COURT OF APPEAL FILE NO. CA12345

MOOT COURT OF BRITISH COLUMBIA

ON APPEAL FROM the order of Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ. of the Supreme Court of Canada, pronounced on June 26, 2020.

BETWEEN:

UBER TECHNOLOGIES INC.

APPELLANT (Defendant)

AND:

DAVID HELLER

RESPONDENT (Plaintiff)

APPELLANT'S FACTUM

Uber Technologies Inc.

Moot Division 1

David Heller

INDEX

OPENING STATEMENT

There are two matters of appeal before this court—both should be allowed.

First, the *International Commercial Arbitration Act* ("ICAA") governs Uber's standard form service agreement (the "Service Agreement"). The Service Agreement is a licensing agreement for the purpose of transporting passengers or goods. This form of agreement expressly falls within the ICAA's definition of commercial. Alternatively, the ICAA's definition of commercial requires a broad interpretation. A superficial review of the evidence confirms the Service Agreement's commercial nature. Determining otherwise involves non-superficial findings of fact, which is prohibited by *Dell Computer Corp*. Finally, the ICAA's application is consistent with public policy considerations and international principles.

Second, the Service Agreement's arbitration clause is not unconscionable. David Heller ("Mr. Heller"), a competent and sophisticated person with no evidence of vulnerability, entered into an agreement with Uber that was neither contrary to his reasonable expectations, nor did it unjustly enrich Uber at Mr. Heller's expense.

Canadian jurisprudence has developed an appropriate test for unconscionability that effectively balances the protection of vulnerable parties with freedom of contract and beneficial economic relations. The Supreme Court of Canada's ("SCC") incorrect use of the unconscionability test creates significant ambiguity for its future application. This decision is inconsistent with existing unconscionability jurisprudence, and undermines good public policy. It should be overturned.

PART 1 – STATEMENT OF FACTS

1. Uber Technologies Inc ("Uber") operates software applications (the "App") used to arrange personal transportation and food delivery between drivers and customers.

Uber Technologies Inc v Heller, 2020 SCC 16 at para 6 [*SCC Decision*].

2. To use Uber's App, drivers must read through the Service Agreement and click "I Agree" twice. The parties to this agreement are the driver and Uber subsidiaries incorporated in the Netherlands.

SCC Decision, *supra* para 1 at para 7.

3. This Service Agreement licenses Uber drivers to use the App to provide transit services to customers. Drivers receive a license to use Uber's App, through the Service Agreement, to interact with Uber's customers. In exchange, drivers must pay a service fee to Uber for their use of the App and their license of its use.

SCC Decision, *supra* para 1 at para 182.

4. The Service Agreement contains a mandatory arbitration clause (the "Arbitration Clause"), which requires all disputes to be submitted first to mandatory mediation. If that fails, the dispute must be submitted to arbitration according to the International Chamber of Commerce Rules. The place of arbitration is Amsterdam. The up-front cost of arbitration, according to the International Chamber of

Commerce Rules, amounts to around $14,500 USD (approximately $19,000 CAD).

SCC Decision, *supra* para 1 at paras 8–10.

5. Mr. Heller entered the Service Agreement with Uber to become an Uber driver.

SCC Decision, *supra* para 1 at para 11.

6. Mr. Heller was required to provide to Uber's legal team, based in the Netherlands, a copy of (1) his driver's license, (2) vehicle registration, (3) proof of eligibility to work in Canada, (4) motor vehicle insurance policy, and (5) Ontario Safety Standards Certificate.

Heller v Uber Technologies Inc, 2018 ONSC 718 at para 18 [*Lower Court Decision*].

7. Uber provides a free internal dispute resolution system for drivers, which is mainly used to settle disputes that involve small sums of money. Mr. Heller raised over 300 complaints using this system, most of which were resolved within 48 hours.

Lower Court Decision, *supra* para 6 at para 22.
SCC Decision, *supra* para 1 at para 186.

