Federal Court  Cour fédérale

**Date: 20240624**

**Docket: T-538-23**

**Citation: 2024 FC 977**

**Montréal, Quebec, June 24, 2024**

**PRESENT: Mr. Justice Gascon**

**PROPOSED CLASS PROCEEDING**

**BETWEEN:**

**ARTHUR LIN**

**Plaintiff**

**and**

**UBER CANADA INC.**
**UBER TECHNOLOGIES, INC.**
**UBER PORTIER CANADA INC.**
**UBER CASTOR CANADA INC.**
**JUST ORDER ENTERPRISES CORP.**
**FAN TUAN HOLDING LTD.**
**FANTUAN TECHNOLOGY LTD.**

**Defendants**

**ORDER AND REASONS**

## I. Overview

[1] The Defendants Uber Canada Inc., Uber Technologies, Inc., Uber Portier Canada Inc., and Uber Castor Canada Inc. [together, the Uber Defendants or Uber] bring a motion to stay the proceeding initiated by the Plaintiff, Mr. Arthur Lin, a consumer who is acting as a potential representative plaintiff in this proposed class action. Relying on subsection 7(1) of Ontario's *Arbitration Act, 1991*, SO 1991, c 17 [Ontario Arbitration Act] or, alternatively, paragraph 50(1)(b) of the *Federal Courts Act*, RSC 1985, c F-7 [Federal Courts Act], the Uber Defendants submit that the Plaintiff's claims against them are subject to a mandatory arbitration agreement found in the user terms and conditions of the Uber platform [Arbitration Clause], and must therefore be resolved by way of arbitration.

[2] The proposed class action underlying this stay motion is being brought against the Uber Defendants and three other Defendants, namely, Just Order Enterprises Corp., Fan Tuan Holding Ltd., and Fantuan Technology Ltd. [together, the Fantuan Defendants], pursuant to section 36 of the *Competition Act*, RSC 1985, c C-34 [Competition Act], for alleged breaches of section 52 relating to misleading representations. However, the stay motion does not concern the Fantuan Defendants.

[3] The Plaintiff opposes the stay motion on the basis that Uber's user terms and conditions constitute an adhesion contract and that the Arbitration Clause is unenforceable for three reasons: 1) the Arbitration Clause is invalid under the legal framework governing the contract between the parties; 2) there is a physical impediment to applying the Arbitration Clause; and 3) the Arbitration Clause is "void" because it is unconscionable.

[4] For the reasons that follow, the stay motion will be granted.

## II. Background

### A. *The alleged anticompetitive conduct*

[5] The underlying nature of the claim being brought against the Uber Defendants and the Fantuan Defendants by way of this proposed class action involves alleged breaches of section 52 of the Competition Act, which prohibits various forms of false or misleading representations. The Plaintiff used the Uber Eats Food Delivery Service [Uber Eats] and the Fantuan Food Delivery Service to acquire food in Canada, and he claims that he had to incur additional charges for food delivery services, including a delivery fee and/or service fee. More specifically, the Plaintiff alleges that the Uber Defendants and the Fantuan Defendants employed the deceptive marketing practice of "drip pricing", now prohibited under subsection 52(1.3) of the Competition Act, and made representations of a price for their respective food delivery services that was not attainable due to additional charges besides taxes or other governmental charges.

[6] The Uber Eats platform connects customers ordering food or other items with restaurants and merchants offering food and other items for sale, and allows those restaurants and merchants to offer delivery options for their products, including through third-party service providers.

[7] Section 52 of the Competition Act prevents, both directly and indirectly, a person from knowingly or recklessly making representations to the public of false or misleading promotional materials. Subsection 52(1.3) of the Competition Act prohibits drip pricing, which is defined as

"the making of a representation of a price that is not attainable due to fixed obligatory charges or fees".

[8] In his proposed class action, the Plaintiff notably seeks damages, pursuant to section 36 of the Competition Act, resulting from the alleged prohibited misleading representations made by the Uber Defendants and the Fantuan Defendants.

B. *The Arbitration Clause*

[9] The Arbitration Clause is found in every version of Uber's website terms and conditions [Uber Terms and Conditions] applicable after July 1, 2021.

[10] According to article 6 of the Uber Terms and Conditions, the laws of Ontario (or Quebec, if the consumer is a Quebec resident) govern the contract between Uber and its customers. All versions of the Uber Terms and Conditions that have been in force since July 1, 2021 have included an Arbitration Clause substantially similar to the following:

> 7. DISPUTE RESOLUTION
>
> IMPORTANT: PLEASE READ THE FOLLOWING ARBITRATION REQUIREMENT CAREFULLY. YOU WILL HAVE TO RESOLVE DISPUTES THROUGH ARBITRATION. YOU WILL NOT BE ELIGIBLE TO GET MONEY OR OTHER RELIEF THROUGH A COURT PROCEEDING.
>
> ARBITRATION REQUIREMENT
>
> You are free to get advice or representation from a lawyer about this arbitration requirement.
>
> Unless prohibited by law, all disputes arising out of or relating in any way to: i) these Uber Eats Terms, ii) the Delivery Services, or iii) advertisements, promotions or oral or written statements related to the Delivery Services will be finally and conclusively adjudicated and resolved by arbitration under the Arbitration Rules

> ("ADRIC Rules") of the ADR Institute of Canada, Inc. ("ADRIC"), except as modified here. The arbitration will be in English or French as you choose. The arbitration may be held anywhere the arbitrator considers appropriate, including remotely by telephone or Internet.
>
> The ADRIC Rules are available by, for example, searching <www.google.ca> to locate "ADRIC Arbitration Rules" or by clicking here. You can also contact ADRIC at 1-877-475-4353 or <www.adric.ca>.
>
> You will have to pay some fees to arbitrate, as described in the ADRIC Rules.
>
> However, before beginning the arbitration, the party with the claim will first try to informally negotiate with the other party, in good faith, a resolution of the dispute for not less than 30 days but no more than 45 days unless extended by agreement. During the negotiation period, any otherwise applicable limitation period will be tolled (temporarily suspended). …

[11] Article 7 of the Uber Terms and Conditions highlights the dispute resolution framework of the contract — and more specifically, the arbitration requirement, which is the only form of recourse available to the contracting parties. Article 7 forms the basis of the Arbitration Clause. It provides that all disputes arising from the Uber Terms and Conditions, Uber services, access to Uber applications, and advertising or promotions of Uber products and applications must be finally and conclusively adjudicated and resolved under the Arbitration Rules [ADRIC Rules] of the ADR Institute of Canada [ADRIC]. Furthermore, the clause states that the customer will have to "pay some fees to arbitrate, as described in the ADRIC Rules". However, the Arbitration Clause does not explicitly specify those fees.

[12] Under the ADRIC Rules referenced in the Arbitration Clause, a person alleging damages of $10,000 or less must pay a commencement fee of $350, and a defendant must pay a case service fee of $75 (Schedule B of the ADRIC Rules). ADRIC Rule 4.23 provides that, in some

circumstances, a party may be required to pay a deposit as an advance for possible costs arising out of the arbitration. Rule 5.3 also stipulates that an arbitrator may award costs to the winning party in relation to the arbitration. Arbitration hearings and meetings may be held in a location the arbitral tribunal considers necessary, including by telephone, email, or videoconference (Rule 4.1 of the ADRIC Rules). Finally, an arbitral tribunal may rule on its own jurisdiction, including on any objections about the existence or validity of the arbitration agreement (Rule 4.8 of the ADRIC Rules).

[13] Customers who use the Uber Eats platform and application cannot place an order on Uber Eats if they do not first agree to the Uber Terms and Conditions. Therefore, the Plaintiff had to agree to the Uber Terms and Conditions, including the Arbitration Clause found therein, in order to receive Uber Eats' food delivery services.

[14] There is no dispute in this case that the Plaintiff agreed to the Uber Terms and Conditions. The Plaintiff accepted these terms and conditions (and thus the Arbitration Clause) on May 19, 2022 (and did not use the Uber Eats platform between July 1, 2021 and May 18, 2022). Thereafter, he accepted a later version of the Uber Terms and Conditions by continuing to use the Uber Eats platform.

C. *The relevant legislative provisions*

[15] For ease of reference, the relevant statutory provisions are reproduced here. The relevant provision of the Ontario Arbitration Act is subsection 7(1). It reads as follows:

| **Stay** | **Sursis** |
| --- | --- |
| **7 (1)** If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding. | **7 (1)** Si une partie à une convention d'arbitrage introduit une instance à l'égard d'une question que la convention oblige à soumettre à l'arbitrage, le tribunal judiciaire devant lequel l'instance est introduite doit, sur la motion d'une autre partie à la convention d'arbitrage, surseoir à l'instance. |

[16] The relevant provision of the Federal Courts Act is subsection 50(1), which reads as follows:

| **Stay of proceedings authorized** | **Suspension d'instance** |
| --- | --- |
| **50 (1)** The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter | **50 (1)** La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire : |
| **(a)** on the ground that the claim is being proceeded with in another court or jurisdiction; or | **a)** au motif que la demande est en instance devant un autre tribunal; |
| **(b)** where for any other reason it is in the interest of justice that the proceedings be stayed. | **b)** lorsque, pour quelque autre raison, l'intérêt de la justice l'exige. |

[17] Finally, as will be discussed below, section 7 of Ontario's *Consumer Protection Act*, 2002, SO 2002, c 30, Schedule A [Ontario Consumer Protection Act] is also highly relevant to this stay motion and is reproduced as follows for convenience:

| **No waiver of substantive and procedural rights** | **Aucune renonciation aux droits substantiels et procéduraux** |
| --- | --- |
| **7 (1)** The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary. | **7 (1)** Les droits substantiels et procéduraux accordés en application de la présente loi s'appliquent malgré toute convention ou renonciation à l'effet contraire. |

| | |
|---|---|
| **Limitation on effect of term requiring arbitration** | **Restriction de l'effet d'une condition exigeant l'arbitrage** |
| **(2)** Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act. | **(2)** Sans préjudice de la portée générale du paragraphe (1), est invalide, dans la mesure où elle empêche le consommateur d'exercer son droit d'introduire une action devant la Cour supérieure de justice en vertu de la présente loi, la condition ou la reconnaissance, énoncée dans une convention de consommation ou une convention connexe, qui exige ou a pour effet d'exiger que les différends relatifs à la convention de consommation soient soumis à l'arbitrage. |

## III. Submissions of the parties

[18] The Uber Defendants first argue that the Arbitration Clause is enforceable due to its content and the fact that since July 2021, it is "materially different" from the arbitration clause that was deemed invalid by the Supreme Court of Canada [SCC] in *Uber Technologies Inc v Heller*, 2020 SCC 16 [*Heller SCC*]. The Uber Defendants maintain that the Ontario Arbitration Act and the Federal Courts Act permit a stay, that Uber meets the technical prerequisites for the approval of a stay in favour of arbitration, that no statutory exceptions apply, that the Ontario Consumer Protection Act does not invalidate the Arbitration Clause, and that recent jurisprudence, such as *Heller SCC* and *Douez v Facebook, Inc*, 2017 SCC 33 [*Douez SCC*], concerning the invalidity of certain arbitration clauses, does not apply to the present case.

[19] Furthermore, the Uber Defendants posit that their position is at least arguable — the standard they deem necessary to prove that their request for a stay in favour of arbitration is well founded — and that the stay should consequently be granted to allow an arbitrator to address the jurisdictional issues under the competence-competence principle.

[20] Finally, the Uber Defendants submit that this Court and the Federal Court of Appeal [FCA] have repeatedly confirmed that claims made under the Competition Act are arbitrable. To this effect, they cite *Murphy v Amway Canada Corporation*, 2013 FCA 38 [*Murphy FCA*] and *Difederico v Amazon.com, Inc*, 2023 FCA 165 [*Difederico FCA*], which both expressly determined that claims made under the Competition Act can be arbitrated (*Murphy FCA* at para 64; *Difederico v Amazon.com, Inc*, 2022 FC 1256 at para 127 [*Difederico FC*], aff'd *Difederico FCA* at para 77).

