Inequality of Bargaining Power and Arbitration: The Tale of Uber

Leonardo V P de Oliveira*

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Abstract Arbitration, as an alternative method of dispute resolution, presents itself as a substitute to court adjudication. The practice of arbitration has been expanding outside the commercial circle, reaching 'new disputes' that were mainly decided by courts. The novelty is welcomed; nevertheless, for the practice of arbitration to be sustainable in the 'new disputes', a level playing field must be secured. Arbitration cannot be a mechanism to hinder justice. The aim of this chapter is to evaluate the problem of inequality of bargaining power in the context of arbitration clauses. To do so, Uber will be employed as a case study because the contract between Uber and its drivers tends to have an arbitration clause to solve disputes. This clause was put to the test in three jurisdictions under the same challenge that the clause restricts the contracting parties' right to bargain. Such an obstacle raises questions of how appropriate arbitration can be when it is used to obtain an advantage over weaker parties. To assess the link between the validity of the arbitration agreement and inequality of bargaining power, the chapter will start by explaining what is understood by inequality of bargaining power and how it works in arbitration. Subsequently, the Uber court cases will be presented to highlight how this topic has been dealt with in disputes involving Uber and its drivers. In the end, the chapter will conclude that arbitration clauses can provide for inequality of bargaining power, however, this is not an automatic idea, that is, just because inequality of bargaining power is present, the arbitration clause is not valid. A holistic approach is needed in such cases.

1 Introduction

Inequality of bargaining power is not a new phenomenon in law.[1] The view that in contracts, the principle of *pact sunt servanda* reigns in absolute, as in Shakespeare's Merchant of Venice when specific performance to take a pound of Antonio's flesh for non-payment of a loan was allowed,[2] and the case of *Lochner v. New York*[3] where the USA Supreme Court declared that state laws limiting

*
L.V.P. Oliveira
Department of Law and Criminology, Royal Holloway, University of London
All mistakes of interpretation and translations are the author's own.
Email: leonardo.oliveira@rhul.ac.uk

[1] See Barnhizer (2005), p. 194, Barnhizer explains that the doctrine's origin 'lies in the late 19th Century social and economic reactions to the perceived abuses of laissez-faire economic regulation and *Lochner-era* freedom of contract doctrine.'
[2] The entire play is available at http://shakespeare.mit.edu/merchant/full.html. Accessed 26 June 2021. Although this request was granted in the Merchant of Venice, it could only be done without a single drop of blood because the contract only allowed the removal of flesh. Moreover, if blood was spieled, under the laws of Venice, the perpetrator would have his goods and lands forfeited. Hence, there was no payment with human flesh.
[3] 198 US 45 (1905)

working time was offensive to the Fourteenth Amendment of the Constitution,[4] are no longer in vogue.[5] Case law and legislative instruments have provided for the development of the doctrine of inequality of bargaining power. The idea is that when contractual clauses are made in a way that causes a severe discrepancy in the parties' capacity to bargain, upholding freedom of contract and *pact sunt servanda* generates substantial unfairness in the transaction. As a result, it is not equitable to enforce such contractual terms. The features of inequality of bargaining power presents itself in different manners, depending on the jurisdiction. In common law, inequality of bargaining power has been presented as an independent argument or as part of unconscionability.[6] In civil law countries, it has taken the shape of a significant imbalance in the contractual relationship or the production of an unreasonable disadvantage to a party.[7]

Whichever way it might be called, different jurisdictions have been addressing inequality of bargaining power and expanding its approach in the context of arbitration. The question of inequality of bargaining power and arbitration goes to the core of the formation of the arbitration agreement, assessing if the agreement in itself is fair. As arbitration expands beyond the traditional commercial sphere into disputes involving parties not trading in equal terms, it is inevitable that the validity of the arbitration agreement will be challenged on grounds of inequality of bargaining power. Recently, this scenario has been emphasized with the growth of the gig economy, particularly with Uber. If someone wishes to become an Uber driver, they will have to accept the company's terms and conditions, which normally, includes an arbitration clause.[8] In some cases, this arbitration clause imposes that disputes will be solved under the rules of the International Chamber of Commerce (ICC), being governed by Dutch law and having the arbitral seat in Amsterdam, the Netherlands. Solving a dispute through arbitration in the Netherlands when you live and work in Tanzania, for instance, can be very onerous, especially if your income as an Uber driver reflects much of the cost to just seek access to justice. In this sense, when Uber makes it a prerequisite to accept its terms and conditions with such an arbitration clause, a conclusion can be made that this clause can be considered oppressive and it might be a representation of inequality of bargaining power.

Recently, many Uber drivers have commenced legal proceedings seeking recognition as employees as opposed to service providers. The legal actions were brought to court instead of arbitration, leading Uber to challenge the jurisdiction of the courts based on the parties' agreement to arbitrate any dispute arising out of their contract. This chapter will therefore examine the question of inequality of bargaining power and arbitration having the Uber lawsuits as a case study. This will be done by first explaining what inequality of bargaining power is and how it applies in arbitration. After, the Uber cases from four

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[4] The Fourteenth Amendment states that no state shall 'deprive any person of life, liberty, or property, without due process of law'. In this sense, in *Lochner v. New* York, the court was of the view that 'The general right to make a contract in relation to his business is part of the liberty protected by the Fourteenth Amendment, and this includes the right to purchase and sell labor, except as controlled by the State in the legitimate exercise of its police power.' The *Lochner* decision was technically overruled by *West Coast Hotel Co. v. Parrish*, 300 US 379 (1937).

[5] As it will be demonstrated in this chapter, inequality of bargaining power is an exception to *pact sunt servanda* and freedom of contract.

[6] See heading number 2.

[7] Ibid.

[8] Uber has terms and conditions for several countries. Not all terms and conditions have an arbitration clause such as the Brazilian terms (https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=brazil&lang=pt-br Accessed 26 June 2021) and the Irish terms (https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=republic-of-ireland&lang=en-gb. Accessed 26 June 2021). Looking at its terms and conditions for the UK, for instance, clause 6 states: 'Any dispute, conflict, claim or controversy arising out of or broadly in connection with or relating to the Services or these Terms, including those relating to its validity, its construction or its enforceability (any "*Dispute*") shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules ("*ICC Mediation Rules*"). If such Dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, such Dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce ("*ICC Arbitration Rules*"). The ICC Rules' Emergency Arbitrator provisions are excluded. The Dispute shall be resolved by one (1) arbitrator to be appointed in accordance with the ICC Rules. The place of both mediation and arbitration shall be Amsterdam, The Netherlands, without prejudice to any rights you may have under Article 18 of the Brussels I bis Regulation (OJ EU 2012 L351/1) and/or Article 6:236n of the Dutch Civil Code. The language of the mediation and/or arbitration shall be English, unless you do not speak English, in which case the mediation and/or arbitration shall be conducted in both English and your native language. The existence and content of the mediation and arbitration proceedings, including documents and briefs submitted by the parties, correspondence from and to the International Chamber of Commerce, correspondence from the mediator, and correspondence, orders and awards issued by the sole arbitrator, shall remain strictly confidential and shall not be disclosed to any third party without the express written consent from the other party unless: (i) the disclosure to the third party is reasonably required in the context of conducting the mediation or arbitration proceedings; and (ii) the third party agrees unconditionally in writing to be bound by the confidentiality obligation stipulated herein.' In https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=great-britain&lang=en-gb. Accessed 26 June 2021. At the time of drafting this chapter (June 2021), clauses with similar format could be found in the terms and conditions for Chile, Argentina, Bolivia, Mexico, Ivory Coast, Ecuador, Hong Kong, India, Jamaica, Morocco, Pakistan, Panama, Paraguay, Peru, Switzerland, Tanzania and Uganda.

jurisdictions will be studied, followed by an analysis of what they represent for the scholarship of inequality of bargaining power and arbitration. The chapter concludes that the Uber cases present different facets of inequality of bargaining power and arbitration. When arbitration is misused to make it harder for parties to have access to justice and the parties have little option but to accept it, there is a clear representation of inequality of bargaining power. Nevertheless, if arbitration is employed in contracts when there is such inequality but there is no clear intention to curtail the parties' right to access to justice, arbitration can be a useful method to solve disputes.

2 Inequality of Bargaining Power

The meaning of inequality of bargaining power is not hard to understand. It presupposes that in a transaction, a party holds a position of some superiority over the other party. This superiority allows the imposition of certain terms that might be disadvantageous to the weaker party, which accepts the term because, otherwise, the transaction will not be concluded. Such imbalance of power limits the bargaining power of the weaker party, creating the inequality of bargaining power. In any contractual agreement, it is safe to assert that there is some inequality of bargaining power. It is hard to envisage that parties in a contract can be on equal footing, regardless of their economic power. There is always a condition that will allow one party to be in a stronger position. Sometimes this can be related to the economic position of a party, such as a consumer contract or the conditions in which the contract is concluded, for instance, when a party is the only one able to provide a specific service. From this perspective, it can be seen that inequality between the parties is not necessarily a reason to assume that their bargaining power is unequal, it is imperative that the imbalance created makes the agreement clearly uneven.

