

CONSIDERING *UBER TECHNOLOGIES INC V HELLER* UNDER US LAW

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Recently, the Supreme Court of Canada in Uber Technologies Inc v Heller used the unconscionability doctrine to strike down a pre-dispute arbitration clause in an Uber driver agreement that required arbitration in the Netherlands. This has led some to ask: How would a court in the United States analyze this case? This comment will address this question, giving due weight to the US Supreme Court's trend toward strengthening the Federal Arbitration Act (FAA) and enforcing pre-dispute arbitration agreements in employment and consumer contexts. Nonetheless, this comment diverges from critiques of unconscionability's flexibility and lack of clear definition—which allegedly threaten efficiency in contract law. Instead, the comment urges that unconscionability remains steadfast in US law to protect core human values. Unconscionability is not a frivolous gloss on classical contract law. Instead, it provides a flexible safety net for catching contractual unfairness. Accordingly, one could argue that under US law, a court would find the arbitration clause in Heller unconscionable. However, a US court may have provided a different remedy.

I. INTRODUCTION

In the United States, companies increasingly include arbitration clauses among the form terms in their boilerplate contracts.¹ This has been the case for a long time in commercial

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¹ “Boilerplate” has taken on its own cultural meaning in today’s society. See Todd D Rakoff, “The Law and Sociology of Boilerplate” in Omri Ben-Shahar, ed, *Boilerplate: The Foundations of Market Contracts* (Cambridge: Cambridge University Press, 2007) at 204.

business-to-business contracts.² Arbitration makes sense in commercial agreements, especially when there is a need for specialist arbitrators or protection of business secrets. Arbitration is also robust for international parties who seek a neutral forum, as well as an enforceable award under the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.³

Meanwhile, consumer and employment arbitrations have become common in the US, which has drawn criticism. Consumers and employees may be subject to arbitration clauses hidden in nonnegotiable boilerplate contracts skewed toward the companies' interests. Commentators and policymakers worry that pre-dispute arbitration clauses unfairly advantage corporate "repeat players" with superior power and information.⁴ Critics add that companies use these clauses to curb employment rights, bar class actions, and shield the public from information regarding safety, disclosure, and other statutory violations.⁵

² Of the 100 largest US companies (as listed in Fortune), many have had arbitration agreements since 2010, including class arbitration waivers. Imre Stephen Szalai, "The Prevalence of Consumer Arbitration Agreements by America's Top Companies" (2018-2019) 52 UC Davis L Rev Online 233 at 234. The data shows that 81 of the 100 companies have used arbitration agreements, and 78 of those 81 companies use class waivers. A majority of US households (it could be 2/3 of US households) are covered by consumer arbitration agreements. In 2018, there were at least 826,537,000 consumer arbitration agreements in force, and the actual number is probably higher considering this only takes a look at some companies (*ibid*).

³ *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 9 USC § 201-08; *Ibid* § 301-07 (implementing the *Inter-American Convention on International Commercial Arbitration (Panama Convention)*).

⁴ See Richard Frankel, "Corporate Hostility to Arbitration" (2020) 50:3 Seton Hall L Rev 707 at 710-11, 731-35, 742-45.

⁵ See Amy J Schmitz, "Untangling the Privacy Paradox in Arbitration" (2007) 54 U Kan L Rev 101 at 120-25 (discussing privacy in arbitration).

Still, US courts usually enforce these clauses under the *Federal Arbitration Act (FAA)*,⁶ as they apply an efficiency-focused jurisprudence in strictly enforcing arbitration agreements.⁷ The Supreme Court of the United States has repeatedly upheld arbitration clauses in employment and consumer contexts, and has found that the *FAA* preempts contrary state law. The court reinforced this mandate in a string of decisions including *American Express v Italian Colors Restaurant*, *Stolt-Nielsen SA v Animalfeeds Int'l Corp*, *AT&T Mobility, LLC v Concepcion*, and *Rent-A-Center v Jackson*.⁸ The court condoned class waivers with respect to statutory rights in *American Express* and significantly narrowed arbitrators' power to order class arbitration in *Stolt-Nielsen SA* and *AT&T Mobility, LLC*.⁹ Furthermore, the court in *Rent-A-Center* emphasized that courts may only consider contract challenges that target the enforceability of an arbitration agreement itself, and sanctioned provisions that allow arbitrators to determine the validity and scope of their own jurisdiction.¹⁰

⁶ *Federal Arbitration Act*, 9 USC § 1–16 (1925) [*FAA*] (covering domestic arbitration). See also *Green Tree Financial Corp v Randolph*, 531 US 79 at 91 (2001) (emphasizing the “liberal federal policy favoring arbitration agreements”).

