CITATION: Heller v. Uber Technologies Inc., 2018 ONSC 718
COURT FILE NO.: CV-17-567946CP
DATE: 20180130

ONTARIO
SUPERIOR COURT OF JUSTICE

2018 ONSC 718 (CanLII)

BETWEEN:	)	
DAVID HELLER Plaintiff	)	*Lior Samfiru* and *Stephen Gillman* for the Plaintiff
– and –	)	
UBER TECHNOLOGIES INC., UBER CANADA, INC., UBER B.V. and RASIER OPERATIONS B.V. Defendants	)	*Lisa Talbot*, *Sarah Whitmore*, and *Davida Shiff* for the Defendants
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: January 22, 2018

PERELL, J.

REASONS FOR DECISION

A INTRODUCTION

[1] The Defendants, Uber Technologies Inc., Uber Canada, Inc., Uber B.V., and Rasier Operations B.V., and the non-defendant Uber Portier B.V., are part of a group of companies that have come to be known collectively and individually as Uber. As is well-known, Uber has developed computer software applications "Apps" for GPS-enabled smartphones, and the Apps have transformed the transportation business, most particularly the taxi and limousine business[1] and the restaurant delivery business.

[2] The Plaintiff, David Heller, a resident of Ontario, entered into several contracts with Uber, and using the Uber Apps, he delivers food from restaurants to consumers. Pursuant to the *Class Proceedings Act, 1992*,[2] Mr. Heller brings a proposed class action on behalf of Uber Drivers, and he alleges that he and his fellow putative Class Members are employees of Uber and entitled to the benefits of Ontario's *Employment Standards Act, 2000*.[3]

[1] The worldwide milestone of five billion Uber rides was reached in May 2017.
[2] S.O. 1992, c. 6.
[3] S.O. 2000, c. 41.

[3] The agreements between Mr. Heller and Uber include an agreement to arbitrate disputes, and pursuant to the *International Commercial Arbitration Act, 2017*,[4] or, if necessary, the *Arbitration Act, 1991*,[5] Uber moves to have Mr. Heller's proposed class action stayed in favour of arbitration in the Netherlands.

[4] For the reasons that follow, I stay Mr. Heller's proposed class action.

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B FACTUAL BACKGROUND

1. Uber and the Service Agreements

[5] Taken as a collective, Uber carries on a global business. The classification of that business is a matter of controversy across the globe. Uber characterizes itself as a vendor of "lead generation services," which it sells to transportation providers, but others have characterized Uber as a transportation company, which it fiercely denies.

[6] While around the world, millions of businesses and persons use Uber's software Apps, there is a fierce debate about whether the users are customers, independent contractors, or employees. In the case at bar, the ultimate question is whether Uber is the putative Class Members' employer under Ontario's employment law.[6]

[7] Uber Technologies Inc. is incorporated under the laws of Delaware. It does not operate in Canada.

[8] Uber B.V. is incorporated under the laws of the Netherlands with offices located in Amsterdam. Uber B.V. exploits the intellectual property associated with the Uber Apps around the world (excepting the United States, Brazil, and Australia). As of October 10, 2017, Uber B.V. had over 440 employees in Amsterdam, including 160 General & Administrative employees (in areas such as accounting, financial operations, legal, recruiting, and tax), over 95 Research & Development employees, over 100 Operations employees with a regional or global focus, and over 80 Sales & Marketing employees.

[9] Rasier Operations B.V. is incorporated under the laws of the Netherlands with offices located in Amsterdam. Rasier licences the Uber Apps, uberX, uberXL, and UberSELECT, which have transformed the taxi and limousine industry. Rasier Operations B.V. licenses Uber Apps to drivers that compete with taxi and limousine drivers pursuant to licences granted by Uber B.V.

[10] Uber Portier B.V. is incorporated under the laws of the Netherlands with offices in Amsterdam. Portier licences the Uber App UberEATS, which has transformed the restaurant food delivery industry. Rasier Operations B.V. licences Uber Apps pursuant to licences granted by Uber B.V.

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[4] S.O. 2017, c. 2, Sched. 5.
[5] S.O. 1991, c. 17.
[6] In *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220 (Fla. Dist. Ct. App. 2017), Uber drivers were held not to be employees. In *Aslam v. Uber B.V.* [2015] UK Employment Tribunal (Decision No. 2202550), aff'd [2017] UK Employment Appeal Tribunal (Appeal No. EKEAT/0056/17/DA), Uber drivers held to be "workers." In *O'Connor v. Uber Technologies Inc.*, 82 F.Supp.3d 1133 (2015), US District Court (N.D. California), a class action was certified on the basis that Uber was a transportation company and that its drivers were "presumptive employees."

[11] Uber Canada, Inc. is incorporated under the laws of Canada. Uber Canada provides marketing and administrative support to Uber B.V. for the Uber Apps in Canada. It has no contractual relationship with the users of the Uber Apps, but it provides local, largely technical support to the users of the Apps. At present, Uber has 129 employees in Ontario.

[12] Uber does not own vehicles, and its business model is to licence a "Rider App" to Riders, *i.e.*, consumers who download the app from the internet, and to licence a "Driver App" to Drivers, who download the app and use it to open an account with Uber to become a Driver.

[13] Using the Rider App, the consumer requests and accept rides from Drivers. Using the Rider App, the consumer pays the Driver and "rates" the Driver's performance. Using the Driver App, the Driver responds to ride requests, is paid through the App, and rates the Rider. In exchange for providing the App, Uber charges the Driver a fee. The invoices to the Driver are issued by Uber B.V.

