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CASES

Being Conscious of Unconscionability in Modern Times: *Heller* v *Uber Technologies*

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Requiring low-paid drivers to sign an Arbitration Clause removing their right to local court processes can be unconscionable and, if so, the clause is not enforceable. This was the conclusion reached by the majority of the Supreme Court of Canada when considering a contractual provision that mandated all external dispute resolution processes go through mediation and arbitration in the Netherlands and required upfront fees of $14,500USD to do so. In this case note, it is argued that the Canadian decision opens the door for the United Kingdom to rethink the role of unconscionability and how the doctrine could apply to modern contractual arrangements. *Heller* v *Uber Technologies* provides the opportunity to develop the elements of unconscionability in a way that tackles inequality of bargaining power in standard form contracts, particularly when they fall outside the protection of the Consumer Rights Act 2015.

INTRODUCTION

Who should decide whether an Uber driver in Ontario is an 'employee' under the relevant employment laws – the courts of Ontario or an arbitrator based in the Netherlands? This was the key issue to be considered in *Heller* v *Uber Technologies*[1] (*Heller* v *Uber*). The Supreme Court of Canada came to the conclusion that a clause requiring a potential litigant to incur upfront costs of $14,500USD in order to commence arbitration proceedings in the Netherlands was invalid. The matter should therefore be heard by the Ontario courts. The outcome itself was uncontentious – not many people would support large companies wielding power in a way that unjustifiably restricts access to justice. What was more controversial, however, was the basis on which this decision was made; the judges in the majority were split as to *why* the clause was invalid, and there was also a strong dissenting judgment. The majority found that the arbitration clause in question resulted from an unconscionable bargain and was therefore

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1 2020 SCC 16.

not enforceable. This note focuses on the ratio of the case and the impact that it may have on the development of the unconscionability doctrine, particularly in the United Kingdom (UK).

IMPACT OF THE DECISION

Whilst *Heller* v *Uber* is a Canadian Supreme Court case, it is a significant judgment for all common law jurisdictions in two major ways. First, it raises the issue of if – and how – large companies can utilise arbitration clauses to restrict individuals from pursuing lawsuits in their home jurisdiction. Given the increased use of arbitration clauses and processes, the case has important lessons for many countries. Secondly, the case also prompts interesting questions about the application of the unconscionability doctrine to modern day contractual arrangements.

In the UK, the underlying difficulty of classifying the employment status of Uber drivers has raised different legal questions and will soon be determined by the Supreme Court in *Uber BV* v *Aslam*[2] (*Aslam*). The Court of Appeal held, by a majority, that people driving for Uber are 'workers' and therefore entitled to a variety of benefits, including a minimum wage and paid holidays. Uber have, unsurprisingly, been vocal in their criticism of this decision. The word 'unconscionability' does not appear in *Uber BV* v *Aslam* and the case is concerned with access to justice and employment laws. This, however, does not detract from the significance of *Heller* v *Uber*, which raises important contract law questions that can be applied to many aspects of employment agreements, and to a range of other contracts arising from inherent power imbalances. It would also be a Pyrrhic victory for the litigants in *Aslam* if they won, but then found out that the drivers had agreed to arbitration clauses preventing them accessing the benefits of being designated employees.

BACKGROUND TO *HELLER* V *UBER*

The claimant, David Heller, was a driver for Uber in Toronto. He delivered food for UberEATS starting in 2016, earning approximately $400 to $600 per week based on 40 to 50 hours of work driving his own vehicle. The defendant, Uber, is a global business operating in more than 900 cities and 93 countries, with a customer base of millions of people and businesses.

Heller was required to accept the terms of Uber's standard form services agreement before he could commence driving. This occurred by downloading Uber's mobile application (app) and creating an online account. The first time a driver logs on, they must agree to certain terms and conditions and confirm that they have reviewed all the documents. The driver has to click 'Yes, I Agree' on their phone before proceeding. There are two potential agreements, a

2 [2019] 3 All ER 489, [2018] EWCA Civ 2748. The case was argued before the courts in July 2020; see A. Bogg, 'Uber v Heller and the Prospects for a Transnational Judicial Dialogue on the Gig Economy – II' OxHRH Blog 20 July 2020 at https://ohrh.law.ox.ac.uk/uber-v-heller-and-the-prospects-for-a-transnational-judicial-dialogue-on-the-gig-economy-ii/ (last accessed 24 July 2020).