[21] In support of their position, the Uber Defendants further argue that stays in favour of arbitration where the parties have a mandatory arbitration clause are inherently in the interests of justice. Indeed, as pointed out by the Uber Defendants, the SCC in *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 [*Peace River SCC*] has stated that valid arbitration clauses must be enforced and that arbitrators should generally decide if they have jurisdiction under the competence-competence principle (*Peace River SCC* at paras 39–41).

[22] The Plaintiff responds that the Arbitration Clause is unenforceable, and consequently, invalid. To this effect, he raises three key arguments.

[23] First, the Plaintiff asserts that the Arbitration Clause is invalid under the legal system that the Uber Defendants have selected to govern the Uber Terms and Conditions. This legal system is that of Ontario. The Plaintiff claims that appellate courts across Canada have determined that arbitration clauses cannot be invoked against consumers covered by Ontario's consumer protection laws (*TELUS Communications Inc v Wellman*, 2019 SCC 19 at paras 4, 97 [*Telus SCC*]; *Difederico FCA* at para 80; *Williams v Amazon.com Inc*, 2023 BCCA 314 at para 174

[*Williams BCCA*]). Alternatively, section 25 of the Federal Courts Act would, in any event, ensure that this Court retains jurisdiction to adjudicate cases relating to federal laws.

[24] Second, the Plaintiff submits that there is an apparent physical impediment to applying the Arbitration Clause, as the arbitration institution selected by the Uber Defendants cannot hear class actions. Whereas a class action is not contractually prohibited in the Uber Terms and Conditions, the ADRIC is not able to hear class actions. As such, the Plaintiff claims that the Arbitration Clause, even if found to be valid, is "incapable of being performed".

[25] Finally, the Plaintiff alleges that the Arbitration Clause is unconscionable, as it does not explicitly indicate the costs associated with arbitration, but simply states that consumers "will have to pay some fees to arbitrate".

## IV. Analysis

### A. *Preliminary issues*

[26] Before addressing the substantive issues raised by the parties, I first need to address three preliminary matters.

#### (1) Other Uber defendants

[27] In his submissions to the Court, the Plaintiff indicated that two other legal entities, Uber B.V. and Uber Portier B.V., should be added as defendants in this proceeding. The Plaintiff noted that the Uber Terms and Conditions effective from March 17, 2021 (i.e., the start of the

proposed class period) to June 30, 2021 identified these two Uber entities which are not defendants.

[28] With respect, the Plaintiff's request on this front has no merit. While it may be true that the names of other Uber entities appear in the Uber Terms and Conditions, this is irrelevant to this stay motion. The Plaintiff has not filed any motion to add any other defendants. Moreover, the Plaintiff has provided no evidence on purchases made during the proposed class period that would justify adding the new Uber defendants they have identified.

(2) Uber Canada

[29] The Plaintiff also submits that Uber Canada Inc. [Uber Canada] is not a party to the Uber Terms and Conditions or to the Arbitration Clause, and therefore, could not benefit from the stay motion sought by Uber.

[30] The Plaintiff claims that the Uber Defendants failed to explain how Uber Canada could, on the one hand, not be expressly named in the Uber Terms and Conditions and not enter into contracts with the putative class members but, on the other hand, be subject to the Arbitration Clause. While the Plaintiff acknowledges that, in limited circumstances, a person not named in an arbitration agreement, such as a corporate subsidiary, may claim the benefit of arbitration, he argues that the Uber Defendants have failed to provide any evidence to raise an arguable case that Uber Canada is a corporate subsidiary that would be entitled to be covered by the arbitration agreement through or under the other Uber defendants. According to the Plaintiff, the Uber Defendants even expressly asserted that Uber Canada does not enter into contracts with the

putative class members. He therefore asks the Court to exercise its residual discretion to refuse any stay application for Uber Canada as this entity is not a party to the Arbitration Clause.

[31] I am not persuaded by the Plaintiff's argument.

[32] The Uber Terms and Conditions include the Uber affiliates and repeatedly recognize and benefit these affiliates. The Arbitration Clause thus applies to claims against Uber Canada — an Uber affiliate —, even though it is not expressly named in the Uber Terms and Conditions. In addition, pursuant to the Arbitration Clause contained at section 7 of the Uber Terms and Conditions, the Plaintiff (and any other Uber Eats customers) agreed to arbitrate, among other things, "all disputes arising out of or related in any way to … the Delivery Services, or … advertisements, promotions or oral or written statements related to the Delivery Services". There is no doubt that this captures the Plaintiff's claims in this proposed class action, including those made against Uber Canada. Finally, any claims against Uber Canada would be closely intertwined with the claims made against the other Uber Defendants and would arise from the same factual matrix and the same alleged conduct. In such circumstances, it is preferable to avoid endorsing multiple proceedings and risking inconsistent decisions, which militates in favour of including Uber Canada in the arbitration agreement (*Kwon v Vanwest College Ltd*, 2021 BCSC 545 at para 50).

[33] In sum, I agree with the Uber Defendants that there is at least an arguable case that Uber Canada benefits from the Arbitration Clause.

(3) The Fantuan Defendants

[34] The last preliminary issue relates to the Fantuan Defendants.

[35] The Plaintiff appears to suggest that their presence as defendants may have a bearing on this stay motion. It does not. There is no doubt that the Arbitration Clause does not apply to the Fantuan Defendants and that the Uber Defendants have nothing to do with them. The claims against the Uber Defendants are factually distinct from the claims against the Fantuan Defendants and the conclusions reached by the Court on this stay motion will not affect the latter. Nor does the presence of the Fantuan Defendants as parties to this proceeding modify the issues raised by this stay motion with respect to the Uber Defendants, or their treatment by the Court.

B. *The approach for assessing a request for a stay in favour of arbitration*

[36] This stay motion is made primarily pursuant to section 7 of the Ontario Arbitration Act. This provision requires any court — including this Court — to stay a proceeding where one party to an arbitration agreement commences a proceeding in respect of a matter the parties have agreed to submit to arbitration, subject to limited exceptions. Since the Arbitration Clause is a mandatory arbitration agreement between Uber and the Plaintiff (and many other customers) that is governed by Ontario law, the Ontario Arbitration Act evidently applies.

[37] I underline that subsection 7(1) of the Ontario Arbitration Act is mandatory. The Court does not have discretion to deny a motion to stay in favour of arbitration. As is the case for many

other arbitration legislations in other provinces, the use of the word “shall” in the provision represents a clear policy choice favouring the enforcement of arbitration agreements.

[38] In *Peace River SCC*, the SCC reaffirmed the “legislative and judicial preference for holding parties to arbitration agreements” (*Peace River SCC* at para 10). It is now well accepted that stays in favour of arbitration where the parties have a mandatory arbitration clause are inherently in the interest of justice, and that Canadian courts will only consider challenges to the jurisdiction of an arbitrator or the enforceability of an arbitration agreement in exceptional circumstances. The SCC has repeatedly confirmed that valid arbitration clauses must be enforced and that, under the competence-competence principle, arbitrators should generally decide if they have jurisdiction (*Peace River SCC* at paras 39–41; *TELUS SCC* at paras 46, 54; *Seidel v TELUS Communications Inc*, 2011 SCC 15 at paras 2, 23, 42 [*Seidel SCC*]). This was expressly endorsed by the FCA with respect to federal matters brought before this Court (*Difederico FCA* at paras 34–35, 52).

[39] The competence-competence principle gives precedence to the arbitration process (*Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at para 70 [*Dell SCC*]). It mandates that jurisdictional challenges to arbitration or to the scope of arbitration agreements are to be resolved in the first instance by the arbitrator, and not by courts, unless certain exceptions apply (*Peace River SCC* at para 39).

[40] I pause to emphasize that the outcome in *Peace River SCC* — where the SCC refused the stay in favour of arbitration — is an exception to the fundamental principle of competence-competence which directs the courts to allow arbitrators to rule first on their own jurisdiction. In *Peace River SCC*, the SCC emphasized that it was only the particular policy objectives of the

insolvency legislation at stake in that case that justified sidestepping the arbitration agreements at issue (*Peace River SCC* at paras 9–10).

[41] In other words, the general approach in cases where the validity of an arbitration agreement or the jurisdiction of the arbitrator is challenged is to refer the issue to the arbitrator, subject to limited exceptions (*Dell SCC* at paras 84–86; *Difederico FC* at para 96). The courts will only consider adjudicating challenges to arbitration agreements when such challenges raise either: 1) a pure question of law; or 2) a question of mixed fact and law that only requires a superficial consideration of the record (*Dell SCC* at paras 84–86; *Difederico FCA* at para 35; *Spark Event Rentals Ltd v Google LLC*, 2024 BCCA 148 at paras 15–18, 41 [*Spark BCCA*]). In *Heller SCC*, the SCC set out a third competence-competence exception, stating that a court should not refer a *bona fide* challenge to the validity of an arbitration agreement or to an arbitrator's jurisdiction to the arbitrator if doing so would make it impossible for one party to arbitrate or for the challenge to be resolved (*Heller SCC* at paras 38–46; *Difederico FC* at paras 96–97).

[42] Outside of those situations, the competence-competence principle requires that the matter be referred to the arbitrator.

[43] In *Peace River SCC*, echoing these general principles, the SCC articulated a two-part process to determine whether a proceeding should be stayed in favour of arbitration (*Peace River SCC* at paras 76–84; *General Entertainment and Music Inc v Gold Line Telemanagement Inc*, 2023 FCA 148 at para 30 [*Gold Line FCA*]). These two interrelated, though distinct, components for a mandatory stay of proceedings are known as the "technical prerequisites" and the "statutory exceptions".

[44] Under the first component, the Court must be satisfied that four technical prerequisites exist in order to invoke an arbitration clause. They are: (i) an arbitration agreement must exist; (ii) the court proceeding must have been commenced by a party to the arbitration agreement; (iii) the court proceedings must be in respect of a matter the parties agreed to submit to arbitration in the arbitration agreement; and (iv) the party seeking the stay must apply before taking any step in the court proceeding (*Peace River SCC* at paras 81–86; *Gold Line FCA* at paras 30, 31, 39; *Difederico FC* at para 68).

[45] The party seeking the stay does not need to establish these technical prerequisites on the usual balance of probabilities standard. It must simply establish an "arguable case" that the prerequisites are met. If there is an arguable case, the Court must stay the action and let the arbitrator decide the jurisdictional issue, subject to statutory exceptions (*Peace River SCC* at paras 84–85). When all the technical prerequisites are met, the mandatory stay provision is engaged and the Court should then move on to the second component of the analysis.

[46] Turning to the second component of the two-part process, the Court must determine whether there are any statutory exceptions that would prevent staying the proceeding in favour of arbitration. These statutory exceptions encompass more substantive reasons to object to or invalidate an arbitration clause, including the arbitration agreement being "null, void, inoperative, or incapable of performance", other legislative interventions, or instances where the subject matter of the dispute is incapable of being the subject of arbitration (*Peace River SCC* at paras 86–87). If there are no statutory exceptions, the Court must grant a stay and cede jurisdiction to the arbitrator (*Peace River SCC* at para 79).

[47] At this second stage of the analysis, the party resisting arbitration (here, the Plaintiff) bears the onus of proof and the usual balance of probabilities standard applies. If the party resisting arbitration does not meet that burden, a stay in favour of arbitration is mandatory. Moreover, the competence-competence principle requires that where "the invalidity or unenforceability of the arbitration agreement is not clear (but merely arguable), the matter should be resolved by the arbitrator" (*Peace River SCC* at paras 88–89; see also *Spark BCCA* at paras 13–18). Stated differently, it must be clear on the record that deferral to arbitration raises a real prospect that there would be a denial of access to justice, and a mere possibility is not enough to overcome the competence-competence principle (*Difederico FC* at para 112). As mentioned above, since arbitration clauses are presumptively valid, a clear case is needed to reverse this presumption (*Peace River SCC* at para 89).

