At Vancouver

**MOOT COURT OF BRITISH COLUMBIA**

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

BETWEEN:

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

APPELLANT (Defendant)

AND:

**David Heller**

RESPONDENT (Plaintiff)

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# RESPONDENT'S FACTUM

| Appellant: | Respondent: |
|---|---|
| **Uber Technologies Inc., Uber Canada, Inc., Uber B.V. and Rasier Operations B.V.** | **David Heller** |

Moot Division 2

# INDEX

## OPENING STATEMENT

This appeal is about the enforceability of an arbitration provision (the "**Arbitration Clause**"). The Respondents submit the Arbitration Clause is governed by the *Arbitration Act, SBC 2020, c 2* (the "**AA**") and is thereby invalid.

First, legislative intent and jurisprudence support the Lower Court's finding that the AA is applicable. The Lower Court rightly determined the Arbitration Clause was not commercial and as such, the *International Commercial Arbitration Act*, RSBC 1996, c 233 (the "**ICAA**") does not apply.

The Respondents further submit that the Arbitration Clause should be struck down for unconscionability. There has been a transformation in society's understanding of the importance of access to justice in recent years. We know now that access to justice, whether it be through arbitration or the courts, should not be limited only to those with wealth. Justice is not a pay-to-play game. This knowledge is reflected in the Supreme Court of Canada's decision finding the agreement between Mr. Heller and Uber void for unconscionability. The Supreme Court of Canada saw that a $14,500 USD barrier to justice for a low-income man is simply not conscionable. This decision must be upheld by this Court.

Accordingly, this appeal should not be allowed.

## PART 1 – STATEMENT OF FACTS

1. David Heller ("**Mr. Heller**") signed a standard form service agreement (the "**service agreement"**) with Uber Technologies LLC ("**Uber**") that allowed Mr. Heller to use Uber's applications to provide food delivery services to customers on their behalf.

> *Uber Technologies Inc v Heller,* 2020 SCC 16 at paras 2, 7 [*SCC Decision*].

2. Mr. Heller is 35 years old, has a high-school education and earns $20,800-$31,200 CAD per year as an Uber driver. Uber is a large multi-national corporation that operates in 600 cities and 77 countries, with tremendous financial and legal resources.

> *SCC Decision, supra* at para 5.

3. In part because Uber is incorporated in the Netherlands, there is a clause in the service agreement that requires drivers to submit to mediation and subsequently, should mediation be unsuccessful, seek arbitration in Amsterdam. The Arbitration Clause states that arbitration will be governed by the International Chamber of Commerce Mediation and Arbitration Rules (the "**ICC Rules**"), a separate document. The various administrative and filing fees conferred by the ICC Rules create an up-front cost of $14,500 USD to accessing arbitration. Legal fees are not included in the sum.

> *SCC Decision, supra* at paras 8-10.

4. Mr. Heller seeks to commence a class action suit against Uber for violations of the *Ontario Employment Standards Act* which requires the categorization of drivers as employees as opposed to independent contractors. In response to this, Uber has filed a motion to have the class action stayed in favour of arbitration, relying on the Arbitration Clause. The Ontario Superior Court ruled in favour of Uber and stayed the class action under the ICAA in favour of the *Ontario Arbitration Act*.

*SCC Decision, supra* at para 3.

5. Mr. Heller sought to have the Arbitration Clause struck down on grounds of unconscionability. Additionally, he seeks to have the Arbitration Act declared as the legislation that applies to the Service Agreement.

*SCC Decision, supra* at para 11.

6. The Supreme Court of Canada ruled in favour of Mr. Heller and found the Arbitration Act to be the applicable legislation, and additionally found the Arbitration Clause to be unconscionable and invalid.

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

## PART 2 – ISSUES ON APPEAL

1 The following issues arise on appeal:

(a) Was the Court below correct in finding that the *Arbitration Act* is applicable here?

(b) Was the Court below correct in finding that the Arbitration Clause should be struck down on grounds of unconscionability?

## PART 3 - ARGUMENT

### ISSUE ONE: The Court below was correct in finding that the *Arbitration Act* is applicable here.

7. The AA applies to arbitration agreements in circumstances which the ICAA does not. For the ICAA to apply, agreements must fall within "international" and "commercial" contexts.