Driver services agreement (for personal transportation) and an UberEATS services agreement (for food delivery), which were 14 or 15 pages long. Both contained a clause stating that the agreement was exclusively governed by the laws of the Netherlands, and that any dispute must first be dealt with by mediation before proceeding, if unsuccessful, to arbitration in the Netherlands (the Arbitration Clause).

The mediation and arbitration process mentioned in the services agreement is expensive. Whilst the specific figures were not cited in the Arbitration Clause itself, evidence submitted to the Supreme Court showed that the up-front administrative and filing fees of going through mediation followed by arbitration equated to US$14,500. These fees do *not* include the additional costs of travel expenses, legal fees, lost wages and other costs of arbitration participation. UberEATs drivers earn $20,800 to $31,200 per year (before taxes and expenses), it was therefore practically and financially prohibitive for any driver to challenge Uber via the Arbitration Clause. Heller's counsel submitted evidence that not a single driver worldwide had invoked the Arbitration Clause against Uber. Considering that the company has approximately five million drivers, this is quite remarkable.

Heller commenced proceedings against Uber in 2017 alleging violations of employment standards legislation. Relying on the Arbitration Clause in the standard form services agreement, Uber brought a motion to stay these proceedings in favour of arbitration in the Netherlands.

Motion judge's decision

At first instance, the motion judge allowed Uber's stay of proceedings. It was held that the question of the arbitration agreement's validity had to be referred to arbitration in the Netherlands. This was in line with the principle that arbitrators are competent to determine their own jurisdiction. Relying on the Supreme Court's decision in *Seidel* v *TELUS Communications Inc*[3] and the Ontario Court of Appeal's decision in *Wellman* v *TELUS Communications Company*,[4] it was held that the courts must enforce arbitration agreements freely entered into (even if they are contained in standard form contracts) and should not put restrictions on parties' freedom to arbitrate.[5] The motion judge also concluded that the Employment Standards Act 2000 (ESA 2000) did not restrict the parties' rights to arbitrate. Finally, the unconscionability exception was rejected as the motion judge found there was no evidence that Uber 'preyed [on] or took advantage of Mr. Heller or the other Drivers or extracted an improvident agreement by inserting an arbitration provision'.[6] Heller appealed.

Court of Appeal

The appeal was allowed. The Court of Appeal held that objections to the Arbitration Clause could be decided by the Canadian courts and did not need

3 2011 SCC 15, [2011] 1 SCR 531.
4 2017 ONCA 433, 138 OR (3d) 413.
5 *Heller* v *Uber Technologies Inc* 2019 ONCA 1 at [17].
6 *Heller* v *Uber Technologies Inc* 2018 ONSC 718 at [70].

referral to the arbitrator. Nordheimer JA (with whom Feldman and Pardu JJA agreed) held that there were two relevant issues: first, whether the Arbitration Clause amounts to an illegal contracting out of the ESA 2000, and second whether the Arbitration Clause is unconscionable. Either would make the clause invalid. Under the Arbitration Act 1991, the court must stay any proceedings subject to an arbitration agreement.[7] The courts may however refuse to grant a stay if the agreement is 'invalid'.[8] Heller argued that the Arbitration Clause was invalid on the basis that it amounted to a prohibited contracting out of an 'employment standard' under the ESA 2000 and because it was unconscionable.

Uber invoked the 'competence-competence' principle, stating that the future arbitrator is competent to decide its own competence (ie has jurisdiction to decide its own jurisdiction). This was rejected by the Court of Appeal, with Nordheimer JA determining that the question was not about jurisdiction of the arbitrator but rather about the validity of the Arbitration Clause, which should be determined by the court. His Honour then held that the clause constituted a contracting out of the ESA 2000, as it eliminated the drivers' ability to complain to the Ministry of Labour and the right for a subsequent investigation against Uber.