8. Mr. Heller commenced a proposed class proceeding against Uber in Ontario for $400,000,000 CAD, alleging that Uber drivers have been misclassified by Uber

and are actually employees entitled to the benefits and protections under Ontario's *Employment Standards Act*.

SCC Decision, *supra* para 1 at para 188.

9. Uber brought a motion to have Mr. Heller's proceeding stayed in favour of arbitration, pursuant to the Arbitration Clause and British Columbia's ICAA or, alternatively, British Columbia's *Arbitration Act*.

SCC Decision, *supra* para 1 at para 189.

10. The Ontario Superior Court stayed Mr. Heller's action in favour of arbitration under the ICAA. The Ontario Court of Appeal allowed Mr. Heller's appeal, setting aside the stay. The Court of Appeal declined to determine whether the ICAA or *Arbitration Act* applied, but determined that the Arbitration Clause was unconscionable and therefore unenforceable.

SCC Decision, *supra* para 1 at para 190.

11. The SCC dismissed Uber's appeal, determining that the *Arbitration Act* governed the Arbitration Clause, and that the Arbitration Clause is unconscionable and therefore unenforceable.

SCC Decision, *supra* para 1 at paras 28, 98.

PART 2 – ERRORS OF JUDGEMENT

12. **The SCC erred in applying the British Columbia *Arbitration Act* rather than the British Columbia ICAA.**

13. **The SCC erred in determining that Uber's Arbitration Clause is unconscionable and therefore invalid.**

PART 3 – ARGUMENT

ISSUE ONE: THE SCC ERRED IN APPLYING THE BRITISH COLUMBIA *ARBITRATION ACT* RATHER THAN THE BRITISH COLUMBIA ICAA

1.1 The Service Agreement is expressly covered by the ICAA

14. The Service Agreement is both international and commercial in nature, and therefore the ICAA applies to it. Neither party disputes that the Service Agreement is international. The ICAA includes licensing agreements within its definition of commercial. The Service Agreement expressly states that it is a licensing agreement. Both the Ontario Superior Court and the SCC found that the Service Agreement is a licensing agreement.

> *Lower Court Decision*, *supra* para 6 at para 45.
> *SCC Decision*, *supra* para 1 at paras 14, 216.
> *International Commercial Arbitration Act*, RSBC 1996, c 233, s 1(6)(i) [*ICAA*].

15. The definition of commercial under the ICAA also includes the carriage of goods or passengers. The Service Agreement licensed Uber's software to Mr. Heller for the purpose of delivering food. A licensing agreement for the carriage of passengers or goods satisfies two categories of the ICAA's commercial definition. This provides strong support for finding that the Service Agreement is commercial. Both requirements for ICAA applicability are satisfied; the ICAA should apply.

> *ICAA*, *supra* para 14 at s 1(6)(f).

1.2 If the Court does not accept that the Service Agreement falls within either commercial category of the ICAA, the nature of the Service Agreement can be determined by the parties' relationship

16. Determining the definition of commercial using the parties' relationship accords with legislative intent. The ICAA, *UNCITRAL Model Law on International Commercial Arbitration* ("Model Law"), and the Model Law's explanatory texts define commercial in the context of the parties' relationship, not their dispute. This statutory language demonstrates that the nature of the parties' relationship governs an agreement's commercial nature.

> *ICAA*, *supra* para 14 at s 1(6).
> United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985, with Amendments as Adopted in 2006* (Vienna: United Nations, 2008) at c 1, art 1(1) [*Model Law*].
> United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (New York: 2012) at 9-10 [*Case Digest*].
> *Re Rizzo v Rizzo Shoes*, [1998] SCJ No 2, 154 DLR (4th) 193.
> *Interpretation Act*, RSBC 1996, c 238, s 8.

