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RE-THINKING UNCONSCIONABILITY: ARBITRATION AGREEMENTS IN INTERNATIONAL CONSUMER, EMPLOYMENT AND 'GIG' ECONOMY CONTRACTS

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In recent years, there has been a proliferation of international consumer, employment and 'gig' economy contracts, many of which come with arbitration agreements. Although arbitration agreements are generally given legal effect, courts often refuse to enforce them on the basis of unconscionability if they are particularly disadvantageous to the consumer or worker. After surveying the state of the law of unconscionability in the United Kingdom (under English law), Singapore, Canada, Australia and the United States, we identify problems with the doctrine in the context of arbitration agreements, namely that its vague and confusing nature has the potential to undermine the doctrine of competence-competence, the predictability of arbitration agreements and ultimately the parties' freedom of contract. As we suggest, these problems could, without legislative intervention, mark the end of arbitration in the context of consumer, employment and 'gig' economy contracts. We propose two ways in which courts could make the doctrine of unconscionability more manageable and less problematic: by requiring that the victim have an identifiable frailty and by clarifying that independent advice for the victim usually assuages inequalities. We conclude by arguing that each of these reforms is consistent with the five most prominent theoretical justifications that have been offered for the doctrine of unconscionability.

I. Introduction

In recent years, there has been a proliferation of international consumer, employment and 'gig' economy contracts, many of which have arbitration agreements attached to them.[1] Domestic courts are often called upon to refuse to enforce these arbitration agreements. Although the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[2] commonly known as the New York Convention, sets out the general rule that "the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration", courts may refuse to do so if they find "that the said agreement is null and void, inoperative or incapable of being performed".[3] This arrangement also exists

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1 See generally *Uber Technologies Inc v Heller* [2020] SCC 16 [*Heller*].

2 (10 June 1958), 330 UNTS 3 (entered into force 7 June 1959, accession by Singapore 21 August 1986).

3 *Ibid*, Art 2(3).

in most domestic legislation that governs international commercial arbitration, which is often based on the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law").[4] Even when this arrangement does not apply – as is the case, for example, with employment and 'gig' economy contracts that are deemed in some jurisdictions not to be commercial contracts[5] and to which legislation that implements the New York Convention and the UNCITRAL Model Law is therefore not applicable[6] – invalid agreements to arbitrate are not given legal effect.[7] Arbitration agreements can generally be invalid on the same sorts of grounds as any other contract,[8] such as forgery of a signature,[9] a lack of a *consensus ad idem*[10] or, as we suggest is now increasingly plausible when the law of many common law jurisdictions is applied, unconscionability.[11]

Indeed, the doctrine of unconscionability has been relied on increasingly frequently by parties that wish to impugn arbitration agreements. For example, in the United States, as Charles Knapp notes, "the number of court decisions in which the unconscionability doctrine was applied increased substantially after 1990", due to "parties desiring to avoid being forced to submit to arbitration".[12] In recent years, these "unconscionability attacks on arbitration clauses" in the United States have been met "with increasing success",[13] although courts in some states are more

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4 Such legislation is often modelled after art 8 of the UNCITRAL Model Law on International Commercial Arbitration (21 June 1985). UN Doc A/40/17 (accession by Singapore 1994). Art 8(1) provides: "a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed." See also the Arbitration Act, 9 USC (US) § 2 (1925), which provides: "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

5 *Heller*, *supra* note 1 at [27]–[28].

6 See*, eg,* International Commercial Arbitration Act, SO 2017, c 2, Sch 5 (Can) s 5(3).

7 See, *eg*, Arbitration Act, SO 1991, c 17 (Can) s 7(2).

8 In the United States, as Justice Ginsburg wrote, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements" (*Doctor's Associates Inc v Casarotto*, 517 US 681 (1996); see also *AT&T Mobility LLC v Concepcion*, 563 US 333 (2011)). The same is true in the other jurisdictions that I examine in this paper: see, *eg*, *Dialogue Consulting Pty Ltd v Instagram Inc,* [2020] FCA 1846.