Nordheimer JA was also highly critical of the motion judge's finding that there was no unconscionability, stating that the conclusion was 'flawed' because of 'palpable and overriding errors of fact'. His Honour was particularly concerned by the judge's finding that drivers had access to independent dispute resolution processes in Ontario. This was not the case: all dispute resolution processes (apart from arbitration) were run by Uber technology or personnel and were completely controlled by the company.[9] Nordheimer JA therefore applied the traditional four-element test in *Titus* v *William F Cooke Enterprises Inc*,[10] holding that the clause was invalid on the grounds of unconscionability.[11]

The judgment summarised that 'it can be safely concluded that Uber chose this Arbitration Clause in order to favour itself and take advantage of its drivers, who are clearly vulnerable to the market strength of Uber'.[12] Nordheimer JA was unpersuaded by the argument that the company had included the provision to ensure consistency of outcomes rather than simply to prevent claims being made against it. He observed that the Arbitration Clause 'operates to defeat the very claims it purports to resolve'.[13]

DECISION OF THE SUPREME COURT

Uber appealed to the Supreme Court, arguing for a stricter approach to unconscionability and public policy. The appeal was dismissed, with Côté J dissenting. The judges in the majority were split as to their reasons for dismissing the

7 Arbitration Act 1991, s 7(1).
8 Arbitration Act 1991, s 7(2)(2).
9 n 4 above at [55].
10 2007 ONCA 573, 284 DLR (4th) 734 at [38]; as confirmed more recently in *Phoenix Interactive Design Inc* v *Alterinvest II Fund LP* 2018 ONCA 98, 420 DLR (4th) 335. The different elements and tests are discussed in more detail below.
11 n 4 above at [68].
12 *ibid* at [68.4]
13 *ibid* at [70].

appeal. Abella and Rowe JJ's joint judgment (with Wagner CJ and Moldaver, Karakatsanis, Martin and Kasirer JJ concurring) found the Arbitration Clause was unenforceable on the grounds of unconscionability, while Brown J based his decision for Heller on considerations of public policy.

Abella and Rowe JJ held that, according to *TELUS Communications Inc* v *Wellman*, any claim about a potentially unfair arbitration clause should be dealt with directly through the doctrine of unconscionability.[14] Their Honours emphasised that this equitable doctrine allows contracts obtained by the abuse of unequal bargaining powers to be set aside by the courts. Unconscionability protects individuals who are vulnerable in the contracting process, and is widely accepted in Canadian contract law.[15] Their Honours emphasised that the unconscionability doctrine must be balanced against freedom of contract, which lies at the 'heart' of the common law of contract. Extensive common law and academic literature on freedom of contract and unconscionability was considered, and it was held that the court can *and should* prevent the enforcement of unconscionable contracts: 'when unfair bargains cannot be linked to fair bargaining … courts can avoid the inequitable effects of enforcement without endangering the core values on which freedom of contract is based'.[16]

The judges concluded that it was a 'classic case' of unconscionability[17] and the Arbitration Clause was invalid. The specific important factors noted by Abella and Rowe JJ were: imbalance of power between the two parties, the role of standard form contracts and inability to negotiate, lack of information in the Arbitration Clause about mediation and arbitration in the Netherlands, disproportionate costs associated with arbitration, and the significant impact the clause would have on Heller's substantive rights. As the clause was invalid on the grounds of unconscionability, it was unnecessary to consider whether it had the effect of contracting out of the mandatory protections of the ESA 2000. An arbitration agreement can be classified as a 'self-contained collateral contract', and this allowed the Arbitration Clause to be severed from the services agreement between Heller and Uber.[18]

Brown J agreed in a separate judgement that the Arbitration Clause was invalid, but on the grounds that it undermined access to justice and was therefore contrary to public policy. Whilst the common law has strongly promoted the importance of freedom of contract to ensure certainty and stability, it is not an absolute concept. There are many instances where people will not be bound by contractual agreements, including when the law recognises a 'paramount consideration of public policy'.[19] His Honour emphasised that the concept of public policy has and should be used sparingly to ensure 'a disciplined approach' and the development of narrow, well-established grounds. One of the established grounds of public policy precludes an ouster of court jurisdiction. This is to protect the integrity of the justice system, uphold the rule of law, and ensure

14 [2019] 2 SCR 144 at [85].
15 n 1 above at [55].
16 *ibid* at [59].
17 *ibid* at [4].
18 *ibid* at [96] citing *Bremer Vulkan Schiffbau und Maschinenfabrik* v *South India Shipping Corporation Ltd* [1981] AC 909 (HL).
19 n 1 above at [103] citing *In Re Estate of Charles Millar, Deceased* [1938] SCR 1, 4.