[14] A similar business model is used for customers who wish to order food from restaurants and have it delivered to them. The Uber App connects consumers ordering food, restaurant merchants, and Drivers providing delivery services for the restaurants.

[15] Through the internet, Uber services are available in more than 600 cities in 77 countries around the world. Uber has been in operation in Ontario since February 8, 2012.

[16] Drivers in Ontario do not enter into contracts with Uber Technologies Inc. or Uber Canada Inc. The Drivers rather create an internet account and a contractual relationship with Uber B.V. and with Rasier Operations B.V. and, or Uber Portier B.V.

[17] Under the Service Agreements between the Driver and Rasier Operations or between the Driver and Uber Portier, the Driver is granted a licence to use the App and to obtain the carriage service. The Driver agrees to pay a service fee and represents that the Service Agreements create a legal and direct business relationship. The Driver acknowledges that the parties are not in an employment relationship.

[18] Before a Driver's account is activated to use the Driver App, he or she must meet certain requirements, which are determined by Uber's legal team in the Netherlands. In Ontario, a Driver must provide copies of: (i) a driver's licence, (ii) a vehicle registration, (iii) proof of eligibility to work in Canada, (iv) their motor vehicle insurance policy, and (v) an Ontario Safety Standards Certificate.

[19] To review and accept the operative licencing agreement, the Driver clicks a hyperlink presented on the screen within the App. To click "I agree", a Driver must scroll through the entire agreement, about 14 pages in length. After a Driver has confirmed his or her agreement, he or she is then prompted to confirm his or her acceptance a second time, prior to which the App states, in caps: "PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS." Once a Driver has clicked "YES, I AGREE" a second time, he or she is able to access the Uber App, and their agreement is automatically sent to their "Driver Portal," which provides access to account information.

[20] Uber B.V., Rasier Operations B.V., and, or Uber Portier B.V. periodically revise their agreements with Drivers. Each time a revision occurs, the Driver is required to consider the revised terms in order to receive continued access to the Driver App. The Driver must agree to

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the revised terms through the process described above.

[21] The Service Agreements with the Driver are governed by the law of the Netherlands. The Agreements contain an arbitration clause that stipulates that disputes, conflicts, or controversies arising out of or broadly in connection with the agreements shall be resolved by arbitration in Amsterdam under the Rules of Arbitration of the International Chamber of Commerce. Article 15 of the Service Agreements state:

> 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 the conflict of laws. The Vienna Convention on the International Sale of Goods 1980 (CISG) shall not apply. Any dispute, conflict or controversy, howsoever arising out of or broadly in connection with or relating to this Agreement, including 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 a 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 Place of the arbitration shall be Amsterdam, The Netherlands.

[22] Uber provides dispute resolution to Drivers. The Driver App provides "In-App Support," through which Customer Services Representatives ("CSRs") respond to queries and complaints from Drivers. Typically, the disputes involve small sums of money. There are two levels of CSRs. The first level is provided by support centres in the Philippines, with the second level, which is located in Chicago, having more particularized training from Uber. If the CRSs do not resolve the Driver's complaint, Uber may involve its legal team.

[23] A Driver may also use a local support centre referred to as a Greenlight Hub, which provides technical support for the Apps to Drivers in Canada.

[24] Uber's legal team is located primarily in the Netherlands with local assistance in certain jurisdictions in which Uber operates. When Drivers' complaints or disputes with Uber cannot be resolved through either level of assistance with In-App Support or at a Greenlight Hub, the matter may be referred to Uber's legal team.

[25] Under the Uber Service Agreements, the mediation is pursuant to the International Chamber of Commerce's Mediation Rules, and if the matter is not resolved, there is arbitration pursuant to the Rules of Arbitration of the International Chamber of Commerce. There is a $2,000 USD filing fee for the mediation and an administrative fee that, for a dispute under $200,000 USD, can amount to up to $5,000 USD. There is a $5,000 USD filing fee for the arbitration and an administrative fee that, for a dispute under $200,000 USD, is at least $2,500 USD. The fees do not include the charges of the mediator or arbitrator, which would be approximately $3,000 USD for a dispute worth less than $200,000 USD. The fees do not include the Driver's personal expenses in Amsterdam or legal expenses including counsel fee and disbursements. Arbitrators can award costs which cover expenses.[7]

2. **Mr. Heller**

[26] Mr. Heller is an Ontario resident. He is 35 years of age with a high school education.

[7] International Chamber of Commerce, *Rules of Arbitration* (entered into force 1 March 2017), Article 38.

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[27] On June 7, 2016, Mr. Heller entered into an agreement with Rasier Operations B.V. The Service Agreements include the agreement to arbitrate.

[28] On December 15, 2016, Mr. Heller entered into an agreement with Uber Portier B.V. Subsequently, he agreed to revisions to his agreements with Uber. The Service Agreements include the agreement to arbitrate.

[29] Mr. Heller continues to work in the Toronto area. He earns approximately $400.00 to $600.00 per week based on 40 to 50 hours of work.

[30] On January 19, 2017, Mr. Heller commenced his proposed class action. He seeks, among other things, a declaration that Uber has violated the *Employment Standards Act, 2000*. If the action is certified as a class action, he seeks $400 million in damages for the class.

[31] Mr. Heller proposes to represent a class defined as follows:

> Any person, since 2012, who worked or continues to work for Uber in Ontario as a Partner and/or independent contractor, providing any of the services outlined in Paragraph 4 [UberEats, UberX, UberXL, UberSelect, Uber Black, Uber SUV, Uber Taxi, and Uber Access] of the Statement of Claim pursuant to a Partner and/or independent contractor agreement.

[32] In this pre-certification motion, Uber moves to have the proposed class action stayed in favour of arbitration in the Netherlands.

