCSC 809, 5 B.L.R. (4th) 315; *Haas v. Gunasekaram*, 2016 ONCA 744, 62 B.L.R. (5th) 1.

[224] The *Arbitration Act* and the UNCITRAL Model Law codify one aspect of the doctrine, that is, the preservation of an arbitral tribunal’s jurisdiction to rule on the validity of the underlying contract on the basis that the arbitration agreement is to be treated as a separate and independent contract for such purposes. However, the separability doctrine has wider significance. More broadly, the doctrine holds that an arbitration agreement is invalidated only by a defect relating specifically to the arbitration agreement itself and not by one relating merely to the underlying contract in which that agreement is found: *Fiona Trust*, at paras. 32-35, per Lord Hope; Feehily, at p. 373; Born, vol. I, at pp. 351, 457 and 466-69. In effect, the separability doctrine “immunizes the arbitration clause, protecting it from flaws or defects” in the underlying contract: Feehily, at pp. 371 and 373. Nonetheless, there may be instances

where the same circumstances which impugn the validity of the underlying contract also call the validity of the arbitration agreement into question: *Fiona Trust*, at para. 17, per Lord Hoffmann.

[225] Recognizing the separability doctrine has a number of implications for this appeal. For the purposes of Mr. Heller's challenge to the validity of the Arbitration Clause, the commitment to submit disputes to arbitration should be considered to be an independent agreement which is separate from the Service Agreement. Therefore, while the Choice of Law Clause and the Arbitration Clause appear together in the Service Agreement, the Choice of Law Clause applies to the Service Agreement as a whole and must be analyzed separately from the Arbitration Clause. Further implications are addressed below.

(2) Law Governing the Substantive Validity of the Arbitration Clause

[226] The Choice of Law Clause selects Dutch law to govern the Service Agreement. Owing to the separability doctrine, however, the validity of an arbitration agreement may be governed by a different substantive law than the one that governs the validity of the underlying contract in which the arbitration clause is found: Born, vol. I, at pp. 475-76 and 835; McEwan and Herbst, at pp. 8-1 to 8-6.

[227] Nonetheless, not much turns on this distinction in this appeal, for two reasons. The first is that the Arbitration Clause is likely governed by Dutch law, because the law of the underlying contract and the seat of arbitration are generally

considered to be persuasive factors in determining the law applicable to the arbitration agreement: N. Blackaby et al., *Redfern and Hunter on International Arbitration* (6th ed. 2015), at p. 158; *BNA v. BNB*, [2019] SGCA 84, at paras. 44-48 (CommonLII). The law of the Arbitration Clause is therefore likely Dutch law because of the Choice of Law Clause and the Place of Arbitration Clause — although I express no firm conclusions in this regard at this juncture. The second is that the parties have failed to prove Dutch law. In the absence of evidence proving the foreign law, the court may apply the law of the forum: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1053. For the purposes of this appeal, therefore, this Court may apply the law of Ontario to determine whether the Arbitration Clause is substantively valid.

[228] I wish to stress, however, that a court hearing a challenge to the validity of an arbitration agreement, even under domestic arbitration legislation, should not presume that the law of the forum always governs the substantive validity of the arbitration agreement. Neither should a court assume that the law applicable to the arbitration agreement is the same as the law that applies to the underlying contract.

### (3) Rule of Systematic Referral to Arbitration

[229] Mr. Heller's arguments against Uber's motion raise the same question as the one this Court considered in *Dell*: which body should decide first — a court or an arbitral tribunal? Given that the *International Act* implements the UNCITRAL Model Law, the rule of systematic referral from *Dell* clearly applies to motions brought under that Act. The rule of systematic referral from *Dell* also applies to the

*Arbitration Act*, which is largely based on the *Uniform Arbitration Act*, 1990 (online), drafted by the Uniform Law Conference of Canada (“ULCC”). This is because, despite slight modifications for the purposes of domestic arbitrations, the “organisation and the principles of the Uniform Arbitration Act are recognizably those of the Model Law”: *Uniform Arbitration Act*, p. 2-3. In particular, the *Arbitration Act* provides that an arbitral tribunal has the competence to rule on its own jurisdiction, including the ability to rule on challenges to the validity of the arbitration agreement: *Arbitration Act*, s. 17(1). Thus, *Dell* applies regardless of which arbitration legislation governs Uber’s motion for a stay.

[230] In *Dell*, this Court interpreted Quebec’s legislation implementing the UNCITRAL Model Law in the context of the *Civil Code of Québec*. It established a “general rule that in any case involving an arbitration clause, a challenge to the arbitrator’s jurisdiction must be resolved first by the arbitrator”: *Dell*, at para. 84. A court *may* depart from the rule of systematic referral to arbitration only if the challenge is based solely on a question of law or on a question of mixed law and fact that requires only a “superficial” consideration of the documentary evidence: *Dell*, at paras. 84-85. The court must also be satisfied that the jurisdictional challenge “is not a delaying tactic and will not unduly impair the conduct of the arbitration proceeding”: para. 86.

[231] Contrary to Abella and Rowe JJ.’s view, expressed at para. 36, this Court has clearly decided on the meaning of “superficial review”. A review is not

superficial if the court is required to review testimonial evidence: *Dell*, at para. 88. Put another way, “the court must not, in ruling on the arbitrator’s jurisdiction, consider the facts leading to the application of the arbitration clause”: *Dell*, at para. 84. Throughout her reasons in *Dell*, Deschamps J. carefully distinguished between the types of evidence a court can consider in ruling on a motion for a stay. She stated that when a challenge to the validity of the arbitration agreement requires a court to consider “factual evidence”, the court should normally refer the case to arbitration: *Dell*, at para. 85. The exception she mentioned for questions of mixed law and fact applies only if the questions of fact require only “superficial consideration of the documentary evidence in the record”: *Dell*, at para. 85. Deschamps J. then explained that one of the issues raised in the appeal required more than a superficial review of the record because it required a review of the “documentary and testimonial evidence” in the record: *Dell*, at para. 88. Thus, testimonial evidence is not seen as being reviewable on a superficial basis, and should be left for the arbitral tribunal. In the language of the *prima facie* test which this Court sought to incorporate into the analysis in *Dell*, the “nullity” of an arbitration agreement is “manifest” if, having regard to the contract in which it is found, the question of the validity of the arbitration agreement is a primarily legal one that can be answered without recourse to further evidence: see *Dell*, at paras. 75-77 and 83.

[232] In the cases in which it has applied the rule of systematic referral, this Court has remained faithful to this limit on the kind of evidence which may be considered on a motion for a stay. In *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35,

[2007] 2 S.C.R. 921, Dr. Muroff challenged the validity of an arbitration agreement in his cellphone contract with Rogers Wireless on the basis that it was abusive. The Court held that resolving the challenge would require more than a superficial review of the documentary evidence. Determining whether the arbitration agreement was abusive would have required the Court to look beyond the documentary evidence, given that “an arbitration clause is not necessarily abusive simply because it appears in a consumer contract”: para. 15; see also para. 25, per LeBel J. (concurring). This Court therefore declined to entertain Dr. Muroff’s challenge because it was dependent on testimonial evidence. Subsequently, in *Seidel*, the Court entertained a challenge to the validity of an arbitration agreement in a case in which a superficial review of the documentary evidence in the record was itself sufficient to establish the applicability of the legislation the Court relied upon to find that the arbitration clause was invalid: paras. 13 and 30. Therefore, this Court has applied the superficial review standard consistently since first articulating it in *Dell* — until this appeal.

[233] The new standard for superficial review introduced by Abella and Rowe JJ. allows for the production and review of considerable testimonial evidence. Superficial review will now incorporate a searching review of the record for the purpose of determining whether findings of fact can be made on the basis of apparently undisputed testimonial evidence, and this review might even involve cross-examination. This is a marked departure from the clear principles laid down in *Dell*, which were followed in *Rogers* and *Seidel*, and I therefore cannot accept it.



[234] This point is important because this appeal should turn on the rule of systematic referral. More than a superficial review of the documentary evidence is required, because Mr. Heller's arguments, like those of my colleagues Abella and Rowe JJ. and Brown J., are dependent upon testimonial evidence regarding Mr. Heller's financial position, his personal characteristics, the circumstances of the formation of the contract and the amount that would likely be at issue in a dispute to which the Arbitration Clause applies.

[235] Further, my colleagues avoid the operation of the rule of systematic referral by creating new exceptions to *Dell* which permit them to consider the testimonial evidence in the record. However, even if that evidence could properly be considered by a court ruling on a motion for a stay, it is lacking in many important respects. For example, there is no evidence that Mr. Heller was in a state of necessity or was incapacitated when he entered into the agreement. He had an unlimited amount of time to review the agreement before accepting it. His evidence suggests that he is capable of understanding the significance of the Arbitration Clause: A.R., vol. II, at p. 134. As counsel for Uber demonstrated in cross-examination, Mr. Heller is sufficiently knowledgeable that he was able to quickly grasp the implications of a change in Uber's fee payment structure and voice his concerns through the media: A.R., vol. III, at pp. 145-46. He also showed considerable sophistication in lodging over 300 complaints through Uber's internal dispute resolution procedure: A.R., vol. III, at p. 129. The record is simply not sufficient for this Court to conclude with certainty that Mr. Heller was vulnerable throughout the contracting process.