> *Arbitration Act*, SBC 2020, c 2, s 2(5)(a).
> *International Commercial Arbitration Act*, RSBC 1996, c 233, s 1(1).

8. Both parties acknowledge that the Arbitration Clause is "international", but disagree as to whether it is "commercial".

> *SCC Decision, supra* at para 20.
> *Heller v Uber Technologies Inc*, 2018 ONSC 718 at paras 37-39 [*ONSC Decision*].

9. When considering whether the Arbitration Clause is "commercial", two points surfaced in the Lower Court's decision. First, the Court examined the nature of the parties' dispute. Second, by finding the nature of the dispute was an employment matter, the Court determined the Arbitration Clause was not commercial. As such, the Court found the ICAA did not apply, and the applicable legislation is the AA. This approach and conclusion were correct.

> *SCC Decision*, *supra* at paras 25-26.

#### 1.1 The Court below was correct to focus on the nature of the parties' dispute, not their relationship

10. Contrary to the Appellant's submission, there is no need to discern the nature of the parties' relationship. Courts instead must examine the nature of the parties' dispute.

> *Appellant's Factum* at para 55.

11. First, the judiciary should not engage in a fact-finding inquiry beyond the pleadings. Any inquiry into the nature of the parties' relationship is troublesome because Mr. Heller's proposed class action is an inquiry into the relationship between himself (alongside other drivers) and Uber, namely whether they are considered employees. Assessing the nature of the dispute remains the only option to avoid presupposing the outcome of Mr. Heller's class action claim.

12. Second, Canadian jurisprudence supports focusing on the nature of the dispute. When determining the applicability of legislation, even when deciding whether a claimant must proceed by arbitration, the judiciary has consistently assessed the dispute between parties. In the employment law context, the judiciary has also used the term "dispute" to reference whether the ICAA is engaged. Examining the nature of the dispute between Mr. Heller and Uber is therefore consistent with these legal approaches.

> * *Patel v Kanbay International Inc*, 2008 ONCA 867 at para 13.
> *Bisaillon v Concordia University*, 2006 SCC 19 at paras 13, 29-31, 88.

**1.2 The Court below was correct to find that the nature of the dispute was an employment matter**

13. Legislative intent and jurisprudence support the Lower Court's determination that the Arbitration Clause was not commercial in nature; rather, it was an employment dispute. It was therefore correct in holding that the AA applies.

**1.2(a) Legislative Intent**

14. Given the term "commercial" is broadly defined in the ICAA, the British Columbia legislature relies on international documents and explanatory texts as

interpretive guides. This includes the Model Law. While the Model Law's outlines sixteen relationships considered to be of a "commercial" nature, an employer and employee relationship akin to Mr. Heller and Uber is not included on this list.

> 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).

15. Interpretative guides of the ICAA state that, although "commercial" should be given a wide interpretation, a carve out exists for employment matters. It maintains that "labour or employment disputes" are not covered by the term "commercial", "despite their relation to business."

> United Nations Commission on International Trade Law, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General, UN Doc. A / CN.9 / 264, March 25, 1985, at 10.
> *SCC Decision, supra* at para 24.

16. If the legislature had intended the term "commercial" under the ICAA to include labour and employment matters, it would have done so. Furthermore, the explicit commentary by the ICAA's interpretive guide that "labour or employment disputes" are not covered by the term "commercial" suggests that its absence from the ICAA's list of commercial relationships was not an oversight but an intentional drafting decision.

**1.2(b) Jurisprudence**

17. Labour and employment disputes were never meant to be covered under the term "commercial" in the ICAA.

> *Rhinehart v Legend 3D Canada Inc*, 2019 ONSC 3296 at para 27.
> *Ross v Christian & Timbers Inc* (2002), 23 BLR (3d) 297 (Ont SCJ) at para 11.

> * *Borowski v Heinrich Fiedler Perforiertechnik GmbH* (1994), 29 CPC (3d) 264 (Alta QB) [*Borowski*].

18. Employment matters are also routinely excluded under definitions of commercial.

> * *Borowski, supra* at 15-19.