C. *The technical prerequisites*

[48] In the present matter, the four technical prerequisites are not really in dispute, and there is no doubt that they are met.

[49] First, an arbitration agreement obviously exists as the Arbitration Clause is clearly part of the Uber Terms and Conditions. Second, the Plaintiff, as a party bound by the Uber Terms and Conditions, commenced this class action proceeding. Third, the proposed class action in this case relates to Uber Eats' food delivery services and covers a matter subject to the Arbitration Clause. Finally, the Uber Defendants have not taken any steps in this proceeding. In April 2023, counsel for the Uber Defendants accepted service and asked Plaintiff's counsel to confirm they would not take steps to note the Uber Defendants in default. Plaintiff's counsel responded that statements of defence should be filed within the timeline under the Rules, subject to a reasonable extension.

On May 15, 2023, the Plaintiff served his Notice of Motion for certification. The Notice of Motion confirmed that the Plaintiff did not require statements of defence until after certification. On May 19, 2023, counsel for the Uber Defendants advised Plaintiff's counsel of Uber's intention to bring this motion for a stay in favour of arbitration.

D. *The statutory exceptions*

[50] At issue in this stay motion is whether the Plaintiff has demonstrated, on a balance of probabilities, the existence of any statutory exceptions preventing the Court from referring the matter to an arbitrator.

[51] Under this second component of the two-part test, the Plaintiff offers three reasons why a stay in favour of arbitration should not be granted despite the satisfaction of the technical requirements : 1) two statutes override any enforcement of the Arbitration Clause; 2) the Arbitration Clause is "incapable of being performed" in the sense that the chosen arbitration institution, namely ADRIC, cannot adjudicate disputes of the type raised by the Plaintiff; and 3) the Arbitration Clause is "void" in the sense that it is unconscionable.

[52] For the reasons that follow, I find that in the circumstances of this case, these three arguments are all without merit.

(1) Legislative overrides

[53] In this instance, the Plaintiff submits that there are two clear legislative overrides of the Arbitration Clause, namely, section 7 of the Ontario Consumer Protection Act and section 25 of the Federal Courts Act. Each will be dealt with in turn.

(a) *The Ontario Consumer Protection Act*

[54] The Plaintiff claims that sections 7 and 8 of the Ontario Consumer Protection Act ban arbitration altogether and guarantee the access of aggrieved consumers to the courts. In support of this position, the Plaintiff relies on the text of the legislation, court precedents, and the remedial objective of these provisions.

[55] The Plaintiff first argues that the actual text of the Arbitration Clause states that "[u]nless prohibited by law", all disputes under the Uber Terms and Conditions are to be referred to arbitration. The Plaintiff contends that the Arbitration Clause is prohibited by Ontario law and that Uber is asking the Court to ignore the precondition set out in its own Arbitration Clause and to read in an exception to allow enforcing, in this Court, what is a prohibited clause. The Plaintiff maintains that section 7 of the Ontario Consumer Protection Act expressly states that "any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action …" [emphasis added].

[56] According to the Plaintiff, the rules of statutory interpretation require the Court to take into account the context of the legislation. Such relevant "context" for the Ontario Consumer Protection Act includes the fact that the Ontario legislature would have known that the statute was a "complete code" and that there would be no other consumer causes of action or consumer remedies that the Ontario Consumer Protection Act does not touch upon. It also includes, says the Plaintiff, section 6 of the legislation, which specifically provides that "[n]othing in this Act shall be interpreted to limit any right or remedy that a consumer may have in law", thus recognizing and affirming the rights and remedies that a consumer already has in common law and statutory law, which necessarily includes applicable federal statutes such as the Competition Act.

[57] The Plaintiff maintains that what he describes as Uber's "technical" interpretation of the Ontario Consumer Protection Act would have the absurd consequences of defeating the Ontario legislature's intent to outlaw mandatory arbitration clauses in consumer agreements.

[58] In addition, the Plaintiff argues that court precedents actually support his interpretation of section 7 of the Ontario Consumer Protection Act. He claims that *Gupta v Lindal Cedar Homes Ltd*, 2020 ONSC 7524 [*Gupta ONSC*] — a precedent relied on by the Uber Defendants — is inconsistent with appellate guidance across Canada, including the SCC. The Plaintiff maintains that appellate courts have mentioned, either in *obiter dicta* or directly, that in Ontario, the legislature has generally precluded mandatory arbitration agreements in the consumer context. For instance, says the Plaintiff, the British Columbia [BC] Court of Appeal [BCCA] stated that "Ontario, Quebec and Saskatchewan have expressly prohibited mandatory arbitration agreements and class waivers" (*Williams BCCA* at para 174). For its part, the FCA ruled that "[s]ome

provinces have reacted to this reality by adopting legislation protecting consumers from the potential unfairness of such adhesion contracts. For example, in Ontario, section 7 of the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A, declares mandatory arbitration clauses invalid" (*Difederico FCA* at para 80). Finally, the Plaintiff maintains that the SCC itself determined that "the [Ontario] Consumer Protection Act expressly shields consumers from a stay of proceedings under the Arbitration Act" (*Telus SCC* at para 4), that the provisions of the Ontario Consumer Protection Act "render the arbitration agreements entered into by the consumers invalid to the extent that they would otherwise prevent the consumers from commencing or joining a class action" (*Telus SCC* at para 97), and that section 7 of the Ontario Consumer Protection Act can be seen as a "legislative override" of any consumer arbitration agreement (*Telus SCC* at para 97).

[59] The Plaintiff also relies on *Griffin v Dell Canada Inc*, 2010 ONCA 29 [*Griffin ONCA*], where the Ontario Court of Appeal noted that one of the very purposes of the enactment of section 7 of the Ontario Consumer Protection Act was to prevent "[c]lauses that require arbitration and preclude the aggregation of claims [which] have the effect of removing consumer claims from the reach of class actions" (*Griffin ONCA* at para 30). Finally, the Plaintiff refers to *Union des consommateurs c Bell Canada*, 2018 QCCS 1927 [*Bell QCCS*], where the Superior Court of Quebec similarly rejected a strict interpretation of a provincial statute as it would only serve to defeat the legislative intent to ensure that limitation periods are tolled, and the flexible and generous interpretation of class action legislation (*Bell QCCS* at paras 2, 23).

[60] The Plaintiff claims that Uber's interpretation would have the effect of defeating the Ontario legislature's intent to ensure access to justice for consumers, undermining the remedial

purposes of the Ontario Consumer Protection Act. Such interpretation also could not be "in the interest of justice" as provided in paragraph 50(1)(b) of the Federal Courts Act.

[61] With respect, I disagree with the Plaintiff's arguments. I instead find that the Plaintiff puts forward a tortuous, inaccurate, and meritless reading of both the Ontario Consumer Protection Act and the case law he attempts to rely on.

(i) The wording of subsection 7(2) of the Ontario Consumer Protection Act

[62] I will first deal with the legislative provision.

[63] I accept that section 7 of the Ontario Consumer Protection Act constitutes a specific legislative override. However, both the provision itself and the precedents having interpreted it clearly establish that this legislative override is limited in scope.

[64] Indeed, the Ontario Consumer Protection Act invalidates arbitration clauses only to a limited extent. Subsection 7(2) invalidates an arbitration clause in a consumer agreement or related agreement only "insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under the [Consumer Protection Act]" [emphasis added]. Subsection 8(1) further provides that a consumer "may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding".

[65] The language of subsection 7(2) is crystal clear: it does not protect consumers from arbitration in every transaction they enter. Nor does consumer protection legislation invalidate an arbitration clause for all purposes, contrary to what the Plaintiff suggests (*Telus SCC* at para 97; *Seidel SCC* at paras 31–32, 40, 50). Subsection 7(2) of the Ontario Consumer Protection Act protects only some statutory causes of action commenced before the Ontario Superior Court of Justice under the Ontario Consumer Protection Act.

[66] The references to "Superior Court of Justice" and "*Class Proceedings Act, 1992*" in sections 7 and 8 of the Ontario Consumer Protection Act indicate that the Ontario legislature only intended to protect access to Ontario courts, but not to other courts of coordinate jurisdiction, such as this Court or a superior court of another province.

[67] The Plaintiff, with his argument and proposed interpretation, simply ignores and turns a blind eye to the last part of subsection 7(2). The Plaintiff may not like it, but it is obvious that courts "cannot disregard the actual words chosen by [the legislature] and rewrite the legislation to accord with [their] own view of how the legislative purpose could be better promoted" (*Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at para 40).

[68] I pause to underline that, since the Plaintiff's sole cause of action is based on sections 36 and 52 of the Competition Act, he could have decided to bring his class action proceeding before the Ontario Court of Justice, as a recovery of damages pursuant to those provisions may be brought before "any court of competent jurisdiction", including this Court. Stated differently, this Court and the superior courts of the provinces have concurrent jurisdiction regarding recourses in damages pursuant to sections 36 and 52 of the Competition Act. However, the

Plaintiff elected to bring this proposed class action proceeding before this Court, and he must live with his choice of forum.

[69] The principles applicable to statutory interpretation are well known. The SCC has repeatedly affirmed that "there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21 and *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26, both quoting Elmer A. Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87). Statutory interpretation is the art of inferring what words mean. Sometimes, the meaning is obvious because of the clarity of the language used by the legislator and of its relationship to the legislative intent and the policy objectives of the statutory scheme. This is precisely the case here. The intent is found in the express wording and the plain language used by the Ontario legislature in subsection 7(2) of the Ontario Consumer Protection Act. Neither the context nor the purpose of the legislation alter the clear meaning and scope of the provision.

[70] The fundamental crux of the Plaintiff's approach is that he blatantly avoids any direct reference to the legislative provision and its wording. His proposed interpretation has no traction in the wording of the provision, when read in context and purposively, as required by the modern approach to statutory interpretation, and is untenable in light of the wording of subsection 7(2) of the Ontario Consumer Protection Act. These are not mere "technicalities" raised by the Uber Defendants, far from it.

(ii) The case law

[71] Moreover, contrary to what the Plaintiff valiantly attempts to argue, none of the cases he relies on support his argument or the principles he claims to draw from them. In fact, the jurisprudence unanimously acknowledges that the legislative override established by the Ontario Consumer Protection Act is strictly limited.

[72] In *Gupta ONSC*, the Ontario Superior Court of Justice [ONSC] expressly stated that subsection 7(2) of the Ontario Consumer Protection Act does not prevent all causes of action arising from a consumer agreement from being referred to arbitration. It prevents only the requirement to submit a dispute to arbitration that arises from a specific right under that legislation (*Gupta ONSC* at paras 20–21). In other words, the provision does not protect consumers from arbitration clauses in all possible transactions involving consumers.

[73] Furthermore, the recent decision of the BC Supreme Court [BCSC] in *Tahmasebpour v Freedom Mobile Inc*, 2024 BCSC 726 [*Tahmasebpour BCSC*] confirms this interpretation. In post-hearing submissions, the Plaintiff submitted that the recent BC decisions in *Tahmasebpour BCSC* and *Spark BCCA* assisted in orienting the analysis of his claims. In both matters, the BC courts stayed proceedings in favour of arbitration.

[74] *Tahmasebpour BCSC* concerned an arbitration clause in a cellphone contract. The plaintiffs in that case sued in negligence and under BC's *Business Practices and Consumer Protection Act*, SBC 2004, c 2. They argued that the arbitration clause was unenforceable because 1) Ontario law governed the contract and the Ontario Consumer Protection Act

protected their right to sue in court; and 2) the arbitration clause was unconscionable. The BC court rejected both arguments.

[75] Regarding the Ontario Consumer Protection Act, the BCSC held that "it is only the exercise of a right 'given under [the Consumer Protection Act]' that is shielded from an arbitration clause" (*Tahmasebpour BCSC* at para 37). This legislation does not shield other claims, such as a negligence claim or a Competition Act claim. The Court further observed that *Difederico FCA* confirms that only Parliament, not Ontario's legislature, can decide whether Competition Act claims are arbitrable (*Difederico FCA* at paras 80–81). Moreover, the BCSC found that it could not be said that the arbitration clause prevented the plaintiffs from maintaining an action in the court that is equivalent to a claim that could be brought in the ONSC under the Ontario Consumer Protection Act. Indeed, the plaintiffs could not point to any section of the Ontario Consumer Protection Act that parallels the negligence claim they were making (*Tahmasebpour BCSC* at para 37). *Tahmasebpour BCSC* thus confirmed the judicial interpretation of subsection 7(2) of the Ontario Consumer Protection Act found in *Gupta ONSC*.