17. Canadian jurisprudence supports using parties' relationships to determine an agreement's commercial nature. *United Mexican States v Metalclad Corp* determined that the Model Law applied to an agreement because the relationship was commercial, despite the dispute not being commercial. Similarly, *Kaverit Steel & Crane Ltd v Kone Corp* extended the Model Law's application to a non-contractual dispute because the parties' relationship was commercial.

> **United Mexican States v Metalclad Corp*, 2001 BCSC 664 at paras 44, 46.
> **Kaverit Steel and Crane Ltd v Koen Corp*, 1992 ABCA 7 at para 26, 87 DLR (4th).

18. The intention of the parties' confirms their commercial relationship. By signing this Service Agreement, both parties indicated an intention to create a commercial relationship defined by the agreement's express language.

SCC Decision, *supra* para 1 at paras 14, 182, 216.

19. In summary, the Model Law intended a broad interpretation of commercial, which supports its application to the Service Agreement. Intention for a broad interpretation is expressly noted in the Model Law and its explanatory texts. Further, Canadian statutory principles support a broad interpretation. The non-exhaustive list under the ICAA allows for the inclusion of categories related to those listed. The Service Agreement should be considered to be analogous to the ICAA's listed categories if it is not found to fall under one of them.

Model Law, *supra* para 16 at 1.
Case Digest, *supra* para 16 at 9–10.
UNGA, 18th Sess, UN Doc A/CN.9/264 (25 March 1985) at 10.
UNGA, 40th Sess, UN Doc A/40/17 (21 June 1985) at 6.
Re Rizzo v Rizzo Shoes, [1998] SCJ No 2, 154 DLR (4th) 193.
Consumers' Assn of Canada v Canada (Postmaster General), 1975 CarswellNat 10 at para 14, FCJ No 23.

1.3 In the alternative, *Dell Computer Corp* prevents a non-superficial review of facts

20. For cases of arbitral referral, *Dell Computer Corp* provides that courts must limit its review of evidence to a superficial review. A superficial review of the evidence demonstrates that the Service Agreement is a commercial licensing agreement. This is consistent with the findings of the Ontario Superior Court and

Honourable Justice Côté. Determining otherwise contradicts past jurisprudence and usurps legislatively-prescribed arbitral powers.

> *Union des consommateurs c Dell Computer Corp*, 2007 SCC 34 at paras 84–86 [*Dell Computer*].
> *Lower Court Decision*, *supra* para 6 at 46.
> *SCC Decision, supra* para 1 at para 14, 216.

1.4 Application of the ICAA is consistent with Canadian public policy and international principles

21. Arbitration does not oust the court's jurisdiction. It is a valid dispute resolution mechanism that provides an alternative to courts. The role of courts in the arbitration process is to supervise arbitrators and ensure their decisions are consistent with Canadian law and public policy. It would be an error for this Court to interfere with arbitral referral and the application of the ICAA by usurping an arbitrator's role in the dispute resolution process.

> *ICAA*, *supra* para 14 at ss 6(1)(b), 34(2)(b).

22. Arbitral referral protects freedom of contract and access to justice. Canadian law has increasingly supported arbitral referral to reinforce these rights. Arbitration remains a cost-effective and expedient method of dispute resolution. Limited court intervention in arbitration promotes these rights. However, these rights are undermined by the SCC's decision that the ICAA does not govern the Service Agreement.

> *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4 at para 117 [*Tercon*].
> **Telus Communications Inc v Wellman*, 2019 SCC 19 at 54-56.
> *Model Law*, *supra* para 16 at vii–viii, 27.

SCC Decision, *supra* para 1 at para 177.

23. Granting arbitral referral also supports access to justice. The International Chamber of Commerce and the ICAA allow arbitrators to make orders that promote access to justice. If the arbitrator deems costs or travel as prohibitive for Mr. Heller, they have power to remove those barriers. The SCC's denial of arbitral referral prevents the arbitrator from alleviating any barriers for Mr. Heller and, in fact, increases them.