⁷ Imre S Szalai, “The Consent Amendment: Restoring Meaningful Consent and Respect for Human Dignity in America’s Civil Justice System” (2017) 24:3 *Va J Soc Pol’y & L* 195 at 199–207.

⁸ *American Express Co v Italian Colors Restaurant*, 133 S Ct 2304 (2013) [*American Express*]; *AT&T Mobility LLC v Concepcion*, 131 S Ct 1740 (2011) [*AT&T*]; *Stolt-Nielsen SA v AnimalFeeds International Corp*, 130 S Ct 1758 (2010) [*Stolt-Nielsen*]; *Rent-A-Center, West, Inc v Jackson*, 130 S Ct 2772 (2010) [*Rent-A-Center*].

⁹ See *American Express*, *supra* note 8 at 2304–10 (enforcing a class waiver in arbitration clauses with respect to anti-trust claims); *AT&T*, *supra* note 8 at 1748–53; *Stolt-Nielsen*, *supra* note 8 at 1773–76 (holding a party cannot be compelled under the *FAA* to class arbitration unless contractual basis indicating parties agreed to class arbitration).

¹⁰ See *Rent-A-Center*, *supra* note 8 at 2777–80 (holding a clause in an employment contract delegating to the arbitrator exclusive authority to

Nonetheless, even under the *FAA*, an arbitration clause may be unenforceable per state contract doctrines, such as unconscionability. The unconscionability doctrine survives to protect fairness norms. The history and philosophy underlying the doctrine's conception show that it serves the important purpose of protecting humanity's natural, or innate, sense of "fairness" that defies intellectualized rigidity. The doctrine therefore serves as a flexible safety net which courts can use to address contracts that offend fairness norms.¹¹

Still, there is no question that tensions exist, as courts in the US diverge over enforcement of arbitration clauses in Uber contracts. Accordingly, one may wonder: what would happen if the *Uber Technologies Inc v Heller* case in Canada were decided in the US? One may assume that US courts would enforce arbitration as we have seen in other employment cases. This seems especially likely in the wake of *Epic Systems v Lewis*, where the US Supreme Court held that arbitration agreements calling for individualized proceedings in labour and employment contexts are enforceable even when they deal with the *Fair Labor Standards Act* and *National Labor Relations Act*.¹² There are added wrinkles, such as section 1 of the *FAA* and contract defences, which complicate the question. This comment will unpack some of these complexities. Part II will recap the *Heller* case, Part III will summarize US arbitration and unconscionability law that may apply, and Part IV will apply this law to the *Heller* facts.¹³ Part V will conclude.

decide enforceability of the arbitration agreement was a valid delegation under the *FAA*).

¹¹ Amy J Schmitz, "Embracing Unconscionability's Safety Net Function" (2006) 58:1 Ala L Rev 73.

¹² *Epic Systems Corporation v Lewis*, 138 S Ct 1612 at 1632 (2018).

¹³ Due to space, this comment will not delve into questions regarding the delegation clause in the contract. That would call for more space and a separate analysis; in any event, as the Supreme Court held, the

II. *UBER TECHNOLOGIES INC v HELLER*

In *Uber Technologies Inc v Heller*, the Supreme Court of Canada held that an arbitration provision between Uber and its drivers was unconscionable.¹⁴ Heller was a driver for Uber and UberEats in Ontario, Canada.¹⁵ As a condition of employment, Heller had to accept Uber's standard form services agreement, which included a provision requiring mediation and arbitration in the Netherlands for any dispute with Uber.¹⁶ Specifically, the clause stated:

Governing Law; Arbitration. Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws Any dispute, conflict or controversy howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules ("ICC Mediation Rules"). If such dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, such dispute can be

unconscionability impacted both the dispute resolution agreement overall as well as the delegation clause within the dispute resolution agreement.