an independent judiciary that can vindicate legal rights. Brown J commented that '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'.[20]

Uber contended that the enactment of modern arbitration legislation removes the operation of public policy. This was rejected by Brown J. His Honour emphasised that there is no reason to distinguish between a clause that *expressly* blocks access to justice and one that has the *effect* of doing so.[21] Whilst arbitration generally might be regarded as enhancing access to justice, arbitration clauses like the present one that required substantial upfront payments from individuals are, in reality, 'a tool for cutting off access to justice'.[22] After reviewing the context of the agreement between Heller and Uber, Heller's financial situation and the cost of arbitration, the Arbitration Clause was held effectively to bar any claim that Heller may have had against Uber. It was 'not an agreement *to* arbitrate, but rather *not* to arbitrate'.[23]

Unlike the rest of the Supreme Court, Côté J would have allowed the stay – provided Uber advanced to Heller the funds needed to initiate the arbitration proceedings. The decision contained detailed analysis of arbitration services in Canada. Her Honour emphasised the importance of enforcing arbitration agreements, and her concern that the majority decision risked undermining Canada's leading role in arbitration law. Despite the evidence of the significant costs required under the Arbitration Clause, Côté J emphasised that 'the pursuit of access to justice and the enforcement of arbitration agreements are often complementary objectives… Arbitration enhances access to justice because it can be more expedient and less costly than litigation.'[24]

The three separate judgments raise a number of engaging issues that are worthy of further consideration, including the appropriate arbitration jurisdiction, the elements of an unconscionability doctrine, the role of inequality of power, and the difficulties of defining drivers' employment status in the gig economy.

Arbitration jurisdiction

Before the Supreme Court could consider the substantive matter of whether the Arbitration Clause was invalid, it needed to determine *who* should answer this question – the Canadian Courts or an arbitrator based in the Netherlands? The starting point for this question is the rule in *Dell Computer Corp* v *Union des consommateurs* (*Dell*), which held that a court must refer all challenges of an

20 *ibid* at [112].
21 *ibid* at [113], emphasis in original.
22 *ibid* at [119]
23 *ibid* at [102], emphasis in original.
24 *ibid* at [312]. In light of the cost of arbitration, the wages of Uber drivers and the decisions of other judges, an argument that arbitration would 'enhance' a driver's access to justice is, in the author's opinion, hard to justify. There are also concerns of 'marketisation and private power capture': see F. Wilmot-Smith, *Equal Justice* (Cambridge, MA: Harvard University Press, 2019) 143 (and more generally chapters 7 and 8).

arbitrator's jurisdiction to the arbitrator unless one of the specific exceptions applies.[25]

Abella and Rowe JJ drew a distinction between *Dell* and the current case, holding that issues of accessibility – which were not raised on the facts in *Dell* – must be considered. Their Honours commented that:

> 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.[26]

Two examples of situations raising accessibility concerns are where (1) it would be too costly for the applicant or (b) a foreign choice of law clause circumvents mandatory local policy – for example a clause preventing an arbitrator from giving effect to the employment law protections in Ontario.[27] The judges concluded that in these circumstances the arbitration agreement would be insulated from any 'meaningful challenge'. This issue was not relevant in *Dell*, as the case was based on the assumption that if the court did not decide the matter, an adjudicator would.[28]

The judges were – correctly – concerned that their decision not provide a green light that allowed parties to circumvent valid arbitration agreements. It therefore must be determined whether there is a *bona fide* challenge. This involves a two-step process; first, whether there is a genuine challenge to the arbitral jurisdiction and secondly, whether there is a real prospect that, if the stay were granted, the challenge would never be resolved by the arbitrator.

When applying this process to the facts of the case, it is clear that Uber's actions put access to justice at risk. The fees that were required imposed a 'brick wall' against applicants, and the merits of any case could not be considered until potentially unaffordable fees were paid by the Uber drivers. The details of this were embedded into an electronic standard form contract. It was appropriate therefore that the Canadian Courts, rather than arbitrators in the Netherlands, should have jurisdiction to determine the validity challenge.