2017 Arbitration Rules, International Chamber of Commerce at arts 37–38.
ICAA, supra para 14 at ss 17, 34(2), 36.

24. The application of the ICAA is in accordance with the competence-competence principle and international comity. These principles are protected by the Model Law and arbitral referral.

Model Law, *supra* para 16 at art 16.
SCC Decision, *supra* para 1 at paras 122, 124.

25. The application of the ICAA is supported by statutory language, party intention, legislative intent, domestic public policy, and international principles. Not applying the ICAA undermines each of these, while simultaneously opening the floodgates to future commercial uncertainty. It is an error to affirm the SCC's decision to disapply the ICAA.

ISSUE TWO*:* THE SCC ERRED IN DETERMINING THAT UBER'S ARBITRATION CLAUSE IS UNCONSCIONABLE AND THEREFORE INVALID

26. The Arbitration Clause that Mr. Heller agreed to was not unconscionable. There was no evidence that Mr. Heller could not protect his own interests, nor that he entered into a bargain that was improvident. The test for unconscionability requires the claimant to demonstrate: (1) an inequality of bargaining power; and (2) a resulting improvident bargain. The SCC erred in finding that both prongs of the test were satisfied. Further, the SCC erred in its interpretation of the elements and unnecessarily expanded the doctrine of unconscionability. Expanding the reach of the legal system's ability to decline to enforce contracts far beyond "clear cases where the harm to the public is substantially incontestable" undermines the presumption of freedom to contract, which is central to effective commercial relations.

> *Douez v Facebook Inc,* 2017 SCC 33 at paras 115-116.
> *Tercon, supra* para 22 at para 117.

2.1 There was no inequality of bargaining power between Mr. Heller and Uber

27. Inequality of bargaining power exists "where one party cannot adequately protect their interests in the contracting process". Inequalities exist where there are significant gaps in wealth, knowledge or experience that impairs a party from freely entering the contract, limits their ability to appreciate the contract, or a combination of both. Any gap that existed between Mr. Heller and Uber was not enough to impair Mr. Heller's ability to protect his own interests.

> *SCC Decision*, *supra* para 1 at para 66.

28. Jurisprudence describes two ‘classic’ scenarios that exemplify an inequality of bargaining power. First, situations of ‘necessity’, such as a rescue at sea, situations involving financial vulnerability, or special relationships of trust. Second, situations where only one party to the contract understood or appreciated its terms. Examples of this scenario include the existence of a personal disadvantage of one of the parties, or an agreement of such density or complexity that only one party properly understood the agreement.

> *The Medina* (1876), 1 PD 272.
> *Ayres v Hazelgrove* (9 February 1984), England (QB).
> *Commercial Bank of Australia Ltd v Amadio*, [1983] HCA 14 at 404, 151 CLR 447.

29. There was no evidence that Mr. Heller was a vulnerable party. Imprinting Mr. Heller with a non-existent vulnerability creates a problematic expansion to the scope of the doctrine of unconscionability and undermines the clarity of the doctrine. Further, such an approach invites a post-hoc assessment of the parties and the contract, opening the door for disgruntled parties that are unhappy with their bargain to litigate it at a later date.

30. Mr. Heller is not an unsophisticated party analogous to the claimant in the often-cited *Harry v Kreutziger*, which remains an authority for unconscionability in British Columbia. The claimant in that case had a grade five education, was inarticulate, inexperienced and sold an asset for a quarter of its calculated value. Similarly, successful claims for unconscionability have been made by those who

could not protect their own interests as a result of brain damage, mental incompetence, older age, illness, or lack of language competency. By contrast, Mr. Heller is a high school graduate who is a self-employed driver with no cognitive or financial vulnerabilities, and is thus analogous to the claimant in *Downer v Pitcher.* In that case there was no evidence the claimant had a significant disadvantage in signing a release, but rather her own foolishness was the reason for a poor bargain.