19. A recent appeal decision from the United Kingdom supports categorizing this dispute as one of labour and employment. This appellate court found drivers (in comparable contexts to Mr. Heller) to be employees as opposed to independent contractors. Notably, the contract signed by parties in this decision contained a clause similar to the one acceded to by Mr. Heller, namely:

> > Uber does not and does not intend to exercise any control over the driver - except as provided under the [Partner] Agreement and nothing in the [Partner] Agreement shall create an employment relationship between Uber and the Partner and/or the Driver or create either of them an agent of Uber.

Without presupposing an outcome in Mr. Heller's proposed class action suit, which would define the relationship, this international judgment supports a *prima facie* finding that the dispute here is also related to employment.

> *Uber v Aslam & Others*, [2018] EWCA Civ 2748 at 9, 37, 39-41.
> *ONSC Decision, supra* at para 17.

20. This case's underlying matter is if Mr. Heller and his fellow drivers under the service agreement are considered employees of Uber. The Lower Court emphasized that "whether someone is an employee is the most fundamental of employment disputes." Since employment matters are excluded from the ICAA's application, it follows that a dispute over whether Mr. Heller is an employee is precluded from using the ICAA. As such, it is correct for the AA to apply.

*SCC Decision, supra* at para 26.

**1.3 The Court below acted appropriately in departing from the general rule of arbitral referral**

21. The "competence-competence" principle requires arbitral referral in cases involving an arbitration clause. However, the Supreme Court has found an exception applies where the challenge is based solely on a question of law or requires only a superficial review of the record.

> * *Dell Computer Corp v Union des consommateurs,* 2007 SCC 34 at paras 84- 85 [*Dell Computer Corp*].

22. For reasons provided above, characterizing the nature of this dispute would not require the court to look beyond the record to make a *prima facie* finding that this is an employment-related matter. It was therefore possible and within the purview of the Lower Court to review the validity of the Arbitration Clause through a superficial review of the record.

23. The court in *Dell Computer Corp* also acknowledged that the rule of systematic referral applies "normally" where a question concerning jurisdiction of an arbitrator requires the review of factual evidence. The Lower Court rightly found that the Mr. Heller's situation was "abnormal" because "*Dell Computer Corp.* did not contemplate a scenario wherein the matter would never be resolved if the stay were granted." The fee for initiating arbitration for Mr. Heller was different than in *Dell Computer Corp*. The arbitration fee faced by Mr. Heller "impose[d] a brick wall between [himself] and the resolution of any of the claims he has leveled against Uber." Further, the Lower Court states that "the core of

*Dell Computer Corp*. depends on the assumption that if a court does not decide an issue, an arbitrator will." Because an arbitrator cannot assess whether Mr. Heller is an employee without such fees being paid, this matter may never make it to arbitration if the Lower Court had referred these arguments to the Netherlands.

> * *Dell Computer Corp*, *supra* at paras 84- 85.
> *SCC Decision, supra* at paras 37-38, 40, 47.

24. The Appellants claimed that departing from arbitral referral "threatens the…hands-off approach to arbitration" and undermines freedom of contract. We disagree. The court has measures to safeguard against improper use of court processes. The Supreme Court has outlined that "[b]efore departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding." In summary, there is a prospect that this arbitration proceeding may not even be possible given the prohibitively high fees on Mr. Heller. As such, the Lower Court was correct to depart from the general rule of arbitral referral in this case.

> *Appellant's Factum* at paras 64-65.
> * *Dell Computer Corp*, *supra* at para 86.
> *SCC Decision, supra* at paras 42, 47.

**ISSUE TWO: The Court below was correct in finding that the Arbitration Clause should be struck down on grounds of unconscionability.**

26. The Arbitration Clause should be struck down for unconscionability. The requisite elements of unconscionability are: 1) proof of an improvident bargain, and 2) proof of inequality in the positions of the parties.

*Douez v Facebook Inc.*, 2017 SCC 33, at para 115 [*Douez*].
* *Norberg v Wynrib*, [1992] 2 SCR 226, at para 41 [*Norberg*].