[76] Turning to the appellate cases that the Plaintiff claims to rely on, they simply do not say what the Plaintiff claims they say.

[77] *Telus SCC* concerned a case brought precisely under the Ontario Consumer Protection Act. When the SCC discussed the scope of section 7 of that legislation at paragraph 97 of its reasons, it expressly referred to "a class action of the kind commenced by Mr. Wellman", which was a class action in Ontario. The SCC concluded as follows: "Read together, these two provisions [of the Ontario Consumer Protection Act] render the arbitration agreements entered into by the consumers invalid to the extent that they would otherwise prevent the consumers

from commencing or joining a class action of the kind commended by Mr. Wellman. To this extent, the provision of the *Consumer Protection Act* constitute a 'legislative override' of the consumer arbitration agreement …" (*Telus SCC* at para 97, citing *Seidel SCC* at para 40). With respect, nothing in that extract could be reasonably read as implying that the "legislative override" extends to all consumer arbitration agreements beyond those covered by subsection 7(2) of the Ontario Consumer Protection Act. Regrettably, the Plaintiff ignores the context of the SCC's findings in *Telus SCC*.

[78] The reference to *Griffin ONCA* at paragraph 31 is misplaced for the same reasons, as this case expressly related to recourse in Ontario under the Ontario Consumer Protection Act.

[79] Similarly, the Plaintiff repeats his erroneous exercise with respect to both *Williams BCCA* and *Difederico FCA*. In *Williams BCCA*, the BCCA stated at paragraph 174 that "[s]ome legislatures have precluded mandatory arbitration agreements and/or class waivers in the consumer context. For example, Ontario, Quebec and Saskatchewan have expressly prohibited mandatory arbitration agreements and class waivers: see ss. 7(2) and 8(1) of Ontario's *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A; s. 11.1 of *Quebec's Consumer Protection Act*, C.Q.L.R., c. P-40.1; and s. 101(2) of Saskatchewan's *The Consumer Protection and Business Practices Act*, S.S. 2013, c. C-30.2". And the court continued by observing that, unlike these other provinces, BC has chosen not to preclude mandatory arbitration agreements or class waivers in its consumer protection legislation (*Williams BCCA* at para 175). Nowhere did the BCCA say or imply that the express prohibition on mandatory arbitration agreements extended to all arbitration agreements governed by Ontario law.

[80] In *Difederico FCA*, the FCA made an *obiter dictum* on provincial legislation at paragraphs 80–81 of its reasons. The FCA acknowledged that "[s]ome provinces have reacted to this reality [i.e., the inclusion of mandatory arbitration agreements in online consumer transactions completed through digital adhesion contracts] by adopting legislation protecting consumers from the potential unfairness of such adhesion contracts. For example, in Ontario, section 7 of the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A, declares mandatory arbitration clauses invalid while section 8 renders invalid any clause that would operate to prevent a consumer class action. Similarly, section 11.1 of Quebec's *Consumer Protection Act*, chapter P-40.1, prohibits any stipulation that obliges a consumer to refer a dispute to arbitration as well as any stipulation that attempts to prevent a class action. By virtue of the same section, consumers have the option of agreeing to arbitration after a dispute has arisen" [emphasis added] (*Difederico FCA* at para 80). However, the FCA immediately continued by stating that "[i]n adopting these provisions, each provincial legislature made a policy choice to shield consumers from arbitration clauses to varying degrees" [emphasis added] (*Difederico FCA* at para 80).

[81] The important words here are "to varying degrees". Contrary to what the Plaintiff says in relying on *Difederico FCA*, the FCA never said that the Ontario legislature had declared that mandatory arbitration clauses were absolutely invalid in all circumstances. The court rather took the express precaution of clarifying that the Ontario legislature, like other provincial legislatures, had only done so to a certain degree.

[82] In *Difederico FCA*, the FCA further contrasted the situation in those provinces to the lack of similar provisions at the federal level and in the Competition Act, acknowledging that parliamentary action would be required for an analogous regime to exist in the federal context

(*Difederico FCA* at para 81). So far, Parliament has chosen not to exercise its authority in this respect.

[83] I also observe that the *Bell QCCS* matter can be distinguished for the same reason as in that case, there were no limits whatsoever in the language of the legislative provision suspending the limitation periods. Again, the statement made by the Quebec Superior Court regarding the wide-ranging scope of the prohibition simply echoed the specific wording contained in the provincial provision at stake.

[84] Finally, the Plaintiff's assertion that any interpretation limiting the scope of the arbitration ban contained in subsection 7(2) of the Ontario Consumer Protection Act would leave consumers such as him without a remedy is incorrect. Once again, it ignores the fact that this provision is expressly remedial in nature, but only in one very precise respect: there is a remedial option before the Ontario courts for the conduct the Plaintiff is complaining of.

[85] For all those reasons, I conclude that section 7 of the Ontario Consumer Protection Act is not a legislative override of the Arbitration Clause before this Court.

(b) *Section 25 of the Federal Courts Act*

[86] The Plaintiff also claims that section 25 of the Federal Courts Act is another legislative override preventing a stay in favour of arbitration.

[87] Section 25 provides that this Court "has original jurisdiction, between subject and subject as well as otherwise, in any case in which a claim for relief is made or a remedy is sought under

or by virtue of the laws of Canada if no other court constituted, established or continued under any of the *Constitution Acts, 1867 to 1982* has jurisdiction in respect of that claim or remedy".

[88] Relying on *Creighton v Franco*, 1998 CanLII 8155 (FC) [*Creighton*], the Plaintiff argues that, where no other court has jurisdiction, this Court must have it further to section 25. In *Creighton*, at paragraph 25, the Court stated that "[s]ection 25 of the *Federal Courts Act* applies where no other court constituted under any of the Constitution Acts has jurisdiction in respect to a claim or remedy". According to the Plaintiff, Uber's argument, if accepted, would effectively mean that no other Canadian court has subject-matter jurisdiction to adjudicate the Competition Act claims because of the Arbitration Clause. He submits that this alleged void of venues with subject-matter jurisdiction triggers the application of section 25 of the Federal Courts Act, which is a residual savings clause to ensure that federal laws are adjudicated by a Canadian court.

[89] With respect, I do not agree. I find that the Plaintiff's proposed interpretation of section 25 is without merit.

[90] I do not dispute that, as submitted by the Plaintiff, none of the parties in the *Difederico FCA* matter raised the issue of section 25 of the Federal Courts Act in their submissions to the FCA, and that *Difederico FCA* has not decided what the impact of section 25 would be on a motion like this one seeking a stay in favour of arbitration in a Competition Act matter.

[91] However, section 25 of the Federal Courts Act grants the Court original jurisdiction in limited circumstances, and has no application here. It applies "only when jurisdiction, in the sense of jurisdiction over a subject matter (or in some cases over persons), has not been conferred upon any 'other court' by legislation, inherent powers or by some other recognized

means" (*Winmill v Winmill*, [1974] 1 FC 539 at 543, aff'd [1974] 1 FC 686 (FCA)). Section 25 prevents a jurisdictional lacuna in those rare circumstances where a provincial superior court cannot hear a claim arising under federal legislation. However, it does not invalidate other forms of mandatory dispute resolution, including arbitration, in favour of this Court's jurisdiction.

[92] As correctly argued by the Uber Defendants, if the Plaintiff's interpretation of section 25 were correct, then all federal legislation conferring exclusive jurisdiction on any arbitrator or tribunal would be pointless, and this Court would still have jurisdiction under section 25 because no "other court" does. This would mean that no arbitration would be possible under federal laws because of section 25, which is not only preposterous, but evidently not the case.

[93] Moreover, as I indicated at the hearing before the Court, I am of the view that the SCC decision in *Desputeaux v Editions Chouette (1987) Inc*, 2003 SCC 17 [*Desputeaux*] responds completely to the Plaintiff's argument on section 25 of the Federal Courts Act. In *Desputeaux*, the SCC dealt with section 37 of the *Copyright Act*, RSC 1985, c C-42 [Copyright Act] (as the provision was then known), providing that this Court had concurrent jurisdiction with provincial courts to hear and determine all proceedings under that legislation.

[94] It is worth reproducing paragraph 42 of the SCC's reasons in *Desputeaux*. It reads as follows:

> [42] The purpose of enacting a provision like section 37 of the *Copyright Act* is to define the jurisdiction *ratione materiae* of the courts over a matter. It is not intended to exclude arbitration. It merely identifies the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. It cannot be assumed to exclude arbitral jurisdiction unless it expressly so states. Arbitral jurisdiction is now part of the justice system of Quebec, and subject to the arrangements made by Quebec pursuant to its constitutional powers.

[95] And at paragraph 46, the SCC goes on to add:

> [46] Section 37 of the *Copyright Act* gives the Federal Court concurrent jurisdiction in respect of the enforcement of the Act, by assigning shared jurisdiction *ratione materiae* in respect of copyright to the Federal Court and "provincial courts". That provision is sufficiently general, in my view, to include arbitration procedures created by a provincial statute. If Parliament had intended to exclude arbitration in copyright matters, it would have clearly done so.

[96] The same reasoning applies, by analogy, to section 25 of the Federal Courts Act with respect to the Competition Act. Even more than it was at the time the *Desputeaux* decision was rendered, arbitration is an undisputed method of dispute resolution in Canada, the legitimacy of which is fully recognized by the legislative authorities of both federal and provincial orders, and by the courts. If Parliament had intended to exclude arbitration in federal matters, it would have clearly done so.

[97] As was the case for section 37 of the Copyright Act, section 25 of the Federal Courts Act does not prevent an arbitrator from ruling on other federal questions, such as questions concerning the Competition Act. The provision was not, and is not, intended to exclude arbitration. It merely identifies the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. It is sufficiently general to include arbitration procedures.

[98] I further note that *Desputeaux* was affirmed by this Court in *Murphy v Compagnie Amway Canada*, 2011 FC 1341 [*Murphy FC*], aff'd *Murphy FCA*, and in *General Entertainment and Music Inc v Gold Line Telemanagement Inc*, 2022 FC 418 [*Gold Line FC*], aff'd *Gold Line FCA*.

[99] In *Murphy FC*, the Court agreed that, as in the case of *Desputeaux*, subsection 36(3) of the Competition Act did not confer exclusive jurisdiction to the Court, but merely identified the Court as a court of competent jurisdiction to hear section 36 claims. “Put in other words, section 36 merely provides for the *ratione materiae* jurisdiction of the Federal Court and in no way excludes arbitration as a valid forum” (*Murphy FC* at para 63).

[100] In *Gold Line FC*, the Court reaffirmed that section 41.25 of the Copyright Act (which replaced section 37) was not intended to exclude arbitration and merely identified the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter (*Gold Line FC* at paras 48–49). The Court reiterated that it cannot be assumed to exclude arbitral jurisdiction unless it expressly so states.

[101] In addition, the Plaintiff’s argument on section 25 of the Federal Courts Act fails for another reason. As the FCA expressly stated in *Moudgill v Canada*, 2014 FCA 90 at paragraph 9, “[s]ection 25 of the *Federal Courts Act* is of no assistance to the appellant as it has no application where the superior Court of a province has jurisdiction to grant the relief sought such as is the case here”. Indeed, section 25 does not constitute a valid statutory grant of jurisdiction where a claimant could seek relief in the superior court of any province (*Creighton* at para 25).

[102] Here, as mentioned above, the Plaintiff has a recourse under sections 36 and 52 of the Competition Act before the Ontario courts or other provincial courts.