C DISCUSSION AND ANALYSIS

1. Which *Arbitration Act* Applies?

[33] There is no issue between the parties that Mr. Heller has entered into an arbitration agreement with those Uber Defendants that carry on business in the Netherlands. There is, however, an issue about whether the *International Commercial Arbitration Act, 2017* applies to the agreement between the parties, which is the Defendants' position, or whether the *Arbitration Act, 1991* applies, which is Mr. Heller's position.

[34] The relevant sections of both acts are set out below in Schedule "A", and I shall next explain that, in my opinion, the *International Commercial Arbitration Act, 2017* applies.

[35] However, while the point of which Act applies was a matter of dispute between the parties, ultimately not much turns on this point, because under either Act, subject to certain exceptions, when there is an arbitration agreement, then upon the request of one of the parties, the court must refer the matter to arbitration. The form and procedure of the arbitrations is much the same under either Act, and thus in the case at bar, much more important than answering the question of which Act applies, is answering the questions of whether there are reasons for the court to refuse a stay. Nevertheless, while not much turns on it, I shall answer the question of which Act applies and then undertake an analysis for both Acts.

[36] As already noted, there is no dispute that Mr. Heller has entered into an arbitration agreement with several of the Uber entities. Pursuant to s. 2 of the *Arbitration Act, 1991*, that Act applies unless the *International Commercial Arbitration Act, 2017* applies to the arbitration.

[37] For the *International Commercial Arbitration Act, 2017* to apply, there must be an "international" and "commercial" arbitration agreement.

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[38] Under Article 1(3)(a) of the Model Law incorporated in the *International Commercial Arbitration Act, 2017*, a commercial arbitration agreement is international if the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different countries. In the case at bar, Uber B.V., Rasier Operations B.V., and Uber Portier B.V. have their places of business in the Netherlands, while Mr. Heller's place of business or employment is in Ontario. And thus, there is an "international" agreement between the parties.

[39] However, the parties dispute whether the arbitration agreement is "commercial". Mr. Heller submits that the *International Commercial Arbitration Act, 2017* does not apply because his contractual relationship with the Uber entities is an employment relationship and not a commercial one.

[40] While it is true that all agreements involve an exchange of promises, it is not true that all agreements are commercial and thus there are agreements that are outside the ambit of the *International Commercial Arbitration Act, 2017*. The Act itself stipulates that in applying the Model Law, recourse may be had, among other things, to the *Commission on International Trade Law, Report of the Secretary General*,[8] and that *Report* defines "commercial" as follows:

> Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods; 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 co-operation; carriage of goods or passengers by air, sea, rail or road.

[41] Another interpretative aid for the *International Commercial Arbitration Act, 2017* is the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration.* Under the heading "commercial," the *Digest*, which refers to international case law, including Canadian cases, states:

> 7. The Model Law does not provide a strict definition of the term "commercial". The footnote to article 1 (1) calls for "a wide interpretation" and offers an illustrative and open-ended list of relationships that might be described as commercial in nature, "whether contractual or not". The purpose of the footnote is to circumvent any technical difficulty that may arise, for example, in determining which transactions should be governed by a specific body of "commercial law" that may exist in some legal systems. Several decisions have indeed adopted this approach by providing that the term "commercial" should be construed broadly having regard to manifold activities which form an integral part of international trade. …. A Canadian court held that the commercial nature of a relationship was not dependent upon the qualification of the parties as merchants or commercial persons. For example, the sale of a residential property was considered as involving a commercial relationship, particularly where the sale was transacted in a business-like manner, with the assistance of professional realtors, and within a legal framework appropriate for a transaction involving a large sum of money. [9] ….
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> 8. However, not all relations related to business would be "commercial". Where the relation was that of employer/employee as opposed to one of professional services by an independent contractor, the same was considered as non-commercial within the meaning of the Model Law.[10]

[8] UNGAOR, 1985, UN Doc. A/CN.9/264, Part One, Chapter 1, p. 7.
[9] *Carter v. McLaughlin* (1996), 27 O.R. (3d) 792 (Gen. Div.) at para. 16.
[10] *Borowski v. Heinrich Fiedler Perforiertechnik GmbH,* 1994 (Alta. Q.B.); *Ross v. Christian and Timbers, Inc*., [2002] O.J. 1609 (S.C.J.).

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> On the other hand, a Canadian court had held that "liability in tort was an arbitrable matter, provided that the relation that created that liability was of a "commercial nature".[11] Nonetheless, a claim for wrongful dismissal and the tort of negligent misrepresentation was later held not to satisfy the "commercial" requirement.[12]

[42] In *Carter v. McLaughlin*,[13] one of the cases referred to in the *Digest*, Justice Rutherford stated that the term "commercial" in the *International Commercial Arbitration Act, 2017* should be given a broad interpretation, so as to embrace matters arising from all relationships of a commercial nature notwithstanding that the parties were not necessarily merchants or business operators. In that case, the McLaughlins, who moved from Minnesota to Ontario, were bound by an arbitration award granted to the Carters in Minnesota. The Carters had purchased the McLaughlin's residence in Minnesota and received an award because they had to replace the septic system servicing the property.

[43] In *Ross v. Christian and Timbers, Inc.*,[14] another case referred to in the *Digest*, a wrongful dismissal action brought by an Ontario employee was stayed for arbitration because the employment agreement included an arbitration provision that all disputes had to be submitted to an arbitrator in Ohio, where the employer's head office was located.