**2.1 Improvident Bargain**

27. An improvident bargain is found when at the time of contracting, the bargain unduly advantages the stronger party, or unduly disadvantages the weaker party.

*Douez, supra* at para 115.
See also: McCamus, *The Law of Contracts*, 2d ed (Toronto: Irwin Law, 2012) at 426–427, cited in *SCC Decision, supra* at para 74 [*McCamus*].

28. The agreement between Uber and Mr. Heller is improvident for three reasons: 1) the cost of arbitration is improvident, 2) unattainable arbitration unduly enriches Uber, and 3) Mr. Heller's reasonable expectations are flouted.

29. First, the cost of arbitration makes the bargain improvident. The arbitration and mediation process requires $14,500 USD upfront in administrative fees.

*SCC Decision*, *supra* at para 2.

30. Mr. Heller entered into the contract on June 7, 2016. On that date, the $14,500 USD of upfront administrative and filing fees required for arbitration amounted to $18,494.75 CAD. Mr. Heller earns approximately $20,800-$31,000 CAD per year, based on 40-50 hours of work per week.

*ONSC Decision, supra* at para 27.
*SCC Decision*, *supra* at para 11.

31. A serious access to justice issue is raised here. An Uber driver working full time would have to spend up to 89% of his annual income in order to attempt to protect his contractual rights. This high fee not only makes access to justice through arbitration and mediation inaccessible, but makes arbitration effectively

unattainable. When arbitration is unattainable, any contractual rights offered by the contract are effectively illusory. Mr. Heller has no reasonable way of protecting his rights if they are violated. Further, the $18,494.75 CAD in fees does not include legal fees, lost wages, or any potential travel costs, increasing the barrier to access arbitration further. To uphold this Arbitration Clause would be to allow powerful corporations to effectively contract out of access to justice, because it raises the bar to entry beyond any realistically attainable cost.

32. Unattainable arbitration unduly enriches Uber, and unduly disadvantages Mr. Heller. Uber is unduly enriched when it can take on drivers without having to effectively furnish them with the agreed upon contractual rights. Mr. Heller is unduly disadvantaged with arbitration made unattainable. The contract itself also enriches Uber with other advantages: forum selection, choice of which law applies, and not providing Uber drivers with any ability to negotiate terms.

33. Additionally, terms of a bargain are unfair when they flout the reasonable expectations of the weaker party, or cause an unfair surprise to the weaker party.

> Angela Swan, Jakub Adamski and Annie Y Na, *Canadian Contract Law* (4th ed. 2018), at page 993-94, cited in *SCC Decision, supra* at para 77.

34. It is reasonable for Mr. Heller to expect a conscionable bargain, and to expect that if his contractual rights are violated, he would be able to seek remedy. Uber has flouted these reasonable expectations, resulting in an unfair surprise. Mr. Heller had no reason to suspect that a lone reference to ‘mandatory mediation’ in the contract would incur upon him an $18,494 CAD upfront barrier to enforcing his contractual rights. The rules surrounding the cost of arbitration were not

attached to the contract itself and can only be found within the ICC Rules, separate and lengthy documents that must be sought out independently.

*Heller v Uber Technologies Inc,* 2019 ONCA 1 at para 11.

35. Even within the ICC Rules, the true cost of $14,500 USD must be calculated by adding up numerous filing fees and expenses, which can each be found only by searching through the complicated language of Appendix III of the ICC Rules.

*International Chamber of Commerce, Arbitration Rules and Mediation Rules* (Paris, International Chamber of Commerce, 2019).

36. Mr. Heller's reasonable expectation of access to remedy has been flouted. This, paired with the exorbitant cost itself and Uber being unduly enriched, makes the bargain improvident.

**2.2 Inequality of Bargaining Power**

37. Inequality of bargaining power alongside the established improvident bargain constitutes an unconscionable contract.

*Douez, supra* at para 145.
*Hess v Thomas Estate*, 2019 SKCA 26 at paras 75-76 [*Hess*].

38. The Appellants erroneously suggest that inequality of bargaining power requires intent to exploit, or a disability of the weaker party

*Appellant's Factum* at paras 38-39.