[103] In sum, section 25 of the Federal Courts Act cannot be interpreted as preventing arbitration as a form of dispute resolution and is not a legislative override of the Arbitration Clause.

(c) *Further considerations*

[104] I must also underline that there are now several appellate court decisions expressly stating that Competition Act claims such as the Plaintiff's claims under sections 36 and 52 are arbitrable (*Murphy FCA* at para 60; *Difederico FCA* at paras 52, 71–72, 77–81; *Williams BCCA* at para 156; *Petty v Niantic Inc*, 2023 BCCA 315 at para 30 [*Petty BCCA*]). This Court, the FCA and the BCCA all agreed that Competition Act claims can be stayed in favour of arbitration. In sum, the issue of whether damages claimed under section 36 of the Competition Act can be subject to arbitration has now been clearly disposed of.

[105] In *Difederico FCA*, the FCA expressly noted that Parliament could make a policy choice in the context of the Competition Act and enact a provision comparable to subsection 7(2) of the Ontario Consumer Protection Act. However, it has not done so yet. And until it does so, "mandatory arbitration clauses in consumer adhesion contracts will be enforced, subject to the limited exceptions developed by the Supreme Court of Canada and addressed in these reasons" (*Difederico FCA* at para 81).

[106] I further observe that, on May 16, 2024, the SCC dismissed the applications for leave to appeal that had been filed in each of *Difederico FCA*, *Williams BCCA*, and *Petty BCCA* (SCC case numbers 40927, 40932 and 40935), meaning that the FCA and BCCA decisions in those matters represent the current and undisputed state of the law on arbitration clauses in Competition Act matters, such as the present case.

[107] Any *bona fide* challenge to the jurisdiction of an arbitrator to address Competition Act claims and to address the validity of the Arbitration Clause should be determined by the arbitrator as per the competence-competence principle and subject to the limited exceptions established in *Dell SCC* and *Peace River SCC*.

(d) *Conclusion on legislative overrides*

[108] For all of those reasons, the Plaintiff has not demonstrated, on a balance of probabilities, that there is any legislative override of the Arbitration Clause at issue, whether under the Ontario Consumer Protection Act, section 25 of the Federal Courts Act, or the Competition Act.

(2) Incapable of being performed

[109] As a second argument for why a stay in favour of arbitration should not be granted, despite the satisfaction of the *Peace River SCC* technical requirements, the Plaintiff submits that the Arbitration Clause is "incapable of being performed".

[110] In Uber's Arbitration Clause, Uber has selected ADRIC as the arbitral institution. However, in a response to inquiries on class arbitrations made by counsel for the Plaintiff, which is part of the evidentiary record before the Court on this stay motion, ADRIC's Arbitration Administrator stated that they cannot accept cases such as the Plaintiff's and does not currently offer any support for class arbitrations.

[111] In *Peace River SCC*, the SCC noted that "an arbitration agreement is considered 'incapable of being performed' where 'the arbitral process cannot effectively be set in motion'

because of a physical or legal impediment beyond the parties' control" (*Peace River SCC* at para 144). More specifically, the "non-availability of the arbitrator specified in the agreement" is sufficient to demonstrate a physical impediment rendering the agreement incapable of being performed (*Peace River SCC* at para 145).

[112] The Plaintiff thus argues that the non-availability of an arbitrator to hear his class action proceeding under the arbitration regime selected by the Uber Defendants renders the Arbitration Clause incapable of being performed and invalid. The Plaintiff further adds that the Uber Terms and Conditions do not prohibit the bringing of a class action. They contain no class action waiver clause and accordingly, the Plaintiff is entitled to proceed by way of a class action.

[113] I am not persuaded by the Plaintiff's argument and am not convinced that he has demonstrated, on a balance of probabilities, that the Arbitration Clause is incapable of being performed.

[114] Indeed, I agree with the Uber Defendants that the Plaintiff's argument that the Arbitration Clause is incapable of being performed because ADRIC will not administer a class arbitration is not convincing. Courts, including this one, have repeatedly held that class action procedures cannot override a party's substantive right to arbitrate. In *Murphy FC*, this Court stated that "courts have consistently defined class actions, as a procedural vehicle 'whose use neither modifies nor creates substantive rights'" and that "class actions cannot serve as a means of circumventing an agreement to arbitrate" (*Murphy FC* at para 46). If the Plaintiff's position was accepted, any plaintiff could avoid any arbitration clause by filing a proposed class proceeding. The fact that the Arbitration Clause does not contain a class action waiver is irrelevant. The Plaintiff has no substantive right to commence a class proceeding, nor has one been certified yet

in this matter. It is not disputed that ADRIC can and will administer an arbitration between the Uber Defendants and the Plaintiff under the Arbitration Clause.

[115] It is therefore not a situation where the arbitration agreement is clearly impossible or incapable of being performed. At the very least, the question of whether the Arbitration Clause is incapable of being performed because of this alleged limit in the ADRIC Rules regarding class actions should be referred to the arbitrator. As mentioned above, the competence-competence principle requires that where "the invalidity or unenforceability of the arbitration agreement is not clear (but merely arguable), the matter should be resolved by the arbitrator" (*Peace River SCC* at paras 88–89). A mere possibility is not enough to overcome the competence-competence principle (*Difederico FC* at para 112).

[116] The Plaintiff has therefore not demonstrated, on a balance of probabilities, that the Arbitration Clause is incapable of being performed and that the requested stay in favour of arbitration ought to be denied on this basis.

(3) Unconscionability

[117] The last statutory exception raised by the Plaintiff to invalidate the Arbitration Clause is his claim that the arbitration agreement is void for reasons of unconscionability[1].

[1] I note that, contrary to the situation in *Difederico FCA* or *Petty BCCA*, the Plaintiff is not arguing that the Arbitration Clause is void for reasons of "public policy". As the BCSC said in *Petty v Niantic Inc*, 2022 BCSC 1077 at paragraphs 40 to 54 [*Petty BCSC*], aff'd *Petty BCCA*, the concepts of unconscionability and public policy are two separate concepts, albeit doctrinal cousins.

[118] In his written submissions, the Plaintiff submits that the Arbitration Clause is unconscionable because Uber has misrepresented the real costs of an arbitration. The Plaintiff argues that, in both the Uber Terms and Conditions and before this Court, Uber has misstated the arbitration costs, as compared to the situation in *Heller SCC*. According to the Plaintiff, Uber's disclosure of the arbitrator fees in this case is, at best, incomplete. The Arbitration Clause refers to "some fees" but there is no disclosure on what fees need to be paid, or how much those fees are. The Plaintiff asserts that Uber has continued the practice that was heavily criticized in *Heller SCC*, where the SCC said "[e]xacerbating this situation is that these Rules were not attached to the contract, and so Mr. Heller would have had to search them out himself" (*Heller SCC* at para 93). In this case, claims the Plaintiff, the ADRIC Rules are similarly not attached to the Uber Terms and Conditions.

[119] In addition, according to the Plaintiff, ADRIC's website does not actually disclose the fact that further fees are payable to an arbitrator under the ADRIC Rules. These rules only disclose the $350 commencement fee and $75 case service fee. One would need a very keen eye, says the Plaintiff, to locate the single reference to "Tribunal's fees" in the definition section of the separate ADRIC Rules to possibly infer that there may be further fees payable to an arbitrator.

[120] At the hearing before the Court, the Plaintiff further provided a detailed chart comparing various features of the Arbitration Clause in this matter to those contained in the arbitration agreements reviewed by the courts in *Difederico FCA*, *Williams BCCA*, *Petty BCCA*, and *Murphy FCA*. The Plaintiff maintains that, contrary to those cases where the courts did not find

the arbitration provisions unconscionable pursuant to the *Heller SCC* test, the Arbitration Clause imposed by Uber in this case does not deserve a passing grade.

[121] While I acknowledge that this third ground to challenge the validity of the Arbitration Clause is the Plaintiff's most solid one, I am not satisfied that the Plaintiff has demonstrated, on a balance of probabilities, that the Arbitration Clause is unconscionable.

(a) *Principles governing unconscionability*

[122] In *Heller SCC*, the SCC set out the principles governing unconscionable arbitration agreements. The SCC explained that two elements are necessary to prove unconscionability: 1) proof of inequality in the positions of the parties; and 2) proof of a resultant improvident bargain (*Heller SCC* at para 64 citing *Norberg v Wynrib*, [1992] 2 SCR 226 at 256; *Douez SCC* at para 115; *Williams BCCA* at paras 71, 129). Both inequality of bargaining power and improvidence are needed to render an arbitration agreement unconscionable, and thus invalid (*Heller SCC* at para 74).

[123] In essence, the doctrine of unconscionability provides relief from improvident contracts where there is an inequality of bargaining power between the parties arising from some weakness or vulnerability affecting the claimant. An improvident contract is one that unduly advantages the stronger party or unduly disadvantages the weaker (*Heller SC*C at para 74). Improvidence is assessed at the time the contract is made with reference to the surrounding circumstances.

(i) Inequality of bargaining power

[124] For inequality of bargaining power to exist, one party must be in a position where they "cannot adequately protect their interests in the contracting process" (*Heller SCC* at para 66) and there must be "no 'rigid limitations' on the types of inequality that fit this description" (*Heller SCC* at para 67). Examples of what might constitute inequality include "[d]ifferences in wealth, knowledge, or experience", but "inequality encompasses more than just those attributes" (*Heller SCC* at para 67).

[125] In the context of contractual relations, the SCC notes that in many of the cases where an inequality of bargaining power has been demonstrated, "the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both" (*Heller SCC* at para 68). This is particularly true in cases of necessity, where the weaker party is so dependent on the stronger party that serious consequences would flow from not agreeing to a contract. "When the weaker party would accept almost any terms, because the consequences of failing to agree are so dire, equity intervenes to prevent a contracting party from gaining too great an advantage from the weaker party's unfortunate situation" (*Heller SCC* at para 69). In this respect, the SCC references the "rescue at sea" scenario as a classic example of cases of necessity (*Heller SCC* at para 70). Inequity in bargaining power may thus exist in cases of necessity, where a party is vulnerable due to financial circumstances, or where there is a special relationship of trust.

[126] The SCC also mentions a second form of inequality in contractual relations, namely, a "cognitive asymmetry" (*Heller SCC* at para 71). Such a situation occurs when "only one party could understand and appreciate the full import of the contractual terms" (*Heller SCC* at para

71). The SCC indicates that in such a situation, the weaker party becomes particularly vulnerable and "the law's assumption about self-interested bargaining loses much of its force" (*Heller SCC* at para 71).

[127] Ultimately, in order to establish inequality of bargaining power to the point of unconscionability, one must be at a point "where the law's normal assumptions about free bargaining either no longer hold substantially true or are incapable of being fairly applied" (*Heller SCC* at para 72).

[128] In *Heller SCC*, the SCC retained the following elements in its inequality of bargaining power analysis:

A. The arbitration agreement was part of a standard form contract;

B. Mr. Heller was powerless to negotiate any of its terms and only had two contractual options: to accept the arbitration agreement or to reject it;

C. There was a significant gap between Mr. Heller's sophistication (a food delivery man in Toronto) and Uber (a large multinational corporation);

D. The arbitration agreement contained no information about the costs of mediation and arbitration which was to take place in the Netherlands;

E. A person in Mr. Heller's position could not be expected to appreciate the financial and legal implications of agreeing to arbitrate under the applicable rules or under Dutch law;

F. Even assuming that Mr. Heller was the rare fellow who would have read through the contract in its entirety before signing it, he would have had no reason to suspect that behind an innocuous reference to mandatory mediation, there lay a $14,500 USD hurdle to relief; and

G. The arbitration rules were not attached to the contract, and so Mr. Heller would have had to search them out himself.

(ii) Improvident bargain

[129] Turning to the resultant improvident bargain dimension, the SCC first establishes that, as a general rule, "a bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable party, and that improvidence is measured at the time the contract is formed and must be measured contextually" (*Heller SCC* at paras 74–75). Thus, says the SCC, "the emphasis in assessing improvidence should be on whether the stronger party has been unduly enriched" (*Heller SCC* at para 76). This can take many forms.