> **Harry v Kreutziger,* 1978 CanLII 393 at para 2, 9 BCLR 166 (CA).
> *Marshall v Canada Permanent Trust Co* (1968), 69 DLR (2d) 260 at para 16, 1968 CanLII 638 (ABQB).
> *Hall v Grassie*, 1982 CarswellMan 177 at paras 4, 12, 16 Man R (2d) 399 (QB).
> *Fusty v McLean Construction Ltd,* 1978 Carswell Alta 71 at para 2, 14 AR 602 (Dist Ct).
> **Downer v Pitcher*, 2017 NLCA 13 at paras 63–64.

31. Significant implications are raised by the SCC's determination that Mr. Heller suffered from vulnerability so significant that he could not protect his own interests. First, the common and efficient use of standard form contracts risk increased substantive review, since what appeared to be a rebuttable assumption of competency has been removed or obfuscated. Second, even if parties believe that there is no evidence of vulnerability at the time of contract formation, the SCC has opened the door to a post-hoc analysis for an unsatisfied party to attack the contract's validity. By attacking these principles, the SCC undermines one of the "most important liberties prized by a free people...the liberty to bind oneself by consensual agreement" — a liberty that should require strong evidence to be removed, not post-hoc judicial activism.

Hofer v Hofer, [1970] SCR 958 at 964, 13 DLR (3d) 1.

2.2 The Arbitration Clause did not result in an improvident bargain for Mr. Heller

32. A bargain will be found to be improvident if it "unduly advantages the stronger party or unduly disadvantages the more vulnerable [party]". Improvidence is analyzed contextually and assessed at the time the contract was formed. Courts focus on undue enrichment of the stronger party when the weaker party is in a desperate situation, and focus on the expectations of the weaker party in cases where they may not understand the terms or significance of the agreement.

SCC Decision, *supra* para 1 at paras 74–75, 77.
Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, (Markham, ON: LexisNexis, 2014) at 528.

33. Improvidence is considered using the lens of a reasonable person considering the surrounding context at the time that the agreement was entered into. This surrounding context includes market price and the positions of the parties. There is no evidence that Mr. Heller's expectations were not met when one considers the entire context of the contract at the time when it was agreed to.

SCC Decision, *supra* para 1 at paras 76–77.

34. Mr. Heller was given unlimited time to review the document, was required to scroll through it and press "Accept" twice and was alerted in large font to his ascent. A reasonable person entering into a contractual arrangement in order to

provide themselves with a source of livelihood would deem it prudent to fully review and consider the document before agreeing to its terms.

Lower Court Decision, *supra* para 6 at para 19.

35. A reasonable person of ordinary intelligence would assume any legal action, whether through the courts or arbitration, would be costly — particularly if the dispute would be heard by another jurisdiction. If Mr. Heller was in in such a 'desperate situation' that any agreement would have been better than nothing, the court is required to focus its analysis on Uber's unjust enrichment rather than Mr. Heller's reasonable expectations. Even if Mr. Heller was in such circumstances, he would still fail to establish that Uber was unjustly enriched.

SCC Decision, *supra* para 1 at para 76.

36. The 3-part test for unjust enrichment requires that: (1) the person received a benefit; (2) the claimant suffered a loss corresponding in some way to the benefit, and (3) there was no juristic reason for the benefit or loss. Uber received a benefit, but there is no evidence that Mr. Heller suffered a loss corresponding to Uber's benefit. Even if there was a corresponding loss, juristic reasons include contractual allocation of risk, economic efficiency, and commercial certainty.

Kerr v Baranow, 2011 SCC 10 at paras 36–41, 43.