39. Case law has established that inequality of bargaining power can in fact be established wherever only one party understands the full import of the contractual terms for a variety of reasons. For example: personal vulnerability, ignorance, need which leaves the weaker party in the power of the stronger, or

disadvantages in the contracting process such as terms that are difficult to understand. Exploitation or disability are extreme examples, not requirements.

> * *Input Capital Corp v Gustafson*, 2019 SKCA 78 at para 18.
> *Hess, supra* at paras 70-72.
> See also: Stephen A Smith, *Contract Theory* (2004), at pp. 343-44, cited in *SCC Decision, supra* at para 68.

40. To restrict the test for inequality of bargaining power only to circumstances in which the stronger party has intent to exploit, as the Appellants have suggested, has been explicitly rejected by the Supreme Court of Canada. Intent to exploit does not alter the position the weaker party is in. The harm remains the same regardless of whether or not the stronger party has an intent to exploit. To import this new requirement would effectively insulate standard form contracts from unconscionability, as in a contract where the parties did not interact or negotiate it is near impossible to prove knowledge of wrongdoing on an individual basis.

41. In the case at hand, there is inequality of bargaining power for two reasons. First, Mr. Heller's inability to negotiate. He could only accept or decline the terms presented to him. For a man with comparatively limited access to financial resources and only a high school education, this lack of ability to negotiate puts Mr. Heller in a vulnerable position. Second, there is a serious gulf in sophistication between the two contracting parties. The stark difference in wealth, education, and access to legal expertise leaves Mr. Heller in an unequal position. At the time of contracting, Mr. Heller was a man with a high school education, seeking a position with an income of $20,800-$31,000 per year. Uber is a collection of companies with a multi-billion-dollar global business operating in

over 600 cities, and a robust legal department with fourteen different teams of lawyers. Uber would be well aware the average person seeking work as an Uber driver is unlikely to have access to sufficient financial resources to seek independent legal advice, nor are they likely to understand the complex legal jargon in this contract. Mr. Heller's income left him with no reasonable access to a lawyer before signing. Lack of independent legal advice does not necessarily render a contract unconscionable, but its absence may be fatal when paired with an improvident bargain.

* *Norberg, supra* at para 31.

42. In *Atlas Supply Company of Canada v Yarmouth Equipment Ltd,* a large corporation, Atlas, signed a contract with Mr. Murphy, a small local business owner with a high school education and no experience in the industry. Mr. Murphy became a franchisee for Atlas's failing franchises in Yarmouth. Mr. Murphy was not told before signing the contract that Atlas had projected that these franchises would earn no money. The exclusion clause in that contract was struck for unconscionability because there was an inequality of bargaining power based on the gulf in sophistication between the parties, and because Mr. Murphy was "not sufficiently informed of some factor which would affect his judgement".

* *Atlas Supply Company of Canada v Yarmouth Equipment Ltd,* 103 NSR (2d) 1 (NS CA) at para 93, 97-99 *[Atlas].*

43. Mr. Heller, like Mr. Murphy, was a man with a high school education signing a contract with a large corporation, creating a gulf in sophistication. As well. Mr. Heller was similarly not sufficiently informed of a factor which would affect his judgement: the $18,494.75 CAD in administrative and filing fees required upfront

in order to access arbitration. An inequality of bargaining power is as present in the case at bar as it was in *Atlas*.

44. The Appellant's erroneously suggest that to find this bargain unconscionable would be to find all standard form contracts unconscionable since standard form contracts often involve an inequality of bargaining power.

*Appellant's Factum* at para 44.

Inequality alone is not enough to create unconscionability. The established test for unconscionability requires both inequality and an improvident bargain. Here, both are present rendering the arbitration agreement unconscionable. The purpose of unconscionability is the protection of vulnerable persons. Preventing people from being taken advantage of in unconscionable ways outweighs the notion that we should promote freedom of contract and profit above all else. In certain circumstances, there are important limitations. For David Heller, this is about the ability to access justice, and this unconscionable Arbitration Clause takes that away from him. The unconscionable arbitration agreement must be set aside and declared null and void.