9 See, *eg*, *Opals on Ice Lingerie v Bodylines, Inc* 425 F Supp 2d 286 (EDNY, 2004).

10 See, *eg, Titan, Inc v Guangzhou Zhen Hua Shipping Co, Ltd* 16 F Supp 2d 326 (SDNY, 1998).

11 As Charles Knapp notes, in the United States, "if the court finds a contractual clause to be unconscionable, then as a matter of law that clause ought not to be enforceable" (Charles Knapp, "Unconscionability in American Contract Law: A Twenty-First Century Survey" (2013) UC Hastings Research Paper No. 71 <https://ssrn.com/abstract=2346498> at 317 [Knapp, *Unconscionability*]).

12 *Ibid*. See also Charles Knapp, "Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device" (2009) 46(3) San Diego L Rev 609.

13 Knapp, *Unconscionability, supra* note 11 at 317. See also Jeffrey W Stempel, "Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism" (2004) 19(3) Ohio St J Disp Resol 757; Susan Randall, "Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability" (2004) 52(1) Buff L Rev 185; Sandra F Gavin, "Unconscionability Found: A Look at Pre-Dispute Mandatory Arbitration Agreements 10 Years after Doctor's Associates, Inc. v. Casarotto" (2006) 54(3) Clev St L Rev 249.

receptive to arguments that arbitration agreements are unconscionable than others.[14] Empirical studies reveal that, in many states, "unconscionability challenges … succeed with far greater frequency when the contractual provision at issue is an arbitration agreement",[15] sometimes as much as "at twice the rate of non-arbitration agreements".[16] Unconscionability thus has a particularly significant impact on arbitration agreements. In addition, it potentially undermines, the effectiveness of the competence-competence principle.

The Canadian case of *Uber Technologies Inc v Heller*,[17] which was decided by the Supreme Court of Canada in 2020, is illustrative. David Heller, who earned his income by driving as part of Uber's network, was the representative plaintiff for a proposed class action against Uber. The standard-form contract that Heller and others entered into with Uber provided that disputes are to be "referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce" and that "the place of arbitration shall be Amsterdam, The Netherlands".[18] In order to commence a claim pursuant to the arbitration agreement, Heller would have needed to pay around US$14,500,[19] which was a significant portion of his total annual income of CAD 20,800–31,200[20] (which is equivalent to around US$16,600–24,900).[21] Heller successfully argued that the arbitration agreement was unconscionable, and therefore without legal effect. The fact that the courts took it upon themselves to decide the issue of the arbitration agreement's validity – an issue of arbitral competence – instead of referring the matter to arbitration raises an important question of competence-competence: should the arbitral tribunal not pronounce in the first instance on its competence? This issue is not the focus of this paper, though we do show how it compounds the impact of the Supreme Court of Canada's expanded view of the unconscionability doctrine on the viability of arbitration in this area.

Heller's situation might seem particularly egregious, and it might even seem as though Uber got its just deserts. It might even be called a "classic case of unconscionability".[22] In fact, there has been a steady stream of scholarly criticism that has documented the unfairness that often results from arbitration clauses in standard-form contracts such as Heller's.[23]

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14 See Susan Landrum, "Much Ado about Nothing: What the Numbers Tell Us About How State Courts Apply the Unconscionably Doctrine to Arbitration Agreements" (2014) 97(3) Marq L Rev 751.

15 Stephen A Broome, "An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act" (2006) 3(1) Hastings Bus LJ 39 at 40.

16 Randall, *supra* note 13 at 186.

17 Heller, *supra* note 1.

18 *Ibid* at [8].

19 *Ibid* at [10].

20 *Ibid* at [11].

21 Estimate calculated based on market exchange rates in September 2021.

22 *Heller*, *supra* note 1 at [4].

23 See, *eg*, Margaret Jane Radin, "Access to Justice and Abuses of Contract" (2016) 33(2) Windsor YB Access Just 177; Stephen J Ware, "The Case for Enforcing Adhesive Arbitration Agreements-With Particular Consideration of Class Actions and Arbitration Fees" (2006) 5(2) J American Arbitration 251 at 252 [Ware] (for a helpful list of scholars who have made these sorts of arguments, some of which I cite here); Richard M Alderman, "Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform" (2001) 38(4) Hous L Rev 1237; Mark E Budnitz, "The High Cost of Mandatory Consumer