¹⁴ *Uber Technologies Inc v Heller*, 2020 SCC 16 [*Heller*]. The lower court judge held that he did not have the authority to determine the validity of the arbitration agreement. However, the Court of Appeal reversed, holding that the arbitration clause was unconscionable because of the inequality of bargaining power and the cost of arbitration. The court here affirmed the decision of the Court of Appeal.

¹⁵ *Ibid* at para 2.

¹⁶ *Ibid*.

referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce (“ICC Arbitration Rules”) The dispute shall be resolved by one (1) arbitrator appointed in accordance with ICC Rules. The place of arbitration shall be Amsterdam, The Netherlands¹⁷

Heller showed that mediation and arbitration under this process would cost an initial \$14,500 USD in administrative and filing fees. That did not include travel and other legal fees.¹⁸ Furthermore, Heller showed that he earned between \$400 and \$600 per month, and that the costs to arbitrate a claim would equal all or most of the annual income he would earn as a full-time Uber driver.¹⁹

The Supreme Court of Canada held that the domestic *Arbitration Act* applied, instead of the *International Commercial Arbitration Act*.²⁰ Applying the *Arbitration Act*, the court assessed validity and found the arbitration agreement unconscionable.²¹ The court noted unconscionability requires both an inequality of bargaining power and a “resulting improvident bargain.”²² There is inequality of bargaining power when the agreement is one-sided or a party is unable to

¹⁷ *Ibid* at para 8. Heller brought a class proceeding against Uber for violations of Ontario’s *Employment Standards Act (ESA)*, arguing that he qualified as an employee under the *ESA*. Uber moved to stay it in favor of arbitration in the Netherlands. Heller argued that the arbitration clause was invalid because it contracted out of mandatory *ESA* provisions and it was unconscionable.

¹⁸ *Ibid* at para 10.

¹⁹ *Ibid* at para 11.

²⁰ *Ibid* at paras 18–19.

²¹ *Ibid* at paras 52–53.

²² *Ibid* at para 65.

understand the full import of the contractual terms.²³ An improvident bargain unduly advantages the stronger party or disadvantages the vulnerable party, measured at the time the contract is formed.²⁴ This is very similar to the two-prong test used by US courts.²⁵

Applying this law, the Supreme Court of Canada concluded that there was “clearly” inequality of bargaining power between Heller and Uber. Their agreement was a standard form contract which Heller had to accept as a condition of employment; he did not have the opportunity to negotiate.²⁶ There was also a “gulf in sophistication” between him as a food deliveryman and Uber as a multinational corporation.²⁷ The court also noted that because the agreement does not have information about the costs of the dispute resolution process, a person in his position could not understand the financial implications of agreeing to arbitrate in the Netherlands under Dutch law.²⁸ They also held that the improvidence of the agreement was clear, due to the high filing and administrative fees, even putting aside the cost of travel, accommodation, a lawyer, or lost wages.²⁹ The upfront costs effectively made the substantive rights under the contract unenforceable.³⁰ Having concluded the arbitration agreement was unconscionable, the court did not need to address Heller’s second claim that it was invalid under the *Employment Standards Act*.³¹

²³ *Ibid* at paras 68–71.

²⁴ *Ibid* at paras 74–75.

²⁵ *Ibid* at para 90.

²⁶ *Ibid* at para 93.

²⁷ *Ibid*.

²⁸ *Ibid*.

²⁹ *Ibid* at para 94.

³⁰ *Ibid* at para 95.

³¹ *Ibid* at para 99.