[236] In addition, my colleagues assert that the Arbitration Clause is inaccessible to Mr. Heller despite the fact that there is no evidence in the record regarding the comparative availability of third party funding for arbitration or litigation. This Court also has no indication as to what fraction of the CAN\$400,000,000 being sought in Mr. Heller's proceeding represents his individual claim against Uber. Nor is there any evidence regarding the comparative cost of pursuing a class action — although I note that the costs awarded in the Court of Appeal (CAN\$20,000) were greater than the amount of the ICC Fees (approximately CAN\$19,000), and the parties are not even at the certification stage of the class proceeding: C.A. reasons, at para. 75. I am of the view that all of this evidence is necessary, because I find it highly unlikely that the cost of pursuing this claim in the courts, whether individually or by way of a class action, would be very much less than the ICC Fees. Indeed, such a proceeding might even be more costly. It is therefore not the absolute dollar value of the ICC Fees which is at issue. I think that what is implicit in my colleagues' arguments about accessibility is an unstated assumption about the comparative accessibility of pursuing a class action, given the existence of a specialized third party litigation funding industry and lawyer fee structures for the pursuit of such claims. However, such assumptions should be grounded in evidence. As the record currently stands, this Court cannot say on the basis of the testimonial evidence that the Arbitration Clause makes dispute resolution any less accessible than litigation.

[237] In my view, my colleagues' efforts to avoid the operation of the rule of systematic referral to arbitration reflects the same historical hostility to arbitration which the legislature and this Court have sought to dispel. The simple fact is that the parties in this case have agreed to settle any disputes through arbitration; this Court should not hesitate to give effect to that arrangement. The ease with which my colleagues dispense with the Arbitration Clause on the basis of the thinnest of factual records causes me to fear that the doctrines of unconscionability and public policy are being converted into a form of *ad hoc* judicial moralism or "palm tree justice" that will sow uncertainty and invite endless litigation over the enforceability of arbitration agreements. This is in fact what the *Arbitration Act* and the UNCITRAL Model Law were designed to avoid.

(4) Proposed Exceptions to the Rule of Systematic Referral

[238] I will now address the exceptions to the rule of systematic referral proposed by the Court of Appeal as well as by Abella and Rowe JJ. and Brown J. I will confine my comments on Brown J.'s approach to his contention that s. 96 of the *Constitution Act, 1867* requires such an exception.

(a) *Systematic Referral and Challenges to the Validity of the Arbitration Agreement*

[239] The Court of Appeal appears to have held that the rule of systematic referral is confined to challenges relating to the scope of arbitration agreements, and

therefore does not apply to challenges to the validity of such agreements: C.A. reasons, at paras. 39-40. I disagree.

[240] The rule of systematic referral is based on the arbitral tribunal's competence to rule on its own jurisdiction. Article 16(1) of the UNCITRAL Model Law and s. 17(1) of the *Arbitration Act* both state that the arbitral tribunal has competence to rule on objections with respect to "the existence or validity of the arbitration agreement". In *Seidel* and in *Rogers Wireless*, this Court applied the rule of systematic referral to challenges to the validity of the arbitration agreements that were at issue. There is accordingly no basis in the words of either statute for excluding the rule of systematic referral from a challenge to the validity of an arbitration clause, and there is in fact authority from this Court to the contrary.

(b) *Systematic Referral and Accessibility*

[241] Abella and Rowe JJ. propose to create an exception to the rule of systematic referral that would apply where an arbitration agreement is deemed to be "too costly or otherwise inaccessible": paras. 38-46. With great respect, I am of the view that this Court should not create this exception to the rule of systematic referral. I also do not agree that, if such an exception were to be created, it should be applied on the basis of the record before the Court.

[242] First, and foremost, the rule of systematic referral is the product of an exercise of interpretation of the UNCITRAL Model Law. This means that any

exception to the rule must also be a product of statutory interpretation. However, Abella and Rowe JJ. do not purport to justify their proposed exception with reference to the words, the scheme, the context, the object, and the purposes of either statute, as this Court's jurisprudence requires: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. The exception they propose rests instead on policy considerations related to access to justice: paras. 38-39. While I appreciate the importance of those considerations, I am respectfully of the view that they cannot be used to make the *Arbitration Act* say something it does not say: see *Wellman*, at para. 79. Further, because Abella and Rowe JJ. propose this exception as a modification of the *Dell* framework itself, the exception must also be justified on the basis of an interpretation of the UNCITRAL Model Law which was interpreted in *Dell*.

[243] Second, the dissenting justices in *Dell* proposed a flexible approach to referral according to which the courts would have retained some discretion to fully entertain a challenge to an arbitration agreement's validity: para. 178, per Bastarache and LeBel JJ. (dissenting). The majority chose not to adopt this discretionary approach, preferring instead a rule of *systematic* referral to arbitration "in any case involving an arbitration clause": para. 84. Abella and Rowe JJ.'s exception would transform the rule of systematic referral by turning it into a rule of *situational* referral that is dependent on the circumstances of a given case. This situational "carve-out" of part of the rule of systematic referral would add to the grounds for judicial intervention in the arbitration process and thus create a perverse incentive to engage

in “parasitic” litigation as a delaying tactic: see J. Paulsson, *The Idea of Arbitration* (2013), at pp. 58-60. It would be open to future courts to endlessly identify issues which constitute “unforeseen circumstances” that *Dell* did not contemplate, thus sowing uncertainty and giving rise to incessant litigation with respect to the degree of scrutiny to apply when ruling on a motion for a stay. Inviting litigiousness is more likely to thwart access to justice than to advance it because litigiousness increases the time and cost of dispute resolution.

[244] Third, Abella and Rowe JJ. argue that courts are well positioned to mitigate the risk of spurious arguments being advanced against the validity of an arbitration agreement by awarding costs and requiring security for costs: para. 42. However, this Court contemplated the risk of spurious arguments being used as a delaying tactic in *Dell* and decided that the scope of review on a motion for a stay should be confined to a superficial review of the documentary evidence in order to counteract such tactics: *Dell*, at para. 84. If costs awards were an effective deterrent against delaying tactics, there would be no need to confine the scope of the review to a superficial review of the documentary evidence in the record at all. In addition, seeking security for costs would require a motion within the motion, thus adding further complexity and a potential for further delays.

[245] Fourth, Abella and Rowe JJ. observe “incidentally” that their approach would prevent the drafting of arbitration agreements which “exploit” what they see as a “significant loophole” in *Dell*: paras. 49-50. The exploitative loophole they are

worried about results from the ordinary operation of the rule of systematic referral to arbitration under an agreement which is governed by a foreign choice of law clause. This argument amounts to a critique of *Dell* itself. What is more, the critique is not grounded in legislative intent. There is no basis in the *Arbitration Act* or in the UNCITRAL Model Law for distinguishing between arbitration agreements which include a foreign choice of law clause from those which do not.

[246] Fifth, Abella and Rowe JJ. state that their exception applies where the fees to commence arbitration proceedings are “significant” relative to the plaintiff’s claim: para. 39. However, they provide no guidance on what amount might be considered “significant”, and this Court has no indication in the record regarding the size of Mr. Heller’s claim. They also express a concern that Mr. Heller may not reasonably be able to reach the physical location of the arbitration. But, as I explain in detail below, the choice of a foreign seat for arbitration should not be equated with the choice of the physical location of the arbitration proceedings. In fact, Uber has agreed to hold the proceedings in this case in Ontario. While it might be appropriate to disregard this concession on Uber’s part for the purpose of determining whether the contract is valid, there is no reason to do so in relation to Abella and Rowe JJ.’s fact-specific exception to the rule of systematic referral. There is therefore no basis for concluding that the ICC Fees are significant relative to Mr. Heller’s claim, given that the amount of the claim is unknown, or for concluding that he will be unable to reach the physical location of the arbitration, given that Uber has agreed to hold it in his home jurisdiction.

[247] For these reasons, I do not accept that an exception should be either created or applied in this case. If the Constitution requires such an exception, I would, of course, have to reconsider the issue. It is to that question which I now turn.

(c) *Systematic Referral and the Governor General's Constitutional Power to Appoint Superior Court Judges*

[248] My colleague Brown J. refers to a “constitutional dimension” which, in his view, demands an exception to the rule of systematic referral where arbitration is inaccessible in the context of the parties’ relationship: paras. 120 and 125. I will confine my comments here to the question whether the Constitution requires such an exception, as I will consider Brown J.’s additional arguments regarding public policy below. While I agree that access to justice and the rule of law are important considerations, I respectfully disagree that the rule of systematic referral would, absent an exception, infringe, or even engage, s. 96 of the *Constitution Act, 1867*.

[249] Section 96 of the *Constitution Act, 1867* assigns to the Governor General the power to appoint superior court judges. This Court has interpreted this provision as a restriction on the competence of provincial legislatures and Parliament to enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 30. In my view, legislation which facilitates the enforcement of agreements to submit disputes to



arbitration neither abolishes the superior courts nor removes any part of their core or inherent jurisdiction.

[250] As a preliminary matter, it is important to understand that arbitration is not litigation by another name: W. G. Horton, “A Brief History of Arbitration” (2017), 47 *Adv. Q.* 12, at p. 12. Rather, it is a substitute for the parties’ own ability to negotiate or to reach agreement through mediation, and is not based on a transference or denial of court power: Alberta Law Reform Institute, Final Report No. 103, *Arbitration Act: Stay and Appeal Issues* (2013), at para. 24. Courts retain an oversight role throughout the arbitration process and afterwards: *Arbitration Act*, ss. 6, 8, 10, 15, 17(8) and 45 to 48. Arbitration legislation, and supporting doctrines such as the rule of systematic referral, should not therefore be conceptualized as a limit on the supervisory jurisdiction of the courts. Instead, they should be seen as a positive reinforcement of the principle of party autonomy in that they require parties to an arbitration agreement to abide by their agreement.