[44] In *United Mexican States v. Metalclad Corp.*[15], the British Columbia Supreme Court applied B.C.'s *International Commercial Arbitration Act*[16] even though one party was a regulator and not engaged in commerce. The Court held that the Act applied, because the arbitration arose pursuant to an underlying agreement which dealt with investing, one of the categories defined by B.C.'s statute as commercial in nature.

[45] In the case at bar, the Service Agreements expressly state that it does not create an employment relationship, and except for Mr. Heller's argument that Uber's software licence agreements do create employment relationships, I would have little difficulty concluding that the Service Agreements are commercial in nature.

[46] I say this without needing to rely on the wide and expansive definition of "commercial" from the *Commission on International Trade Law, Report of the Secretary General*. Reference to the *Report* simply confirms that the agreement is commercial since the licence agreements of the Service Agreements fall within the definition of "a transaction for the supply or exchange of goods; … licensing; …; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers …". But for Mr. Heller's argument, I would characterize the agreements as commercial contracts for the sale for the use of intellectual property, a software program, for a fee.

[47] Turning then to Mr. Heller's argument that there is an employment relationship between Uber and the Drivers, I agree with him that there may be such a relationship notwithstanding the express language to the contrary in the Service Agreements. Whether a worker is an employee, independent contractor, or a dependent contractor is a fact-based determination that depends

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[11] *Kaverit Steel and Crane Ltd. v. Kone Corp.*, 1992 ABCA 7.
[12] *Patel v. Kanbay International Inc.*, 2008 ONCA 867.
[13] (1996), 27 O.R. (3d) 792 (Gen. Div.) at para. 16.
[14] [2002] O.J. No. 1609 (S.C.J.).
[15] 2001 BCSC 664.
[16] R.S.B.C. 1996, c. 233.

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upon on a variety of factors and not just the written or oral agreement between the parties.[17] However, while recognizing that the parties' own characterization of their relationship may not be determinative of how a court might classify the relationship, their characterization is not irrelevant, and I do not change my conclusion that the arbitration clause in the case at bar is subject to the *International Commercial Arbitration Act, 2017*. I come to this conclusion for two reasons.

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[48] The first reason is that treating the matter as a question of first instance and assuming that the Uber agreements create an employment relationship, it does not follow that all employment relationships are not commercial agreements nor that employment agreements are inimical to arbitration. Collective agreements between a union and an employer are an obvious example of an employment relationship infused with resort to mediation and arbitration. Individual contracts with professional athletes and entertainers are other examples of an employment relationship that could be viewed as commercial on both sides and almost invariably include arbitration. Operating under domestic *Arbitration Acts,* Canadian courts regularly enforce arbitration agreements in the employment context, including those entered into by parties governed by the *Employment Standards Act*.[18] While I accept that some employment agreements are not commercial agreements for the purposes of the *International Commercial Arbitration Act, 2017,* I would not go so far as to conclude that all employment relationships are outside the reach of the Act.

[49] The second reason is that accepting that the *International Commercial Arbitration Act, 2017* does not apply to employment contracts, then in accordance with the Competence-Competence Principle, discussed below, it is for the arbitrator in the Netherlands to determine whether he or she has jurisdiction to decide whether the agreements in the case at bar are employment contracts and whether the dispute between Mr. Heller and Uber is arbitrable under the Act. In other words, until the arbitrator rules otherwise, the court should take the parties at their word that the Service Agreements are not employment contracts and let Mr. Heller challenge the arbitrator's jurisdiction in the first instance at the outset of the arbitration.

[50] I, therefore, conclude that in the case at bar, the *International Commercial Arbitration Act, 2017* is the applicable statute.

2. **Does the Competence-Competence Principle Apply?**

[51] In *Seidel v. TELUS Communications Inc.*,[19] discussed below, the Supreme Court of Canada held that absent legislative language to the contrary, courts must enforce arbitration agreements.[20] The court should only refuse a reference to arbitration if it is clear that the matter

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[17] *Braiden v. La-Z-Boy Canada Ltd.*, 2008 ONCA 464; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., 2001 SCC 59; *Belton v. Liberty Insurance Co. of Canada* (2004), 72 O.R. (3d) 81 (C.A.); *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.).

[18] *Morrison v. Ericsson Canada Inc.*, 2016 ONSC 3908; *Robert v. Markandu*, 2012 ONSC 6891; *Van Kempen v. Brown Pineo Insurance Brokers Ltd.*, [2009] O.J. No. 65 (S.C.J.); *Rashid v. Wipro Ltd.*, 2015 BCSC 2199; *Ross v. Christian and Timbers, Inc*., [2002] O.J. No. 1609 (S.C.J.).

[19] 2011 SCC 15.

[20] *Dell Computer Corp. v. Union des consommateur*s, 2007 SCC 34; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35 (S.C.C.); *Éditions Chouette (1987) inc. v. Desputeaux*, 2003 SCC 17; *Trade Finance Solutions Inc. v. Equinox Global Ltd.*, 2018 ONCA 12.

falls outside the arbitration agreement.[21] In *Wellman v. TELUS Communications Company*,[22] the Court of Appeal stated that arbitration agreements will generally be enforced and that any restriction of the parties' freedom to arbitrate must be found in the legislation.