But arbitration agreements are popular – including in the context of consumer, employment and 'gig' economy contracts – because arbitration often comes with significant advantages.[24] In international contracts, it can ensure that disputes are heard in a neutral forum by a tribunal that has relevant expertise that domestic courts might lack.[25] Leaving these benefits aside, there are other compelling reasons to enforce arbitration agreements. For example, if courts in some jurisdictions refuse to enforce arbitration agreements too often, this could harm the business climate of those jurisdictions. Foreign investors would probably be less likely to be attracted to those jurisdictions if they know that their disputes will be 'resolved' in domestic forums that are too costly and inflexible or that they do not regard as neutral or properly equipped. More crucially, jurisdictions' business climates can be harmed because investors' confidence in the remainder of their contracts, leaving arbitration agreements aside, may be undermined if they come to expect that courts in those jurisdictions will not often enforce their arbitration agreements. What message about respect for party autonomy and predictability would courts send if they become known to not enforce arbitration agreements? Therefore, even in employment, consumer and 'gig' economy contracts that might be fertile ground for the sort of unfairness that Heller experienced, arbitration agreements still have a place that courts should be wary of taking away without a legislative mandate. As *Heller* illustrates, there are jurisdictions with legislative provisions that exclude areas such as labour standards and consumer contracts from the effects of contract-based arbitration. There is nothing problematic about these legislative provisions because they provide, as long as courts apply them, certainty and predictability. Using an expansive doctrine of unconscionability on a case-by-case basis, by contrast, creates an unacceptable level of uncertainty that jeopardises the business climate even beyond contracts of adhesion.

Canada and the United States are far from the only jurisdictions in which it is possible to impugn arbitration agreements that are attached to consumer, employment and 'gig' economy contracts. That said, in order to keep the scope of this paper manageably narrow, we focus on five jurisdictions: the United Kingdom (under English law), Singapore, Canada, Australia and the United States. Not only do we

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Arbitration" (2004) 67(1) Law & Contemp Probs 133; Paul D Carrington & Paul H Haagen, "Contract and Jurisdiction" (1996) Sup Ct Rev 331; David S Schwartz, "Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration" (1997) 1 Wis L Rev 33; Sarah Rudolph Cole, "Incentives and Arbitration: The Case against Enforcement of Executory Arbitration Agreements between Employers and Employees" (1996) 64(3) UMKC L Rev 449.

[24] As Gary Born notes, "businesses perceive international arbitration as providing a neutral, speedy and expert dispute resolution process, largely subject to the parties' control, in a single, centralized forum, with internationally-enforceable dispute resolution agreements and decisions" (Gary Born, *International Commercial Arbitration*, 2d ed (Austin: Wolters Kluwer, 2009) at 73) [Born, *International Commercial Arbitration*]. See also Ware, *supra* note 23.

[25] See Gary Born & Petra Butler, "Bilateral Arbitration Treaties: An Improved Means of International Dispute Resolution" <https://efilablog.org/wp-content/uploads/2019/02/461da-uncitraborn26butlerbat.pdf>. International awards that have "effects in different countries" can also be seen as "an economic requirement", even though, with some exceptions, only two countries are ever involved with consumer, employment and 'gig' economy contracts entered into with particular consumers or workers. See "Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration at its meeting of 13 March 1953" (1998) 9(1) ICC International Court of Arbitration Bulletin 32 at 32.

consider these jurisdictions to offer a reasonably accurate panorama of the common law as it exists across the world, but they are home to many consumers, employees and 'gig' economy workers,[26] as well as some of the corporations that are on the opposite ends of the sort of transactions that involve these parties. Our approach, therefore, is comparative, drawing on law from several jurisdictions. Comparative law is an exercise in identifying points of comparability and building analysis based on those points. We therefore discuss the doctrine of unconscionability, which exists in some form or another in each jurisdiction that we address, as if it were one doctrine, while noting that it operates slightly differently in each jurisdiction.

We confine our analysis to unconscionability at common law – and therefore we do not discuss statutory unconscionability[27] – in order to allow for a generalised discussion across jurisdictions.