[251] From this perspective, it is party autonomy, not statutory edict, which compels the parties to an arbitration agreement to refrain from litigation in the courts and to pursue the mode of dispute settlement to which they have previously agreed: see *Wellman*, at paras. 51-52. The legislation merely gives the parties to an arbitration agreement machinery they can use to enforce their agreement. Section 96 of the *Constitution Act, 1867* and the unwritten principle of the rule of law are not engaged because s. 96 “has never been construed (and cannot be) as forbidding two or more

citizens from appointing another as their ‘private judge’ to resolve their dispute”: *Quintette Coal Ltd. v. Nippon Steel Corp.* (1988), 29 B.C.L.R. (2d) 233 (S.C.). Further, “[a]s legislation similar in effect has been on the books for nearly 300 years without it being attacked as constitutionally outrageous, I think it too late to take the point”: *Stancroft Trust Ltd. v. Can-Asia Capital Co.* (1990), 67 D.L.R. (4th) 131 (B.C.C.A.), at p. 136. Thus, no constitutional issue arises. In my view, the possibility that the agreed-upon terms of a given arbitration agreement may be ill suited to a hypothetical claim for a small amount that is unrelated to the appeal now before the Court does not elevate the issue from one of private law to one of constitutional law.

[252] Another relevant — and important — consideration is the type of remedy courts are to grant in order to enforce arbitration awards. A court stays a proceeding that has been commenced in contravention of an arbitration agreement — it does not dismiss the action: *Arbitration Act*, s. 7. This has important practical ramifications, because a stay can be lifted. Further, a court hearing a motion for a stay may order a conditional stay and specify how the parties are to proceed to arbitration: see, e.g., *Popack v. Lipszyc*, 2009 ONCA 365 (CanLII); *Iberfreight S.A. v. Ocean Star Container Line A.G.* (1989), 104 N.R. 164 (F.C.A.); *Continental Resources Inc. v. East Asiatic Co. (Canada)*, [1994] F.C.J. No. 440 (F.C.); see also *Fuller Austin Insulation Inc. v. Wellington Insurance Co.* (1995), 135 Sask. R. 254 (Q.B.), var’d (1995), 137 Sask. R. 238 (C.A.). It is therefore wrong to conceptualize a successful motion for a stay as the end of the line for the plaintiff’s pursuit of their claim.

[253] It would also be wrong to characterize private arbitral tribunals as statutory tribunals, which are amenable to judicial “surveillance” by virtue of s. 96 of the *Constitution Act, 1867: Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, at para. 13, quoting *Knox v. Conservative Party of Canada*, 2007 ABCA 295, 422 A.R. 29, at para. 14. A statutory tribunal is “a body set up by statute and which has duties conferred on it by statute so that the parties are bound to resort to it”: *R. v. National Joint Council for the Craft of Dental Technicians (Dispute Committee)*, [1953] 1 Q.B. 704, at p. 706, quoted in *Roberval Express Ltée v. Transport Drivers, Warehousemen and General Workers Union, Local 106*, [1982] 2 S.C.R. 888, at pp. 893-94. By contrast, arbitration “is essentially a creature of contract, a contract in which the parties themselves charter a private arbitral tribunal for the resolution of their disputes”: *Astoria Medical Group v. Health Insurance Plan of Greater New York*, 182 N.E.2d 85 (N.Y. 1962), at p. 87, quoted in *Wellman*, at para. 52. Thus, the distinction between a statutory tribunal and a private arbitral tribunal is the greater autonomy which parties have and are free to exercise in the private arbitration context. That is why this Court’s jurisprudence distinguishes between a statutory tribunal and “a clearly consensual tribunal which owes its existence solely to the will of the parties”: *Roberval Express*, at p. 900; see also *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 104.

[254] I would add that, even if s. 96 were considered to be engaged, the constitutional right to access to the courts is not absolute: *British Columbia (Attorney*

*General*) v. *Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, at para. 17. The legislature has the power to impose conditions on how and when people have access to the courts. Any impediment to such access under the *Arbitration Act* or the *International Act* exists simply because the parties to an arbitration agreement must abide by their agreement. Payment of the hearing fees at issue in *Trial Lawyers Association* was a mandatory condition on litigants' access to the superior courts which had the effect of taking the choice of pursuing litigation in the superior courts away from a segment of society: para. 35. Similarly, the Alberta Court of Appeal's comment that "[i]nsurmountable preconditions . . . effectively amount to a total barrier to court access" concerned court orders which bar vexatious litigants from commencing proceedings in the courts unless the litigants fulfill certain preconditions: *Jonsson v. Lymer*, 2020 ABCA 167, at para. 67 (CanLII). By contrast, the *Arbitration Act* and the *International Act* deny access (to the limited extent that they do) only to "those who by agreement have surrendered their constitutional right of access": *Stancroft*, at para. 21. Since the legislature has the competence to impose conditions on access, these humble conditions must be permissible.

[255] For these reasons, I conclude that the rule of systematic referral applies unaltered to Uber's motion for a stay. The general rule is that the parties must be referred to arbitration unless Mr. Heller's challenge to the validity of the Arbitration Clause can be characterized as a pure question of law or a question of mixed law and fact which requires only a superficial review of the documentary evidence. If the arguments against the validity of the Arbitration Clause require more than a

superficial review of the documentary evidence, that will be sufficient to decide the appeal. However, as the parties have made submissions on the merits of Mr. Heller's challenge to the validity of the Arbitration Clause, I will also comment on the merits of their arguments.

(5) Does Determining Whether the Arbitration Clause Is Valid Require More Than a Superficial Review of the Documentary Evidence?

[256] Three main arguments have been raised against the validity of the Arbitration Clause. Mr. Heller argues the Arbitration Clause is invalid because it is unconscionable and because it is contrary to the *ESA*. Brown J. raises a separate argument that the Arbitration Clause is invalid because it is contrary to public policy. I address each of these arguments below in turn.

(a) *Doctrine of Unconscionability*

[257] Despite Abella and Rowe JJ.'s learned analysis of the theoretical underpinnings of the unconscionability doctrine, I am unfortunately unable to agree with their statement of that doctrine. In particular, I am concerned that their threshold for a finding of inequality of bargaining power has been set so low as to be practically meaningless in the case of standard form contracts. Abella and Rowe JJ. state that vulnerability in the contracting process may arise from "dense or difficult to understand terms" in the agreement: at para. 71. They also note that one situation in which a standard form contract might impair a party's ability to protect their interests

would be if it contained provisions which were “difficult to read or understand”:  
para. 89. I find this standard rather vague and illusory. I fear it might be open to abuse  
by a party to a standard form contract who chooses to enjoy the benefits of the  
agreement as long as it suits them, but who then chooses to rely on this opaque  
standard when called upon to honour an obligation which is not in their interest. As  
Brown J. observes, a lower threshold for finding that there is inequality of bargaining  
power risks exposing the terms of every standard form contract to review in order to  
ensure that they are substantively reasonable: para. 163. This would be an unwelcome  
development, as it would undermine private ordering and commercial certainty,  
which are important considerations in the law of contracts: see *Bhasin v. Hrynew*,  
2014 SCC 71, [2014] 3 S.C.R. 494, at para. 66.

[258] I therefore agree with Brown J.’s able exposition of the unconscionability  
doctrine in the general law of contracts. However, an arbitration agreement engages  
unique considerations which require an analytical approach that differs from the one  
he takes in para. 172. In particular, Mr. Heller directs his unconscionability arguments  
specifically at the Arbitration Clause, which should be considered a separate and  
autonomous contract for this purpose.

[259] I will now analyze Mr. Heller’s arguments and those of Abella and  
Rowe JJ. in light of the components of the unconscionability doctrine identified by  
Brown J., which I understand to be (1) a significant inequality of bargaining power  
stemming from a weakness or vulnerability, (2) a resulting improvident bargain, and

(3) the stronger party's knowledge of the weaker party's vulnerability: Brown J.'s reasons, at paras. 156, 159 and 164-66. However, I add that I would reach the same conclusions if I were to apply the test set out by Abella and Rowe JJ.

(i) Significant Inequality of Bargaining Power

[260] The key question in relation to this component of the doctrine is whether the weaker party “had a degree of vulnerability that had the potential to materially affect their ability, through autonomous, rational decision making, to protect their own interests”, thereby undermining the premise of freedom of contract: *Downer v. Pitcher*, 2017 NLCA 13, 409 D.L.R. (4th) 542, at paras. 37. The “personal characteristics or attributes of the weaker party are a fundamental consideration” in this regard: *Input Capital Corp. v. Gustafson*, 2019 SKCA 78, 438 D.L.R. (4th) 387, at para. 39.

[261] The vulnerability alleged by Mr. Heller relates to his high school education and his comparatively limited access to financial resources: R.F., at paras. 121-22. Establishing these facts would require the Court to consider testimonial evidence, which means that the rule of systematic referral is engaged and that the parties must be referred to arbitration. This conclusion suffices to dispense with Mr. Heller's unconscionability argument; however, I wish to address the question whether the testimonial evidence is adequate to support a finding of unconscionability on the merits.

[262] Even if the superficial review criterion did not apply, the testimonial evidence before this Court is contradictory on the question as to whether Mr. Heller had the capacity to understand and appreciate the significance of the Arbitration Clause. Mr. Heller's evidence established that he is capable of understanding the significance of the Arbitration Clause, but that he simply declined to read it before agreeing to the terms: A.R., vol. II, at p. 134. He was free to review the Service Agreement for as long he wished before communicating his acceptance: A.R., vol. II, at p. 16. And as counsel for Uber demonstrated in cross-examination, Mr. Heller showed considerable sophistication by lodging over 300 complaints through Uber's internal dispute resolution procedure and by communicating with the media shortly after a change had been made to Uber's fee payment structure: A.R., vol. III, at pp. 129 and 145-46. There is nothing in the record to suggest that he was rushed into accepting the terms of the Service Agreement, and no evidence regarding why he decided to become an Uber driver. There is accordingly no basis for finding that his capacity for autonomous self-interested decision-making was compromised or that the law's normal assumptions about free bargaining no longer hold true. Because this inquiry requires findings of fact based on conflicting evidence, this issue cannot be resolved on the basis of the record before the Court.