[52] Under s. 17 (1) of the *Arbitration Act, 1991* and Article 16 (1) of the *International Commercial Arbitration Act, 2017,* arbitrators have the power to rule on their own jurisdiction. Under what is known as the competence-competence principle, if there is an arguable or *prima facie* case that the arbitrator has jurisdiction, the court should defer the issue of jurisdiction to the arbitrator.[23] Once an agreement to arbitrate is shown to exist, the court will stay its own proceedings, unless it is clear that the dispute before the court is outside the terms of the arbitration agreement or that the parties are not subject to the agreement.[24] Under the competence-competence principle, the arbitrator will determine what, if anything, is excluded from his or her jurisdiction. The competence-competence principle applies to both the *Arbitration Act, 1991* and the *International Commercial Arbitration Act, 2017*.[25]

[53] Where the arbitration agreement is found within another agreement, it is treated as a separate agreement and it will survive even where the contract in which it is found is determined to be invalid.[26]

[54] The general rule is that a challenge to the arbitrator's jurisdiction should be first resolved by the arbitrator. The exceptions to the general rule are where the challenge is based solely on question of law. If, however, the challenges raised are questions of mixed fact and law, the court should refer the challenge to the arbitrator unless the questions of fact require only superficial consideration of the documentary evidence in the record.[27]

[55] Whether the case falls within the exceptions to a referral to arbitration under either Act is the issue that I shall examine in the next section of my Reasons for Decision. In this section, I will examine whether the competence-competence principle applies.

[56] Mr. Heller's position is that because his proposed class action is about an alleged employment relationship, it cannot be stayed because this issue is outside the jurisdiction of the arbitrator to decide. Uber's counterargument is that in accordance with the competence-competence principle, it is for the arbitrator to decide whether he or she has jurisdiction save for limited circumstances in which the court may decide not to refer a matter to arbitration, none of which circumstances, Uber submits, are applicable to the case at bar. Uber says that there whether the Drivers are employees is a complex issue of mixed fact and law that it is for the

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[21] *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (C.A.); *Patel v. Kanbay International Inc.*, 2008 ONCA 867.
[22] 2017 ONCA 433.
[23] *Trade Finance Solutions Inc. v. Equinox Global Ltd.,* 2018 ONCA 12; *Ontario Medical Association v. Willis Canada Inc.,* 2013 ONCA 745; *Jean Estate v. Wires Jolley LLP,* 2009 ONCA 339; *Dancap Productions Inc. v. Key Brand Entertainment Inc.,* 2009 ONCA 135; *Dell Computer Corp. v. Union des consommateurs,* 2007 SCC 34; *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (C.A.).
[24] *Trade Finance Solutions Inc. v. Equinox Global Ltd.*, 2018 ONCA 12; *Haas v. Gunasekaram,* 2016 ONCA 744; *Seidel v. TELUS Communications Inc.,* 2011 SCC 15; *Ontario Medical Assn. v. Willis Canada Inc.,* 2013 ONCA 745; *Ontario v. Imperial Tobacco Canada Ltd.,* 2011 ONCA 525; *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (C.A.).
[25] *Ontario Medical Assn. v. Willis Canada Inc.,* 2013 ONCA 745.
[26] *Haas v. Gunasekaram,* 2016 ONCA 744 at para. 13.
[27] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34; *Ontario Medical Assn. v. Willis Canada Inc.*, 2013 ONCA 745.

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arbitrator to decide. Mr. Heller's counter-counterargument is that the case at bar is one in which the court can decide whether the matter is arbitrable as a matter of interpreting the *Employment Standards Act, 2000*, an issue of law, and that the case is also within the exceptions to when the court must refer a matter to arbitration.

[57] It is a matter of statutory interpretation whether resort to arbitration is precluded by the *Employment Standards Act, 2000*. However, for example, in contrast to the *Consumer Protection Act 2002*,[28] the *Employment Standards Act, 2000* does not expressly oust arbitration agreements and thus it is not a simple matter of statutory interpretation. Mr. Heller's argument is essentially that it would be an absurd result and contrary to public policy to enforce an arbitration agreement in an employment contract and thereby deny vulnerable non-unionized employees their rights and protections under the *Employment Standards Act, 2000*, which precludes employees contracting out if their rights under the Act.

[58] There are several serious weaknesses to Mr. Heller's argument. First, for the argument to work, it simply assumes that Mr. Heller is an employee, which is to beg the whole point of his proposed class action.

[59] Second, his argument begs the issue of statutory interpretation. The court's role is to interpret the statute, not enact it; if the sense of the words of the statute is clear and unambiguous, the court must interpret the words literally and in accordance with their plain meaning even if the consequences are absurd or unjust.[29] In this regard, it must be emphasized that the rule from *Seidel v. TELUS Communications Inc.*,[30] and *Wellman v. TELUS Communications Company*,[31] is that absent legislative language to the contrary, courts must enforce arbitration agreements.[32]

[60] It is presumed that the legislator does not intend absurd consequences and an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or it is incompatible with other provisions or with the object of the legislative enactment. Where there are competing plausible constructions, a statute should be interpreted in a way that avoids absurd results.[33] However, recognition of the proper roles of the legislature and the judiciary requires that courts give effect to the plain meaning of the words of a duly enacted statute and a court should not interfere merely because it does not approve of the result produced by the statute in a particular case.[34]

[61] In *Seidel v. TELUS Communications Inc.,* Ms. Seidel signed a standard form TELUS cellular phone services contract. The contract included an arbitration agreement and a waiver of any right to commence or participate in a class action. Nevertheless, Ms. Seidel commenced a

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[28] S.O. 2002, c. 30.
[29] *Victoria (City) v. Bishop of Vancouver Island*, [1921] A.C. 384 (P.C.); *R. v. McIntosh*, [1995] 1 S.C.R. 686 at p. 704; *R. v. Huggins*, 2010 ONCA 746 at paras. 17-18.
[30] 2011 SCC 15.
[31] 2017 ONCA 433.
[32] *Dell Computer Corp. v. Union des consommateur*s, 2007 SCC 34; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35 (S.C.C.); *Éditions Chouette (1987) inc. v. Desputeaux*, 2003 SCC 17.
[33] *Re Rizzo & Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27 at para. 27; *Blue Mountain Resorts Ltd. v. Bok*, 2013 ONCA 75 at para. 43.
[34] *Zeitel v. Ellscheid*, [1994] 2 S.C.R. 142 at p. 152.