Elements of an unconscionability claim

The Supreme Court tackled the very foundation of the unconscionability doctrine, with different views on whether a claim has two or four-elements. In the Court of Appeal, Nordheimer JA followed *Titus* v *William F Cooke Enterprises Inc*[29] in holding that there were four elements to unconscionability;

25 [2007] 2 SCR 801 at [84]-[85].
26 n 1 above at [38].
27 *ibid* at [38].
28 *ibid* at [40].
29 2007 ONCA 573, 284 DLR (4th) 734 at [38]; as confirmed more recently in *Phoenix Interactive Design Inc* v *Alterinvest II Fund LP* 2018 ONCA 98, 420 DLR (4th) 335.

(1) A grossly unfair and improvident transaction;
(2) A victim's lack of independent legal or other suitable advice;
(3) An overwhelming imbalance in bargaining power caused by the victim's ignorance or other disability; and
(4) The other party's knowingly taking advantage of this vulnerability.

Abella and Rowe JJ disagreed with this approach, citing academic support for a two-element approach to unconscionability: one that requires, first, an inequality of bargaining power arising from a weakness or vulnerability and, secondly, an improvident transaction.[30] On the first of these elements, the court emphasised that there are no strict limitations on what constitutes 'inequality'; it can arise from personal characteristics of the claimant and/or their circumstantial vulnerability. The effect of the inequality can either affect the individual's ability to freely enter or negotiate a contract, or compromise their ability to understand the impact of a contract they have entered into. On the second element, a bargain is improvident when it unduly advantages the stronger party or unduly disadvantages the vulnerable individual. The judges noted that this issue can take many forms, and determining what makes it improvident 'cannot be reduced to an exact science'.[31]

Uber argued that the Supreme Court should reject the two-part approach and instead adopt the stricter four-part test.[32] This contention was rejected by Abella and Rowe JJ on the basis that it would result in unconscionability being 'more formalistic and less equity-focused.'[33] The judges also rejected the strict requirement of the other party knowingly taking advantage, as this shifted the focus away from the protection of the vulnerable party and towards the state of mind of the stronger party.[34]

Whilst only making brief comments on unconscionability, Côté J emphasised that Uber was not aware of Heller's specific circumstances and thus could not have had the knowledge of his vulnerability that (Her Honour thought) was necessary for a finding of unconscionability.[35] Abella and Rowe JJ disagreed, stating that 'a rigid requirement based on the stronger party's state of mind would … 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.'[36]

The importance of a knowledge requirement depends on the purported objective of unconscionability. If the doctrine targets exploitative behaviour, some knowledge would be necessary.[37] However, if the focus is protecting weak individuals from unfair contracts, why is knowledge relevant? This question is particularly pertinent for standard form contracts where there is no opportunity to

30 n 1 above at [62]-[65].
31 *ibid* at [78].
32 *ibid* at [80].
33 *ibid* at [82].
34 *ibid* at [85].
35 *ibid* at [288].
36 *ibid* at [85].
37 *Hart* v *O'Connor* [1985] UKPC 1 has confirmed a knowledge requirement for unconscionability in the United Kingdom.

negotiate, making evidence of specific advantage taking and the stronger party's *actual* knowledge of the vulnerability impossible to adduce. In an era where the vast majority of contracts entered into by individuals are standard form, requiring actual knowledge of the vulnerability would make the unconscionability doctrine practically redundant. In the current case, Uber could not have known the income, education and knowledge level of the individuals clicking 'Yes, I agree' to the standard form services agreement. They do however know the average annual income of their drivers (and the fact that this is almost the same as the cost of adjudication in the Netherlands). Provided that *constructive* knowledge of the disadvantage (or 'reason to suspect'[38]) is sufficient, it is hard to argue why this element would not be fulfilled, even if the more rigid four-part test were to be used. An insistence on actual knowledge would mean that, provided the stronger party avoided learning the specific circumstances of the other party, they would be immune from the resulting agreement being unenforceable on the grounds of unconscionability. In light of the realities of contracting in the modern world, such an outcome cannot fairly stand.