[130] In the instance of cognitive asymmetry, the SCC notes that the focus should be on whether the weaker party has been unduly disadvantaged by the terms they did not understand or appreciate. The terms will be considered unfair when, taken in context, "they flout the 'reasonable expectation' of the weaker party … or cause an 'unfair surprise'" (*Heller SCC* at para 77).

[131] Finally, the SCC determined that unconscionability involves both inequality and improvidence, and that "proof of a manifestly unfair bargain may support an inference that one

party was unable adequately to protect their interests [… as] it is a matter of common sense that parties do not often enter a substantively improvident bargain when they have equal bargaining power" (*Heller SCC* at para 79).

[132] In *Heller SCC*, the SCC retained the following elements in its improvident bargain analysis:

A. The mediation and arbitration processes required $14,500 USD in up-front administrative fees, an amount close to Mr. Heller's annual income, and it did not include the potential costs of travel, accommodation, legal representation or lost wages;

B. The costs were disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into;

C. The arbitration agreement designated the law of the Netherlands as the governing law and Amsterdam as the "place" of the arbitration;

D. The arbitration agreement left the clear impression that Uber drivers had little choice but to travel at their own expense to the Netherlands to individually pursue claims against Uber;

E. Any representations to the arbitrator, including about the location of the hearing, could only be made after the fees had been paid;

F. The arbitration clause, in effect, modified every other substantive right in the contract such that all rights that Mr. Heller enjoyed were subject to the apparent precondition that he travel to Amsterdam, initiate an arbitration by

paying the required fees and receive an arbitral award that establishes a violation of this right. It is only once these preconditions were met that Mr. Heller could get a court order to enforce his substantive rights under the contract. The arbitration clause thus made the substantive rights given by the contract unenforceable by a driver against Uber; and

G. No reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it.

(b) *Competition Act cases*

[133] Given the emphasis put by the Plaintiff on other comparable cases in his oral submissions, it is also helpful to briefly review how these *Heller SCC* principles were applied in matters involving arbitration agreements in Competition Act claims. These include *Difederico FCA*, *Williams BCCA*, *Petty BCCA*, *Spark BCCA*, and *Tahmasebpour BCSC*. In all of these cases, various Canadian courts did not find the arbitration clauses at issue unconscionable.

[134] In *Difederico FCA*, the proposed class action opposed Amazon and purchasers of its on-line products. The Amazon arbitration clauses provided that Ms. Difederico was only required to pay a relatively modest up-front administrative fee of $200 to initiate arbitration. Amazon was also bound, under the arbitration clauses, to refund these fees for claims of less than $10,000, unless the arbitrator determined the claim to be frivolous. The arbitration could be conducted by telephone, written submission, or in a mutually agreed upon location. Moreover, a claimant had

the option of proceeding in small claims court where the claims fell within the jurisdiction of that court.

[135] The Court was not satisfied that the nature of the goods offered on Amazon could be classified as "important elements of everyday life" that would make Ms. Difederico particularly dependent or vulnerable (*Difederico FC* at para 124). Ms. Difederico had failed to point to evidence in the record that would establish any such vulnerability or dependence on her part relative to the Amazon products. Moreover, the Court was not convinced that the bargain was improvident at the time it was made, as was the case in *Heller SCC*, since Ms. Difederico's argument was that the arbitration clauses were now unconscionable in light of her particular claims (*Difederico FC* at para 129).

[136] In *Williams BCCA*, the BCCA first assessed the way in which the BCSC judge had addressed the unconscionability of the arbitration clause at issue. As in *Difederico FCA*, this case related to a proposed class action involving purchasers of Amazon on-line products. Despite finding that the BCSC's analysis did not go into as much depth as the SCC did in *Heller SCC*, the BCCA was "satisfied the [trial] judge's overall assessment of unconscionability and public policy in the context of this particular case warrant[ed] deference and should be affirmed" (*Williams BCCA* at para 117).

[137] The BCCA then went on to distinguish *Williams BCCA* from *Heller SCC* in the following ways:

A. The up-front administration fee was $200 USD and refundable, as opposed to $14,500 USD plus travel costs in *Heller SCC* (*Williams BCCA* at paras 122, 134);

B. Unless a claim under the Amazon agreement was found to be frivolous, Amazon refunded the up-front fee for all claims of less than $10,000 and would not seek legal costs against an unsuccessful claimant (*Williams BCCA* at para 123);

C. Under the Amazon agreement, an arbitration could be conducted by telephone or by written submissions, or at a mutually agreed upon location, whereas in *Heller SCC*, the arbitration had to occur in the Netherlands and did not allow alternatives to personal attendance (*Williams BCCA* at para 124); and

D. There was no evidence that as a consumer, the appellant was dependent on Amazon, such that "serious consequences" would flow from not agreeing to the terms of use (*Heller SCC* at para 69). Unlike the circumstances in *Heller SCC*, the effects of failing to agree to arbitration as an Amazon book consumer were not "so dire" that equity must intervene. The BCCA further noted that "there was no evidence before the judge that the Amazon platform was the only marketplace available to them (virtual or otherwise), for the purchase of books, videos, music and DVDS, or that their livelihoods or financial well-being are somehow dependent on access" (*Williams BCCA* at para 126).

[138] Ultimately, the BCCA found an inequality of bargaining power between the appellant and Amazon (*Williams BCCA* at para 128), but opined that the contractual relationship was not one of necessity. The BCCA also determined that the presence of an inequality of bargaining

power was not determinative of the unconscionability and public policy analyses. It reiterated that unconscionability requires a finding of both inequality of bargaining power and a resultant improvident bargain (*Williams BCCA* at para 129). To this effect, the BCCA found that the contractual relationship between Amazon and the plaintiff was not "one of necessity" such that it could not qualify as an improvident bargain (*Williams BCCA* at para 131).

[139] The BCCA concluded that, based on the distinguishing factors of the case and the lack of a relationship of necessity, the arbitration agreement did not "'unduly' advantag[e] Amazon or 'unduly' disadvantag[e] the appellant" (*Williams BCCA* at para 133). The BCCA further added, in relation to the class waiver clause included in the arbitration agreement, that it failed to see "how, standing alone, an otherwise valid arbitration agreement is rendered unconscionable or contrary to public policy by mere virtue of the fact that it includes a class waiver" (*Williams BCCA* at para 171).

[140] *Petty BCCA* involved customers who purchased "loot boxes" in the defendants' video games. In that case, the BCCA similarly concluded that the trial judge's unconscionability analysis required a deferential standard of review (*Petty BCCA* at para 9).

[141] The trial judge was not satisfied there was an inequality of bargaining power between the parties "justifying a finding that the arbitration clause is unconscionable" (*Petty BCSC* at para 59). The judge found no evidence that use of the video games or the ability to purchase "loot boxes" within the games "are important elements of everyday life which make the plaintiffs particularly dependent or vulnerable in terms of their need to access the game platforms" (*Petty BCSC* at para 60), nor any evidence "of a special relationship of trust …" (*Petty BCSC* at para 62). Finally, the judge determined that the "costs of arbitration and arbitration procedure [were]

sufficiently described" in the arbitration agreement and that there was no indication the plaintiffs were unable to understand the arbitration agreement (*Petty BCSC* at para 63).

[142] The BCSC further found that the arbitration agreement was not an improvident bargain (*Petty BCSC* at para 64), and retained the following factors:

A. The up-front filing fee for commencing arbitration is "relatively modest" (*Petty BCSC* at para 72);

B. The legal costs of advancing a claim through arbitration or in small claims court "would almost certainly exceed the amount of the plaintiffs' claims…" (*Petty BCSC* at para 73). However, the "costs disadvantage is mitigated" by provisions that provide for reimbursement of filing and arbitrator fees, and legal costs, where the consumer prevails (*Petty BCSC* at para 74);

C. The arbitration agreement also provides that if a claim does not succeed, the respondents will not seek their legal fees unless the claim is found by an arbitrator to be frivolous or improperly motivated (*Petty BCSC* at para 74);

D. There is no evidence that reimbursement of filing and arbitrator fees would not be made in a timely way (*Petty BCSC* at para 75);

E. An arbitration can be conducted in writing and the arbitrator has explicit jurisdiction to order "further discovery", even for claims under $10,000 (*Petty BCSC* at para 76);

F. The arbitrator is required under the applicable rules to make decisions in a timely manner (*Petty BCSC* at para 76);

G. The arbitration agreement identifies a website where a claimant can access the arbitration rules (*Petty BCSC* at para 78);

H. Customers may "opt-out of the arbitration agreement within 30 days of agreeing to the terms of service when they download a game — which provides the customer with some time to decide whether to advance a claim in superior court …" (*Petty BCSC* at para 79). If they do not opt-out, they still have a "choice to proceed with a small claims court action" rather than arbitration (*Petty BCSC* at para 79);

I. The arbitration agreement "does not present an insurmountable economic or procedural barrier to the plaintiffs" (*Petty BCSC* at para 89); and

J. Despite "the relative cost of proceeding to arbitration or small claims court on an individual basis compared to the amount of the claims at issue, accessible arbitration remains a viable method of resolving the plaintiffs' individual disputes" (*Petty BCSC* at para 90).

[143] Based on the above findings of the BCSC, the BCCA concluded that "[i]n the specific context of [that] case, a non-dependent consumer relationship the purpose of which is to facilitate access to on-line video games, the appellants have not persuaded me that the judge erred in finding the arbitration agreement neither unconscionable nor contrary to public policy" (*Petty BCCA* at para 55). To this effect, the BCCA found that "the arbitration agreement, here, is profoundly different from the one in [*Heller SCC*]" (*Petty BCCA* at para 57).

[144] In *Spark BCCA*, the BCCA was seized of a proposed class action that alleged Google had engaged in price fixing to artificially maintain Google search ads above competitive market rates. In upholding a stay in favour of arbitration, the BCCA addressed the circumstances where a court may adjudicate a jurisdictional challenge to an arbitration agreement instead of deferring to an arbitrator under the competence-competence principle.

[145] First, the BCCA affirmed that "where the jurisdiction of the arbitrator requires the admission and examination of factual proof alone, normally the matter is referred to the arbitrator [… and,] for questions of mixed law and fact, courts must also favour referral to arbitration" (*Spark BCCA* at para 15). An exception occurs "where answering questions of fact entails a superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration" (*Spark BCCA* at para 15).

[146] Second, the BCCA noted that a court may adjudicate a jurisdictional challenge if a "brick wall" prevents an arbitrator from resolving it (*Spark BCCA* at paras 19–20). This "brick wall" exception applied in *Heller SCC*. It exists when there is a "real prospect that 'the validity of an arbitration agreement may not be determined', such as when resolving that question in arbitration is fundamentally too costly or otherwise unavailable … [b]ut the concern arises generally from circumstances that effectively insulate the arbitration agreement from meaningful challenge" (*Spark BCCA* at para 20).

[147] The BCCA also specifically highlighted that the exercise the courts must conduct in this respect is not the determination of whether it is economic for a plaintiff to pursue their claim as a whole within the arbitration process, in light of the quantum of damages sought. Rather, the court

noted that "[t]he issue is whether the arbitrator or the court should decide the threshold jurisdictional challenge" (*Spark BCCA* at para 41), not whether the arbitration on the merits is economical. To this effect, the BCCA observed that "any damages [Spark] could prove individually are minimal, certainly insufficient economically to justify either an individual action or individual arbitration" (*Spark BCCA* at para 29). However, that was not the relevant consideration. The BCCA instead proceeded to conduct the exercise it is tasked with: assessing whether the brick wall exception applies.

[148] In that case, the BCCA examined Spark's capacity to pay the fees for the arbitrator's adjudication of the threshold jurisdictional challenge — not the arbitration of the merits of their claim (*Spark BCCA* at para 61). The BCCA determined that Spark provided effectively no evidence of their financial circumstances and did not even depose that they could not afford the initial filing fees (*Spark BCCA* at paras 59–62). Consequently, the court ruled that the jurisdictional issues at play could appropriately be referred to arbitration under the competence-competence principle, despite the fact that the plaintiffs in *Spark BCCA* had expert evidence about the proposed arbitral procedure and costs.