[263] Abella and Rowe JJ. find that there was inequality of bargaining power in this case because the Service Agreement in which the Arbitration Clause is found is a standard form contract, and because it was not accompanied by information about the cost of mediation and arbitration proceedings administered by the ICC's dispute



resolution bodies: para. 93. Of course, these circumstances would not be sufficient to find that there was inequality of bargaining power based on the approach articulated by Brown J., with which I agree: para. 162. Nonetheless, I appreciate the reasons of Abella and Rowe JJ. for what they do not say. They do not contend that an arbitration agreement in a standard form contract is itself unconscionable. Such a conclusion would conflict with the weight of authority from this Court:

. . . nothing in the *Arbitration Act* suggests that standard form arbitration agreements, which are characterized by an absence of meaningful negotiation, are *per se* unenforceable. Indeed, this Court's decision in *Seidel* — as well as its predecessors *Dell*, *Rogers*, and *Desputeaux* — confirm that the starting presumption is the opposite.

(*Wellman*, at para. 84)

[264] At first blush, Abella and Rowe JJ.'s point that it would not be clear to a person reading the Arbitration Clause that the selection of the ICC Rules means that initiating the arbitration process would entail the payment of US\$14,500 (approximately CAN\$19,000) in fees has some force. On reflection, however, my view is that individuals should be expected to be aware that any form of dispute settlement, including litigation in the courts, comes with a price. A person cannot read an arbitration clause and reasonably assume that the process will be free of charge. It has not been shown that the ICC Fees are out of step with the cost of pursuing litigation — or of pursuing arbitration under a different set of rules — for a claim involving an amount equivalent to the unknown amount of Mr. Heller's claim. I therefore find it difficult to accept Abella and Rowe JJ.'s speculation that Mr. Heller

would have had no reason to suspect that fees of this magnitude were required. With respect, they are effectively arguing that individuals have no reason to suspect that dispute settlement has a cost. To approach the matter as they do infantilizes individuals by viewing all of them as being bereft of autonomy and incapable of rational decision making. There is ample evidence in the record to suggest that Mr. Heller is not such an individual.

[265] Further, although Abella and Rowe JJ. do not expressly state that a standard form contract containing an arbitration clause is unconscionable, one wonders how a contract drafter could possibly anticipate the cumulative fees that would have to be paid in every possible arbitration scenario given the wide variety of disputes which could arise under an arbitration agreement. Arbitration is a private form of dispute resolution in which, generally speaking, the parties are required, at a minimum, to pay for the arbitral tribunal's time and expenses and for the venue, as well as to pay certain other costs. Abella and Rowe JJ. implicitly take the position that Uber should not have selected the ICC Rules because, in their view, the ICC Fees are substantively unfair. It is difficult to see how the drafter of a contract could anticipate the total of the fees to be paid in a non-institutional arbitration that would be conducted on an *ad hoc* basis under either the *Arbitration Act* or the *International Act*, which means that it is hard to see how an arbitration clause in a standard form contract could possibly be drafted in a way that would satisfy the requirements of Abella and Rowe JJ.'s approach to the unconscionability doctrine.

[266] Regrettably, I fear that the effect of their approach amounts to a sweeping restriction on arbitration clauses in standard form contracts, even if they did not intend such a consequence. This Court has stated that deciding whether to restrict arbitration clauses in standard form contracts is a matter for the legislature: *Seidel*, at para. 2; *Wellman*, at paras. 46 and 79-80. With respect, the approach taken by Abella and Rowe JJ. to the doctrine of unconscionability is therefore inconsistent with the proper law-making role of the courts. In our democracy, it is the legislature, and not the courts, which is primarily responsible for law reform: *R. v. Salituro*, [1991] 3 S.C.R. 654, at pp. 666-70. Major changes in the law are best left to the legislature, because reform should be considered with a wider view of how the new rule will operate in the broad generality of cases: pp. 666-68. A court of law may not be in a position to appreciate the economic, social and other policy issues at stake: p. 668.

[267] These concerns are heightened by the economic context of this appeal, which relates to the contractual arrangements of businesses operating in what some have styled the “sharing economy”: I. F. (Montreal Economic Institute), at para. 6. Enterprises with business models similar to that of Uber and individuals in Mr. Heller’s position are part of a vital and growing sector of Canada’s economy which could be stifled if the majority’s reduced threshold for inequality of bargaining power is adopted. This sector depends on standard form contracts that are agreed to electronically by businesses and the people who use their online platforms: I. F. (Montreal Economic Institute), at para. 12. Individuals in Mr. Heller’s position may have reduced opportunities to generate income in this sector of the economy if

businesses like Uber cannot be assured of certainty in their contractual arrangements, as certainty is essential for global business operations. This Court is simply not in a position to know what the fallout from Abella and Rowe JJ.'s approach might be.

[268] It is not the role of the courts to establish policies where the legislature has declined or omitted to do so. Ontario's Ministry of Labour, Training and Skills Development recently undertook a comprehensive review of the *ESA* in order to address the changing nature of work, including the sharing economy: *The Changing Workplaces Review: An Agenda for Workplace Rights — Final Report* (2017). That review culminated in amendments to the *ESA* that were enacted in the *Fair Workplaces, Better Jobs Act, 2017*, S.O. 2017, c. 22. If the legislature was concerned about arbitration agreements in this sector's standard form digital contracts, it could easily have amended the *ESA* to restrict such clauses, as it has in the case of consumer protection legislation: *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, ss. 7 and 8. Whether the legislature's omission was an oversight or a deliberate policy choice, any decision to restrict or not to restrict standard form contracts containing arbitration clauses is a matter for the legislature, not the courts.

[269] In the end, whether Mr. Heller suffered from a peculiar vulnerability that undermined his capacity to engage in rational autonomous decision making is a question of mixed law and fact which requires more than a superficial review of the documentary evidence. Therefore, the rule of systematic referral applies and the

parties must be referred to arbitration. I will nonetheless consider the other components of unconscionability below.

(ii) Improvident Bargain

[270] Mr. Heller's attack on the Arbitration Clause rests on three propositions: (1) the Place of Arbitration Clause forces him to travel to Amsterdam at his own expense, (2) the Choice of Law Clause excludes the application of the *ESA*, and (3) the selection of the ICC Rules entails the payment in advance of disproportionately high fees in order to initiate a dispute. I will address each of these propositions in turn, not because they could not cumulatively add up to a substantially unfair bargain, but because, in my view, the first two are unpersuasive, which leaves the third to stand on its own.

1. *Place of Arbitration Clause*

[271] Mr. Heller equates the Place of Arbitration Clause in the Arbitration Clause with a forum selection clause that requires him to travel to Amsterdam in order to pursue his claim. With respect, it is wrong to equate the designation of a foreign seat in an arbitration agreement with a forum selection clause.

[272] One major distinction relates to the fact that the discretion not to enforce a forum selection clause comes from the common law: see *Z.I. Pompey Industrie v. ECU - Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450. By contrast, a court's power to

decline to enforce an arbitration agreement is circumscribed by the exhaustive list in s. 7(2) of the *Arbitration Act*. The designation of a foreign place of arbitration is not one of the enumerated grounds for declining a stay.

[273] Another distinction stems from the fact that “[f]orum selection clauses purport to oust the jurisdiction of otherwise competent courts in favour of a foreign jurisdiction”: *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 1. If enforced, such a clause requires a litigant to commence a proceeding in the foreign forum, which may indeed involve travelling to the foreign jurisdiction. The place (or “seat”) of arbitration, by contrast, is a legal concept which denotes the parties’ selection of a particular jurisdiction “whose arbitration law governs proceedings, and under whose law the arbitral award is made”: Born, vol. I, at pp. 206; Born, vol. II, *International Arbitral Procedures and Proceedings*, at p. 1596. The designation of a foreign jurisdiction as the place of arbitration is therefore akin to a choice of law clause for the procedural aspects of the arbitration process.

[274] However, the place of arbitration “is not synonymous with the location where arbitral hearings take place”: *Alberta Motor Association Insurance Co. v. Aspen Insurance UK Limited*, 2018 ABQB 207, 17 C.P.C. (8th) 81, at para. 147. There is no obligation to actually conduct the arbitration at the place of arbitration. Article 20(2) of the UNCITRAL Model Law provides that an arbitral tribunal may meet, and hear witnesses or submissions from the parties, at any place it considers appropriate, regardless of the place of arbitration selected by the parties. The

*Arbitration Act* includes a substantively a similar provision: s. 22(2). Article 18 of the ICC Arbitration Rules provides that the arbitral tribunal may conduct hearings and meetings at any location it considers appropriate: p. 26. In addition, art. 3(5) of the ICC Expedited Rules provides that the arbitral tribunal may decide the dispute solely on the basis of documentary evidence and written submissions, and that it may conduct hearings “by videoconference, telephone or similar means of communication”: p. 72. In practice, it often happens that, although the parties have agreed to arbitration in one jurisdiction, the arbitration proceedings are in fact conducted at other locations for the sake of convenience: McEwan and Herbst, at p. 7-1 to 7-8; Born, vol. II, at p. 1596.