After providing an overview of the doctrine of unconscionability in each jurisdiction, we argue that the doctrine, as it exists now, is problematic. We point to problems with the doctrine that make it, to varying extents in each jurisdiction, vague and confusing. As we will discuss, it is difficult to tell what might be sufficient to constitute a relationship of inequality or procedural unconscionability, as well as what might rise to the level of unfairness, improvidence or substantive unconscionability. There are sometimes added difficulties because, in some jurisdictions, the role that independent advice for the victim might play is unclear, and in one jurisdiction there is even a judicially imposed circular relationship between inequality and improvidence. Although we are not the first to claim that the doctrine of unconscionability is "essentially formless and unhelpful",[28] particularly in the United States,[29] our analysis contributes a multi-jurisdictional perspective that takes account of recent legal developments, including developments from outside of the United States. Overall, we argue that these problems make the doctrine of unconscionability unpredictable, which ultimately has a deleterious effect on freedom of contract. Moreover, we suggest that the doctrine of unconscionability in its present state could lead to the end of arbitration, without legislative mandate, in many consumer, employment and 'gig' economy contracts. Therefore, we propose two ways whereby courts could make the doctrine of unconscionability more manageable: by requiring that the victim have an identifiable frailty and by clarifying that independent advice usually serves to assuage inequalities between the parties. We should note that the proposals that we advance to constrain the doctrine of unconscionability are, as we indicate, currently in force in some jurisdictions. We do not suggest that our ideas in this respect are original; rather, we aim to show how insights from some jurisdictions can be useful in shaping the law in other jurisdictions.

We conclude by showing that each of these reforms is consistent with five leading theoretical justifications that have been offered for the doctrine of unconscionability.

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[26] See generally *Heller*, *supra* note 1.

[27] See, *eg*, Consumer Protection Act, SO 2002, c 30, Sch A (Can) s 15; Competition and Consumer Law Act 2010 (Cth) sch 2 [Australian Consumer Law] s 20(1).

[28] Knapp, *supra* note 11 at 314. See also Richard E Speidel, "Unconscionability, Assent and Consumer Protection" (1970) 31(3) U Pitt L Rev 359.

[29] See Arthur Allen Leff, "Unconscionability and the Code-The Emperor's New Clause" (1967) 115(4) U Pa L Rev 485.

II. The Doctrine of Unconscionability

Beginning in the seventeenth century, courts of Equity have expressed a willingness to refuse to enforce contracts that are substantively unfair.[30] Over time, the doctrine of unconscionability evolved to provide an avenue for courts to set aside unfair contracts, and even parts of contracts. Although the doctrine initially evolved to apply to entire contracts, it is safe to say that it can also be used to impugn arbitration agreements alone. Some courts have held that the doctrine can apply to parts of contracts rather than exclusively to entire contracts.[31] But more significantly, arbitration agreements are broadly considered to be separate agreements, meaning that they can be impugned separately from the substantive contracts with which they are associated.[32]

In English law, following the merger of the courts of common law and equity, the doctrine of unconscionability "effectively went into hibernation"[33] until 1978 when the High Court of Justice issued its decision in *Cresswell v Potter*.[34] Justice Morgan, building on a line of authority that culminated in *Fry v Lane*,[35] wrote that there are three requirements for a contract to be set aside for unconscionability: "first, whether the plaintiff is poor and ignorant; second, whether the sale was a considerable undervalue; and third, whether the vendor had independent advice".[36] Put otherwise, there must be an "unfair manner in which [the contract] was brought into existence" in addition to substantive unfairness because "equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing".[37] This test has been subject to some variations. Some courts have slightly expanded the requirement that the victim be "poor and ignorant". For example, one deputy High Court judge wrote that courts must consider whether "one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken".[38] Moreover, some courts eventually added the requirement that the stronger party "imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience".[39] In the more recent case of *Strydom v Vendside*, the High Court set out the following test: 1) one party must be at a disadvantage "in some relevant way" relative to the other, 2) the other party exploited that disadvantage in a morally culpable manner, and 3) the contract is "overreaching and oppressive".[40]

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30 See, *eg*, *James v Morgan* (1663) 83 ER 323 (KB); *Earl of Chesterfield v Janssen*, (1751) 28 ER 82 at 100 (Ch).

31 See, *eg*, *Tercon Contractors Ltd v British Columbia (Transportation and Highways)* [2010] SCC 4 [*Tercon*].

32 See George A Bermann, *International Commercial Arbitration* (St. Paul: West Academic, 2020) at 35.

33 David Capper, "The Unconscionable Bargain in the Common Law World" (2010) 126 LQR 403 at 403.

34 [1978] 1 WLR 255 (Ch D) [*Cresswell*].

35 (1888) 40 Ch D 312.

36 *Cresswell*, supra note 34.

37 *Hart v O'Connor* [1985] AC 1000.

38 *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87 at 94–95 (Ch D).

39 *Multiservice Bookbinding Ltd and others v Marden* [1979] Ch 84. See also *Boustany v Pigott* [1995] 69 P & CR 298 (PC, UK).