37. In summary, existing case law in Canada provides a clear and appropriate test for unconscionability. Applying this test, there is no evidence that Mr. Heller

was a vulnerable party who needed legal protection under the doctrine of unconscionability. He was a sophisticated and competent party who entered into an agreement, which at the time provided a reasonable bargain. Mr. Heller later sought an escape when the reasonable bargain was no longer convenient for him. The SCC created significant ambiguity in the unconscionability doctrine by imprinting Mr. Heller with a post-hoc vulnerability, which fundamentally undermines freedom of contract and poses significant concerns for public policy in Canada.

PART 4 – NATURE OF ORDER SOUGHT

38. The Appellant seeks an Order:

    1. That the decision of the SCC be overturned, and the Appellant be awarded costs.

All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, this January 20 of 2021.

Uber Technologies Inc.

Appellant

_____

Counsel for the Appellant

_____

Counsel for the Appellant

APPENDIX: ENACTMENTS

2017 ARBITRATION RULES
International Chamber of Commerce

Advance to Cover the Costs of Arbitration

37(2) As soon as practicable, the Court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators, the ICC administrative expenses and any other expenses incurred by ICC related to the arbitration for the claims which have been referred to it by the parties, unless any claims are made under Article 7 or 8 in which case Article 37(4) shall apply. The advance on costs fixed by the Court pursuant to this Article 37(2) shall be payable in equal shares by the claimant and the respondent.

(5) The amount of any advance on costs fixed by the Court pursuant to this Article 37 may be subject to readjustment at any time during the arbitration. In all cases, any party shall be free to pay any other party's share of any advance on costs should such other party fail to pay its share.

(7) If one of the parties claims a right to a set-off with regard to any claim, such set-off shall be taken into account in determining the advance to cover the costs of the arbitration in the same way as a separate claim insofar as it may require the arbitral tribunal to consider additional matters.

Decision as to the Costs of the Arbitration

38(1) The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case.

(4) The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

(5) In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

ARBITRATION ACT
[SBC 2020] Chapter 2

Application

2(5) This Act does not apply to the following:

(a) an arbitration to which the *International Commercial Arbitration Act* applies;

INTERPRETATION ACT
[RSBC 1996] Chapter 238

Enactment Remedial

8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

INTERNATIONAL COMMERCIAL ARBITRATION ACT
[RSBC 1996] Chapter 233

Scope of application

1(1) This Act applies to international commercial arbitration, subject to any agreement which is in force between Canada and any other state or states and which applies in British Columbia.

(6) An arbitration is commercial if it arises out of a relationship of a commercial nature including, but not limited to, the following:

(a) a trade transaction for the supply or exchange of goods or services;
(b) a distribution agreement;
(c) a commercial representation or agency;
(d) an exploitation agreement or concession;
(e) a joint venture or other related form of industrial or business cooperation;
(f) the carriage of goods or passengers by air, sea, rail or road;
(g) the construction of works;
(h) insurance;
(i) licensing;
(j) factoring;
(k) leasing;
(l) consulting;
(m) engineering;
(n) financing;
(o) banking;
(p) investing.

International origin and general principles

6(1) In interpreting this Act, a court or arbitral tribunal

(a) must have regard to the international origins of the Act, the need to promote uniformity in its application and the observance of good faith, and

(b) may have regard to the following:

(i) the Reports of the United Nations Commission on International Trade Law on the work of its eighteenth (1985) and thirty-ninth (2006) sessions (UN Docs A/40/17 and A/61/17);

(ii) the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration (UN Doc A/CN.9/264);

(iii) 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 (UN Sales No. E.08.V.4).

Power of arbitral tribunal to order interim measures

17(1) Unless otherwise agreed by the parties and subject to section 17.01, the arbitral tribunal may, at the request of a party, grant an interim measure.

(2) In this Act, "interim measure" means any temporary measure, whether in the form of an arbitral award or in another form, by which, at any time before the issuance of the arbitral award by which the dispute is finally decided, the arbitral tribunal orders a party to

(a) maintain or restore the status quo pending determination of the dispute,

(b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself,

(e) provide appropriate security for costs in connection with arbitral proceedings.