Roots to the idea of inequality of bargaining power come from Roman Law and the Courts of Chancery. In Roman Law, the principle of *laesio enormis* 'provided a remedy for those who sold land at less than half its just price'.[9] The principle established rules 'allowing rescission of contracts for mere inadequacy of price'.[10] It was not a general norm as it applied only to sales of land.[11] The Courts of Chancery used equitable grounds to decide the fate of unfair agreements. For instance, in *Earl of Aylesford v. Morris*[12] the court understood that a nobleman entitled to a large inheritance was taken advantage of by a moneylender. Because the nobleman was in debt, he followed advice to secure loans from a moneylender who charged 60 per cent interest for the loan. The Court of Appeal in Chancery understood that such terms were unconscionable.[13] The law also found that terms are unconscionable when one of the parties was a 'poor or ignorant person'. In *Fry v. Lane*,[14] the Chancery Division set aside a contract that was considerably undervalued because 'where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction'.[15] Lastly, it was also settled that unconscionability occurs when one party uses its stronger position to exploit the weaker party.[16]

Inequality of bargaining power can be found in two different situations: one that relates to the power and capacity that a party has to bargain; and another concerning the contrary – that is, the weaker party, the less bargaining power it has.[17] The first inequality (strength) refers to a market position that a party has. So, when it deals with other parties, it has an unusual bargaining power, being able to dictate rules and almost impose certain conduct in the market.[18] This is normally regulated by the state when trying to avoid abuse of dominant position. The second inequality is based on the fact that the party is weak and has little or no room to bargain. The weak party does not necessarily need to be dealing with a party that dominates the market; it just needs to be in a poor bargaining position.[19] This is not only

[9] Gordley (1981), p. 1638. Gordley asserts that the principle of *laesio enormis* can be found in the Code of Justinian 4.44.2.
[10] Cellini & Wertz (1967), p. 193.
[11] Ibid.
[12] (1872–73) LR 8 Ch. App. 484.
[13] Ibid. Lord Selborne said: 'The truth is, that such terms as those imposed on the borrower in the present case are not less, but are more onerous and unconscionable than if a deferred security upon the reversionary interest had been taken.'
[14] (1888) 40 Ch. D. 312.
[15] Ibid.
[16] See *Boustany vs Pigott* (1995) 69 P & CR 298.
[17] Thal (1988), p. 29.
[18] Ibid.
[19] Ibid.

for cases in which the parties' position generates a presumption that the party is weak, it is also in circumstances of necessity. So, the idea of inequality of bargaining power is not restricted to the level of sophistication of a party; that is, if the party is poor, ignorant and vulnerable. It also looks at the situation that led the party to accept the agreement when it did not have room to bargain. Beale, referring to English law, summarized the settings in which inequality of bargaining power can be identified, stating that it 'can mean ignorance, vulnerability to persuasion, desperate need, lack of bargaining skill or simple lack of influence in the market place'.[20]

The law of contract has developed to accept that in certain situations, when inequality of bargaining power can be identified, the contract should be set aside. The problem is that such an approach clashes with a fundamental principle of contract law, that is, freedom of contract. Essential to the doctrine of freedom of contract is the idea that individuals should be left free to make contracts. This leads to the conclusion that the state has a small role to play in the market, that the role of the courts is merely to enforce contracts and that judicial intervention should be kept to a minimum. The doctrine of inequality of bargaining power, and more generally the idea that fairness should be a condition of validity, poses a direct challenge to the notion of freedom of contract. It suggests that contract law is a set of principles subjected to limitations and that the role of the courts is not merely to enforce contracts but also to ensure that a minimum degree of fairness is observed. Opposing this approach is the idea that '[c]lassical contract law described a broad realm in which individuals could exercise their autonomy by consenting to agreements with other autonomous individuals'.[21] This view requires a more formalistic understanding of contract avoiding flexibility generated by assessments based on fairness, such as inequality of bargaining power. Because inequality of bargaining power does not have a precise definition, it provides uncertainty, which is not good in contractual interaction.

Another criticism is made by the Economic Analysis of Law. Through this theoretical perspective 'parties enter a contract in order to secure investment in a jointly beneficial project'.[22] As a result, based on the general Economic Analysis of Law, a contract needs to be efficient and to do so, predictability is paramount. In this sense, inequality of bargaining power lacks a precise definition and its nearest meaning in economics is of 'market or monopoly power'.[23] Through this market or monopoly of power, parties can make contracts more efficient by using terms that parties want.[24] Although there will be no asymmetry between the parties' capacity to bargain, there might be a give-and-take, such as the example that someone accepts uneven terms in a loan because the contract offers low interest rate.[25]

In relation to the favourable views about inequality of bargaining power, the first opposes the lack of precision by stating that 'procedural unfairness which arises because of a bargaining disability on the part of one party to a transaction can be defined with some degree of certainty because the bargaining weaknesses which the law will protect can be identified'.[26] In relation to the Economic Analysis of Law, the critique is that contracts tend to be the result of 'one-sided dealings and market failure, and do not necessarily result in optimal allocation of resources'.[27] Therefore, some tool must be available to restrain oppressive contracts when there is no fair play and contractual efficiency is not the sole purpose of contracts.[28] Despite the academic debate, inequality of bargaining power has manifested itself in different forms. Legislation and courts have either used it as part of another idea, such as unconscionability, contractual imbalance and unreasonably disadvantage, or they tried to introduce the concept on its own as only inequality of bargaining power.

Starting with the common law jurisdictions, there was an unsuccessful attempt to recognize the principle of inequality of bargaining power in England. With characteristics and goals akin to inequality of bargaining power, common law countries developed the doctrine of unconscionability. The doctrine, when applied, can void a contract based on lack of fairness, which can be founded on the fact that the parties are not on equal footing.

[20] Beale (1986), p. 125.
[21] Feinman (2004), p. 4.
[22] Posner (2003), p. 832.
[23] Ibid, p. 842.
[24] Ibid, p. 843.
[25] Ibid.
[26] Thal (1988), p. 33.
[27] Schmitz (2006), p. 76.
[28] Ibid.

In England, unconscionability refers to the equitable relief for unconscionable bargains.[29] It is necessary for some unfairness to occur so courts will set aside unconscionable bargains. The first cases addressing the issue were decided based on equitable grounds as demonstrated in the cases of *Earl* and *Fry* mentioned above. Following such lines, English courts will treat a bargain as unconscionable when there is a significant disadvantage between the parties, the contract benefits significantly one party and, this party, 'must have procured the contract through unconscionable conduct'.[30] Other aspects of English contract law, such as duress and undue influence, have a connection with unconscionability – after all, they surface under equitable grounds. With that in mind, Lord Denning tried to merge the ideas of duress, undue influence and unconscionability to a general principle of inequality of bargaining power. Such approach was made in *Lloyds Bank v. Bundy*[31] where he asserted that:

> There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms – when the one is so strong in bargaining power and the other so weak – that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the Court.

Lord Denning applied his idea in other cases[32] but, eventually, the House of Lords rejected it. Lord Scarman, in *National Westminster Bank v. Morgan,*[33] expressed the view that it was not for the courts to create such doctrine when parliament had legislated in different ways to achieve the same goal.[34]

In the USA, the Uniform Commercial Code, in Article 2, regulates the sales of goods. Article 2-302 deals with unconscionability by declaring that if a clause in the contract is found to be unconscionable, the court might not enforce the contract or enforce it without the unconscionable clause.[35] Although the Uniform Commercial Code is more like a model for American states to incorporate in their legislatures,[36] case law has recognized its efficacy in relation to unconscionability.[37] The approach to unconscionability in the USA law was distinguished in two categories: substantive unconscionability and procedural unconscionability.[38] The first 'refers to the actual terms of the agreement',[39] it assess the 'oppressiveness or one-sided nature of the transaction and simply restates the basic requirement that the substantive terms must be unreasonably favorable to one party or unduly

[29] Peel (2011), p. 464.
[30] Capper (2010), p. 403. In *Brian Strydom v. Vendside Limited* [2009] EWHC 2130 (QB), at paragraph 37, Mr Justice Blair stated: 'In summary, therefore, before the court will consider setting a contract aside as an unconscionable bargain, one party has to have been disadvantaged in some relevant way as regards the other party, that other party must have exploited that disadvantage in some morally culpable manner, and the resulting transaction must be overreaching and oppressive. No single one of these factors is sufficient-all three elements must be proved, otherwise the enforceability of contracts is undermined.'
[31] [1974] EWCA 8.
[32] See *Arrale v. Costain Civil Engineer* [1976] 1 Lloyd's Rep. 98 and Levison v. Patent Steam Carpet Cleaning Co [1978] QB 69.
[33] [1985] UKHL 2.
[34] Ibid. Lord Scarman said: 'And even in the field of contract I question whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power. Parliament has undertaken the task – and it is essentially a legislative task – of enacting such restrictions upon freedom of contract as are in its judgment necessary to relieve against the mischief: for example, the hire-purchase and consumer protection legislation, of which the Supply of Goods (Implied Terms) Act 1973, Consumer Credit Act 1974, Consumer Safety Act 1978, Supply of Goods and Services Act 1982 and Insurance Companies Act 1982 are examples. I doubt whether the courts should assume the burden of formulating further restrictions.'
[35] The full wording of Article 2-302 is: '(1) If the court as a matter of law finds the contractor any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contractor any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.'
[36] Knapp (2013), p. 310.
[37] In *Williams v. Walker-Thomas Furniture Company* 350 F.2d 445 (DC Cir. 1965), Judge J Skelly Wright said: 'Congress has recently enacted the Uniform Commercial Code, which specifically provides that the court may refuse to enforce a contract which it finds to be unconscionable at the time it was made. 28 D.C. CODE § 2-302 (Supp. IV 1965). The enactment of this section, which occurred subsequent to the contracts here in suit, does not mean that the common law of the District of Columbia was otherwise at the time of enactment, nor does it preclude the court from adopting a similar rule in the exercise of its powers to develop the common law for the District of Columbia. In fact, in view of the absence of prior authority on the point, we consider the congressional adoption of § 2-302 persuasive authority for following the rationale of the cases from which the section is explicitly derived. Accordingly, we hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.'
[38] The dichotomy was presented by Leff (1967), p 487.
[39] Prince (1995), p 472.