[275] It is true that the UNCITRAL Model Law, the *Arbitration Act* and the ICC Arbitration Rules leave the decision regarding the location of the proceedings to the arbitral tribunal, but there is no reason to presume that an arbitral tribunal would act arbitrarily and callously by compelling a party to travel overseas unnecessarily and at great hardship. Indeed, there is good reason to assume otherwise. The *Arbitration Act* requires the arbitral tribunal to treat the parties equally and fairly: s. 19(1). Further, art. 22(1) and (4) of the ICC Arbitration Rules provide that the arbitral tribunal must make every effort to conduct the arbitration in an expeditious and cost-effective manner and must ensure that each party has a reasonable opportunity to present its case: pp. 27-28. I therefore see no basis for assuming that the arbitral tribunal would require Mr. Heller to travel to Amsterdam in order to participate in arbitration proceedings. Hearings, if any need to be conducted, can

reasonably be expected either to be held in Ontario or to be conducted remotely. Further, this Court should take judicial notice of the fact that modern communications technology makes it unnecessary for an Ontario resident to travel overseas in order to pay the ICC Fees or to make initial representations to the arbitral tribunal.

[276] The Arbitration Clause thus cannot be impugned on the basis that the Place of Arbitration Clause would require Mr. Heller to travel to a foreign jurisdiction in order to initiate a claim or to participate in the hearings, thereby incurring expenses, and any arguments to that effect cannot stand. I therefore see no basis for concluding that the Place of Arbitration Clause favours Uber significantly at Mr. Heller's expense.

## 2. *Choice of Law Clause*

[277] In light of the separability doctrine, it is critical, for analytical purposes, to distinguish between the validity of the Service Agreement, or of one of its terms, and the validity of the Arbitration Clause: Born, vol. I, at pp. 401-2 and 834; see also *Fiona Trust*. The result is that the alleged invalidity of the Choice of Law Clause on the basis that it is unconscionable does not affect the validity of the Arbitration Clause. Arguments directed at the alleged unfairness, whether substantive or procedural, of having the Service Agreement governed by a foreign law are therefore analytically distinct from those concerning alleged unfairness arising from the Arbitration Clause itself. As a result, arguments directed at the Choice of Law Clause are not a bar to Uber's motion for a stay.



[278] Approaching the validity of the Arbitration Clause in this fashion is consistent with this Court's jurisprudence. In *Seidel*, the arbitration agreement provided that "[a]ny claim, dispute or controversy . . . shall be determined by . . . arbitration" and that, "[b]y so agreeing, [Ms. Seidel] waive[d] any right [she] may have to commence or participate in any class action against TELUS Mobility": para. 13 (emphasis added; emphasis in original deleted). This Court declined to view the class action waiver as separate from the arbitration provision because the contract was "structured internally to make the class action waiver dependent on the arbitration provision": para. 46. By contrast, in the instant case, the Choice of Law Clause is not dependent on arbitration being the parties' chosen means to settle disputes. Despite the fact that the text of the Choice of Law Clause appears in the same paragraph of the Service Agreement as the text of the Arbitration Clause, the two clauses have very different legal effects and should be considered to be separate.

[279] It would be different if Mr. Heller was arguing that unfairness results from having the Arbitration Clause itself governed by Dutch law, but he has neither argued nor proven that to be the case. As with his arguments regarding the *ESA*, which I will address below, the alleged invalidity of the Choice of Law Clause has no bearing on the validity of the Arbitration Clause.

[280] Even if the separability doctrine did not apply, there is nothing unusual or offensive about a choice of law clause in an international contract. Uber is a company with global operations and is headquartered in the Netherlands. Its selection of Dutch

law to govern the contract is merely an attempt at legal risk management designed to ensure a degree of certainty in its operations. For a company with global operations, this serves a valid commercial purpose which courts should not interfere with lightly. A court that does so risks undermining the certainty that is needed in conducting international commerce. Further, although the Choice of Law Clause does confer a benefit on Uber (namely, legal certainty in the company's global operations), it is unclear that it does so at any cost to Mr. Heller, given that neither party has proven the foreign law and, as I will explain below when I address Mr. Heller's arguments with respect to the *ESA*, it remains to be seen whether the arbitral tribunal would apply the *ESA* in any event.

### 3. *Selection of Institutional Procedural Rules*

[281] As I have refuted Mr. Heller's arguments about the effect of the Place of Arbitration Clause and the Choice of Law Clause, all that remains of his unconscionability argument is the submission that the selection of the ICC Rules imposes the payment of disproportionately high fees, which total US\$14,500, or approximately CAN\$19,000. This disproportionality argument has two branches: (1) the ICC Fees are a disincentive to pursue hypothetical claims for small amounts; and (2) the ICC Fees are disproportionate to Mr. Heller's ability to finance the pursuit of a claim for a larger amount, because his income as an Uber driver is approximately CAN\$20,800-31,200 a year. I will address each of these branches in turn, as I consider them to be distinct arguments for analytical purposes.

[282] In my view, any commitment to submit disputes to arbitration should be regarded as generally imposing mutual obligations on both parties. It does not impose an obligation on one party in favour of the other. Rather, “[i]t embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution”: *Heyman*, at pp. 373-74, per Lord Macmillan. An arbitration agreement thus involves a mutuality of exchange.

[283] If an arbitration agreement involves a mutuality of exchange, I fail to see how mandatory fees which apply to disputes initiated by either party would not involve a similar mutuality of exchange. The ICC Fees make pursuing a claim for a small amount just as uneconomic for Uber as for Mr. Heller. By contrast, a one-sided arbitration clause which requires one party to submit disputes to arbitration while the other party retains the right to litigate might not involve a mutuality of exchange: see, e.g., *Houston v. Exigen (Canada) Inc.*, 2006 NBQB 29, 296 N.B.R. (2d) 112, at para. 12. Therefore, to the extent that any unfairness results from the imposition of high fees on hypothetical claims for small amounts, I do not consider this situation to be sufficiently unfair, given the mutuality of the exchange.

[284] In any event, the actual amount of Mr. Heller’s claim is unknown. While it is possible — from the point of view that “anything can happen” — to discern from the Arbitration Clause itself that a dispute over a small amount could, in theory, arise, establishing that such a dispute is likely or foreseeable under the contract would

require the production and review of testimonial evidence, thereby engaging the rule of systematic referral. To proceed otherwise would be to hold that a contract is invalid on the basis of speculation.

[285] An imbalance might be observed between the size of the fees and Mr. Heller's ability to finance a claim for a larger amount, because Uber clearly has greater financial resources than he does. However, this aspect of Mr. Heller's argument requires the production and review of testimonial evidence, which means that the rule of systematic referral applies.

[286] Even if this Court were to consider Mr. Heller's testimonial evidence, the improvidence of a transaction has to be measured as of the time the contract is formed: *Abella and Rowe JJ.*'s reasons, at para. 74. The Court has no evidence regarding Mr. Heller's financial position at the time he entered into the Service Agreement. The only information the Court has regarding his financial means is the income he derived as an Uber driver after entering into the Service Agreement. Additionally, the Court does not have any evidence before it regarding the availability of third party funding for arbitration or the comparable cost of, for example, pursuing a class proceeding. And, I repeat, the size of Mr. Heller's individual claim is unknown. There is simply no basis for concluding that the ICC Fees render his rights under the Service Agreement unenforceable.

(iii) Knowledge

[287] A finding that Uber had, at a minimum, constructive knowledge of Mr. Heller's peculiar vulnerability is required in order for a court to conclude that the Arbitration Clause is unconscionable: *Downer*, at para. 47; *Input Capital*, at paras. 48 and 61-64. In the case at bar, the Court of Appeal found that Uber had such knowledge, but I am of the view that it erred in principle regarding the kind of vulnerability which would be sufficient to establish inequality in bargaining power and that this error tainted its finding with respect to knowledge. The Court of Appeal found that Uber knew its drivers were "vulnerable to the market strength of Uber": para. 68. Uber's knowledge that it is a large company which uses standard form contracts does not suffice in this regard because contracts of adhesion, including agreements to arbitrate, are generally enforceable: *Seidel*, at para. 2.

[288] The vulnerability alleged by Mr. Heller relates to his comparatively limited access to financial resources and the fact that he has only a high school education. Given that the Driver App is widely accessible to members of the public, it would have been impossible for Uber to be aware of Mr. Heller's specific income and education level when he first decided to become an Uber driver. Uber could not have known that he intended to use the Driver App as his primary source of income, given that Uber drivers are not required to use the App at any given time and may therefore use it casually as a means to supplement their income. There is a lack of evidence as to why Mr. Heller chose to sign up for the Driver App, and why he chose to adopt it as his primary source of income and not to seek other work. There is also no evidence of his income at the time he entered into the contract. In any event, such questions

would require the production and review of testimonial evidence, which would lead the Court to stray impermissibly beyond the documentary record.

[289] Whether the unconscionability doctrine renders the Arbitration Clause unenforceable is thus a question of mixed law and fact that requires more than a superficial review of the documentary evidence. The parties should therefore be referred to arbitration.

(iv) Application of Unconscionability to Individual Terms of an Arbitration Agreement

[290] In a footnote to their reasons, Abella and Rowe JJ. assert a contested point of substantive law: that the unconscionability doctrine may be applied to individual terms of an agreement: fn. 8. I agree with Brown J. that the unconscionability doctrine should not be applied to individual terms of a contract, but I take issue with how Abella and Rowe JJ. apply their approach to the unconscionability of individual terms to the contractual arrangements now before the Court.

[291] If Abella and Rowe JJ.'s approach were to be applied in light of the separability doctrine, which, at para. 96, they purport to accept, they would be led to the conclusion that the Place of Arbitration Clause and the selection of the ICC Rules are individually unconscionable terms of the Arbitration Clause. In their opinion, this does not render the Arbitration Clause itself unenforceable, because they assert that

the unconscionability doctrine can be applied to individual terms without rendering the entire agreement unenforceable: fn. 8.