## PART 4 – NATURE OF ORDER SOUGHT

The Respondent requests that:

a) the appeal be dismissed;

b) the Respondent be awarded costs in this Court and the courts below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Counsel for the Respondent

Counsel for the Respondent

Dated at the City of Vancouver, in the Province of British Columbia, this 29th day of January 2021.

## APPENDIX I: ENACTMENTS

### 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).

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

## APPENDIX II: INTERNATIONAL SOURCES

### United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985, with Amendments as Adopted in 2006

#### 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.

### United Nations Commission on International Trade Law, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General, UN Doc. A / CN.9 / 264, March 25, 1985.

#### II. "Commercial" – footnote to paragraph 1(1).

16. The term "commercial" has been left undefined in the model law, as in conventions on international commercial arbitration. Although a clear-cut definition would be desirable, no such definition, which would draw a precise line between commercial and non-commercial relationships, could be found. Yet, it was deemed undesirable to leave the matter to the individual States or to provide some guidance for uniform interpretation merely in the session reports of the Working Group or any commentary on the model law. As an intermediate solution, a footnote is annexed to article 1 as an aid in the interpretation of the term "commercial".

…

18. The content of the footnote reflects the legislative intent to construe the term commercial in a wide manner. This call for a wide interpretation is supported by an illustrative list of commercial relationships. Although the examples listed include almost all types of contexts known to have given rise to disputes dealt with in international commercial arbitrations, the list is expressly not exhaustive.

Therefore, also covered as commercial would be transactions such as supply of electric energy, transport of liquified gas via pipeline and even "non-transactions" such as claims for damages arising in a commercial context. Not covered are. for example. labour or employment disputes and ordinary consumer claims. despite their relation to business. Of course. the fact that a transaction is covered by the model law by virtue of its commercial nature does not necessarily mean that all disputes arising from the transaction are capable of settlement by arbitration (as to the requirement of arbitrability. see commentary to article 7. para. 5).

**International Chamber of Commerce, Arbitration Rules and Mediation Rules (Paris, International Chamber of Commerce, 2019).**

Appendix III: Arbitration Costs and Fees

Scales of Administrative Expenses and Arbitrator's Fees:

### A Administrative Expenses

| Amount in dispute (in US Dollars) | Administrative expenses* |
|---|---|
| up to 50,000 | $5,000 |
| from 50,001 to 100,000 | 1.53% |
| from 100,001 to 200,000 | 2.72% |
| from 200,001 to 500,000 | 2.25% |
| from 500,001 to 1,000,000 | 1.62% |
| from 1,000,001 to 2,000,000 | 0.788% |
| from 2,000,001 to 5,000,000 | 0.46% |
| from 5,000,001 to 10,000,000 | 0.25% |
| from 10,000,001 to 30,000,000 | 0.10% |
| from 30,000,001 to 50,000,000 | 0.09% |
| from 50,000,001 to 80,000,000 | 0.01% |
| from 80,000,001 to 500,000,000 | 0.0123% |
| over 500,000,000 | $150,000 |

* For illustrative purposes only, the table on page 57 indicates the resulting administrative expenses in US$ when the proper calculations have been made.

## B Arbitrator's Fees

| Amount in dispute (in US Dollars) | Fees** | |
|---|---|---|
| | minimum | maximum |
| up to 50,000 | $3,000 | 18.0200% |
| from 50,001 to 100,000 | 2.6500% | 13.5680% |
| from 100,001 to 200,000 | 1.4310% | 7.6850% |
| from 200,001 to 500,000 | 1.3670% | 6.8370% |
| from 500,001 to 1,000,000 | 0.9540% | 4.0280% |
| from 1,000,001 to 2,000,000 | 0.6890% | 3.6040% |
| from 2,000,001 to 5,000,000 | 0.3750% | 1.3910% |
| from 5,000,001 to 10,000,000 | 0.1280% | 0.9100% |
| from 10,000,001 to 30,000,000 | 0.0640% | 0.2410% |
| from 30,000,001 to 50,000,000 | 0.0590% | 0.2280% |
| from 50,000,001 to 80,000,000 | 0.0330% | 0.1570% |
| from 80,000,001 to 100,000,000 | 0.0210% | 0.1150% |
| from 100,000,001 to 500,000,000 | 0.0110% | 0.0580% |
| over 500,000,000 | 0.0100% | 0.0400% |