burdensome to the other'.[40] The second 'pertains to the bargaining process';[41] that is, it looks at the process employed by the contracting parties. It involves 'surprise or lack of knowledge … on terms that are deceptively hidden in a mass of contract language, the object of other concealment, or imposed in circumstances involving haste or high pressure tactics so that they are not likely to be read or understood'.[42] The case law has applied the dichotomy in interpreting unconscionable clauses involving obvious parties such as consumers,[43] but it also applies to unusual parties. In *Spectrum Networks, Inc. v. Plus Realty*,[44] a clause was considered unconscionable in a business-to-business contract. The contract had a liquidated damages clause that the court found to be unconscionable. The Court of Common Pleas of Ohio said that '[w]hen viewing the guaranteed amount of compensation owed to Spectrum in light of the limited performance required of it, the one-sided nature of the agreement becomes apparent'. As a result, looking at the substantial and procedural unconscionability of the clause, the court rejected its enforcement. In *Potts v. Potts*,[45] the Missouri Court of Appeals, Western District analysed the enforcement of a prenuptial agreement. Maintaining the first instance decision, the Court of Appeals understood that there was procedural unconscionability as the wife was given very little time to review the prenuptial agreement; and substantive unconscionability because in the marriage, the husband was 'the only one with assets that would generate future assets' while 'the agreement allowed him to categorize all assets generated in the future as separate property'.[46]

In Australia, the doctrine of unconscionability 'represents a broader idea of advantage-taking, or exploitation'.[47] The case law of the Australian High Court first addressed the question in the 1950s. In *Wilton v. Farnworth*,[48] 'a person of dull intellect and defective hearing'[49] granted a gift of a substantial property without really understanding what he was doing. The court understood that such action was unconscionable.[50] After *Wilton,* in *Commercial Bank of Australia Ltd v. Amadio*,[51] the High Court explained that

> Relief on the ground of unconscionable conduct will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will be granted when such advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in his best interest.[52]

Later on, the High Court started to limit the reach of unconscionability in *ACCC v. Cg Berbatis Holdings Pty Ltd.*[53] The case related to the renew of leases in a shopping centre. The leases were about to expire and the landlord pressure the tenants to agree the terms of the new lease as long as they waived their rights to claims against the landlord, as well as to discontinue ongoing proceedings against the landlords. The Australian Competition and Consumer Commission, on behalf of the tenants, started proceedings against the landlord based on unconscionability.[54] The High Court rejected the unconscionability argument narrowing down the approach to it. They were of the view that inequality

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[40] Ibid, p 473.
[41] Ibid, p 472.
[42] Ibid, p 474.
[43] See *Johnson v. The Cash Store* 68 P.3d 1099 (Wash Ct. App. 2003).
[44] 144 Ohio Misc. 2d 68, 2007-Ohio-6580 (2007).
[45] 303 S.W.3d 177 (Mo. Ct. App. 2010).
[46] Ibid.
[47] Stewart, Swain and Fairweather (2019), p. 380.
[48] (1948) 76 CLR 646.
[49] Ibid.
[50] Ibid. The court stated: 'It has always been considered unconscientious to retain the advantage of a voluntary disposition of a large amount of property improvidently made by an alleged donor who did not understand the nature of the transaction and lacked information of material facts such as the nature and extent of the property particularly if made in favour of a donee possessing greater information who nevertheless withheld the facts.'
[51] [1983] HCA 14.
[52] Ibid at p. 461.
[53] [2003] HCA 18.
[54] The claim was supported by Section 51AA of the Trade Practices Act in force at the time of the trial. The provision stated: 'A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.' Today, this provision is part of Section 20 of the Australian Consumer Law.

of bargaining power, by itself, was not sufficient to render the contract unconscionable.[55] In *Kakavas v. Crown Melbourne Limited*,[56] which dealt with a case involving a compulsive gambler who argued that the techniques used by a casino to assure that he would continue gambling was unconscionable, the High Court, again, rejected the claim. It asserted that the gambler's diagnosis of a pathological gambler did not put him in a special disadvantage where he was not able to make clear decisions. Last, in *Thorne v. Kennedy*,[57] a prenuptial agreement was set aside because it was unconscionable. The High Court summarized that an unconscionable conduct 'requires the innocent party to be subject to a special disadvantage',[58] one party must 'unconscientiously take advantage of that special disadvantage'[59] and a party must know 'or ought to have known of the existence and effect of the special disadvantage'.[60] Besides the case law, Australian legislation also regulates unconscionability. The Australian Consumer Law, which is set out in the Schedule 2 of the Competition and Consumer Act 2010, provides that in trade and commerce, a person cannot 'engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time'.[61]

In civil law countries, legislation tends to provide tools to avoid discrepancies of power between contracting parties. In France, the law forbids contracts creating clauses providing for a significant imbalance between the parties.[62] The first instrument regulating such obligation was the Consumer Code. Article L132-1 stated that clauses imposing a significant imbalance (*déséquilibre significatif*) in the rights and obligations of the parties are considered abusive.[63] After the regulation of consumer contracts, similar provisions were adopted in other instruments. The Civil Code, in Article 1171, establishes that in adhesion contracts, when there is a term imposing significant imbalance in the parties' rights and obligations in a contract, such clause is to be understood as non-written.[64] Moreover, the Commercial Code, in Article L442-1 I (2) also addressed the issue by creating liability to parties by imposing a duty to repair damages caused 'in commercial negotiation, the conclusion or the execution of a contract, by any person carrying out activities of production, distribution or services' if one party is subjected to terms causing significant contractual imbalance.[65]

In Germany, the significant imbalance took the shape of unreasonable disadvantage. The German Civil Code regulates standard terms in contracts, and in Section 305 (1) states that '[s]tandard business terms are all contract terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract'. Also that '[c]ontract terms do not become standard business terms to the extent that they have been negotiated in detail between the parties'. Thus a standard term needs to be made beforehand and imposed on a party. This will not present an inequality between the parties, but when the Civil Code excludes standard terms from contracts that have been negotiated in detail, one might presume that negotiation was the essential element to qualify what is standard and what is not. The validity of the terms is assessed through the test of reasonableness of contents in Section 307. Subsection (1) in Section 307 provides that such terms

[55] Chief Justice Gleeson declared at paragraph 11: 'A person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, simply because of inequality of bargaining power. Many, perhaps even most, contracts are made between parties of unequal bargaining power, and good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests.'

[56] [2013] HCA 25.

[57] [2017] HCA 49.

[58] Ibid at para 38.

[59] Ibid.

[60] Ibid.

[61] Section 20 of the Australian Consumer Law.

[62] Amariles, Bassilana and Winkler (2018), p. 149. Also, The French legislation uses the same language implemented by the EU Council Directive 93/13/EEC of 5 April 1993, regarding unfair terms in consumer contracts. Article 3(1) of the directive states: 'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

[63] Article L132-1 of the Consumer Code says: 'In contracts concluded between professionals and non-professionals or consumers, clauses which have the object or effect of creating, to the detriment of the non-professional or the consumer, a significant imbalance between the rights and obligations of the parties to the contract are abusive.'

[64] Article 1117 of the Civil Code says: 'In an adhesion contract, any clause which creates a significant imbalance between the rights and obligations of the parties to the contract is deemed unwritten. The assessment of significant imbalance must not concern either the main subject- matter of the contract nor the adequacy of the price in relation to the act of performance.'

[65] Article L442-1 I (2) says: 'I - A party acquires responsibility and is obliged to repair the damages caused by the fact that, within the framework of the commercial negotiation, the conclusion or the execution of a contract, by any person carrying out activities of production, distribution or services … (2) Subject or attempt to subject a business partner to obligations creating a significant imbalance in the rights and obligations of the parties.'

are not valid if they are 'contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user'. The unreasonably disadvantage mirrors the significant imbalance in French Law and the unconscionability from common law.

After examining the approach made to inequality of bargaining power, one might ask how this would work in relation to arbitration clauses. Is inequality of bargaining power a relevant argument to set aside an arbitration clause? Such questions were raised in the Uber cases and other challenges involving contracts with arbitration clauses. Before assessing the Uber case law, the next section will explain how arbitration clauses and inequality of bargaining power interact.

3 Inequality of Bargaining Power and Arbitration

The connection between inequality of bargaining power and arbitration comes to surface when the arbitration agreement will be deemed unfair because is the result of inequality of bargaining power. Although inequality of bargaining power is not exclusive to parties that are impecunious, in arbitration, it is common to see this debate revolving around consumer and employment disputes.

One feature of inequality of bargaining power is the lack of funds presented by one party when a dispute is or has to be submitted to arbitration. The absence of financial means to arbitrate has been studied through the lens of the parties' impecuniosity.[66] Impecuniosity relates to the inability to afford the costs of arbitration. The term impecuniosity 'refers to various situations, all based on the lack of money'.[67] There two approaches for this event to take place a substantive and a jurisdictional.[68] The first solves the issue deciding if the arbitration agreement is enforceable or not, while the second focuses on the competence–competence principle, that is, a determination will be made if the impecuniosity question is to be decided by the judge or the arbitrator.[69] In the substantive approach, a similarity is found with inequality of bargaining power because it will look at the validity of the arbitration agreement. The impecuniosity or the inequality of bargaining power would render the agreement unenforceable and, therefore, parties would have to seek redress in courts. A contrary view is that impecuniosity is concerned with the enforcement of the arbitration agreement as opposed to its validity from its conception.[70] As a result, this approach would consider that impecuniosity does not include questions of inequality of bargaining power since the latter deals with the validity of the arbitration agreement from the point of its formation, making it invalid if it was tainted by inequality of bargaining power.