III. AMERICAN ARBITRATION AND UNCONSCIONABILITY LAW

1. “Pro-arbitration Policy” Per the FAA

As noted above, the US Supreme Court has repeatedly upheld arbitration clauses in employment agreements, and has frowned on use of state law to refuse enforcement. To do this, the court has used the preemption doctrine, making the *FAA* supreme over state law where interstate commerce is involved. Furthermore, under the doctrine of separability, the issue of whether the contract as a whole is unconscionable is something that is left to the arbitrator per *Rent-A-Center v Jackson* and its progeny.³² Moreover, courts enforce delegation clauses, giving arbitrators the power to decide their own jurisdiction as well as the enforceability of the arbitration clause. It is no surprise that arbitration clauses have become the norm in consumer and employment contracts.³³

For example, in *Mohamed v Uber Technologies*, the Court of Appeals reversed a district court finding that delegation clauses in arbitration agreements with Uber drivers were unconscionable.³⁴ The court found that the questions relating to the validity of the arbitration provision were for an arbitrator and that the plaintiffs had not shown the delegation clause itself was unenforceable.³⁵ In this case, the two plaintiffs were Uber drivers who had to sign new contracts on the Uber app before

³² Felipe Jiménez, “Arbitration: A Creature of Contract?” (2020) [unpublished], online: <ssrn.com/abstract=3657506> DOI: <[10.2139/ssrn.3657506](https://doi.org/10.2139/ssrn.3657506)> at 19 (citing *Rent-A-Center, supra* note 8 at 70–73).

³³Andrea Cann Chandrasekher & David Horton, “Arbitration Nation: Data from Four Providers” (2019) 107:1 Calif L Rev 1 at 12–18.

³⁴ *Mohamed v Uber Technologies, Inc*, 848 F (3d) 1201 at 1208 (9th Cir 2016) [*Mohamed*].

³⁵ *Ibid.*

they were able to sign in and start working.³⁶ The updated agreements stated that disputes were governed by California law, and precluded class proceedings of any kind.³⁷ Nonetheless, there was an option to opt out of the arbitration agreement within 30 days, which the plaintiffs did not take.³⁸

This opt-out clause saved the contract from being found procedurally unconscionable. The court made this finding even though the clause was hidden in a prolix printed form, and the plaintiffs alleged there was no meaningful opportunity for drivers to understand the fees involved in arbitration.³⁹ The Court of Appeals here determined the opt-out provision was not illusory, citing the fact that other drivers opted out.⁴⁰ The court also cited precedent stating an agreement with an opt-out provision is not adhesive and cannot be unconscionable.⁴¹ Accordingly, the court did not go on to analyze substantive unconscionability.⁴²

Similar cases have been decided with similar results. In *O'Connor v Uber Technologies, Inc*, current and former Uber drivers again filed several class actions alleging that Uber violated federal and state statutes by misclassifying them as independent contractors.⁴³ Citing *Mohamed v Uber Technologies*, the Ninth Circuit reversed the district court's class certification of Uber drivers and held the arbitration agreement was

³⁶ *Ibid* at 1206.

³⁷ *Ibid* at 1207.

³⁸ *Ibid* at 1206.

³⁹ *Ibid*.

⁴⁰ *Ibid*.

⁴¹ *Ibid*.

⁴² *Ibid*.

⁴³ *O'Connor v Uber Technologies, Inc*, 904 F (3d) 1087 at 1090 (9th Cir 2018) [*O'Connor*].

enforceable.⁴⁴ The court denied arguments that the lead plaintiffs in *O'Connor* constructively opted out on behalf of the rest of the class.⁴⁵ Furthermore, *Epic Systems v Lewis* rejected the argument that class action waivers violated the *National Labor Relations Act*.⁴⁶

2. Section 1 Exclusion for Transportation Workers

With the backdrop, it is also important to note the *FAA* section 1 wrinkle. In *New Prime Inc v Oliveira*, the US Supreme Court held that section 1 of the *FAA*'s exception for "contracts of employment of... any other class of workers engaged in foreign or interstate commerce" includes independent contractors.⁴⁷ Accordingly, cases involving Uber drivers also may bring in section 1 issues. Here is the argument: the *FAA* does not apply because Uber drivers are transportation workers in interstate commerce, leaving the case to state law, which may exclude enforcement of pre-dispute arbitration clauses in employment cases. Of course, this argument is not helpful in states with strong pro-arbitration law.

For example, in *Singh v Uber Technologies*, Uber drivers sought to use section 1 to get out of an arbitration clause, while Uber argued that this exclusion should only cover transportation workers that are involved in interstate transportation of goods.⁴⁸ The court denied that argument, but remanded to the district court to decide whether Uber

⁴⁴ *Ibid* at 1090.