[292] Even if the separability doctrine did not apply, it would be arbitrary to conclude that the individual term committing the parties to submit disputes to arbitration is invalid on the basis that the clause providing for it is close to clauses providing for other supposedly unenforceable terms involving the selection of certain institutional procedural rules for arbitration proceedings, of a foreign seat for such proceedings and of a foreign law to govern their agreement. Abella and Rowe JJ. relieve Mr. Heller of his commitment to submit disputes to arbitration on the basis that they find the terms for the arbitration offensive even though the commitment to arbitrate is itself left unimpeached. This result is impractical from a commercial standpoint, as well as being unjustified by Abella and Rowe JJ.'s own approach to unconscionability.

[293] Therefore, it follows from Abella and Rowe JJ.'s approach to the doctrine of unconscionability that the Arbitration Clause is valid and enforceable. I will now consider whether Mr. Heller's other arguments relating to whether the Arbitration Clause is invalid under the *ESA* require more than a superficial review of the documentary evidence in the record.

(b) *The ESA*

[294] My colleagues decline to address the *ESA* issue because they would decide the appeal on the basis of unconscionability or, in the case of *Brown J.*, on the basis of public policy. As I do not agree with their disposition of those issues, and for the sake of completeness, I must also analyze Mr. Heller's arguments with respect to the question whether the Arbitration Clause is invalid under the *ESA*.

[295] Mr. Heller raises two arguments in support of his position that the Arbitration Clause is invalid under the *ESA*. First, he argues that the Arbitration Clause amounts to an unlawful contracting out of an employment standard because he says it prevents him from accessing the *ESA*'s statutory enforcement mechanisms. Second, he submits that the choice of Dutch law to govern the Service Agreement also amounts to an unlawful contracting out of an employment standard.

[296] Although these two arguments are distinct, they suffer from the same fatal flaw. For the purposes of both of them, Mr. Heller submits that it is appropriate to presume that he is an employee, which means that the *ESA* applies. In *Seidel*, this Court was able to apply the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"), to find that the arbitration agreement at issue was partially invalid, because a superficial review of the documentary evidence was sufficient to establish the applicability of the legislation. By contrast, the Service Agreement expressly states that it is an agreement to access and license software and that it does not create an employment relationship: A.R., vol. II, pp. 34 and 109-10. The question whether Mr. Heller is an employee goes to the heart of the dispute between the



parties. The Court of Appeal recognized that this issue was central to the dispute, as it repeatedly relied on an assumption that Mr. Heller is an employee in its analysis: paras. 24, 42, 45-46, 49-50 and 74. However, a court hearing a motion for a stay cannot make such an assumption without usurping the role of the arbitral tribunal.

[297] This means that the provision of the *ESA* on which Mr. Heller relies in support of a determination of invalidity of the Arbitration Clause is unavailable to him for the purposes of this motion:

**No contracting out**

**5** (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.

A court cannot determine that an arbitration agreement is invalid pursuant to s. 5 without first finding that the parties involved are an employer or agent of an employer and an employee or agent of an employee.<sup>9</sup> Whether Mr. Heller is an employee within the meaning of the *ESA* is a complex question of mixed law and fact which cannot be decided on the basis of the record before the court, nor should it be: the rule of systematic referral applies, and the parties should be referred to arbitration.

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<sup>9</sup> Mr. Heller did not rest his argument on the common law doctrine of statutory illegality, and I decline to consider it in the absence of submissions from the parties: see *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] 1 S.C.R. 249.

[298] Nonetheless, because the parties have made submissions on the merits of the challenge under the *ESA*, I find that it will be helpful to comment on some of the legal aspects of this challenge.

(i) Contracting out of the Enforcement Mechanisms by Means of an Arbitration Clause

[299] Mr. Heller argues that the Arbitration Clause amounts to a contracting out of an employment standard in that it precludes him from filing a complaint with the Ministry of Labour pursuant to s. 96 of the *ESA* in which he would allege that he has been misclassified. The flaw in his argument is that the ability to file a complaint under s. 96 of that Act is not an employment standard. An “employment standard” is a “requirement or prohibition [under the *ESA*] that applies to an employer for the benefit of an employee”: *ESA*, s. 1(1). Even if I assume, without deciding, that s. 96 of the *ESA* operates “for the benefit of an employee”, it clearly does not require an employer to do — or prohibit an employer from doing — anything. It therefore does not provide for an employment standard.

[300] In addition, nothing in the record indicates that Mr. Heller has attempted to make a complaint under s. 96 of the *ESA*. Instead, he filed a multi-million dollar class proceeding. It may be possible to interpret the Arbitration Clause such that it does not apply to s. 96 of that Act. As the parties expressly represented in the Service Agreement that they are not in an employment relationship, it may be open to a court or an arbitral tribunal to conclude that s. 96 of the *ESA* was not reasonably within

their contemplation. I note in this regard that where a term of a contract is capable of two constructions, one which renders the term lawful and one which renders it unlawful, the construction which supports the validity and legality of the term is to be preferred: J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 772-73.

[301] Mr. Heller also argues that the *ESA* precludes arbitration as a means of pursuing claims under that Act. The opposite is true, however, as there is no express prohibition on arbitration in the *ESA* and the *ESA* “cannot be assumed to exclude arbitral jurisdiction unless it expressly so states”: *Desputeaux*, at para. 42. When the legislature wants to exclude arbitration, it is able to express itself in very clear language, and it has in fact done so in other statutes: see, e.g., *Consumer Protection Act, 2002*, s. 7(2); *Energy Consumer Protection Act, 2010*, S.O. 2010, c. 8, s. 3(3); *Payday Loans Act, 2008*, S.O. 2008, c. 9, s. 39(2). Further, the objective of the *ESA*’s enforcement provisions is “to make redress available, where it is appropriate at all, expeditiously and cheaply”: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 27. Arbitration is entirely consistent with this objective. Given arbitration’s inherent flexibility, this Court’s numerous statements encouraging and professing the benefits of arbitration, and the legislature’s clear pro-arbitration stance as indicated in the *Arbitration Act* and the *International Act*, I would be very slow to conclude that arbitration is excluded as an acceptable means of dispute resolution under the *ESA*: *Seidel*, at para. 23; *Wellman*, at paras. 48-56.

(ii) Contracting out of the *ESA* by Means of a Choice of Law Clause

[302] Mr. Heller submits that the Arbitration Clause amounts to a contracting out of the entire *ESA* as a result of the Choice of Law Clause. However, in light of the separability doctrine, the Choice of Law Clause must be understood as a part of the Service Agreement, while the Arbitration Clause must be considered to be a separate contract which is independent of the Service Agreement. Therefore, even if I were to assume, without so deciding, that the Choice of Law Clause is invalid, a finding to that effect would not, on its own, render the Arbitration Clause invalid because an arbitration agreement generally survives the invalidity of the underlying contract, or of a term therein.

[303] Further, the *ESA* only renders invalid the individual terms of an employment agreement which amount to a contracting out of an employment standard, not the entire employment agreement: *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1001. Therefore, this is not one of those cases in which the invalidity of the underlying contract also entails the invalidity of the arbitration agreement: *Fiona Trust*, para. 17, per Lord Hoffmann. The alleged invalidity of the Choice of Law Clause does not undermine the validity of the Arbitration Clause. Therefore, Mr. Heller's argument is not a bar to Uber's motion for a stay.

[304] In addition, since the Service Agreement expressly states that it is an agreement to license software and that it does not create an employment relationship, it may be open to the arbitral tribunal to find that the contracting parties did not intend to exclude the operation of mandatory employment legislation in the jurisdiction in

which the contract was to be performed. Given that the contract did not purport to create an employment relationship, it is unlikely that the drafters contemplated the possibility that employment legislation would apply to the contract.

[305] In any event, the parties' choice of law does not oust mandatory rules, particularly mandatory statutory rules that are applicable in a jurisdiction with a strong nexus to the dispute (in this case, Ontario): S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2nd ed. 2016), at pp. 298-300; G. A. Bermann, "Mandatory rules of law in international arbitration", in F. Ferrari and S. Kröll, eds., *Conflict of Laws in International Arbitration* (2011), 325, at pp. 333-34; see also *Williams v. Amazon.com, Inc.*, 2020 BCSC 300, at paras. 61-71 (CanLII). While the parties produced no evidence on whether an arbitral tribunal seated in the Netherlands and applying Dutch law would apply the *ESA*, it does not follow merely from the choice of Dutch law that the *ESA* would not be applied in relation to the dispute. Simply assuming that the *ESA* will not apply smacks of the old common law mistrust of arbitration which the *Arbitration Act* was intended to put to rest: *Wellman*, at para. 49.

[306] In conclusion on the *ESA* issue, neither of Mr. Heller's arguments warrants holding that the Arbitration Clause is invalid, as the rule of systematic referral negates both of them and, in any event, the substance of his arguments does not justify the relief he seeks.

(c) *Doctrine of Public Policy*

[307] My colleague Brown J. proposes to create a new common law rule that contractual provisions which have the effect of prohibiting access to dispute resolution are contrary to public policy: paras. 119-21 and 129-31. He concludes that the selection of the ICC Rules in this case is contrary to public policy, because the ICC Fees are disproportionate in light of the parties' relationship, and that this renders the Arbitration Clause itself invalid.

[308] Like Abella and Rowe JJ.'s unconscionability analysis, Brown J.'s approach is dependent on testimonial evidence for the purpose of establishing that the ICC Fees are disproportionate relative to the amount that would likely be at issue in a dispute under the Service Agreement and to the income Mr. Heller earns as an Uber driver: Brown J.'s reasons, at para. 132. His approach therefore requires more than a superficial review of the documentary evidence, and the parties should be referred to arbitration. Nonetheless, even if the rule of systematic referral did not apply, I also respectfully disagree with the legal and factual merits of the public policy analysis Brown J. expounds in his carefully drafted reasons.