For impecuniosity cases in international commercial arbitration, a solution has been put forward to approach it through the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (NYC).[71] The idea is that the convention, in Article II (3) allows a court to decline the arbitral jurisdiction if 'it finds that the said agreement is null and void, inoperative or incapable of being performed'. In this condition, impecuniosity can be considered under the null and void exception, but impecuniosity here will not be the reason for the challenge but the support for the reason to challenge, which can be the inequality of bargaining power.[72] So, in cases of impecuniosity, the best direction would be to apply the incapable of being performed exception because it refers to arbitration agreements that, despite being valid, for some reason (here impecuniosity) cannot be triggered.[73] That reason might be the impossibility to bear the costs of the arbitration before or after it starts, regardless the bargaining power of the parties. Another perspective is the principled approach where the arbitral tribunal could 'recognize that an arbitration agreement may be rendered "incapable of being performed" in exceptional situations when there would be a breach of the rules of natural justice.'[74] The impecuniosity would create a severe restriction to the parties' right to access to justice if the arbitration agreement is interpreted as an absolute rule. Therefore, by declining its jurisdiction, the arbitral tribunal would accept

[66] See Živković (2016).
[67] Kühner (2014), p. 807.
[68] Cardoso (2020), p. 125.
[69] Ibid.
[70] Moyano (2017), p. 635.
[71] Ibid, p. 132–8.
[72] Ibid, p. 134.
[73] Ibid. See also Fabbri (2018), p. 74–8.
[74] Jun (2020), p. 498.

that 'an arbitration agreement that cannot be fairly performed in accordance with the rules of natural justice is a ground of incapability of performance'.[75]

Impecuniosity is part of inequality of bargaining power but the latter goes beyond the capacity a party has to provide funds to support the arbitral procedure. Inequality of bargaining power involves a restriction made to a party's bargaining power, resulting in the acceptance of such limitation as a condition to conclude a contract. Therefore, in terms of arbitration, it is not just the possibility to bear the costs of arbitration but also if the arbitration agreement in itself curtails the parties' bargaining power. If the arbitration procedure excludes a right that would benefit the weak party as a condition to conclude the contract (such as providing evidence through cross-examination of witness or bring a class action), the question at hand will not be the unavailability of money but the abuse of a contractual position employed when concluding the contract. For this reason, in arbitration, inequality of bargaining power will assess the validity of the arbitration agreement either based on Article II (3) of the NYC, domestic legislation or the case law on inequality of bargaining power.

Looking at how courts dealt with this question in France, the Cassation Court, in *La société PWC Landwell-PricewaterhouseCoopers Tax & Legal Services v. Mme LY et autres*,[76] considered abusive an arbitration clause in a contract of services. The claimant was one of the heirs in a complex succession and hired PWC to provide legal services in relation to the succession of her father's assets in Spain. Two mandates were concluded between the parties and both had an arbitration clause to submit disputes to the Civil and Mercantile Court of Madrid. When the claimant started legal proceedings in France, PWC challenged the court's jurisdiction saying that disputes should be submitted to arbitration. The Cassation Court rejected the challenge. It understood that the arbitration clause in a consumer contract was abusive. The analysis started by looking at EU consumer legislation. Article 6 (1) of the Directive 93/13/EEC allows countries to determine that abusive clauses in a contract can be declared non-binding.[77] The protection given by the Directive has a public interest nature;[78] and combined with Article 7 (1) and recital 24 of the Directive,[79] imposes that member states must provide 'adequate and effective means to stop the use of unfair terms in contracts concluded with consumers by a trader'. Within such rights is the possibility to have an effective remedy, that means, allowing the consumer the capacity to appeal a decision or to present an objection in litigation under procedural conditions that are reasonable, in a way that the consumer's right 'is not subject to conditions, in particular time limits or costs, which reduce the exercise of the rights guaranteed in the Directive 93/13'. As a result, the rule under Article 1448 of the French Code of Civil Procedure, which adopts the competence–competence principle,[80] cannot prevent a consumer from exercising their rights enshrined in EU law. As a result, the arbitration clauses in the mandates could be considered non-binding by a member state court. Additionally, the court concluded that the mandates had standard clauses that were not negotiated and therefore they are abusive in light of EU legislation.

The previous case involved a consumer and an arbitration agreement, but inequality of bargaining power can be present in business-to-business contracts with an arbitration clause. This is the case of Subway franchisees in France. The contracts between a franchisee and franchiser to operate a Subway fast-food business has an arbitration clause that stipulates disputes will be decided by arbitration in New

[75] Ibid, p. 500.

[76] Arrêt n° 556 du 30 Septembre 2020 (18–19.241) – Cour de cassation – Première chambre civile.

[77] Article 6, 1 has the following wording: '1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.'

[78] This assertion was made by the Cassation Court based on the CJEU decision in *OTP Bank v. OTP Faktoring*, C-51/17 at para 89: 'In addition, the Court of Justice has held that, in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 thereof must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy (see, to that effect, judgment of 17 May 2018, Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen, C-147/16, EU:C:2018:320, paragraph 35 and the case-law cited).'

[79] The wording of Article 7,1 is: 'Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.' The 24th recital says: 'Whereas the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts.'

[80] Article 1448 of the French Code of Civil Procedure states: 'When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable. A court may not decline jurisdiction on its own motion. Any stipulation contrary to the present article shall be deemed not written.'

York with Dutch Law as the contractual governing law. In seven cases,[81] the French Court of Appeal rejected challenges to arbitral awards deriving from Subway contracts in which the parties raised an argument based on inequality of bargaining power. Such cases triggered an investigation by the French Regional Directorate for Competition and Consumer Policy and the Repression of Fraud to assess the commercial practices employed by Subway, [82] specially practices restricting competition and contractual clauses generating imbalance between the parties.[83] The investigation eventually became a court action aiming at imposing fines and determining Subway to cease the employment of certain boilerplate clauses in their franchise contracts,[84] among them the clauses related to the language of the contract, the governing law and the one employing arbitration to solve disputes. The Tribunal du Commerce de Paris understood that the contract was an adhesion contract that left no room for negotiation between the parties and, there was an absence of reciprocity between the parties in relation to the contractual obligations.[85] When analysing the arbitration clause, the tribunal asserted that arbitration is a common form of dispute resolution in international commerce. However, the tribunal was of the view that a retail trader in France, would not, voluntarily, choose arbitration to settle contractual disputes with a seat in New York and with Dutch law using the English language. The tribunal asserted that the 'arbitration clause is far from the legal field in which retail traders operate in France' and considered that the constraints imposed on the franchisee create a significant imbalance against the franchisee.

In the USA, the Supreme Court, in *Rent-A-Center, West, Inc. v. Jackson*,[86] determined that an arbitration clause in an employment contract was valid. In this case, the employee commenced proceedings against their employer for employment discrimination. As the employment contract had an arbitration clause, a motion to stay proceedings was made and the employee argued that the arbitration agreement was unconscionable under Nevada Law. This was based on the fact that the agreement to arbitrate was imposed as a condition of employment and that it was not open to negotiation. The agreement to arbitrate contained several provisions on how disputes would be settled by arbitration.[87] Following precedents established by the Supreme Court, the judgment stated that parties had the freedom to delegate to an arbitral tribunal the power to choose if they wanted specific issues in the contract to be decided by arbitration. In this sense, this delegation part of the agreement, if challenged, should be decided by the court but, if the challenge is to the enforceability of the agreement to arbitrate as a whole, it is for the arbitrator to decide. The Supreme Court ruled that the unconscionability challenge was made to the delegation provision only in the Supreme Court and not in the previous stance, which was considered too late.[88] Consequently, the validity of the arbitration agreement was upheld and the motion to stay granted. The decision did not address if arbitration clauses in employment contracts are unconscionable; it just stated that the argument brought by the claimant should have been against the part of the agreement that allows arbitrators to decide which disputes are covered by the arbitration agreement (delegation provision). If that is the case, the court would look into the unconscionability challenge.

[81] See CA Paris, 27 Jan. 2015, n° 14/05126; CA Paris, 10 March 2015 n° 13/20664; CA Paris, 14 June 2016, n° 14/16113; CA Paris, 11 Sep. 2018, n° 16/19913; CA Paris, 21 May 2019, n° 17/07210; CA Paris, 2 June 2020, n° 17/18900 and CA Paris, 15 Sep. 2020, n° 18/01360.

[82] The investigation is based on the provision in Book IV - Pricing freedom and competition, Title IV - Transparency, restrictive competitive practices and other prohibited practices, of the French Commercial Code.

[83] This was focused on the provision in Article L-442-6 I (2) of the Commercial Code in force in 2016 (today Article L442-1 of the Commercial Code): 'To subject or attempt to subject a business partner to obligations creating a significant imbalance in the rights and obligations of the parties.'

[84] The claim targeted several clauses such as the insurance clause, the duration of the contract, the contract formation clause and the opening times clause.

[85] Tribunal de Commerce de Paris, 1 Ere Chambre, Jugement Prononce le 13/10/2020, RG 2017005123.