Application for setting aside arbitral award

34(2) An arbitral award may be set aside by the Supreme Court only if

(b) the court finds that

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of British Columbia, or

(ii) the arbitral award is in conflict with the public policy in British Columbia.

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985, WITH AMENDMENTS AS ADOPTED IN 2006

United Nations Commission on International Trade Law

Resolutions adopted by the General Assembly

Recognizing the value of arbitration as a method of settling disputes arising in international commercial relations

Convinced that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations

Convinced that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Arbitration Rules of the United Nations Commission on International Trade Law recommended by the General Assembly in its resolution 31/98 of 15 December 1976, significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations

Recommends that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice

Chapter I. General Provisions

1(1) This Law applies to international commercial[2] arbitration, subject to any agreement in force between this State and any other State or States

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

UNCITRAL 2012 DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION
United Nations Commission on International Trade Law

"Commercial"—footnote to paragraph (1)

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.

LIST OF AUTHORITIES

Authorities	Page # in factum	Para # in factum
2017 Arbitration Rules, International Chamber of Commerce, May 2019	9	23
Ayres v Hazelgrove (9 February 1984), England (QB)	11	28
Commercial Bank of Australia Ltd v Amadio, [1983] HCA 14, 151 CLR 447	11	28
Consumers' Assn of Canada v Canada (Postmaster General), 1975 CarswellNat 10, FCJ No 23	7	19
Douez v Facebook Inc, 2017 SCC 33	10	26
**Downer v Pitcher*, 2017 NLCA 13	12	30
Fusty v McLean Construction Ltd, 1978 Carswell Alta 71, 14 AR 602 (Dist Ct)	12	30
Hall v Grassie, 1982 CarswellMan 177, 16 Man R (2d) 399 (QB)	12	30
**Harry v Kreutziger,* 1978 CanLII 393, 9 BCLR 166 (CA)	12	30
Heller v Uber Technologies Inc, 2018 ONSC 718	2, 5, 8, 14	6, 7, 14, 20, 34
Hofer v Hofer, [1970] SCR 958, 13 DLR (3d) 1	13	31
International Commercial Arbitration Act, RSBC 1996, c 233	5, 6, 8, 9	14, 15, 16, 21, 23
Interpretation Act, RSBC 1996, c 238	6	16
**Kaverit Steel and Crane Ltd v Koen Corp*, 1992 ABCA 7, 87 DLR (4th) 129	6	17
Kerr v Baranow, 2011 SCC 10	14	36
Marshall v Canada Permanent Trust Co (1968), 69 DLR (2d) 260, 1968 CanLII 638 (ABQB)	12	30
Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, (Markham, ON: LexisNexis, 2014)	13	32
Re Rizzo v Rizzo Shoes, [1998] SCJ No 2, 154 DLR (4th) 193	6, 7	16, 19

Tercon Contractors Ltd v British Columbia (Transportation and Highways), 2010 SCC 4	8, 10	22, 26
**Telus Communications Inc v Wellman*, 2019 SCC 19	8	22
The Medina (1876), 1 PD 272	11	28
Uber Technologies Inc v Heller, 2020 SCC 16	1, 2, 3, 5, 7, 8, 9, 10, 13, 14	1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 14, 18, 20, 22, 24, 27, 32, 33, 35
UNGA, 18th Sess, UN Doc A/CN.9/264 (25 March 1985)	7	19
UNGA, 40th Sess, UN Doc A/40/17 (21 June 1985)	7	19
Union des consommateurs c Dell Computer Corp, 2007 SCC 34	8	20
**United Mexican States v Metalclad Corp*, 2001 BCSC 664	6	17
United Nations Commission on International Trade Law, UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (New York: 2012)	6, 7	16, 19
United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985, with Amendments as Adopted in 2006 (Vienna: United Nations, 2008)	6, 7, 8, 9	16, 19, 22, 24