[309] The common law of contracts is fundamentally committed to ensuring "the freedom of contracting parties to pursue their individual self-interest": *Bhasin*, at para. 70. Thus, the doctrine of public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds": *In re Estate of Millar (Charles), Deceased*, [1938] S.C.R. 1, at p. 7, quoting *Fender v. Mildmay*, [1937] 3 All E.R.

402, at p. 407. This is a high hurdle to overcome. With respect, I am not persuaded that the public policy concerns my colleague identifies justify overriding the “very strong public interest in the enforcement of contracts”: *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 123, per Binnie J. (dissenting, but not on this point). In this regard, I view the *Arbitration Act* and the *International Act* as strong statements of public policy which favour enforcing arbitration agreements: see *Haas*, at paras. 10, 40 and 58; *Wellman*, at para. 54.

[310] Deciding whether to submit disputes to arbitration or to pursue litigation in the courts involves trade-offs. In arbitration, the parties trade the procedural certainty of the courts and the opportunity to appeal an unfavorable decision for the procedural flexibility, expediency, and efficiency of arbitration. There is no guarantee that arbitration will always yield the correct decision, but the courts are equally unable to offer that guarantee: L. Y. Fortier, “Delimiting the Spheres of Judicial and Arbitral Power: ‘Beware, my Lord, of Jealousy’” (2001), 80 *Can. Bar Rev.* 143. Deciding whether this trade-off is in the parties’ best interests rests with them, not with the courts.

[311] Just as there are many valid commercial reasons for parties to use exclusion clauses, including to allocate risks, there are also many valid commercial reasons for parties to use an arbitration agreement in which they select a particular international arbitral institution’s procedural rules: *Tercon*, at para. 102, per Binnie J.

(dissenting). One such reason might be to have the parties share the risk that recourse to arbitration may not be economical in the case of a claim for a small amount, although Mr. Heller would of course be free to use Uber's internal dispute resolution procedure, as he already has many times. However, should a claim for a large amount arise, the parties would have access to a world-class institution to aid in resolving the dispute. This is a valid contractual arrangement with which courts should not interfere. Given the mutuality of exchange the Arbitration Clause involves, it bears no resemblance to the clause at issue in *Novamaze Pty Ltd. v. Cut Price Deli Pty Ltd.* (1995), 128 A.L.R. 540 (F.C.), which was clearly one-sided.

[312] In any event, the pursuit of access to justice and the enforcement of arbitration agreements are often complementary objectives. Indeed, one of the objectives of the *Arbitration Act* is to further access to justice by encouraging the use of arbitration: *Wellman*, at para. 135. Arbitration enhances access to justice because it can be more expedient and less costly than litigation: para. 135. The policy that parties to a valid arbitration agreement should abide by their agreement furthers access to justice by preventing delaying tactics which hamper access to dispute resolution: para. 135. By contrast, widening the grounds for judicial intervention, as Brown J. would do, is as likely to undermine access to justice as to promote such access, because it would incentivize litigation as a delaying tactic, thereby increasing the time for, and cost of, dispute resolution.



[313] While it is often complementary to other legislative objectives, the pursuit of access to justice should not “be permitted to overwhelm the other important objectives pursued by the *Arbitration Act*”: *Wellman*, at para. 83. The Act also pursues another important objective: it gives effect to party autonomy by permitting parties to craft their own dispute resolution mechanism through consensual agreement: *Wellman*, at para. 52. Moreover, concluding that an arbitration agreement is invalid on public policy grounds without impeaching the parties’ consent to the agreement undermines another objective of the *Arbitration Act*, that of holding parties to their commitment to submit disputes to arbitration where they have agreed to do so: *Wellman*, at para. 49, quoting *Ontario Hydro v. Denison Mines Ltd.*, 1992 CarswellOnt 3497 (Gen. Div.) (WL Can.).

[314] Similarly, the rule of law is not a “tool by which to avoid legislative initiatives of which one is not in favour”: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 67. On the contrary, the rule of law requires courts to “give effect to the Constitution’s text, and apply, by whatever its terms, legislation that conforms to that text”: *Imperial Tobacco*, at para. 67. As a motion for a stay in favour of arbitration does not impinge on the Governor General’s power to appoint judges under s. 96 of the *Constitution Act, 1867*, I see no reason why this Court should not seek to give effect to the legislature’s objectives as embodied in the *Arbitration Act* and the *International Act*.

[315] Further, when considering whether, or how, to refashion old common law doctrines regarding arbitration, this Court should, in my view, follow its decision in *Wellman* to embrace a more modern approach to arbitration law. According to this approach, arbitration is “an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts”: *Inforica*, at para. 14, quoted in *Wellman*, at para. 56. Therefore, doctrines based on the notion that only superior courts are capable of granting remedies for legal disputes should no longer be applied. This Court should not seek to roll back the tide of history by breathing new life into authorities which are irreconcilable with the modern approach to arbitration.

[316] I appreciate Brown J.’s able attempt to provide a new conceptual justification for the common law doctrine: paras. 111-14. However, when this new justification is considered alongside his reformulation of the substantive doctrine, these innovations cannot be said to amount to an incremental development in the law: paras. 119-21 and 129-31. Rather, in my view, this is an entirely new common law rule governing the validity of arbitration agreements.

[317] Additionally, the comparative suitability of litigation, arbitration and other methods of dispute resolution for various classes of persons in various circumstances is a complex, polycentric policy decision that involves a host of different interests, objectives and solutions. Such questions do not fall to be answered

by the courts, as they are instead matters for the elected policy-makers who sit in the legislature: *Wellman*, at para. 79.

[318] My concerns about the limits of the courts' institutional capacity to fully consider questions in this regard are heightened by Brown J.'s reliance on s. 96 of the *Constitution Act, 1867*, which risks permanently restraining the legislature's competence in the future to enact policies which promote access to civil justice outside the courtroom context. Although I appreciate Brown J.'s attempt to corral his proposed rule, public policy is an "unruly horse", and I fear that once this Court sits astride that horse, judges may be led back to the days when they displayed overt hostility to arbitration, treating it as a second-tier method of dispute resolution: *Tercon*, at para. 116.

[319] Finally, while Brown J. maintains that the ICC Fees bar Mr. Heller from bringing a claim of any size against Uber, there is no evidence before this Court regarding the actual size of Mr. Heller's claim against Uber or the possible availability of third party funding for the pursuit of his claim: Brown J.'s reasons, at para. 132. Neither is there any evidence of his income at the time of the formation of the contract. There is, therefore, an insufficient evidentiary basis for Brown J.'s conclusion given the testimonial evidence in the record. The analysis requires an understanding of the parties' ability to finance the pursuit of arbitration proceedings, and of the comparative availability of litigation funding. As the record currently stands, it is difficult to accept that approximately CAN\$19,000 in fees for the pursuit

of arbitration can be said to amount to a total bar on dispute resolution in this case when the costs awarded to Mr. Heller in the Court of Appeal amounted to CAN\$20,000: C.A. reasons, at para. 75. Given the inadequacy of the record, this appeal differs markedly from *Lymer*, in which the Alberta Court of Appeal found that a court order barring an undischarged bankrupt from commencing or continuing court proceedings until he paid all costs awards against him in full constituted an insurmountable precondition to court access: para. 67. Therefore, I cannot conclude, as Brown J. does, that the ICC Fees act as an insurmountable precondition that prevent Mr. Heller from commencing a claim: Brown J.'s reasons, at para. 132.

[320] I conclude that the selection of the ICC Rules in this case is not contrary to public policy. Because each of the arguments against the validity of the Arbitration Clause requires more than a superficial review of the documentary evidence in the record, the parties should be referred to arbitration. The remedial options available to a court on a motion for a stay remain to be considered, however.

E. *Possible Remedies on a Motion for a Stay*

[321] My colleagues put forward different theories to conclude that the Arbitration Clause is invalid. Even though none of their theories impugn the parties' basic commitment to submit disputes to arbitration, my colleagues find that that commitment is invalid. They appear to conceptualize the available relief as involving a stark choice between rigidly enforcing the arbitration agreement and finding that the entire arbitration agreement is invalid. In my view, the pro-arbitration stance that has

been taken by legislatures across Canada and which is embodied in this Court's jurisprudence supports a generous approach to remedial options which will facilitate the arbitration process. Two such options are (1) ordering a conditional stay of proceedings and (2) applying the doctrine of severance. I address each of these options below.

(1) Conditional Stay of Proceedings

[322] If the exceptions in s. 7(2) of the *Arbitration Act* or art. 8(1) of the UNCITRAL Model Law do not apply, the legislation directs a stay of the proceedings: *Arbitration Act*, s. 7(1); *International Act*, s. 9; UNCITRAL Model Law, art. 8(1). A stay is mandatory in such circumstances, but the *Arbitration Act* and the *International Act* are silent as to what conditions, if any, may be imposed on the stay. However, s. 106 of the *Courts of Justice Act*, which Uber cited in its notice of motion, provides that a court may stay a proceeding on such terms as it considers just: A.R., vol. II, at p. 88. Although it will usually be unnecessary for a court to order a conditional stay, it may be appropriate to do so to ensure procedural fairness in the arbitration process. I caution that a court should be careful not to impose conditions which impinge on the decision-making jurisdiction of the arbitral tribunal: Born, vol. II, at p. 2196. Nonetheless, in the period before the appointment of the arbitral tribunal, a condition which facilitates the arbitration process can protect the tribunal's jurisdiction by ensuring that the parties are able to proceed with the arbitration.