[86] 561 U.S. 63.

[87] Ibid. According to the judgement, two provisions in the agreement to arbitrate were relevant, one titled 'Claims Covered by the Agreement' and another titled 'Arbitration Procedure'.

[88] Ibid. The judgment says: 'In his brief to this Court, Jackson made the contention, not mentioned below, that the delegation provision itself is substantively unconscionable because the quid pro quo he was supposed to receive for it – that "in exchange for initially allowing an arbitrator to decide certain gateway questions," he would receive "plenary post-arbitration judicial review" – was eliminated by the Court's subsequent holding in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 US 576 (2008), that the non-plenary grounds for judicial review in §10 of the FAA are exclusive. Brief for Respondent 59–60. He brought this challenge to the delegation provision too late, and we will not consider it. See 14 *Penn Plaza LLC v. Pyett*, 556 US ___, ___ (2009) (slip op., at 24).'

4 The Tale of Uber

Uber is part of the gig economy and uses its digital platform to provide services to consumers. The method is quite simple, Uber developed an app that can be easily downloaded to a smart phone. Through this app, you can request an Uber driver to drive you from point A to point B, paying a fee to Uber. In this sense, there is a contract between Uber and a consumer that is provided by a third party, the Uber driver. The third party also has an agreement with Uber in which it will provide transportation services when consumers request Uber to transport them from point A to point B. Once the driver transports someone, Uber will be paid for the service provided and it will share part of the fee with the driver. Just like the consumer, Uber drivers use the digital platform to know when consumers are asking for transportation. Once the driver agrees to become an Uber driver, the driver will adhere to the Uber terms and conditions.

Recently, in different jurisdictions, Uber drivers commenced legal proceedings arguing that they are employees and not service providers.[89] Thus, they claimed the recognition of their employee status which entitled them to employee rights such as national minimum wage, paid annual leave, sick leave etc. In some cases, which is the object of this chapter, once the claim was triggered, Uber challenged the court's jurisdiction because the terms and conditions provide for disputes to be solved through arbitration. In such cases, there was a discussion about the validity of the arbitration clause supported by arguments related to the inequality of the parties' bargaining power. In other cases, when this was not an issue, the case was decided by the local judiciary.[90] This section will examine cases from four jurisdictions involving Uber and arbitration. Three cases are from common law jurisdictions and one from a civil law jurisdiction. Three referred to a challenge to the court's jurisdiction and one was about an annulment of an arbitral award in an employment dispute. The four cases had as the main claim the fact that Uber drivers should be considered employees and three cases dealt with the jurisdictional question which was the validity of the arbitration clause in the Uber terms and conditions.

4.1 The Canadian Case

The Canadian Supreme Court, in *Uber Technologies Inc. v. Heller*,[91] was presented with the question if Uber drivers could be considered employees under the Ontario's Employment Standards Act 2000. Before assessing if the drivers were employees, it had to decide a challenge to the court's jurisdiction. The service agreement between Uber and its drivers had an ICC mediation-arbitration clause with the seat of arbitration in Amsterdam and Dutch law as the contractual governing law. To start the dispute resolution process, up-front filing fees of US$14,500 were required, in addition to legal fees and cost of participation. The claimant argued that the arbitration agreement was not valid, while Uber stated that the claim should be settled by arbitration. The majority of the Canadian Supreme Court understood that the clause was not valid. The decision focused on the doctrine of unconscionability. The Supreme Court said:

> Heller's claim that the arbitration clause is unconscionable requires considering two elements: whether there is an inequality of bargaining power and whether there is a resulting improvident bargain. There was inequality of bargaining power between Uber and Heller because the arbitration clause was part of an unnegotiated standard form contract, there was a significant gulf in sophistication between the parties, and a person in H's position could not be expected to appreciate the financial and legal implications of the arbitration clause. The arbitration clause is improvident because the arbitration process requires US$14,500 in up-front administrative fees. As a result, the arbitration clause is unconscionable and therefore invalid.

The decisions shows that the Canadian view of unconscionability encompasses inequality of bargaining power, which opposes Lord Denning's proposal that unconscionability is part of inequality of bargaining power. Be that as it may, the lack of power to bargain was seen as a clear reason to set

[89] See Cherry and Aloisi (2017) for a comparative view of the 'misclassification' of workers as employees in the gig economy.
[90] For instance, in the UK, the Supreme Court in *Uber BV and others v. Aslam* [2021] UKSC 5 recognised that Uber drivers are workers and granted them protections under the National Minimum Wage Act 1998, Working Time Regulations 1998 and the Employment Rights Act 1996.
[91] 2020 SCC 16.

aside the arbitration clause in the Uber agreement. The reasoning also has some base on impecuniosity as the Canadian Court focused on how much would cost to start arbitration, but it went further to argue that the costs to start arbitration represent on average half of the Uber driver's annual salary.[92] This disproportion created by the arbitration clause, together with the fact that Uber drivers could not negotiate the contract, presented a severe imbalance in the driver's capacity to bargain when concluding the contract.[93]

4.2 The USA Cases

Most of the cases in the USA followed the approach presented above in *Rent-A-Center*; that is, the pro-arbitration policy adopted by the Supreme Court in employment disputes. The cases considered that parties had the freedom to delegate to an arbitral tribunal the power to choose if they wanted specific issues in the contract to be decided by arbitration. Questions of unconscionability were also raised together with the exclusion of the Federal Arbitration Act (FAA) to transportation workers.[94] The cases about the recognition of Uber drivers as employees were subject to decisions made by the Court of Appeals in two different circuits.[95]

In *Mohamed v. Uber Technologies, Inc.*,[96] the United States Court of Appeals, Ninth Circuit reversed the District Court decision and granted Uber's request to compel the dispute to be submitted to arbitration. The claim was that Uber misclassified the claimants as independent contractors as opposed to employees. The court understood that the arbitration agreement in the contract should be enforced and the validity of the arbitration clause was a matter to be decided by arbitration. The facts of the case provide an interesting aspect of how this clause was not considered to be unconscionable. The claimant concluded a contract with Uber in 2012 and UberX in 2014. In 2013 and 2014, Uber presented new terms and conditions which drivers needed to agree to before they could connect to the application used by Uber. All new terms and conditions were governed by Californian Law; they provided for arbitration to solve contractual disputes and for drivers to waive their right to bring a class action. There was an option for drivers to opt-out of the arbitration clause in all terms which the claimant did not use it. In October 2014, the claimant Mohamed's access to UberX's application was rejected because of negative information in his consumer credit report. The same situation occurred with the other claimant, Gillette, but in April 2014. They both filed claims against Uber. The court followed *Rent-A-Center*'s precedent and understood that the delegation agreements provided for the arbitrator's to decide the validity of the arbitration clause, except for 'challenges to the class, collective, and representative action waivers in the 2013 Agreement'.[97] When rejecting the unconscionability argument, the court explained that such question, under precedents from the Ninth Circuit, has a

[92] Ibid at para 11: 'Mr. Heller is an Ontario resident who entered into contracts with corporations that are part of the Uber enterprise to be a driver.[3] He earns approximately $400–$600 per week based on 40 to 50 hours of work, or $20,800–$31,200 per year, before taxes and expenses. The costs to arbitrate a claim against Uber equal all or most of the gross annual income he would earn working full-time as an Uber driver.'

[93] Ibid at para 94: 'The improvidence of the arbitration clause is also clear. The mediation and arbitration processes require US$14,500 in up-front administrative fees. This amount is close to Mr. Heller's annual income and does not include the potential costs of travel, accommodation, legal representation or lost wages. The costs are disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into. The arbitration agreement also designates the law of the Netherlands as the governing law and Amsterdam as the "place" of the arbitration. This gives Mr. Heller and other Uber drivers in Ontario the clear impression that they have little choice but to travel at their own expense to the Netherlands to individually pursue claims against Uber through mandatory mediation and arbitration in Uber's home jurisdiction. Any representations to the arbitrator, including about the location of the hearing, can only be made after the fees have been paid.'

[94] This is because the FAA excludes its application to transportation workers. The FAA at 9 US Code § 1states: '"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' Such exclusion was dealt with in *New Prime Inc. v. Oliveira* 586 US ___ (2019) where the Supreme Court considered that a contract to hire a driver as an independent contractor was an employment contract and therefore the exception in the FAA was applicable. The judgment stated that '[w]hen Congress enacted the Arbitration Act in 1925, the term "contracts of employment" referred to agreements to perform work.' Thus, a contract to hire a driver as an independent contractor.

[95] The author is not aware if new cases were tried in other court of appeals. At the time of drafting this chapter, to the Author's knowledge, there were two cases decided by the courts of appeal in the USA.

[96] 848 F.3d 1201

[97] Ibid, p. 1209.

substantive and a procedural feature, these being (a) representation of 'oppression or surprise due to unequal bargaining power', and (b) an 'overly harsh or one-sided result'.[98] Both features must be present to consider something unconscionable in addition to the arbitration agreement being an adhesive clause.[99] Moreover, if the arbitration agreement gives an opportunity to opt-out, it should not be considered adhesive.[100] As Uber provided for an opt-out, there was no unconscionability in the arbitration clause. The Ninth Circuit revisited the theme in *O'Connor v. Uber Techs*[101] and *Grice v. Uber Technologies, Inc.*[102] The conclusion in both cases was the same, that is, to compel arbitration. In *O'Connor*, there were two new arguments: the first was that the main plaintiff in the class action had opted-out of the arbitration agreement and, as a result, such conduct embraced all the claimants in the class action; and the second was that the arbitration agreements were unenforceable because they waived the right to class actions, which violated the National Labor Relations Act of 1935. The court rejected the first argument on the basis that there was no evidence that the main claimant had authority to represent all the claimants; and the second argument was denied based on the precedent in *Epic Systems Corp. v. Lewis*.[103] In *Grice*, the allegation was that the drivers fell within the transportation workers exception in the Federal Arbitration Act and, therefore, their case should be decided in court. Although the court recognized that Uber drivers picked up passengers at airports, this did not amount to interstate commerce and Uber drivers operate more like taxis functioning locally.