⁴⁵ *Ibid*.

⁴⁶ *Ibid* at 1090. In *Fridman v Uber Technologies, Inc*, 2019 WL 1385887 (ND Cal) [*Fridman*], several Uber drivers sued Uber, which moved to compel arbitration. The drivers were controlled by a delegation clause that was almost identical to the one in *Mohamed*, *supra* note 34, and the court decided that the *Mohamed* decision was controlling.

⁴⁷ *New Prime Inc v Oliveira*, 139 S Ct 532 at 536 (2019).

⁴⁸ *Singh v Uber Technologies, Inc*, 939 F (3d) 210 at 221 (3d Cir 2019) [*Singh*].

employees are engaged in “interstate commerce or in work so closely related thereto as to be in practical effect part of it.”⁴⁹

Recently, in *Heller v Rasier, LLC*, the court looked at the same issue and found that the Uber driver was not within the residual clause: “any other class of workers engaged in foreign or interstate commerce.”⁵⁰ Importantly, the plaintiff never crossed any state lines, and it was not sufficient that he worked in the “stream of interstate travel.” The court noted that section 1 was held to be construed narrowly, as Congress likely means section 1 to exclude seamen and railroad workers because it had already enacted legislation to govern arbitration of disputes over these workers.⁵¹ Congress did not want there to be possibly conflicting laws regarding this area of arbitration.⁵²

Similarly, in *Capriole v Uber Technologies, Inc*, Uber drivers sued Uber over violations of Massachusetts labour laws.⁵³ The plaintiffs argued they fell within the section 1 exception because they frequently crossed state lines, and were in the “flow of interstate commerce” while dropping passengers off at airports.⁵⁴ Uber provided evidence that only 2.5% percent of rides start and end in different states.⁵⁵ Uber also provided evidence that 10.1% of rides in 2019 started or ended at an airport.⁵⁶ Given the narrow reading of section 1, the court concluded Uber drivers are not an integral part of the flow of

⁴⁹ *Ibid* at 227.

⁵⁰ *Heller v Rasier, LLC*, 2020 WL 413243 at *5 (CD Cal).

⁵¹ *Ibid* at *8.

⁵² *Ibid* at *9, citing *Circuit City Stores Inc v Adams*, 532 US 105, 112–13 (2001). See also *Grice v Uber Technologies, Inc*, 2020 WL 497487 at *7 (CD Cal).

⁵³ *Capriole v Uber Technologies, Inc*, 2020 WL 2563276 at *1 (ND Cal) [*Capriole*].

⁵⁴ *Ibid* at *7.

⁵⁵ *Ibid*.

⁵⁶ *Ibid*.

interstate commerce.⁵⁷ Accordingly, the court held that the *FAA* applies to the arbitration agreement.⁵⁸ The court went on to find that all named plaintiffs were bound by arbitration agreements, and ordered arbitration.

Nonetheless, not all cases agree. In *Cunningham v Lyft, Inc*, Lyft drivers alleged that Lyft misclassified its drivers as independent contractors rather than employees, while Lyft sought to compel arbitration.⁵⁹ The plaintiffs claimed to fall within the *FAA*'s transportation worker exemption.⁶⁰

The court noted that it is not necessary for a plaintiff to cross state lines to engage in interstate commerce. Instead, it considered eight factors listed in *Lenz v Yellow Transportation, Inc*:⁶¹ (1) whether the plaintiffs work in the transportation industry; (2) whether the plaintiffs are directly responsible for interstate travel; (3) whether the plaintiffs handle goods/passengers that travel interstate; (4) whether the plaintiffs supervise others who are themselves transportation workers; (5) whether the plaintiffs (like seamen and railroad workers) belong to a class of workers for which Congress already had arbitration legislation before the *FAA*; (6) whether the vehicle itself is vital to the commerce of the employer; (7) whether a strike by the plaintiffs would disrupt interstate trade; and (8) the nexus that exists between the plaintiffs' duties and the vehicle they use to accomplish those duties.⁶²

The court found that the plaintiffs met at least three of the above factors because they were involved in the "continuity of

⁵⁷ *Ibid* at *9.