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proposed class action in British Columbia, and she asserted common law causes of action and also statutory causes of action under the *Business Practices and Consumer Protection Act*[35] and the *Trade Practice Act.*[36] She alleged that TELUS falsely represented to her and other consumers how it calculated time for billing purposes. Relying on the arbitration clause, TELUS applied for a stay of all proceedings. Varying the judgment of the British Columbia Court of Appeal, a majority of the Supreme Court (Chief Justice McLachlin and Justices Binnie, Fish, Rothstein and Cromwell JJ.; Justices LeBel, Deschamps, Abella and Charron dissenting), stayed all the causes of action except one of the statutory causes of action. In the view of the majority, British Columbia's *Business Practices and Consumer Protection Act* contained a statutory remedy whereby a public interest plaintiff could resort to court proceedings including a class action to enforce the statute's consumer protection standards.

[62] It is to be noted, however, that the majority stayed the common law actions and the other statutory causes of action.

[63] Justice Binnie, who wrote the judgment for the majority, stated that the choice to restrict or not restrict arbitration clauses is a matter for the legislature and that absent 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. Except for the one statutory claim, where the legislature had indicated a public interest plaintiff's right to sue in court, the arbitration clause was valid and enforceable, and Ms. Seidel's action was stayed including her other statutory claims. Justice Binnie stated that this outcome was not precluded by the competence-competence principle because the interpretation of the *Business Practices and Consumer Protection Act* was a question of law to be determined on undisputed facts.

[64] Comparing and contrasting the case at bar to *Seidel v. TELUS Communications Inc.*, both cases have an arbitration agreement found in an adhesion contract where one contracting party has no bargaining power. In contrast to Ms. Seidel in *Seidel v. TELUS Communications Inc.*, Mr. Heller's status as an employee is a complex issue of mixed fact and law that remains to be determined, while Ms. Seidel's status as a consumer and as a consumer advocate was not an issue in her case. In *Seidel v. TELUS Communications Inc.* and in the case at bar, the fundamental interpretative principle is that absent legislative language to the contrary, courts must enforce arbitration agreements. In *Seidel v. TELUS Communications Inc.* and in the case at bar, the interpretation of the legislation (as distinct from who is a consumer or an employee, covered by the legislation) is not precluded by the competence-competence principle because the interpretation of the statute is a question of law to be determined on undisputed facts.

[65] In the case at bar, in my opinion, be the result absurd public policy or not, the plain meaning of the words of the *Employment Standards Act, 2000* do not preclude resort to arbitration. Further, the issue of whether employment claims are arbitrable is an issue subject to the competence-competence principle. It is a complex issue of mixed fact and law to be determined in the first instance by the arbitrator; it is not a simple matter of statutory interpretation to be resolved by the court.

[66] Therefore, I conclude that unless one of the exceptions to the requirements under the *Arbitration Act, 1991* or the *International Commercial Arbitration Act, 2017* that Mr. Heller's

[35] S.B.C. 2004, c. 2.
[36] R.S.B.C. 1996, c. 457.

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action must be stayed applies, the challenge to the arbitrator's jurisdiction should be first resolved by the arbitrator in the Netherlands.

3. **Do the Exceptions to a Stay and a Referral to Arbitration Apply?**

[67] Under the *Arbitration Act, 1991*, the exceptions to referring a dispute to arbitration are set out in s. 7(2) of the Act, and Mr. Heller argues that there should be no referral because the agreement is illegal on the grounds of unconscionability. Under the *International Commercial Arbitration Act, 2017*, the exceptions are set out in Article 8(1), and if this Act applies, Mr. Heller argues, once again, that there should be no referral because the agreement is null and void or inoperative, once again, on the grounds of unconscionability.

[68] The elements of a claim of unconscionability are: (1) pronounced inequality of bargaining power; (2) a substantially improvident or unfair bargain; and (3) the defendant knowingly taking advantage of the vulnerable plaintiff.[37] In *Kanitz v. Rogers Cable Inc.*,[38] discussed below, Justice Nordheimer described the constituent elements of unconscionability as follows:

> … three elements can be discerned as being required for a finding of unconscionability. First, there must be an inequality of bargaining power. Second, there must be some taking advantage of, or preying upon, the weaker party by the stronger party. Third, there must be a resulting improvident agreement. It is not sufficient to simply show that one party extracted a better deal than the other.

[69] It may be observed that the elements of the claim are fact-based and will depend upon the personal circumstances and situations of the parties and the nature and terms of their contract.

[70] In the immediate case, there undoubtedly was an inequality of bargaining power, but I do not see how it can be said that Uber preyed or took advantage of Mr. Heller or the other Drivers or extracted an improvident agreement by inserting an arbitration provision. As demonstrated by the record, most grievances or disputes between Drivers and Uber can be dealt with by the dispute resolution mechanisms readily available from Ontario and that it will be a substantial dispute that entails arbitration in the Netherlands.