[323] Courts hearing motions for stays and for referral to arbitration have ordered conditional stays in the past: see, e.g., *Popack*; *Iberfreight*; *Continental Resources*; see also *Fuller Austin*. As was the case in *Iberfreight* and *Continental Resources*, such conditions support one of the purposes of arbitration agreements and of modern arbitration legislation, that of proceeding with dispute resolution in a timely manner rather than delaying progress in the courts. In this regard, I find that the following comments of Gerwing J.A. from *Fuller Austin* (C.A.), at para. 5, on the interpretation of Saskatchewan's legislation implementing the UNCITRAL Model Law are persuasive:

In most stays the party requesting the extraordinary indulgence of the court must act with expedition to facilitate justice. Particularly where remedies of an unusual nature, such as commercial arbitration, are permitted to circumvent litigant's normal access to the court, or delay it, it is for the purpose of facilitating and not delaying justice. As in most stays, common sense indicates that the successful applicant for a stay cannot use it as it were as a permanent way of ending the matter by deliberate inattention to pursuing the course of action which justified the granting of the stay. While we did not indicate expressly in our reasons this requirement, that reasonable steps be taken, we agree with the interpretation placed by the chamber judge below that this is implicit. (Indeed, it might be noted that substantial argument can be made that in interpreting the *Act*, if principles of statutory interpretation would have to be called in aid, that the legislation was similarly intended to expedite the resolution of disputes and not to delay them.)

[324] Mr. Heller has given sworn evidence that he cannot afford the ICC Fees, which must be paid in order to initiate ICA proceedings. In light of Mr. Heller's particular circumstances, I would impose a condition that Uber advance the filing fees to enable him to initiate such proceedings. I would leave the decision as to who

should ultimately bear those costs to the arbitral tribunal. In this regard, Rule 38 of the ICC Arbitration Rules empowers the arbitral tribunal to make decisions on costs at any time during the proceedings and to decide which party should bear the costs in the final award.

[325] This condition would be consistent both with the principle of party autonomy and with the legislature's intent, because it would facilitate the arbitration process. As it would merely be an interim measure, it would not change the substantive rights and obligations of the parties pursuant to the Arbitration Clause. It would therefore be consistent with s. 17(1) of the *Arbitration Act* and art. 16(1) of the UNCITRAL Model Law, because it would leave the decision on the question of the validity of the Arbitration Clause to the arbitral tribunal.

(2) Doctrine of Severance

[326] While granting a conditional stay is sufficient for my purposes to decide the appeal, there is one further important aspect of Uber's submissions which Abella and Rowe JJ. do not address in their reasons. In oral argument, counsel for Uber suggested that, if part of the Arbitration Clause was found to be unenforceable, this Court should sever the unenforceable portions of the agreement and enforce the remainder: transcript, pp. 17 and 55-56. I agree. Compelling policy considerations support a generous application of the doctrine of severance in cases in which the parties have clearly indicated an intent to settle any disputes through arbitration but in which some aspects of their arbitration agreement have been found to be

unenforceable. Where doing so is practical, courts should strive to give effect to the parties' intentions by severing unenforceable terms and referring the parties to arbitration.

[327] The doctrine of severance takes two forms: (1) notional severance and (2) blue-pencil severance. Notional severance involves reading down a contractual provision so as to make it legal and enforceable. Blue-pencil severance consists of removing the illegal part of a contractual provision: *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at paras. 2 and 29-30. Whereas notional severance calls for the application of a bright line test of illegality, blue-pencil severance can be effected where the court can strike out the portion of the contract it wants to remove by drawing a line through it without affecting the meaning of the part that remains: *Shafron*, at paras. 29 and 31; *Transport North American Express*, at para. 34.

[328] In deciding whether to apply the doctrine of severance, a court should also consider whether it would be both commercially practical and consistent with the parties' intentions for it to enforce the remainder of the arbitration agreement: *McCamus*, at pp. 510-11. The fundamental aspect of an arbitration agreement is a clear commitment by both parties to settle any disputes by arbitration: see UNCITRAL Model Law, art. 7 (option 1); *Arbitration Act*, s. 1 "arbitration agreement". Therefore, where the parties' intention to submit disputes to arbitration is



clearly established, applying the doctrine of severance will usually be consistent with their intentions.

[329] Further, courts will consider the context of the contract at issue and any relevant policy considerations when assessing whether and how to sever provisions: *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152, 124 O.R. (3d) 776, at para. 37. The *Arbitration Act* and the *International Act* are both legislative statements of public policy which encourage the use of arbitration and favour holding parties to their commitment to submit disputes to arbitration: *Wellman*, at para. 49. The doctrine of severance advances these policies by ensuring that the parties' intentions are not defeated by shortcomings in their selection of the terms for the arbitration process.

[330] In *Shafron*, Rothstein J. cautioned courts to take a restrained approach to severance, because severance interferes with the right of parties to freely contract and to choose the words that determine their obligations and rights: para. 32. However, different considerations arise in assessing arbitration agreements because arbitration itself is a party-driven form of dispute resolution. Were an aspect of an arbitration agreement to be severed, the parties would still be free to agree on a replacement for it: for example, if certain procedural rules were severed, they could agree on other existing procedural rules or on a procedure of their own. Severance does not take that choice away. In fact, it furthers party autonomy by ensuring that the parties can have access to their chosen means of dispute resolution. Severance will rarely, if ever,

change the fundamental nature of the parties' agreement, which was to settle disputes by arbitration.

[331] The practice in other countries is to sever unenforceable provisions while still giving effect to the arbitration clause wherever possible. Thus, “[t]he overwhelming majority of national court decisions . . . uphold the validity of international arbitration agreements even after invalidating one (or more) term(s) of those agreement[s]”: Born, vol. I, at p. 916; see, e.g., *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

[332] This Court's jurisprudence supports upholding the validity of an arbitration clause where practical. In *Seidel*, this Court found that the arbitration clause at issue was inconsistent with the *BPCPA*. The consumer had commenced a proposed class proceeding in respect of claims under the *BPCPA* as well as other causes of action. The Court found the arbitration clause to be invalid only to the extent that it applied to the *BPCPA* claims, as the clause in question was barred by that Act, and ordered a stay in relation to the other claims, thereby referring them to arbitration: *Seidel*, at para. 50. The Court's remedial approach in *Seidel* may be viewed as an application of notional severance to the arbitration agreement because the Court in effect granted relief which was equivalent to writing in a term excluding the *BPCPA* claims from the scope of the arbitration agreement instead of holding that the entire agreement was invalid. Further, in *Wellman*, this Court stated that courts must show due respect for arbitration agreements and, more broadly, for arbitration,

thus endorsing the view that the law should favour giving effect to arbitration agreements and that arbitration should be encouraged: para. 54.

[333] In the instant case, the parties' commitment to submit disputes to arbitration is clear. The selection of the ICC Rules is neither contrary to public policy nor unconscionable, but, if it were so, the appropriate remedy would be for the Court to apply blue-pencil severance and strike the selection of the ICC Rules, leaving it to Uber and Mr. Heller to agree on an arbitration procedure, or to the arbitral tribunal to decide how to proceed. The same would be the case for the Place of Arbitration Clause. This approach is more consistent with the parties' intentions and with the legislature's intent than simply holding that the entire arbitration agreement is invalid.

[334] Given that my colleagues do not seem to take issue with the actual selection of arbitration as a mode of dispute settlement or with the requirement to attempt mediation first, it would be inappropriate to sever those aspects of the Arbitration Clause. The substance of Mr. Heller's arguments, and of those of my colleagues, relates to the ICC Fees which result from the selection of the ICC Rules and to the designation of a foreign seat for the arbitration. I repeat that I find that the ICC Rules and the Place of Arbitration Clause are valid, but, if I had found that they were unenforceable, I would have applied blue-pencil severance to rewrite the Arbitration Clause as follows:

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 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 ICC Rules’ Emergency Arbitrator provisions are excluded. The dispute shall be resolved by one (1) arbitrator to be appointed in accordance with the ICC Rules. The place of arbitration shall be Amsterdam, The Netherlands.~~

[335] If the parties were then unable to agree on how to proceed, the *Arbitration Act* and the UNCITRAL Model Law contain detailed provisions to assist in the enforcement of an arbitration agreement where the parties are unable to agree on the details: see, e.g., *Arbitration Act*, ss. 9, 10, 20 and 22; UNCITRAL Model Law, arts. 10, 11(3), 19(2) and 20(1).

[336] The facts of this case illustrate a situation in which severance is needed in order to prevent commercially absurd results. My colleagues take issue with the ICC Fees in the context of a hypothetical dispute for a small amount. While I appreciate that such a dispute could arise from the Service Agreement, defeating the parties’ commitment to submit disputes to arbitration on the basis of this hypothetical case is absurd given that the dispute actually before the Court concerns a proposed class proceeding for CAN\$400,000,000 and that the amount of Mr. Heller’s individual claim is as yet unknown. Approaching the enforceability of arbitration agreements in this fashion compromises the certainty upon which commercial entities rely in structuring their global operations. The commitment to submit disputes to arbitration should be upheld. Any other result would be commercially impractical.

[337] Finally, I note that, since Abella and Rowe JJ. would apply the unconscionability doctrine to individual terms, they are, in reality, applying blue-pencil severance by another name. However, they do not explain why they have chosen to strike the entire Arbitration Clause (and perhaps — although this is unclear — the Choice of Law Clause as well) instead of the specific individual terms they find to be unconscionable.

## VI. Conclusion

[338] For these reasons, I would allow the appeal and order a conditional stay of proceedings.

*Appeal dismissed with costs throughout, CÔTÉ J. dissenting.*

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*Solicitors for the respondent: Wright Henry, Toronto; Samfiru Tumarkin, Toronto.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.*

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*Solicitors for the interveners the Chartered Institute of Arbitrators (Canada) Inc. and the Toronto Commercial Arbitration Society: Blake, Cassels & Graydon, Vancouver.*

*Solicitors for the intervener the Canadian Chamber of Commerce: Davies Ward Phillips & Vineberg, Toronto.*

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