40 *Strydom v Vendside Ltd* [2009] EWHC 2130 (QB) at [36] [*Strydom*].

In Singapore, the doctrine of unconscionability "is not wholly clear. The only certainty might be that the doctrine of unconscionability is still in its formative stages of development".[41] Indeed, the Singapore Court of Appeal observed that "the legal status of [unconscionability] is still in a state of flux".[42] That said, after a period of time in which courts entertained the idea that the doctrine of unconscionability "did not form part of the law of Singapore",[43] courts now generally endorse the English test for unconscionability that is set out in *Cresswell*.[44] However, they usually take special care to note that inequality of bargaining power alone is not sufficient to meet the first step of the test unless the weaker party has a recognised frailty.[45] One judge even noted that courts must adhere to the requirement that the weaker party have a frailty – "whether physical, mental and/or emotional in nature"[46] – in order to avoid causing uncertainty and confusion.[47] Moreover, there is some indication that the third step of the test articulated in *Cresswell*, which requires that the victim did not receive independent advice, might no longer be part of the test applied in Singapore, although it is possible that a lack of independent advice could amplify a party's weakness.[48]

In Canada, the doctrine of unconscionability has, until recently, been unsettled. Some courts had applied a four-step test which required that: 1) the impugned transaction be grossly unfair, 2) the victim did not receive legal or other advice, 3) there was a significant imbalance of power between the parties due to one party's frailty, and 4) the stronger party deliberately exploited the weaker party.[49] Although the doctrine of unconscionability has the potential to be wide-reaching, this test kept it under somewhat tight control by limiting its availability to relatively egregious cases in which one party knowingly took advantage of another party's marked frailty without ensuring that they obtained legal or other advice. Perhaps the most significant of these controls is the third step of the test, which limited the doctrine's application to situations in which one party had an identifiable frailty. As we will discuss later, a body of case law developed to define what sorts of frailties would satisfy this requirement, including "the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or

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41 Andrew Phang Boon Leong, *The Law of Contract in Singapore* (Singapore: Academy Publishing, 2012).

42 *Chua Chian Ya v Music & Movements (S) Pte Ltd* [2010] 1 SLR 607 at [24] (CA). See also *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR (R) 117 (HC).

43 Nelson Enonchong, "The State of the Doctrine of Unconscionability in Singapore" [2021] Sing JLS 100.

44 *Ibid*.

45 See, *eg*, *Rajabali Jumabhoy and others v Ameerali R Jumabhoy and others*, [1997] 2 SLR (R) 296 (HC); *E C Investment v Ridout Residence Pte Ltd* [2011] 2 SLR 232 (HC); *BOK v BOL* [2017] SGHC 316 [*BOK*]; *BOM v BOK* [2018] SGCA 83.

46 *BOK*, *ibid* at [141].

47 *Ibid* at [112].

48 *Ibid* at [120].

49 See *Titus v William F Cooke Enterprises Inc* [2007] ONCA 573 at [38] [*Titus*]; *Phoenix Interactive Design Inc v Alterinvest II Fund LP* [2018] ONCA 98; *Heller v Uber Technologies Inc* [2019] ONCA 1 [*Heller (ONCA)*]; *Kielb v National Money Mart Company* [2017] ONCA 356.

similar disability".[50] However, in another strand of case law, courts applied a different – and somewhat less demanding – test to assess whether a contract is unconscionable. This test merely required that there be an inequality of bargaining power and an unfair transaction.[51] In 2020, the Supreme Court of Canada confirmed in *Heller* that this test is the one that ought to be applied.[52] Justices Abella and Rowe, who wrote for the majority, held that unconscionability "requires both an inequality of bargaining power and a resulting improvident bargain".[53] In addition to confirming that the requirement that the stronger party deliberately take advantage of the weaker party is no longer part of the test, Justices Abella and Rowe also relegated the role of legal advice to merely one factor to consider when a court assesses whether there was inequality. Indeed, they went so far as to write that "independent advice is relevant only to the extent that it ameliorates the inequality of bargaining power experienced by the weaker party".[54] As Justice Brown wrote in his concurring reasons, after *Heller*, "a party who contracts exclusively with individuals who have received independent legal advice *still* cannot take comfort in the finality of their agreements" because "only *competent* legal advice will ameliorate an imbalance in bargaining power".[55] Finally, Justices Abella and Rowe removed the requirement that inequality must be caused by an identifiable frailty. Instead, "an inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process",[56] and "there are no 'rigid limitations' on the types of inequality that fit this description".[57]