The Court of Appeals, Third Circuit, in *Singh v. Uber Technologies Inc*.[104] also looked at the transportation workers exception in the Federal Arbitration Act. The claimant brought a putative class action also alleging that Uber misclassified them as independent contractors as opposed to employees. As a result, Uber deprived them of overtime compensation, and required them to incur business expenses for the benefit of Uber. Uber made a motion to stay proceedings based on the arbitration agreement and Singh challenged the stay on several grounds, one of them being unconscionability.[105] The court did not address the question of unconscionability and referred the case back to the District Court to assess if the agreement between Uber and the drivers fell within the transportation workers exception in the Federal Arbitration Act.

Moving to a District Court, in *Saizhang Guan v. Uber Technologies, Inc*.[106] the United States District Court, ED, New York said that the arbitration clause in the Uber agreement was not unconscionable. The facts of the case are similar to *Mohamed* and the Uber drivers agreed to terms and conditions providing for an opt-out of arbitration. This time, the drivers spoke little English and used the Chinese version of the Uber app; however, when they accept the new terms and conditions with the opt-out option, they were using the English version of the app. The object of this claim was that Uber failed to fully reimburse the claimants for toll expenses incurred in their work. As the claimants did not speak English, the court understood that failure to read a contract cannot be used as a defence to argue lack of contract formation.[107] For unconscionability, the court rejected the argument based on New York law. As in California, the court first stated that: '[s]ubstantive unconscionability addresses the content of the contract; and procedural unconscionability addresses the contract formation process and the lack of meaningful choice.'[108] The court decided that the opt-out clauses excluded procedural unconscionability. Concerning substantive unconscionability, the argument was that the counsel and arbitration fees were too high for the claimants. The court rejected this argument. The agreements between Uber and the drivers provided for a fee-splitting policy but it also stated that Uber would incur

[98] Ibid, p. 1210.
[99] Ibid, p. 1211.
[100] Ibid.
[101] 904 F.3d 1087 (9th Cir. 2017).
[102] 2020 WL 497487 at 7* (CD Cal).
[103] 138 S. Ct. 1612 (2018). Here the USA Supreme Court decided that the National Labor Relations Act of 1935 did not provide for barriers to arbitration, making it possible for parties to waive the right of collective redress in favour of arbitration.
[104] 939 F.3d 210.
[105] The grounds were: '(1) Uber failed to meet its burden to show that the provision was a constitutional waiver of the Seventh Amendment right to a jury trial; (2) the provision is excluded under the residual clause of § 1 of the FAA; (3) the provision violated the National Labor Relations Act ("NLRA"), the Norris-LaGuardia Act, and the New Jersey Wage and Hour Law ("NJWHL"); and (4) the provision was unconscionable.'
[106] 236 F.Supp.3d 711.
[107] Ibid, p. 725.
[108] Ibid, p. 730.

the costs of the arbitration until there was a final decision.[109] As a result, the court concluded that the claimants did not show that they were unable to pay for arbitration costs and that they would not have to incur costs beyond what they would have if the claim were pursued in court.[110]

Similar to Canada, in the USA, unconscionability includes inequality of bargaining power. However, the cases were decided in a different manner, with Singh being an exception based on a technicality; that is, if Uber drivers are within the transportation workers provision in the Federal Arbitration Act. In the other cases, contrary to Canada, the opt-out clause was fundamental to reject unconscionability claims.

4.3 The Uruguayan Case

In Uruguay, Esteban Queimada commenced legal proceedings against Uber debating the nature of their contractual relationship. Uber challenged the court's jurisdiction and also the nature of their contractual relationship. Uber's claim failed in first instance and the case was appealed. The Employment Court of Appeal, in *Esteban Queimada v. Uber VB y otro*[111] maintained the first instance decision.

The standard Uber contract had an arbitration clause and just like *Uber v. Heller*. The decision was not unanimous and one of the four Employment Court of Appeal justices dissented from the majority. The predominant view was that the arbitration clause was not valid. The court reached that conclusion through an evaluation of the different parts of Uruguayan laws that regulate employment law. It first started by declaring that Esteban worked for Uber and when judging conflicts over work, human rights form part of the issues in the dispute. As a consequence, access to justice is a human right and in employment disputes is a fundamental guarantee. Such human rights are not waivable, but, in cases of public interest, through law, human rights can be limited.[112] Following this line of thought, it is argued that in Uruguay, employment law is an autonomous legal subject and therefore, it is part of specific laws and not generic laws. Thus, assessing the arbitration clause through the generic Uruguayan law which allows arbitration to solve individual and collective disputes (in Uruguay, arbitration is regulated in the General Procedure Code),[113] as the basis for Uber's argument, this was the wrong approach. The specific law is the instrument used to interpret the validity of the arbitration clause. Accordingly, the validity of the arbitration clause should first be examined through the lens of access to justice and legal procedures in employment law. In this sense, access to justice and legal procedures in employment law are only provided if it guarantees a simple, adequate, effective and free procedure. If the specific law does not provide for the regulation of employment arbitration, the General Procedure Code should supplement the specific law. However, it was not possible to use the Code because it would offend the guarantees of access to justice and legal procedures in employment law, such as a free access to court, which is a fundamental part of legal procedures in employment law. Moreover, in Article 473, the Code provides the possibility of agreeing on arbitration through an arbitration clause, which is done through the free intention of the parties.[114] In this case, the clause was imposed and Esteban was not at liberty

[109] The provision stated: 'You will not be required to bear any type of fee or expense that You would not be required to bear if You had filed the action in a court of law […] Any disputes in that regard will be resolved by the Arbitrator as soon as practicable after the Arbitrator is selected, and Uber shall bear all of the Arbitrator's and arbitration fees until such time as the Arbitrator resolves any such dispute.'

[110] Besides *Saizhang Guan*, there are more District Court cases with the same result such as: *Gunn v. Uber Techs., Inc.*, 16–CV–1668, 2017 WL 386816, at *7 (SD Ind. 27 Jan. 2017); *Lee v. Uber Techs., Inc.*, 15–C–11756, 208 F.Supp.3d 886, 891, 2016 WL 5417215, at *4 (ND Ill. 21 Sept. 2016); *Suarez v. Uber Techs.*, 8:16–CV–166, 2016 WL 2348706, at *4 (MD Fla. 4 May 2016); *Varon v. Uber Techs., Inc.*, 15– CV–3650, 2016 WL 1752835, at *6 (D. Md. 3 May 2016) and *Sena v. Uber Techs. Inc.*, 16–CV–02418, 2016 WL 1376445, at *3–4 (D Ariz. 7 April 2016).

[111] Case number 0002-003894/2019, Tribunal de Apelaciones de Trabajo de Primer Turno, decided on 3 June 2020.

[112] This argument was supported by Article 7 of the Uruguayan Constitution which says: 'The inhabitants of the Republic have the right of protection in the enjoyment of life, honour, liberty, security, labour, and property. No one may be deprived of these rights except in conformity with laws which may be enacted for reasons of general interest.'

[113] The Court referred to Article 472 of the General Procedure Code. It states: 'Any individual or collective dispute may be submitted by the parties for resolution by an arbitral tribunal, unless the law provides the contrary. The law fully recognizes awards issued by arbitrators appointed, either by the parties, or by a judicial court, as well as those dictated by the courts formed by the arbitration chambers, to which the parties have submit their dispute.'

[114] Article 473 says: 'Arbitration Agreement: 473.1 In any contract or subsequent act, it may be established that the disputes arising between the parties must be settled in the arbitral jurisdiction. 473.2 The arbitration clause must be recorded in writing, under penalty of nullity.'

to negotiate it.[115] The court declared the arbitration clause invalid, and it also recognized Esteban as an employee according to Uruguayan law.

The assessment here encompasses features of inequality of bargaining power but it is done through the hierarchy of laws. As employment disputes have guarantees that could not be provided for in arbitration and the contract was not subject to negotiation, limiting the claimant's access to justice was enough to invalidate the clause. In a way, by guaranteeing features of employment disputes to Uber drivers, the Uruguayan court was already signalling that it would recognize drivers as employees.

4.4 The South African Case

In South Africa, the case has a different approach to the previous examples. There was no challenge to the arbitral tribunal's jurisdiction but to an arbitral award. Moreover, the challenge was not based on lack of legitimacy in using arbitration to solve disputes but the claim being brought against the wrong claimant.