[71] Mr. Heller's claim is a significant claim, for him as an individual, and as a collective. The Drivers are claiming $400 million and it does not make the agreement between Mr. Heller and Uber an improvident agreement because it includes an arbitration agreement for significant claims to be arbitrated even if the arbitration is in the Netherlands.[39]

[72] In *Kanitz v. Rogers Cable Inc.*,[40] which involved a proposed consumer class action against a television cable service provider and a similar situation where the plaintiff had no

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[37] *Birch v. Union of Taxation Employees, Local 70030* (2008), 93 O.R. (3d) 1 (C.A.); *Titus v. William F. Cooke Enterprises Ltd.* (2007), 284 D.L.R. (4th) 734 (Ont. C.A.); *Black v. Wilcox* (1976), 12 O.R. (2d) 759 (C.A.); *Mundinger v. Mundinger*, [1969] 1 O.R. 606 (C.A.); affd. [1970] S.C.R. vi; *Vanzant v. Coates* (1917), 40 O.L.R. 556 (C.A.); *Waters v. Donnelly* (1884), 9 O.R. 391 (Ch. Div.); *Rubin v. Home Depot Canada Inc*., 2012 ONSC 3053.

[38] [2002] O.J. No. 665 (S.C.J.).

[39] I note simply for the record that during argument Uber indicated that the arbitration could instead be arranged in Ontario.

[40] [2002] O.J. No. 665 (S.C.J.).

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bargaining power, Justice Nordheimer stayed the action for arbitration notwithstanding the possible expense of arbitration.

[73] Mr. Heller relies on *Huras v. Primerica Financial Services*[41] to argue that the arbitration clause in the Uber contracts is an illegal contracting out of the *Employment Standards Act, 2000* and also an unenforceable contract because of unconscionability. In *Huras,* Ms. Huras brought a class action on behalf of sales representatives of an insurance company, Primerica Financial, for contraventions of the *Employment Standards Act*, during the sales representatives, mandatory training program. Relying on an arbitration provision in the sales representatives' contracts, Primerica moved for a stay of the class action. Justice Cumming refused the stay because, as a matter of interpretation, he concluded that the arbitration provision did not apply to the training program. In what he noted was *obiter dicta*, Justice Cumming concluded that the arbitration provision did not apply because it was an illegal contracting out of the *Employment Standards Act* and because it was unconscionable given the disparity of bargaining power and the overreaching advantages obtained by Primerica. Justice Cumming's judgment was upheld by the Court of Appeal, but the Court disassociated itself from endorsing the *obiter dicta*. Justice Borins stated at para. 20:

> 20. In addition to finding that the dispute between the parties did not fall within the arbitration clause, the motions judge also found that the arbitration clause was unconscionable, and that it was unenforceable under s. 3(1) of the *Employment Standards Act*. That section precludes any agreement from contracting out of or waiving any employment standard mandated by the Act. In doing so, the motions judge appreciated that his findings regarding unconscionability and the violation of s. 3(1) were unnecessary to the result. There is no doubt that it was unnecessary for the motion judge to decide these issues in order to determine whether to stay the respondent's action under s. 7(1) of the *Arbitration Act, 1991*. These findings are clearly *obiter dicta* and, therefore, not binding as a precedent. Because these findings are *obiter dicta*, it is not necessary to review their correctness, as requested by counsel for Primerica.

[74] For my part, I disagree with Justice Cumming's conclusion about the illegality of the arbitration agreement as an illegal contracting out of the *Employment Standards Act* and note that his decision in 2000 was written before the tsunami of case law favouring arbitration agreements. I neither agree nor disagree with Justice Cumming's conclusion that Ms. Huras' contract was unconscionable. Unconscionability is ultimately a fact-based determination of the particular circumstances of the case and of the particular terms of the contract. I do not see a situation of unconscionability in the circumstances of the immediate case.

[75] Mr. Heller also relies on *Douez v. Facebook, Inc.*[42] to make the argument that because he has no bargaining power in a contract of adhesion, therefore, the agreement is unconscionable. In *Douez,* Ms. Douez brought a proposed class action against Facebook, the large social network, for infringing the privacy rights of almost two million consumers. Ms. Douez's standard form contract with Facebook, however, contained a forum selection clause that disputes would be litigated in California. Relying on the forum selection clause and the rule from *Z.I. Pompey Industries v. ECU-Line N.V.,*[43] Facebook moved to have the British Columbia action stayed.

[76] The rule from *Z.I. Pompey Industries* is that a forum selection clause should be enforced

[41] [2000] O.J. No. 1474 (S.C.J.), aff'd [2001] O.J. No. 3318 (C.A.).
[42] 2017 SCC 33.
[43] [2003] S.C.J. No. 23, [2003] 1 S.C.R. 450 (S.C.C.).

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unless there is "strong cause" not to enforce it. The effect of such a clause is to reverse the onus of proof, which normally requires the moving party defendant to justify staying the plaintiff's action, to place a burden on the plaintiff to show why a stay should not be granted. A majority of the Supreme Court held that the context of a consumer contract, as opposed to a commercial agreement, may provide strong reasons not to enforce a forum selection clause having regard to such circumstances as unequal bargaining power, the importance of adjudicating privacy rights, the comparative convenience and expense of litigating in another jurisdiction, public policy concerns, and the interests of justice. Thus, a majority in the Supreme Court held that forum selection clauses in consumer contracts require a special and different treatment than how a forum selection clause will be treated in a commercial contract.

[77] The case at bar, however, is not about a discretionary court jurisdiction where there is a forum selection clause to refuse to stay proceedings where a strong cause might justify refusing a stay; rather, it is about a very strong legislative direction under the *Arbitration Act, 1991* or the *International Commercial Arbitration Act, 2017* and numerous cases that hold that courts should only refuse a reference to arbitration if it is clear that the dispute falls outside the arbitration agreement.