The role of inequality of power

There was significant disagreement between the judges on the relationship between inequality of bargaining power and unconscionability. This is a key issue, as English law has clearly rejected parties' attempts to escape contracts merely on the basis of an inequality of bargaining power.[39]

The joint decision by Abella and Rowe JJ holds that inequality can be sufficient, provided it (a) arises from a weakness and (b) means that the weaker party 'may be vulnerable to exploitation in the contracting process'.[40] This creates a circular argument; the vulnerability required for a finding of unconscionability arises from the inequality of power, which then creates a vulnerability to exploitation. In rejecting the majority decision, Brown J emphasises that inequality, even substantial inequality, is not sufficient for a finding of unconscionability as a specific vulnerability is necessary.[41] Côté J shared this concern, stating that a focus on inequality of power 'would undermine private ordering and commercial certainty'.[42]

Inequality of bargaining power in general is not sufficient to undermine contractual arrangements in the UK. The relative strength of the parties is however at the centre of the law on unconscionability. In 1873 Lord Selborne highlighted in *Earl of Aylesford* v *Morris* that the doctrine was designed not to address outright fraud, but instead something more implicit and nuanced.[43] His Lordship emphasised that it was focused on 'unconscientious use of the power' arising from the circumstances and the 'relative position of the parties'. It is

38 See discussion in M. Chen-Wishart, *Unconscionable Bargains* (Wellington: Butterworths, 1989) 101-105.
39 *Lloyds Bank Ltd* v *Bundy* [1975] QB 326.
40 n 1 above at [72].
41 *ibid* at [160].
42 *ibid* at [257].
43 (1873) R 8 Ch App 484, 490.

therefore not controversial that, in certain circumstances, the relative difference in position between the two parties may result in vulnerability or weakness sufficient for the 'overwhelming imbalance in bargaining power' required by unconscionability. This is of particular concern with standard form contracts drafted in a heavily one-sided manner by 'armies of lawyers'.[44] As outlined by Abella and Rowe JJ:

> 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 … 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.[45]

In other countries, the law has moved away from requiring a specific 'disability' and instead looks at the situation as a whole. For example, Dalton J recently held in the Queensland Supreme Court that the 'situational disadvantage and vulnerability' of four coal mining companies was sufficient for a finding of unconscionability against Adani (a multinational conglomerate company).[46] In light of the standard required for 'vulnerability' in English unconscionability cases, this aspect of *Heller* v *Uber* is unlikely to cause any controversy. It is hard to distinguish between a Post Office telephonist not understanding the impact of a property transaction in *Cresswell* v *Potter*[47] and an Uber driver agreeing to a complex and legalistic arbitration clause in a standard services agreement as the only way to obtain relatively low-paid work from the company.

The gig economy and defining drivers

The impact of the 'gig economy' is central to the issues raised in *Heller* v *Uber*. The gig economy has a number of alleged benefits; Côté J discussed the role of a 'shared economy' in her judgement. Her Honour highlighted that Uber's business was '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'.[48] But is it worth having a sector of the economy that only works by breaking – or at the very least, stretching – the law? The changing labour market has created complexities and opened up new spaces for exploitation of the economically vulnerable; many countries around the world have grappled

44 *Consistent Group Ltd* v *Kalwak* [2007] UKEAT 0535, [2007] IRLR 560 at [57].
45 n 1 above at [89].
46 *Adani Abbot Point Terminal Pty Ltd* v *Lake Vermont Resources Pty Ltd* [2020] QSC 260. This case has been appealed to the Queensland Court of Appeal.
47 [1978] 1 WLR 255.
48 n 1 above at [267].

with the legal impacts of the gig economy, or are currently dealing with these issues.[49]

The basis of *Heller* v *Uber* was a desire for drivers to be classified as 'employees' and hence acquire employment rights under Ontario law. There is however a related issue of whether the drivers are 'consumers' or 'traders'; if they are not protected by employee rights, can they be protected by consumer rights? In his concluding remarks, Nordheimer JA highlighted that even if Uber is correct and their drivers are not employees, they are akin to consumers in terms of their relative bargaining position. They are not being represented by a union, they are at the 'mercy' of Uber, and the contract was entered into by clicking 'I Agree' on a downloaded app. This is not the case under UK law. As Uber drivers enter into the services agreement 'for purposes [of their] trade, business, craft or profession',[50] they are very likely to be classified as traders. The impact of this is that the drivers would not be entitled to the benefit of various (and often powerful) consumer protection mechanisms, such as the Unfair Terms provisions in the Consumer Rights Act 2015.[51] This makes the unconscionability doctrine even more important for ensuring fairness and transparency within the common law of contract.