Seven Uber drivers started a claim in the South African Commission for Conciliation, Mediation and Arbitration. Their complaint was that they were unfairly dismissed when their account with Uber was deactivated. According to the South African Labour Relations Act no 66 of 1995, employment disputes can be submitted to The Commission for Conciliation, Mediation and Arbitration for arbitration.[116] Thus, a dispute was submitted to the Commission which issued an award recognizing the seven claimants as employees.[117] The award issued by the Commission was challenged in court and in *Uber South Africa Technology Services (Pty) Ltd v. National Union of Public Service and Allied Workers (NUPSAW) and Others*,[118] the Labour Court of South Africa in Cape Town reviewed the decision made by the Commission. Justice Van Niekerk ruled that the Commission's decision was incorrect.[119] The reasoning concentrated on the fact that the referral to the Commission was against Uber SA and Uber BV, but during the proceedings, the commissioner, based on the realities of the

[115] The court said: 'Finally, waiving the jurisdiction of the State Judiciary cannot be admitted when, as in the case, the adherence to the arbitration clause has been adopted by someone who was in a position to seek work in a community in which work is a good scarce. Therefore, being what normally happens, interpreting the factual platform, it is inferred in a degree of high probability, that Esteban Queimada, under conditions and restriction of his freedom to self-determination, submitted to accept the arbitration because of the need to work. This is the only reason that can be attributed to the fact that Esteban Queimada, who was going to work in Uruguay, accepted that "the seat of arbitration will be in Amsterdam, the Netherlands".'

[116] Section 112 of the Labour Relations Act no 66 of 1995 establishes the Commission states: '112. Establishment of Commission for Conciliation, Mediation and Arbitration the Commission for Conciliation, Mediation and Arbitration is hereby established as a juristic person.' Section 115 (1) explains the purpose of the Commission: '115. Functions of Commission (1) The Commission must (a) attempt to resolve, through conciliation, any dispute referred to it in terms of this Act; (b) if a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute if (i) this Act requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration; or (ii) all the parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the Commission; (c) assist in the establishment of workplace forums in the manner contemplated in Chapter V; and (d) compile and publish information and statistics about its activities.' Section 191 (1) and (5) regulate the procedure for arbitration in cases of unfair dismissals and unfair labour practices, it says: '191. Disputes about unfair dismissals and unfair labour practices (1) (a) If there is a dispute about the fairness of a dismissal or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing within to (i) a council, if the parties to the dispute fall within the registered scope of that council; or (ii) the Commission, if no council has jurisdiction … (5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved- (a) the council or the Commission must arbitrate the dispute at the request of the employee if (i) the employee has alleged that the reason for dismissal related to the employee's conduct or capacity, unless paragraph (b)(iii) applies; (ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187; (iii) the employee does not know the reason for dismissal; or (iv) the dispute concerns an unfair labour practice; or (b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is (i) automatically unfair; (ii) based on the employer's operational requirements; (iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or (iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.'

[117] The decision was based on Section 213 of the Labour Relations Act no 66 of 1995: '213. Definitions. In this Act, unless the context otherwise indicates … "employee" 54 means: (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of "employee";'.

[118] (C449/17) [2018] ZALCCT 1.

[119] Section 145 regulates how the court can review the commission's decision; it states: '145. Review of arbitration awards (1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or (b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.'

relationship test, concluded that the employer was Uber SA and not Uber BV.[120] In reviewing the award, Van Niekerk Justice had to assess if the Commission had jurisdiction to rule the case, and as a consequence, if the Commission could assert that the claimants were employees at Uber SA. The court concluded that the realities of the relationship test was not in line with the prevailing authorities on the subject.[121] Moreover, it demonstrated that the Commission erred when it assumed that Uber SA was the employer and Uber BV was not a part of the legal relationship with the claimants.[122] The conclusion was that Uber SA provides administrative and marketing support to Uber BV and therefore, it was not possible to qualify the claimants as employees of Uber SA. In reviewing the award, the court set it aside and left open the question about the claimants being employees of Uber BV.[123]

The interesting aspect of the South African case is that it diverges from the previous examples when arbitration can be used to solve employment disputes between Uber and its drivers. Here the question was not if the arbitration clause creates inequality of bargaining power because arbitration in itself is not at odds with employment disputes in South Africa.

5 Uber, Inequality of Bargaining Power and Arbitration, the New Technology and the Same Problem?

The cases involving Uber present an old debate involving a new setting. The question of inequality of bargaining power in contracts is not new and has developed substantially in the last century. Moreover, the contrast between arbitration clauses and lack of bargaining power is also not something strange to courts and academics. But the Uber cases do present something different; they are part of a business using a new form of technology to trade. The gig economy will raise new legal questions and the arbitration clauses in the Uber contracts might be just the beginning of a bigger legal discussion about how such practices will be more common.

Looking at the cases presented in the previous section, the Canadian and the Uruguayan cases stand out in demonstrating that the arbitration clause in the Uber contract was made with the intention to avoid litigation by restricting the driver's right to access to justice. The choice of a foreign forum, with foreign law and such high fees to start the arbitral procedure must have been in the mind of the contract

[120]*Uber South Africa Technology Services (Pty) Ltd v. National Union of Public Service and Allied Workers (NUPSAW) and Others* at para 57: 'In her analysis of the evidence and argument in the proceedings under review, the commissioner refers to the definition of "employee" in s 213 and the test used to determine the existence of an employment relationship. She records that the statutory Code of Good Practice: Who is an Employee? (the Code) establishes a 'new comprehensive test', this being what she describes as the 'reality of the relationship test'. The nature and extent of that test is apparent from the following extract from her award: … 41) Although not stated in so many words, the Code introduces a new comprehensive test, which includes as factors the past tests. This is the "reality of the relationship" test. This requires that, despite the form of the contract, a person deciding whether someone is an employee or an independent contractor must consider the real relationship between the parties. Item 52 states: 'Courts, tribunals and officials must determine whether a person is an employee or independent contractor based on the dominant impression gained from considering au relevant factors that emerge from an examination of the realities of the parties' relationship.' And para 60: 'The commissioner's conclusions are recorded in the following terms: (52) I am of the view that in applying the Code of Good Practice, in particular the realities of the relationship test, there is sufficient basis for finding that Uber drivers are employees of Uber SA. However, I accept that certain factors indicate that drivers are employees and others indicate that they are not and I accept that the identity of the employer is blurred. In the event that I have adopted what appears to be a broad or generous interpretation of section 213 of the LRA, I believe this is justified by the requirement to adopt an interpretation which is in compliance with the Constitution and which promotes social justice and effective dispute resolution... (59) My conclusion is that even though Uber BV provides the app and generates the contracts, Uber SA is, for all intents and purposes, Uber in South Africa. Uber SA directs operations in the country and the city in question. Insofar as Uber BV is the party that concludes contracts with drivers, it is anonymous and has no relevance for drivers.'

[121]Ibid at para 78: 'What is apparent from all of the judgments of the LAC is that the test to determine the existence of an employment relationship ultimately remains a multi-factoral one. In terms of the prevailing law, the 'realities of the relationship' cannot be reduced to a single, substantive test – a conspectus of all of the relevant facts and circumstances is required, including an examination of the realities of the relationship where this is warranted, typically in circumstances where contractual arrangements are used to disguise those realities.'

[122] Ibid at para 97: 'In summary, in relation to the facts that served before the commissioner, the commissioner erred by failing to distinguish between Uber SA and Uber BV as discrete legal entities. There was no dispute of fact before the commissioner regarding the delineation of functions as between Uber SA and Uber BV. Each of the building blocks of the drivers' case pertains to Uber BV and not Uber SA. Given the nature of the enquiry before her, and in particular, the undisputed facts before disclosed on the affidavits, the commissioner was obliged to consider the respective roles of Uber BV and Uber SA in relation to the drivers. She failed to embark on this enquiry and, as I have recorded, simply conflated the two entities. Had the commissioner maintained the critical distinction between Uber BV and Uber SA and considered (as she was obliged to do), only whether the drivers were employees of Uber SA, she would have come to the conclusion that on the drivers' own version, they had failed to discharge the onus they bore to establish the existence of an employment relationship with Uber SA.'

[123] Ibid at para 98 'Finally, it warrants mention (and emphasis) that this judgment does no more than conclude that on the facts, the drivers were not employees of Uber SA, and that they therefore have no right to refer an unfair dismissal dispute to the CCMA as against Uber SA Whether the drivers are employees of Uber BV (either alone or in a co-employment relationship with another or other parties), or whether they are independent contractors of Uber BV, is a matter that remains for decision on another day. It was not the question before the commissioner, and it is not the question before this court.'

drafters when preparing the terms and conditions. Being a term that has a take-it or leave-it facet can limit the capacity of parties to bargain. That in itself could be considered as just part of commercial life. Commercial pressure when trading should not automatically result in the exclusion of one's ability to bargain. Following the Economic Analysis of the Law, efficiency in contracts is essential for the smooth operation of business. Thus, standard forms are helpful. It is fair to say that Uber drivers are more interested in getting the app up and running to start working as soon as possible. After all, in the gig economy, if you are not working in the 'gig', you do not have income.

However, as presented above, the role of contracts is not solely to be efficient. They should also present a degree of fairness even when there is inequality of bargaining power. In contracts, it will be unusual to eradicate some kind of inequality of bargaining power; but the severe and oppressive manner used to curtail the capacity to bargain brings too much unfairness in contracts to be considered acceptable.