In Australia, as we noted in other work, "a series of cases from the late 20th century and early 21st century resulted in a broadened understanding of unconscionability".[58] In the leading case of *Commercial Bank of Australia Ltd v Amadio*,[59] the High Court of Australia held that a contract could be set aside for unconscionability if an inequality of bargaining power resulted in an unfair transaction. As Justice Mason wrote, this occurs when "unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary",

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[50] *Heller (ONCA)*, *supra* note 49 at [60]. See also *Harry v Kreutziger* (1978) 95 DLR (3d) 231 (CA, BC) [*Harry*]; *Marshall v Canada Permanent Trust Co* (1968) 69 DLR (2d) 260 (SC, Alta) [*Marshall*]; *Stephenson v Hilti (Canada) Ltd* (1989) 63 DLR (4th) 573 (SC, NS) [*Stephenson*]; *Taylor v Armstrong* (1979) 99 DLR (3d) 547 (HC, Ont) [*Taylor*]; *Royal Bank of Canada v Hussain et al* (1997) 37 OR (3d) 85 (Ontario Court (General Division)) [*Royal Bank*]; *Stubbs v Erickson* (1981) CanLII 718 (SC, BC) [*Stubbs*].

[51] See generally *Morrison v Coast Finance Ltd* (1965) CanLII 493 (CA, BC) [*Morrison*]; *Douez v Facebook, Inc* [2017] SCC 33, per Abella J.

[52] See *Heller*, *supra* note 1.

[53] *Ibid* at [65].

[54] *Ibid* at [83].

[55] *Ibid* at [167] [emphasis in original].

[56] *Ibid* at [66].

[57] *Ibid* at [67].

[58] Fabien Gélinas & Zackary Goldford, "More Than a Side-Wind: Rethinking the Consideration Requirement in Commonwealth Contract Law" (2022) 22(1) OUCLJ 1. See also *Turner v Windever* [2005] NSWCA 73 (SC); Andrew Stewart, Karen Fairweather & Warren Swain, *Contract Law: Principles and Context* (Cambridge: Cambridge University Press, 2019) at 379–381; Ying Khai Liew & Debbie Yu, "The Unconscionable Bargains Doctrine in England and Australia: Cousins or Siblings?" (2021) 45(1) Melbourne UL Rev 206 [Liew & Yu].

[59] [1983] HCA 14 [*Amadio*].

such that the victim "is unable to make a worthwhile judgment as to what is in his best interests".[60] Thus, unconscionability "may be invoked whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created".[61] In a later case, the High Court confirmed that "the task of the courts is to determine whether the whole course of dealing between the parties has been such that, as between the parties, responsibility for the plaintiff's loss should be ascribed to unconscientious conduct on the part of the defendant".[62] Courts have held that "equitable intervention does not relieve a plaintiff from the consequences of improvident transactions conducted in the ordinary and undistinguished course of a lawful business",[63] but unconscionability can nevertheless apply to a broad range of unfair agreements that are brought about by a stronger party and made with a weaker party. Although this requires that there be "a special disadvantage which made [the victim] susceptible to exploitation",[64] which is similar to the requirement in some jurisdictions that there be a frailty on the part of the victim, as we will discuss later, this requirement in Australia has proven to be broad and flexible.[65]

In the United States, when faced with "too hard a bargain for a court of conscience to assist",[66] courts are typically willing to "refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result".[67] American courts have generally recognised that there must be "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party".[68] Often, they use the terms "procedural" and "substantive" unconscionability to refer to these requirements.[69] As Susan Landrum notes, "most states' unconscionability doctrines require both procedural unconscionability and substantive unconscionability before a court will refuse to enforce a contract".[70] Procedural unconscionability refers to an inequality of bargaining power that deprives the victim of the opportunity to protect their interests, which could come from the victim's frailty, opaque contract drafting or other sources.[71] By contrast, substantive unconscionability refers to an unfair contract

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60 *Ibid* at [3] (per Mason J).

61 *Ibid* at [6] (per Mason J).

62 *Kakavas v Crown Melbourne Ltd & Ors*, [2013] HCA 25 at [18] [*Kakavas*].

63 *Ibid* at [20].