[149] Finally, *Tahmasebpour BCSC* concerned an arbitration clause in a cellphone contract. In that matter, as indicated earlier, the plaintiffs argued that the arbitration clause was unenforceable because 1) Ontario law governed the contract and the Ontario Consumer Protection Act protected their right to sue in court — an issue I addressed above in the discussion of the legislative overrides —; and 2) the arbitration clause was unconscionable. The BCSC rejected both arguments.

[150] On unconscionability, the court held that neither of the two requirements were satisfied. First, the plaintiffs were not vulnerable or dependent on their cellphone provider, and no serious consequences would flow from failing to agree to the providers' terms of service — even though the court acknowledged a cellphone is a "necessity for almost everyone" (*Tahmasebpour BCSC* at para 55). Second, the court had no evidence of the costs of arbitration or whether those costs would prevent even part of the plaintiffs' claim from proceeding. Thus, it was "impossible to determine if the arbitration clause potentially deprives the plaintiffs of a meaningful remedy under their contract" (*Tahmasebpour BCSC* at para 58), as there was no evidence.

[151] The BCSC, however, acknowledged at paragraph 58 of its reasons that the arbitration clause did not contain the kind of concessions to the consumer that helped save the arbitration clauses in matters such as *Williams BCCA* and *Petty BCCA*. There was no carve-out for small claims, no provision for an arbitration to be by telephone or video, and no provision for Freedom Mobile to pay the up front costs if the plaintiffs could not afford them. The absence of these kinds of concessions, said the BCSC, distinguished this case from *Williams BCCA*, *Petty BCCA* and *Hazell v DoorDash Technologies Canada Inc*, 2022 BCSC 2497 [*DoorDash BCSC*].

[152] Ultimately, the BCSC was still left with no evidence of what up front costs the plaintiffs might be burdened with under an arbitration. That evidence need not be extensive, the court said. But, in that case, the absence of any evidence whatsoever of the potential costs made it impossible to determine if the arbitration clause potentially deprived the plaintiffs of a meaningful remedy under their contract. Nor could the court conclude that granting a stay in favour of arbitration would prevent any issue from being resolved, including the jurisdiction of the arbitrator.

(c) *Other precedents*

[153] It is also worth mentioning two additional cases cited by the Plaintiff which did not involve Competition Act matters, but where the courts found an arbitration clause unconscionable. They are *Lochan v Binance Holdings Limited*, 2023 ONSC 6714 [*Lochan ONSC*] and *Pokornik v SkipTheDishes Restaurant Services Inc*, 2024 MBCA 3 [*Pokornik MBCA*].

[154] In *Lochan ONSC*, the court dismissed a motion to stay a proposed class proceeding due to an arbitration provision in a standard-form adhesion contract. The ONSC determined that the arbitration agreement in that case was contrary to public policy and unconscionable. Relying on *Heller SCC*, the ONSC said it had to ascertain whether "the cost to pursue a claim is disproportionate to the quantum of likely disputes arising from an agreement" (*Lochan ONSC* at para 2, citing *Heller SCC* at para 131).

[155] In *Lochan ONSC*, the terms of the arbitration clause were found to be egregious (even more so than in *Heller SCC*). The record demonstrated that for disputes under $1 million USD arbitrated at the Hong Kong International Arbitration Centre [HKIAC] (the designated arbitrator in the arbitration clause), the median cost of arbitration in Hong Kong on an hourly rate basis was $26,743 USD (approximately $36,700). This figure includes registration, administrative, and tribunal fees, but does not include any other fees and costs such as travel and accommodation, the costs of tribunal appointed expert advice, legal fees, transcript services, language interpretation services, etc. (*Lochan ONSC* at para 16).

[156] Hong Kong as an arbitral forum could effectively amount to a grant of immunity to the defendant Binance (*Lochan ONSC* at para 28). Binance provided no information about the fees and other costs associated with arbitration (*Lochan ONSC* at para 29). Moreover, claimants had to post security for costs before the HKIAC (forcing claimants to face a potentially large and ultimately unknown financial burden to recover a relatively small investment) (*Lochan ONSC* at para 29). The ONSC also found that there was an inherent inequality of bargaining power in standard form contracts (*Lochan ONSC* at para 32). As such, the arbitration agreement was found unenforceable on public policy grounds.

[157] In addition, the ONSC found the agreement unconscionable for the following reasons:

A. The case law that confirmed the arbitrability of such claims referred to domestic Canadian arbitrators applying the laws of Canada and its provinces, not the laws of Hong Kong and the HKIAC Rules, which the court noted is counterintuitive to *Heller SCC* (*Lochan ONSC* at paras 39–41);

B. Click contracts are not necessarily unenforceable, and have been upheld in other cases depending on the particular facts. However, the SCC made clear that unconscionability is potentially triggered "when an arbitration is fundamentally too costly or otherwise inaccessible", which was the case here (*Lochan ONSC* at para 45, citing *Heller SCC* at para 39). Here, "not only were the details, including the changeable location, of the arbitration clause were buried out of sight, and the logistical complexity and expense of arbitration were not revealed anywhere" (*Lochan ONSC* at para 50); and

C. The inequality of information and inequality of power in the bargaining relationship that resulted from this informational deficit was at a maximum (*Lochan ONSC* at para 51).

[158] The arbitration clause in *Lochan ONSC* thus bore many of the hallmarks that the SCC deemed unconscionable in *Heller SCC*.

[159] In *Pokornik MBCA*, the Manitoba Court of Appeal [MBCA] found the factual matrix to be very similar to *Heller SCC* as well, given that Ms. Pokornik was a delivery driver for Skip the Dishes [Skip], and not just a consumer. *Pokornik MBCA* concerned Skip's delivery driver contract. Each delivery driver was required to sign a courier agreement to access and provide services through the Skip platform. In 2018, Skip amended their courier agreement to include mandatory arbitration for all disputes and to exclude class actions.

[160] The MBCA found there were various elements retained in *Heller SCC* present in Skip's arbitration clause, and determined that Ms. Pokornik's vulnerability on Skip — coupled with the fact that the costs of arbitration would be "beyond her financial means and are grossly disproportionate considering the monetary value of her claims" — rendered the clause unconscionable. In *Pokornik MBCA*, similar to *Heller SCC*, the motion judge was able to come to a decision that the agreement containing the arbitration clause was unconscionable based on a superficial review of the record under the *Dell SCC* framework.

[161] In arriving at the conclusion that the clause was unconscionable, the court noted the employment nature of the delivery contract that made Ms. Pokornik vulnerable, the fact that it

was a standard form contract, that the class action waiver was obviously to the advantage of Skip, that Skip was unable to point to any commercial reason for the class action waiver, and that the arbitration agreement made it practically impossible for Ms. Pokornik to arbitrate (*Pokornik MBCA* at paras 85–90, 92–94).

[162] Indeed, the court specifically observed that "[f]orcing this action out of the Court and into private arbitration would likely deny the plaintiff and prospective class members access to any dispute resolution" (*Pokornik MBCA* at para 90). To this effect, the court relied heavily on *Pearce v 4 Pillars Consulting Group Inc*, 2021 BCCA 198 [*Pearce BCCA*], which asserts that "[w]hile on paper it might appear that a pathway to dispute resolution exists, the practical effect of the clause so narrowly defines that pathway as to effectively and practically block access to justice and as such it is unconscionable" (*Pearce BCCA* at para 245).

(d) *Application to this case*

[163] In his oral submissions to the Court, the Plaintiff gave a failing grade to Uber's Arbitration Clause on the issue of unconscionability. Further to my detailed review of the particular circumstances of this case and the parameters established by the jurisprudence in Competition Act matters and other cases involving arbitration clauses, I am not persuaded by the Plaintiff's argument and assessment. I acknowledge that Uber's Arbitration Clause may not deserve a grade as high as other arbitration agreements, but the case law establishes that the passing grade for arbitration agreements to be found conscionable is not necessarily high.

(i) Inequality of bargaining power

[164] As noted above, inequality of bargaining power exists where one party is in a position where they "cannot adequately protect their interests in the contracting process" (*Heller SCC* at para 66) and there are "no 'rigid limitations' on the types of inequality that fit this description" (*Heller SCC* at para 67). The SCC does provide some examples of what might constitute inequality, for example "[d]ifferences in wealth, knowledge, or experience may be relevant, but inequality encompasses more than just those attributes" (*Heller SCC* at para 67).

[165] Ultimately, the SCC describes two primary situations where the inequality of bargaining power dimension would apply in contractual relationships: 1) where the consequences of the inequality are so dire that equity must intervene to prevent a party from having too great of an advantage over the weaker party; and 2) when a cognitive asymmetry prevents one of the contracting parties from fully understanding the terms of the agreement, therefore rendering them vulnerable in the contracting process. To establish inequality of bargaining power to the point of unconscionability, one must be at a point "where the law's normal assumptions about free bargaining either no longer hold substantially true or are incapable of being fairly applied" (*Heller SCC* at para 72).

[166] I am not satisfied that an inequality of bargaining power justifying a finding that the Arbitration Clause is unconscionable is present here, given the facts of this case. An analysis of unconscionability focuses on the vulnerability of the weaker party and any potential unfairness within a contract or its terms. No such vulnerability or unfairness exists here.

[167] First, there is no evidence that the Plaintiff is dependent on the Uber Eats platform. The Plaintiff is not reliant on the Uber Eats platform in the same way as, for example, Ms. Pokornik was reliant on Skip, or Mr. Heller was reliant on Uber. In other words, the Plaintiff is clearly not in a situation of necessity, vulnerability, or dependence with respect to his purchase of food delivery services. His situation is indeed similar to the factual matrices in *Difederico FCA* (Amazon products), *Williams BCCA* (Amazon products), *Petty BCCA* (video games) or *Tahmasebpour BCSC* (cellphone services), where the courts found no element of necessity or dependence. The present matter is more appropriately reflected by the abundance of jurisprudence on arbitration clauses in the consumer context — which establishes that (in most cases) consumers are not reliant on these services to the point of being vulnerable or of suffering "dire" consequences.

[168] It is far from a "rescue at sea" situation, and it cannot be said that food delivery services like Uber Eats are "important elements of everyday life" that would make the Plaintiff particularly dependent or vulnerable in terms of their need to access such food delivery services (*Petty BCSC* at para 60; *Difederico FC* at para 124). Nor is there any evidence of a special relationship of trust between the Plaintiff and Uber Eats, contrary to, for example, an employer-employee agreement as in *Heller SCC* or *Pokornik MBCA*.

[169] Furthermore, as in *Difederico FCA* and *Williams BCCA*, there is no evidence that as a consumer, the Plaintiff is dependent on Uber Eats. There is no reason to believe that the Plaintiff would have been affected by declining to agree to the Uber Terms and Conditions — he could have used another food delivery platform, or food delivery service. As in *Petty BCCA*, the Plaintiff led no evidence showing that he was dependent or vulnerable in terms of his need to

access the Uber food delivery services, or that a special relationship of trust existed between the parties. The Plaintiff did not demonstrate that he relies on Uber Eats to the point where his "livelihood or financial well-being are somehow dependent on access" (*Williams BCCA* at para 126). This is fatal to his claim of unconscionability.

[170] In consumer contexts where the relationship between the consumer and the corporation is not one of necessity, the courts have been reticent to find arbitration clauses unconscionable. Indeed, the courts have firmly distinguished arbitration clauses in cases like this, where the consumer element is far from a "rescue at sea" situation, and the *Heller SCC* situation, which was based on an employment relationship. I see no reason to stray from this established jurisprudence in the case at bar.