** For illustrative purposes only, the table on page 58 indicates the resulting range of fees in US$ when the proper calculations have been made.

| Amount in Dispute | A Administrative Expenses* | |
|---|---|---|
| **(in US Dollars)** | **(in US Dollars)** | |
| up to 50,000 | 5,000 | |
| from 50,001 to 100,000 | 5,000 | + 1.53% of amt. over 50,000 |
| from 100,001 to 200,000 | 5,765 | + 2.72% of amt. over 100,000 |
| from 200,001 to 500,000 | 8,485 | + 2.25% of amt. over 200,000 |
| from 500,001 to 1,000,000 | 15,235 | + 1.62% of amt. over 500,000 |
| from 1,000,001 to 2,000,000 | 23,335 | + 0.788% of amt. over 1,000,000 |
| from 2,000,001 to 5,000,000 | 31,215 | + 0.46% of amt. over 2,000,000 |
| from 5,000,001 to 10,000,000 | 45,015 | + 0.25% of amt. over 5,000,000 |
| from 10,000,001 to 30,000,000 | 57,515 | + 0.10% of amt. over 10,000,000 |
| from 30,000,001 to 50,000,000 | 77,515 | + 0.09% of amt. over 30,000,000 |
| from 50,000,001 to 80,000,000 | 95,515 | + 0.01% of amt. over 50,000,000 |
| from 80,000,001 to 500,000,000 | 98,515 | + 0.0123% of amt. over 80,000,000 |
| over 500,000,000 | 150,000 | |

* See page 56.

| Amount in Dispute | B Arbitrator's Fees** | | | |
|---|---|---|---|---|
| **(in US Dollars)** | **(in US Dollars)** | | | |
| | **Minimum** | | **Maximum** | |
| up to 50,000 | 3,000 | | 18.0200% of amount in dispute | |
| from 50,001 to 100,000 | 3,000 | + 2.6500% of amt. over 50,000 | 9,010 | + 13.5680% of amt. over 50,000 |
| from 100,001 to 200,000 | 4,325 | + 1.4310% of amt. over 100,000 | 15,794 | + 7.6850% of amt. over 100,000 |
| from 200,001 to 500,000 | 5,756 | + 1.3670% of amt. over 200,000 | 23,479 | + 6.8370% of amt. over 200,000 |
| from 500,001 to 1,000,000 | 9,857 | + 0.9540% of amt. over 500,000 | 43,990 | + 4.0280% of amt. over 500,000 |
| from 1,000,001 to 2,000,000 | 14,627 | + 0.6890% of amt. over 1,000,000 | 64,130 | + 3.6040% of amt. over 1,000,000 |
| from 2,000,001 to 5,000,000 | 21,517 | + 0.3750% of amt. over 2,000,000 | 100,170 | + 1.3910% of amt. over 2,000,000 |
| from 5,000,001 to 10,000,000 | 32,767 | + 0.1280% of amt. over 5,000,000 | 141,900 | + 0.9100% of amt. over 5,000,000 |
| from 10,000,001 to 30,000,000 | 39,167 | + 0.0640% of amt. over 10,000,000 | 187,400 | + 0.2410% of amt. over 10,000,000 |
| from 30,000,001 to 50,000,000 | 51,967 | + 0.0590% of amt. over 30,000,000 | 235,600 | + 0.2280% of amt. over 30,000,000 |
| from 50,000,001 to 80,000,000 | 63,767 | + 0.0330% of amt. over 50,000,000 | 281,200 | + 0.1570% of amt. over 50,000,000 |
| from 80,000,001 to 100,000,000 | 73,667 | + 0.0210% of amt. over 80,000,000 | 328,300 | + 0.1150% of amt. over 80,000,000 |
| from 100,000,001 to 500,000,000 | 77,867 | + 0.0110% of amt. over 100,000,000 | 351,300 | + 0.0580% of amt. over 100,000,000 |
| over 500,000,000 | 121,867 | + 0.0100% of amt. over 500,000,000 | 583,300 | + 0.0400% of amt. over 500,000,000 |

** See page 56.

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