⁵⁸ *Ibid*.

⁵⁹ *Cunningham v Lyft, Inc*, 450 F Supp (3d) 37 at 39, 42 (DMass 2020) [*Cunningham*].

⁶⁰ *Ibid* at 42.

⁶¹ *Lenz v Yellow Transportation, Inc*, 431 F (3d) 348 (8th Cir 2005).

⁶² *Cunningham*, *supra* note 59 at 46.

movement” of interstate travellers that were traveling to the airport.⁶³ Accordingly, the court concluded that the plaintiffs were in a class of workers exempted by section 1 of the *FAA*.⁶⁴

The court went on to consider the case under state law and applied state caselaw on public policy against class action waivers.⁶⁵ The court found this public policy especially relevant to Massachusetts *Wage Act* cases, because barring class action can severely disincentivize plaintiffs from bringing actions for violations of the *Wage Act*.⁶⁶ Accordingly, Massachusetts state law would not compel arbitration because of public policy against enforcement of arbitration agreements that include class waivers.

3. *Safety Net Function of Unconscionability*

At the same time, it is important to understand the safety net function of unconscionability. Unconscionability is not an afterthought gloss on classical contract doctrine.⁶⁷ Instead, it flows from a steadfast concern for fairness and equity that lies at the core of contract law.⁶⁸ Formalist doctrine promoting rigid enforcement of private agreements is relatively modern.⁶⁹ It

⁶³ *Ibid.*

⁶⁴ *Ibid* at 47.

⁶⁵ *Ibid* at 47–8.

⁶⁶ *Ibid.*

⁶⁷ See *Market Street Associates v Frey*, 941 F (2d) 588 at 595 (7th Cir 1991), Posner J (acknowledging that the defense is not a “newfangled” doctrine).

⁶⁸ PS Atiyah, *The Rise and Fall of Freedom of Contract* (New York: Oxford University Press, 1979) at 146–47 (explaining how contract law “was being profoundly influenced by moral ideals”).

⁶⁹ Peter Huber, “Flypaper Contracts and the Genesis of Modern Tort” (1989) 10:8 *Cardozo L Rev* 2263 at 2268–69 (highlighting how classical contract law can “operate very harshly”); see also Richard A Epstein, “Unconscionability: A Critical Reappraisal” (1975) 18:2 *JL & Econ* 293 (noting that strict enforcement exists under classical contract doctrine).

was not until the nineteenth century that scholars and policymakers advanced classical contract law's now familiar focus on free choice and limited judicial regulation of exchange.⁷⁰ Indeed, Aristotelian notions of justice lie at the foundations of unconscionability.⁷¹ Law predating classical contract doctrine valued fairness as endemic to the definition of contract and equality of exchange as a presupposition of individuality.⁷² Unconscionability has been recognized under US law per the *Restatement of Contracts*⁷³ and the *Uniform Commercial Code* Article 2.⁷⁴

⁷⁰ See Melvin Aron Eisenberg, "The Bargain Principle and Its Limits" (1982) 95:4 Harv L Rev 741 at 801 (discussing how "[c]oncepts of fairness were smuggled into contract law even when the [bargain] principle seemed most secure"); William Tetley, "Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering" (2004) 35:4 J Mar L & Com 561 at 571-73, 583-89 (discussing unconscionability as an overriding theme among the "piecemeal solutions" for addressing good faith in common contract law). See also James Gordley, "The Moral Foundations of Private Law" (2002) 47 Am J Juris 1 at 20 [Gordley, "The Moral Foundations"] (explaining how German courts recognize these same ideas under "*Treu und Glauben* or good faith" and European Union courts "protect[] consumers against terms which give a seller a disproportionate advantage").

⁷¹ Henry Mather, *Contract Law and Morality* (Santa Barbara: Greenwood Press, 1999) at 45-47 (emphasizing how "Aristotelian rectificatory justice is linked to morality in a very direct and pervasive way," and explaining how this theory of justice bases remedy on "whether the defendant's conduct was morally wrongful", although it seeks to limit remedy to restoring the status quo ante).