[171] Second, it is also not a situation where the Plaintiff was unable to understand the arbitration agreement when he agreed to it, or where there was a gulf in sophistication between the parties as in *Heller SCC*. Similarly, there is no indication that a material information deficit exists between the Plaintiff and Uber. It is not enough to simply assert that a standard form contract was used and to claim that it is unconscionable. Indeed, as was noted by the MBCA, "the presence of a standard form contract, an arbitration clause and a class proceeding waiver by themselves are not determinative" (*Pokornik MBCA* at para 85). Moreover, I am not convinced that there was any misunderstanding of the Uber Terms and Conditions or a cognitive asymmetry between the parties as the Plaintiff had access to the ADRIC Rules and the relevant information. I also find that the arbitration procedure, process, and features are sufficiently and adequately described in the Arbitration Clause and the ADRIC Rules attached to it by reference or clicking.

[172] The arbitration clause in *Lochan ONSC* — the singular consumer arbitration clause to be found unconscionable pointed to by the Plaintiff — had many of the hallmarks of unequal bargaining power that the SCC deemed unconscionable in *Heller SCC*. Notably, that the arbitration took place abroad under the laws of a foreign jurisdiction, the cost of arbitration exceeded $30,000 (notwithstanding travel costs), not a single detail about the arbitration parameters and costs was included in the arbitration clause, claimants had to post security for costs before the arbitration body, and there was a significant information deficit.

[173] In the case at bar, none of these factors are at play.

[174] The absence of inequality of bargaining power is sufficient to conclude that the Arbitration Clause is not void for reasons of unconscionability.

(ii) Improvident bargain

[175] Turning to the improvident bargain, even if I were to assume that an inequality of bargaining power existed here, I also am not persuaded that the Arbitration Clause either unduly advantages Uber or unduly disadvantages the Plaintiff. In my view, the terms and conditions of the Arbitration Clause are not such as to create an "undue" advantage or disadvantage, or to effectively preclude access to justice for the Plaintiff.

[176] The SCC establishes that improvidence is measured at the time the contract is formed and must be considered contextually (*Heller SCC* at paras 74–75). For example, in a situation where a weaker party is in desperate circumstances, almost any agreement will be improvident. Thus, the SCC notes, "the emphasis in assessing improvidence should be on whether the stronger party

has been unduly enriched" [emphasis added] (*Heller SCC* at para 76). As mentioned above, the Plaintiff is not in desperate circumstances here.

[177] In his written submissions, the Plaintiff maintains that the disclosure of fees for the arbitration is incomplete in the Uber Terms and Conditions. According to him, a potential plaintiff is directed to ADRIC's website by the Arbitration Clause and there, the only fee that is explicitly available is the commencement fee of $350 for claims of less than $10 000. However, the costs for individual arbitrators is not disclosed by the website, which vaguely states that "individual practitioners, not the Institute, set their own fees for mediation or arbitration (generally an hourly rate) based on their experience, skill and profession, and on the matters in dispute".

[178] At the hearing before the Court, the Plaintiff also presented to the Court a summary chart comparing the Arbitration Clause in this matter to the arbitration agreements at stake in each of *Difederico FCA*, *Williams BCCA*, *Petty BCCA*, and *Murphy FCA*. The Plaintiff claims that, on several important features, the Arbitration Clause falls well short of those other arbitration agreements found to be conscionable by the courts, to the point where it becomes unconscionable.

[179] With respect, I am not persuaded by the Plaintiff's arguments.

[180] In my view, the general validity analysis in *Heller SCC* supports Uber's current Arbitration Clause. The Arbitration Clause is materially different from the arbitration agreement held invalid in *Heller SCC*. In particular, the commencement fees are a modest $350, not $14,500 USD. In addition, the laws of Ontario govern the Uber Terms and Conditions, not the

laws of the Netherlands. What is more, the arbitration hearings and meetings may be held in any location the arbitrator considers convenient or necessary, and not abroad and in person as in *Heller SCC* (ADRIC Rule 4.1.1). I should point out that ADRIC is a Canadian-based arbitration institute. ADRIC Rule 4.1.2 further states that all of the arbitration hearings may be conducted by telephone, email, the Internet, videoconferencing, or other communication methods, if the parties agree or the arbitrator directs.

[181] Moreover, the Plaintiff incorrectly states that the ADRIC Rules are not "attached" to the Arbitration Clause. As indicated in article 7 of the Uber Terms and Conditions, they are hyperlinked directly from the Arbitration Clause and are therefore easily accessible to the Plaintiff through this hyperlink provided in the Uber Terms and Conditions. I pause to note that the presence of a hyperlink to terms and conditions in an electronic consumer contract has been found sufficient to bind consumers to those terms, even if the consumer did not click on the link or read the terms (*DoorDash BCSC* at para 74).

[182] Finally, I agree with the Uber Defendants that the Arbitration Clause warned the Plaintiff of potential fees at article 7. True, there are some undetermined fees for the arbitrator. The Uber Defendants respond that this is for good reason as there are many drivers of an arbitrator's fees. For example, an arbitrator may hear a case on a fixed-fee basis, a case may be summarily dismissed, or a plaintiff may lead irrelevant evidence that must be dispensed with.

[183] All of these elements are important attributes of arbitration agreements and were indeed the main features considered by the SCC in *Heller SCC* in its analysis of whether the arbitration agreement amounted to an improvident bargain.

[184] I acknowledge that the Plaintiff presented a helpful comparative analysis in his summary chart comparing the Arbitration Clause in this case to arbitration agreements in each of *Difederico FCA, Williams BCCA, Petty BCCA,* and *Murphy FCA*. This comparison indicates that, in several respects, the terms of Uber's arbitration agreement are not as generous as certain conditions offered to consumers in those other contracts. For example, the Arbitration Clause and the ADRIC Rules do not provide for an access to small claims court; there are no special arbitration rules for consumers in the Uber Terms and Conditions; the precise costs for retaining the arbitrator are not disclosed; there is no right to opt out of arbitration; there is no provision stating that the Plaintiff's fees could be refundable in certain cases, nor any provision for a potential refund for claims of less than $10 000; and nothing prevents a possible costs award against the consumer, though the arbitrator has broad discretion on costs and can apportion costs between the parties.

[185] I further accept that, when one looks at this comparative exercise, Uber's Arbitration Clause could certainly be improved for consumers and that it would arguably be preferable for the arbitration agreement to have these other features mentioned in *Difederico FCA, Williams BCCA, Petty BCCA,* or *Murphy FCA*. However, in my view, these differences are not sufficient to push the Arbitration Clause outside the limits of what the courts have considered conscionable. I consider that the particular features singled out by the Plaintiff in his summary chart are more peripheral than other key conditions to arbitration agreements, such as the mode of hearing, the location of arbitration, the governing laws, or the amount of the commencement fees. In the present Arbitration Clause, all of these key conditions are certainly in line with the jurisprudence. In fact, they are a far cry from the problematic features identified by the SCC in *Heller SCC*. There is no doubt that Uber's Arbitration Clause in this case is significantly

different from the arbitration agreements found to be unconscionable in *Heller SCC*, *Pokornik MBCA*, and *Lochan BCSC*.

[186] There is also another problem with the Plaintiff's argument regarding the alleged improvident bargain offered by the Arbitration Clause.

[187] The Plaintiff has the onus of proving a "clear" case of unconscionability and an impossibility to arbitrate. However, the Plaintiff has offered no evidence on this stay motion. He has not deposed as to whether he read the Arbitration Clause and understood it. He has not provided financial information that would allow the Court to understand the significance of the cost of arbitration to him, or whether those costs impeded his access to justice at the time he entered into his contract with Uber. As was the case in *Tahmasebpour BCSC*, it is unclear from the evidence on the record whether the Arbitration Clause truly deprives the Plaintiff of a meaningful remedy under the contract between the parties. Although counsel for the Plaintiff argues that no one in their right mind would agree to the Arbitration Clause, there is no evidence from the Plaintiff supporting this statement.

[188] More generally, there is also no evidence of unfair or "undue" disadvantage to the Plaintiff, or of the Arbitration Clause being unfair to him at the time he accepted the Uber Terms and Conditions. Indeed, the only reference to this issue is the Plaintiff's argument that the value of his current claim is approximately $6.50. However, as stated by the BCCA in *Spark BCCA*, this is not the economic analysis to be conducted to assess the presence or absence of an improvident bargain.

[189] In that case, the BCCA examined the plaintiffs' capacity to pay the fees for the arbitrator's adjudication of the threshold jurisdictional challenge — not the arbitration of the merits of their claim (*Spark BCCA* at para 61). The BCCA determined that the plaintiffs had provided no evidence of their financial circumstances and did not even depose that they could not afford the initial filing fees (*Spark BCCA* at paras 59–62). Consequently, the court ruled that the jurisdictional issues at play could appropriately be referred to arbitration under the competence-competence principle. And the BCCA made this determination despite the fact that the plaintiffs in that case had submitted expert evidence about the proposed arbitral procedure and costs. No similar evidence has been adduced in the present case.

[190] In light of the foregoing, I am also not satisfied that there is an improvident bargain in this case.

(e) *Conclusion on unconscionability*

[191] The Arbitration Clause therefore meets the test for conscionability, though perhaps only with a minimally passing grade. However, the mere fact that other arbitration clauses may be more favourable to consumers than this Arbitration Clause is not sufficient to say that the arbitration agreement fits within the parameters found to be unconscionable in *Heller SCC*.

[192] As was the case in *Difederico FCA*, *Williams BCCA*, or *Petty BCCA*, there is no particular dependence on access to the food delivery services at stake here. The FCA and the BCCA have firmly distinguished arbitration clauses in consumer cases like this one, where the consumer element is far from a "rescue at sea" situation, from the *Heller SCC* or *Pokornik MBCA* situations, which were based on an employment relationship.

[193] In any event, the Plaintiff's unconscionability challenge in this matter raises mixed questions of fact and law and clearly does not allow for the Court to conduct a "superficial examination" of the matter. At a bare minimum, the issues raised by the Plaintiff on the unconscionability front are something that would have to be decided by the arbitrator in the arbitration process as per the competence-competence principle.

[194] I accept that, in some cases, the empirical reality is that mandatory arbitration clauses in consumer contracts may have the effect of severely limiting access to justice in the context of low-value claims. However, I do not read *Heller SCC* as opening the door to conclude that the potential low-value of a claim is sufficient, in and of itself, to render an arbitration agreement unconscionable. This, in part, is what may have driven many provincial legislatures to amend their consumer protection legislations to limit or ban arbitration agreements to varying degrees for consumer contracts. However, as the FCA rightly observed in *Difederico FCA*, nothing in that respect has yet been done at the federal level. Only Parliament could make such a policy choice in the context of the Competition Act or other federal legislation.

## V. Conclusion

[195] For all of the above reasons, I find that the Arbitration Clause is not invalid under the legal framework governing the contract between the parties, it is not incapable of being performed, and it is not void for reasons of unconscionability. The Plaintiff's claims relating to his purchase of the Uber Eats food delivery services will therefore be stayed in favour of arbitration.

[196] The Plaintiff has failed to demonstrate, on a balance of probabilities, that there are any statutory exceptions that would justify an exception to the competence-competence principle. Any *bona fide* challenge to the jurisdiction of the arbitrator to address the Plaintiff's Competition Act claims and to address the validity of the Arbitration Clause should be determined by the arbitrator.

[197] Since the Uber Defendants indicated at the hearing before the Court that they are not seeking costs, no costs will be awarded.

**ORDER in T-538-23**

**THIS COURT ORDERS that**:

1. The Plaintiff's claims relating to the Uber Defendants are stayed in favour of arbitration.

2. No costs are awarded.

"Denis Gascon"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-538-23 |
| **STYLE OF CAUSE:** | ARTHUR LIN v UBER CANADA INC. |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | OCTOBER 17, 2023 |
| **ORDER AND REASONS:** | GASCON J. |
| **DATED:** | JUNE 24, 2024 |

**APPEARANCES:**

| | |
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| Gillian Kerr<br>Patrick Williams<br>Adriana Forest | FOR THE DEFENDANTS<br>UBER CANADA INC.<br>UBER TECHNOLOGIES, INC.<br>UBER PORTIER CANADA INC.<br>UBER CASTOR CANADA INC. |

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