Brown J commented that it is unnecessary to look at this issue through the lens of unconscionability, as the validity of the Arbitration Clause can be determined by public policy. The ability for arbitration clauses to remove legislative rights and/or prevent claimants from accessing their judicial rights, such as class-action lawsuits and punitive damages, has been discussed in depth.[52] Brown J's approach is court-centric; all it does is focus on ensuring access to the courts, but it does not provide any further protection. In contrast, the decision of Abella and Rowe JJ provides a much-needed pathway for litigants to challenge potentially unfair terms, particularly if they do not fall within the remit of the relevant consumer protection regime. It is easy to imagine that a services agreement between a large corporation and a lower-income individual could contain a range of potentially unfair terms – restraint of trade clauses, unfair fees and charges, unbalanced cancellation clauses, and penalties for failure to obtain a certain level of performance. These types of clauses are not addressed by Brown J's public policy approach or by UK statute law. Looking at the services agreement through the lens of unconscionability has the benefit of providing a framework for addressing other potentially unfair terms, particularly in standard form business agreements.

49 This case is focused on contract, and the consequences have been raised in many other areas, such as tort law (*Barclays Bank Plc* v *Various Claimants* [2020] UKSC 13) and employment law (*Uber BV* v *Aslam* [2019] 3 All ER 489, [2018] EWCA Civ 2748). For further discussion, see J. Prassl, *Humans as a Service* (Oxford: OUP, 2018).

50 Consumer Rights Act 2015, s 2(2).

51 It is however recognised that drivers would still have rights under the Unfair Contract Terms Act 1977 (UK).

52 See for example M. Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton, NJ: Princeton University Press, 2012); J. Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2015) 124 *Yale Law Journal* 2804; R. Kar and M. Radin, 'Pseudo-Contract and Shared Meaning Analysis' (2019) 132 *Harvard Law Review* 1135.

CONCLUDING REMARKS

The Supreme Court of Canada could have chosen to focus on the questions of public policy demanding the preservation of access to justice, something which has been recently addressed by the UK Supreme Court.[53] This may have been a more natural fit; Brown J commented that framing the issues around unconscionability amounted to 'forcing a square peg into a round hole'.[54] His Honour was concerned that the decision of Abella and Rowe JJ would result in a drastic expansion of the doctrine's reach without providing meaningful guidance on how the doctrine could and should develop. The common law's role however is to develop concepts and legal principles to suit new circumstances and challenges. *Heller* v *Uber* has started the process of how unconscionability may tackle new forms of contracting – such as agreements made by clicking 'I Agree' on an app[55] – and future courts will have the opportunity to further refine the scope of the doctrine.

Unconscionability is a flexible doctrine that has developed and evolved over time. In the 19th century version of unconscionability protected expectant heirs, and sales at considerable undervalue by 'poor and ignorant' persons. In the 20th century, the test of 'poor and ignorant' was updated to include 'members of the lower income group' and the 'less highly educated'. It therefore seems fitting that the doctrine should be used in the 21st century to prevent a multinational company from enforcing an unfair and one-sided arbitration clause against their drivers. The world has changed immeasurably since the first case on unconscionability; contracts can now be agreed by clicking a box in an online app with challenges to these agreements being determined by a privately paid arbitrator in another country applying the laws of a different jurisdiction. Despite these changes, individuals and institutions continue to take advantage of power imbalances and vulnerabilities – and contract law must be able to respond effectively to substantively unfair bargains arising from these situations. The Canadian Supreme Court's decision in *Heller* v *Uber* opens the door for English courts to develop unconscionability in a way that can respond fairly and transparently to the new challenges faced by contract law.

53 See *R (UNISON)* v *Lord Chancellor* [2017] UKSC 51 and A. Adams and J. Prassl, 'Vexatious Claims: Challenging the Case for Employment Tribunal Fees' (2017) 80 MLR 412.

54 n 1 above at [103].

55 Unconscionability and standard form contracts in and of itself is not a 'new' issue: see, for example, L. Kornhauser, 'Unconscionability in Standard Forms' (1976) 64 *California Law Review* 1151; *Davidson* v *Three Spruces Realty Ltd* (1977) 79 DLR (3d) 481 (BCSC).