⁷² See James Gordley, "The Common Law in the Twentieth Century: Some Unfinished Business" (2000) 88:6 Calif L Rev 1815 at 1849-50 (discussing the history of contract law); see also Gordley, "The Moral Foundations", *supra* note 70 at 6-9, 17 (discussing fairness in contract law); James Gordley, "Why Look Backward" (2002) 50:4 Am J Comp L 657 at 666-67 [Gordley, "Why Look Backward"] (discussing fairness as it relates to damages for breach of contract).

⁷³ *Restatement (Second) of Contracts* § 208 (1981).

⁷⁴ UCC § 2-302 (1998).

Unconscionability therefore remains part of US law. As long as courts do not single out arbitration for special treatment, they are free to use unconscionability to strike down an arbitration clause. The analysis requires two prongs similar to the Canadian analysis: (1) procedural—looking at bargaining power and asking if it is an adhesion contract; and (2) substantive—similar to the Canadian analysis, looking at the bargain itself to ask if it shocks the conscience or is beyond reasonable expectations. This analysis is flexible, and gets down to questions of “fairness” that arguably underly so-called “natural law.”⁷⁵ Of course, some may argue that reference to natural law and moral precepts is problematic because reasonable minds disagree about what is “wrong” or “right,” and contextual norms and values defy easy definition.⁷⁶ Nonetheless, unconscionability’s protection of these conventions helps stabilize contract law by enhancing its reputation as “fair” law worthy of following. Indeed, it helps curb improvident bargains and fosters fairness.

IV. *HELLER*’S OUTCOME IN THE US?

The above background brings us to the ultimate question: What would have happened if *Heller v Uber Technologies Inc* were decided in a US court? Of course, it is unclear exactly how a court would assess *Heller*, as more facts would need consideration regarding FAA section 1 and there may be further questions about the contract formation. Still, one can use the above arbitration and unconscionability law to provide a

⁷⁵ *Ibid*; see also Gordley, “Why Look Backward”, *supra* note 72 at 666–67 (explaining that the northern natural lawyers of the seventeenth century borrowed equitable concepts and conclusions from Aristotelian and Thomistic principles, although they were not concerned with linking their ideas to these schools of thoughts).

⁷⁶ HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) at 163–76 (Hart ostensibly denies a connection between morality and law, but he nonetheless recognizes four “simple truisms” being “human vulnerability, approximate equality, limited altruism, and limited understanding and strength of will”); see also Anita L Allen & Maria H Morales, “Hobbes, Formalism, and Corrective Justice” (1992) 77:2 Iowa L Rev 713 at 725.

scaffold for analysis. We also have other cases involving Uber contracts that have been decided under US law. For example, Uber drivers were ordered to arbitrate in *O'Connor*, *Fridman* and *Mohamed*—all noted above.⁷⁷

Accordingly, the “easy answer” may be that US *FAA* law and Supreme Court jurisprudence toward enforcement of arbitration agreements would result in the drivers in *Heller* being ordered to arbitrate per the arbitration clause. That would be an oversimplification of the issues, however, as there may be an *FAA* section 1 argument in the US if the drivers could show that they were transportation workers in interstate commerce. As noted above, this would depend on the facts of the case, although it would face an uphill battle under the *Singh*, *Heller v Rasier* and *Capriole* cases.⁷⁸ Still, *Cunningham v Lyft, Inc* at least leaves the door open for such arguments under US *FAA* law.⁷⁹

At the same time, unconscionability remains a viable defence under US law to enforcement of arbitration clauses as long as the court applies it in a neutral manner and does not single arbitration out for negative treatment. The court is not permitted to merely base its finding on its own ideas of arbitration as “bad” in any way. Instead, the court will apply the two-prong unconscionability test noted above, which is similar to Canadian law. Under that test, the clause in the Canadian *Heller* case⁸⁰ could be found unconscionable. From the facts, it appears that the arbitration clause was a condition of employment. Furthermore, there was no “opt out” clause to dispel procedural unconscionability, as we saw in *O'Connor*, *Fridman* and *Mohamed*. We can certainly argue about whether such “opt-out” clauses are illusory in practice, but they continue

⁷⁷ *O'Connor*, *supra* note 43; *Fridman*, *supra* note 46; *Mohamed*, *supra* note 34.

