



**UNIVERSITY OF ALBERTA**  
**FACULTY OF LAW**

# **When Will Courts Refuse to Apply an Arbitration Clause?**

**Lessons from the experience of arrogant Tech Giants**

**David R Percy, Q.C.**

**Borden Ladner Gervais Chair of Energy Law**

**University of Alberta**



## **Where does the Problem Lie?**

**Arbitration (or Forum Selection clauses) can create problems in consumer agreements and employment contracts where there is significant inequality of bargaining power**

**Problems arise when either type of clause is designed to suppress rights rather than provide an effective forum for resolving disputes**



## **Douez v. Facebook, SCC 2017**

**How does a forum selection clause that requires the resolution of all disputes by state or federal courts in Santa Clara affect arbitrations?**

**Similar principles govern application of arbitration clauses and forum selection clauses**



## **Non-enforcement of Clause**

**Validity of a Forum Selection Clause is more important in commercial than consumer transactions**

**Relevant factors:**

- **Inequality of bargaining power (not exclusive)**
- **P's privacy right was quasi-constitutional and dependent on BC Privacy Act**
- **BC Act might override choice of law clause**
- **P would suffer by enforcing her rights in Calif.**



## **Uber v. Heller, SCC 2020**

**H commences Ontario class action against Uber for breach of employment standards**

**H's contract provided for mediation and arbitration in Netherlands under ICC Rules**

**Rules required an upfront payment of \$14,500, plus payment of expenses**

**Could Uber obtain a stay of Ontario action?**



## **SCC Dismisses Stay Application (8-1)**

**Arbitration Clause was unconscionable based on a simplified 2 factor test:**

- 1. Inequality of bargaining power, as H had no hope of negotiating contract terms**
- 2. An improvident contract that provided no reference to required \$14,500 payment, costs were disproportionately higher than any possible award and clause rendered H's contractual rights illusory**



## **Brown J.'s Concurrence**

**Arbitration clause is unenforceable because it denied access to justice to Mr. Heller and was contrary to public policy**

**The majority approach undermines certainty of contracts by allowing decisions based on the “unreasoned intuition” of individual judges**



## What Should Arbitrators Do After Uber

- **We need to recognise that there is a problem with certain types of arbitration clauses that prevent the assertion of even valid rights**
- **There is little to be gained by interventions to try and uphold such clauses**
- **There is much to be gained by working on criteria to be applied to suspect clauses and advocacy of changes to provincial legislation**





## **A Possible Example**

**AB Consumer Protection Act, s. 16:**

**An arbitration clause (but not a FSC!) in a consumer transaction or an arbitration agreement with a consumer is void and unenforceable**

**Should an appropriate clause be added to Employment Standards Act, so as to isolate most problem clauses and reduce risk of attacks on proper arbitration clauses?**