[78] The *Douez* judgment does not change the ancient contract law about the doctrine of unconscionability and of the majority judges, three judges (Justices Karakatsanis, Wagner and Gascon) and three dissenting judges (Chief Justice McLachlin and Justices Moldaver and Côté) concluded that Facebook's forum selection clause was enforceable and only Justice Abella (concurring with the majority) spoke about unconscionability as the explanation for why there was strong cause to not enforce an enforceable forum selection clause.

[79] The *Douez* judgment does not assist Mr. Heller. In any event, Mr. Heller's case is not about the court's *forum conveniens* discretionary jurisdiction; rather, it is case about the court's very limited jurisdiction to refuse to stay an action when the parties have agreed to submit their dispute to arbitration, as they have in the case at bar.

D CONCLUSION

[80] For the above reasons, Mr. Heller's action is stayed in favour of arbitration.

[81] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Uber's submissions within 20 days of the release of these Reasons for Decision followed by Mr. Heller's submissions within a further 20 days.

_____

Perell, J.

Released: January 30, 2018

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Schedule "A" - Legislation

Arbitration Act, 1991

The relevant provisions of the *Arbitration Act, 1991* are:

Definitions

1 In this Act,

"arbitration agreement" means an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them;

….

Application of Act

Arbitrations conducted under agreements

2(1) This Act applies to an arbitration conducted under an arbitration agreement unless,

(a) the application of this Act is excluded by law; or

(b) the *International Commercial Arbitration Act* applies to the arbitration.

….

Arbitration agreements

5(1) An arbitration agreement may be an independent agreement or part of another agreement.

….

COURT INTERVENTION

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.

….

Effect of refusal to stay

(4) If the court refuses to stay the proceeding,

(a) no arbitration of the dispute shall be commenced; and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.

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….

No appeal

(6) There is no appeal from the court's decision.

….

JURISDICTION OF ARBITRAL TRIBUNAL

Rulings and objections re jurisdiction

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.

….

Ruling

(7) The arbitral tribunal may rule on an objection as a preliminary question or may deal with it in an award.

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.

….

1. ***International Commercial Arbitration Act, 2017***

The relevant provisions of the *International Commercial Arbitration Act, 2017* are:

PART I
THE CONVENTION

Interpretation

1 Except as otherwise provided in this Act, words and expressions used in this Part have the same meaning as the corresponding words and expressions in the Convention.

Application of Convention

2(1) Subject to this Act, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations Conference on International Commercial Arbitration in New York on 10 June 1958 and set out in Schedule 1, has force of law in Ontario in relation to arbitral awards or arbitration agreements in respect of differences arising out of commercial legal relationships.

….

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PART II
THE MODEL LAW

Interpretation

4 Except as otherwise provided in this Act, words and expressions used in this Part have the same meaning as the corresponding words and expressions in the Model Law.

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.

Same

(2) With respect to article 7 of the Model Law, option I applies in Ontario; option II does not.

Same

(3) The Model Law applies to international commercial arbitration agreements and awards made in international commercial arbitrations, whether made before or after the coming into force of this Act.

…

Interpretation of Model Law

6(1) For the purposes of subsection 5 (1), the words and expressions listed in Column 2 of the following table, as used in the provisions of the Model Law set out in Column 1 of the table, shall be read as the words and expressions listed in the corresponding row of Column 3 of the table.

TABLE

Column 1	Column 2	Column 3
article 1 (1)	"agreement in force between this State and any other State or States"	"an agreement that is in force in Ontario between Canada and any other country or countries"
articles 1 (2), 17 J, 27, 34 (2) (a) (i), 34 (2) (b) (ii), and 36(1) (b) (ii)	"this State"	"Ontario"
article 1 (3)	"different States" and "the State"	"different countries" and "the country", respectively
article 1 (5)	"any other law of this State"	"any other law of Ontario or laws of Canada that are in force in Ontario"
articles 34 (2) (b) (i), and 36 (1) (b) (i)	"the law of this State"	"the law of Ontario and any laws of Canada that are in force in Ontario"
article 35 (2)	"this State"	"Canada"

Same, "court" or "competent court"

(2) "Court" or "competent court", when used in the Model Law in reference to an Ontario court, shall be read as a reference to the Superior Court of Justice unless the context requires otherwise.

Use of extrinsic material

(3) In applying the Model Law, recourse may be had to,

> (a) the Reports of the United Nations Commission on International Trade Law on the work of its 18th (3 – 21 June 1985) and 39th (19 June – 7 July 2006) sessions (U.N. Docs. A/40/17 and A/61/17);

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(b) the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration (U.N. Doc A/CN.9/264); and

(c) the Commentary of the United Nations Commission on International Trade Law concerning the UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006 (U.N. Sales No. E.08.V.4).

….

PART III - GENERAL

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.

….

SCHEDULE 2
UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

(United Nations documents A/40/17, annex I and A/61/17, annex I)

(As adopted by the United Nations Commission on
International Trade Law on 21 June 1985,
and as amended by the United Nations Commission
on International Trade Law on 7 July 2006)

CHAPTER I.
GENERAL 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.

(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

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(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25(a) and 32(2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 2 A. International origin and general principles

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

….

CHAPTER II.
ARBITRATION AGREEMENT

Option I

Article 7. Definition and form of arbitration agreement

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

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(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

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.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

….

CHAPTER IV.
JURISDICTION OF ARBITRAL TRIBUNAL

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.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

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CITATION: Heller v. Uber Technologies Inc., 2018 ONSC 718
COURT FILE NO.: CV-17-567946CP
DATE: 20180130

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DAVID HELLER

Plaintiff

– and –

UBER TECHNOLOGIES INC., UBER CANADA, INC., UBER B.V. and RASIER OPERATIONS B.V.

Defendants

REASONS FOR DECISION

PERELL J.

Released: January 30, 2018