Arbitration has a contractual nature where the parties agree that disputes will be submitted to a private tribunal for a final decision. In that sense, similar problems found in the law of contract that would invalidate a contract or a contractual term apply to arbitration. Using arbitration as a tool to impose severe inequality of bargaining power should not be acceptable. That is not to mean that arbitration cannot be employed when there is inequality of arms between the parties. As the South African case has shown, the South African legislation provides for an arbitration system to solve disputes between employers and employees. But even if the legislative has not made a statutory provision for arbitration in cases of inequality of bargaining power, private companies have provided systems that remove or reduce unfairness in the use of arbitration when there is an adhesion contract. For instance, in the USA, AT&T have a dispute resolution system with arbitration where the costs of the arbitration are mainly covered by AT&T.[124] The arbitration follows the Consumer Arbitration Rules of the American Arbitration Association and for claims valued at US$75,000 or less, AT&T pays the fees.[125] The exception is if the claim exceeds the value of US$75,000 or if the arbitrator decides that the claim is considered frivolous or brought for an improper purpose.[126] The framework implemented by AT&T seems to mitigate issues about arbitration as a method to create inequality of bargaining power. Let us not be naïve here and see AT&T as this nice company trying to help the 'poor' consumer. AT&T is still a company aiming at maximizing profit and reducing costs. In relation to the latter, it becomes clear that AT&T uses the arbitration to avoid class actions.[127] This was the subject of the debate in *AT&T Mobility v. Concepcion*[128] when the USA Supreme Court, by majority, considered that the class action arbitration waiver in the AT&T terms was valid.[129] Such decision obviously helped AT&T to continue with its dispute resolution programme.

Looking at the Uber cases in the USA, the opt-out provision excluding arbitration from its terms and conditions should remove any doubt about a lack of any inequality of bargaining power. At least it can be asserted that this was not a take-it or leave-it type of clause. A contrary argument here is hard to

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[124] Information about the system can be found at https://www.att.com/support/article/wireless/KM1045585/. Accessed 26 June 2021.

[125] At https://www.att.com/support/article/wireless/KM1041856. Accessed 26 June 2021, AT&T explains: 'Arbitration Fees: If AT&T initiates arbitration or if you initiate arbitration of claims valued at $75,000 or less, AT&T will pay all AAA filing, administration, case-management, hearing, and arbitrator fees, so long as you have fully complied with the requirements in section 2 for any arbitration you initiated. In such cases, AT&T will pay the filing fee directly to the AAA upon receiving a written request from you at the Notice Address or, if the AAA requires you to pay a filing fee to commence arbitration, AT&T will promptly reimburse you or arrange for the AAA to reimburse you for the filing fee and will remit the filing fee to the AAA itself. If you seek relief valued at greater than $75,000, the payment of the AAA filing, administration, case-management, hearing, and arbitrator fees will be governed by the AAA rules. In addition, if the arbitrator finds that either the substance of your claim or the relief sought in the arbitration demand is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)), then the payment of all such fees will be governed by the AAA Rules. In such case, you agree to reimburse AT&T for all monies previously disbursed by it that are otherwise your obligation to pay under the AAA Rules.'

[126] Ibid.

[127] Ibid. AT&T states**:** 'Any arbitration under this Agreement will take place on an individual basis; class arbitrations and class actions are not permitted.'

[128] 563 US 333 (2011).

[129] The Supreme Court emphasized that bilateral arbitration is better suited to solve the disputes envisaged by AT&T in its dispute resolution system. The Court declared: 'Third, class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail, see, e.g., Kohen v. Pacific Inv. Management Co. LLC, 571 F. 3d 672, 677–8 (CA7 2009), and class arbitration would be no different.'

be made. Not reading the terms and condition cannot be a reasonable motive to say that there was inequality of bargaining power. There is no debate here about the weak party having no option but to accept the terms and conditions. If the challenge was about something specific in the terms and conditions instead of the arbitration clause, this could have worked, but when the drivers accepted terms and conditions without the arbitration clause, it is hard to say that there is inequality of bargaining power in the use of the arbitration clause. Moreover, the discussion in the USA relates to the use of class action and procedures tools such as discovery together with the costs of arbitration. In effect, the costs are different in the USA cases when compared to the Uruguayan and Canadian examples because the American version of the Uber arbitration clause provides for arbitration under the rules of the American Arbitration Association, taking place in the USA.

The assessment of the Uber cases and arbitration raises question about when arbitration will be a clear representation of inequality of bargaining power. In the Canadian and Uruguayan cases, the question was about the arbitration agreement limiting the parties' right to access to justice. In the USA, the argument was not very different, but to say that an arbitration clause that could have been opted-out is unconscionable seems far-fetched. The capacity to opt-in or opt-out is the embodiment of freedom of contract. Hence, to say that the clause was unfair might be actually unfair. In South Africa, what was demonstrated is that arbitration can be used to solve disputes where there is a perceived inequality of bargaining power and there will not necessarily be a restriction to the parties' right to access to justice.

Perhaps the cases might propose a more profound question which is about the choice to be made when contracting and if this choice is an equitable choice? Was the choice to opt-out in the Uber agreement equitable? In the American cases, the party was able to continue to exercise their trade with terms and conditions without an arbitration clause; thus, it looks equitable. But imagine if that was not the case. Of course, there will always be an argument that in the Uber case, the Uber driver is not forced to agree with Uber's terms and the driver can either go work for the competition or not be a driver at all. The problem with this view is that in certain areas of contemporary society, being a hermit has become harder. In western society it is not easy to live without a smart phone or without having an email and at the same time, enjoy all the rights emanating from your civil life. Consequently, although a person might still have an option to opt-out of civil life, it will be hard to envisage this individual being able to exercise their trade without adhering, at least, to a contract of adhesion.

This is a policy discussion relating to balance in contractual transactions which now has arbitration as a topical issue. Legislators have not been oblivious to such situations, for instance, in England, the Arbitration Act 1996 had a specific provision for consumer contracts,[130] which refers to the Consumers Right Act 2015. The latter, in Schedule 2, provides for a list of consumer terms that may be regarded as unfair. Paragraph 20 of the Schedule identifies that arbitration as an exclusive method of dispute resolution might be considered unfair.[131] As we have seen above, EU consumer law did the same through Directive 93/13/EEC. Be that as it may, inequality of bargaining power is not restricted to consumers or parties, which – due to their condition, there is a presumption that they are weak – can also be present in business-to-business transactions.

From this evaluation, it can be seen that arbitration in itself should not be invalidated just because there is inequality of bargaining power in the agreement. Following the Uber decisions, two steps can be taken to assess the validity of the arbitration agreement in cases of inequality of bargaining power. The first step should be to evaluate whether the contract containing the arbitration agreement is one related to an industry where there is little to no market competition. The option in this case for a party wishing to continue to exercise their trade is to either agree with the terms of the contract or not use/interact/provide the service or goods to that specific industry. If that is the case, there should be a rebuttable presumption that inequality of bargaining power is present. If there are different options, such as the opt-out clause in the American Uber cases, it will be hard to see inequality of bargaining power, unless it can be demonstrated that the options do not present equitable choices. Moreover, if there are other options to trade with someone else, it would have to be investigated if that industry has

[130] Section 91(1) of the Act states: 'A term which constitutes an arbitration agreement is unfair for the purposes of the Consumer Rights Act 2015 so far as it relates to a claim for a pecuniary remedy which does not exceed the amount specified by order for the purposes of this section.'

[131] The full wording of paragraph 20 is: 'A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by: (a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions.'

a uniform approach to their contracts or the market, through competition, determines the rules applicable in the contracts. Be that as it may, a second step should be taken to see if the arbitration clause has the purpose of restricting the parties' right to access to justice. If it can be concluded that arbitration is being misused to curtail access to justice, the arbitration agreement should not be considered valid. That can be exemplified by the Canadian and Uruguayan cases when access to justice could only be done in a foreign country, under foreign law and at a huge cost. One exception must be made here. If the weak party freely agrees to such conditions, there should be no reason to invalidate the arbitration agreement. For instance, a consumer prefers arbitration over court litigation because the consumer would like to benefit from the confidentiality of arbitration. This would be the case of respecting the parties' freedom of contract. Another example can be seen in employment disputes involving chief executive officers. Because their remuneration is high and they might not want to have the facts of their disputes heard in public, arbitration might be an option.

Freedom of contract and inequality of bargaining power do not need to be adversaries; on the contrary, they should coexist to improve the balance in contractual transactions. None of the ideas should be used in extreme as it would defeat their purpose. Freedom of contract cannot be absolute. And because all contracts have some degree of inequality of bargaining power, it should serve as a safeguard to guarantee justice when contracts provide for extreme discrepancy in the parties' rights.

6 Conclusion

Standard forms of contract are made to facilitate trade and create efficiency. Be that as it may, they are also subject to restrictions and assessments based on fairness. No one expects contractual terms and conditions to generate obligations that are unreasonable. Such outcome was satirized in the South Park cartoon, when the character Kyle agreed to iTunes terms and conditions and was taken by Apple to be subjected to uncomfortable situations in the development of a new product.[132] The cartoon ridiculed the fact that people sign terms and conditions and do not read them. Of course, the cartoon is fictitious but, as presented above, inequality of bargaining power is not.

The Uber case study demonstrates how arbitration and inequality of bargaining power are being used in the gig economy. Through the examination of the Uber decisions in four jurisdictions, it could be seen that when arbitration is used to remove the parties' right to access to justice, the arbitration clause can be invalidated on grounds of inequality of bargaining power. This result is not automatic and takes into consideration different aspects involving the agreement to arbitrate. Moreover, the question of choice is fundamental to assess inequality of bargaining power. The lack of capacity to negotiate a contract can lead to the conclusion that an arbitration clause was imposed and, as a result, creates an extreme disadvantage in relation to the parties' contractual rights. Although this advantage can be acceptable, this will have to be examined on a case-by-case manner. If arbitration is not misused, it can be a useful mechanism to solve disputes in contracts where there is inequality of bargaining power.

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[132] South Park, Season 15, episode one entitled 'HumancentiPad'.

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