⁷⁸ *Singh*, *supra* note 48; *Heller v Rasier, LLC*, *supra* note 50; *Capriole*, *supra* note 53.

⁷⁹ *Cunningham*, *supra* note 59.

⁸⁰ *Supra* note 14.

to hold weight in US courts assessing procedural unconscionability.

Furthermore, the Canadian *Heller* case is distinguishable from the US Uber cases noted here in that the location of the arbitration was the Netherlands, with filing and administrative costs that essentially foreclosed access to remedies. Courts in the US would be likely to find such location and cost provisions substantively unconscionable—satisfying prong two under US unconscionability law. For example, in *Casement v Soliant Health, Inc*, a California district court found an arbitration agreement’s forum selection clause was unconscionable where the plaintiff, who lived in California, would have been required to arbitrate in Jacksonville, Florida.⁸¹ Moreover, the high filing fees in the Canadian *Heller* case would evidence substantive unconscionability under US law.

That said, a US court may simply sever the unconscionable parts of the arbitration clause and enforce the remainder—meaning it could sever the Netherlands choice of law and forum, as well as filing fee provisions, and order arbitration to occur in the claimant’s jurisdiction with filing fees covered by the employer. For example, in *Casement*, the court severed the substantively unconscionable forum selection and choice of law clauses to ultimately order arbitration in the claimant’s jurisdiction. The court, therefore, disagreed with the plaintiff, who argued that the arbitration agreement was “so permeated with unconscionability” that the entire agreement should be unenforceable.⁸² The court noted that there is a strong legislative and judicial preference for severing unconscionable terms and enforcing the rest of the agreement.⁸³

⁸¹ *Casement v Soliant Health, Inc*, 2020 WL 2062173 at *9 (ED Cal 2020).

⁸² *Ibid* at *8.

⁸³ *Ibid*. Casement filed an appeal with the Ninth Circuit on May 29, 2020, and the appeal is pending.

Similarly, in *Lang v Skytap, Inc*, a district court severed three unconscionable provisions and enforced arbitration.⁸⁴ Lang had sued their employer on several grounds and sought to avoid arbitration, arguing that the arbitration agreement was so permeated with unconscionability that it should be thrown out altogether.⁸⁵ Lang, from California, challenged the forum selection clause in the arbitration agreement because it required him to arbitrate in Washington under Washington law, and required the parties to split fees—which could be prohibitively expensive for Lang.⁸⁶ The court agreed that these provisions were all unconscionable.⁸⁷ However, instead of allowing Lang to litigate, the court severed the problematic provisions and ordered arbitration in California under California law, without the fee-splitting provision.⁸⁸

V. CONCLUSION

In sum, American and Canadian arbitration law certainly have their differences. Each has intricacies and courts in different provinces and states may apply law in different ways. Indeed, disagreements in the US remain regarding the enforcement of various iterations of arbitration clauses in Uber and Lyft driver contracts. Nonetheless, unconscionability remains as an equitable safety net under US and Canadian law, and common contract law in general. Furthermore, the terms of the Canadian *Heller* arbitration clause appear to have been unconscionable under any standard. Still, it is possible that a

⁸⁴ *Lang v Skytap, Inc*, 347 F Supp (3d) 420 at 434 (ND Cal 2018).

⁸⁵ *Ibid* at 426.

⁸⁶ *Ibid* at 429.

⁸⁷ *Ibid* at 431.

⁸⁸ *Ibid* at 434. *Cf MacDonal v CashCall, Inc*, 883 F (3d) 220 at 233 (3d Cir 2018) (refusing to order arbitration under a clause that designated the Cheyenne River Sioux Tribe as an arbitral forum because the Tribe did not exist as an arbitral forum and such forum was integral and non-severable from the agreement; the entire arbitration clause was therefore unenforceable).

court in the US would sever the substantively unfair portions of the contract and order arbitration—provided that the court could find that the unconscionable parts of the contract did not so permeate the agreement as to render the entire arbitration provision unenforceable.