64 *Ibid* at [131].

65 See generally *Amadio*, *supra* note 59. At one time, the requirement that there be a "special disadvantage" was framed in narrower terms. For example, in one case that was decided before *Amadio*, the High Court used the term "dull-witted and stupid" (*Wilton v Farnworth,* (1948) 76 CLR 646 at 649–50 (HC)).

66 *Campbell Soup Co v Wentz* 172 F 2d 80 at 84 (3d Cir, 1948).

67 Restatement (Second) of Contracts (US) § 208 (1981). See also Knapp, *supra* note 11 at 311; Uniform Commercial Code USC (US) § 2-302.

68 *Williams v Walker-Thomas Furniture Co* 350 F 2d 445 (DC Cir, 1965) [*Williams*].

69 See, *eg*, *Brower v Gateway 2000* 246 AD 2d 246 (NY SC App Div 1st Dept, 1998) [*Gateway 2000*].

70 Landrum, *supra* note 14 at 767. See also Michael Schneidereit, "A Cold Night: Unconscionability as a Defense to Mandatory Arbitration Clauses in Employment Agreements" (2004) 55(4) Hastings LJ 987 at 989.

71 See generally *Williams, supra* note 66. See also Alan Schwartz, "A Reexamination of Nonsubstantive Unconscionability" (1977) 63(6) Va L Rev 1053.

that results from such an inequality. However, in the context of consumer contracts, some courts have held that substantive unconscionability alone is sufficient if the consumer is prevented "from resorting to the courts by the arbitration clause in the first instance, the designation of a financially prohibitive forum effectively bars consumers from this forum as well; [and] consumers are thus left with no forum at all in which to resolve a dispute".[72] While this might make it seem like unconscionability is sometimes more easily available in these circumstances than in other jurisdictions because there is no need to show that there was procedural unconscionability, it is fair to assume that it is often easy to show that there was an inequality of bargaining power between consumers and the commercial parties with whom they enter into contracts, although this is harder to show in jurisdictions that require that the weaker party suffer from an identifiable frailty. Therefore, unconscionability in the United States is, broadly speaking, similar to its counterparts in other jurisdictions, especially those that do not require that the victim suffer from an identifiable frailty.

III. Problems with the Doctrine of Unconscionability

Across each of these jurisdictions – and by extension, across most of the common law world – the doctrine of unconscionability can be deeply problematic, particularly in the context of arbitration agreements that are associated with consumer, employment and 'gig' economy contracts. As we will show, to varying degrees in each jurisdiction, the doctrine is vague and confusing, which has the effect of undermining the predictability of arbitration agreements and ultimately the parties' freedom of contract. These problems could result, without legislative intervention, in the end of arbitration in the context of consumer, employment and 'gig' economy contracts.

Each element of the test for unconscionability has problematic elements, although as we will show, the severity of these problems varies across jurisdictions. We identify some of these problems at the inequality, or procedural unconscionability, and unfairness, or substantive unconscionability, steps that apply in each of the jurisdictions that we examine.

A. *Inequality or Procedural Unconscionability*

In jurisdictions that do not require that the alleged victim suffer from an identifiable frailty, the definition of inequality or procedural unconscionability is far from clear. In Canada, the Supreme Court held that "an inequality of bargaining power exists when one party cannot adequately protect their own interests".[73] Although frailties such as "differences in wealth, knowledge or experience may be relevant [considerations]", the Court held that inequality can be established in any number of ways, including without reference to these frailties or, for that matter, other indicia that it

[72] See generally *Gateway 2000*, *supra* note 69.

[73] *Heller*, *supra* note 1 at [66].

provided.[74] Such a broad definition could lend itself to unduly broad application in the context of consumer, employment and 'gig' economy contracts, which practically always involve one party that is markedly weaker than the other. This is especially true for consumer contracts that are formed with persons from cross-sections of society that include those who cannot always look out for their own interests, and 'gig' economy contracts that are sometimes formed with people that, due to a lack of education or experience, cannot find other employment.

Although the Court's broad and non-exhaustive definition means that there are examples – possibly many examples – of inequality that are not captured in its guidance on this point, the Court did give some clues of what could count as inequality. But even when it did, those clues leave many unanswered questions. For example, the Court wrote that:

> in many cases where inequality of bargaining power has been demonstrated, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both.[75]

While this suggests that a party's inability to understand the meaning and significance of a contract *might* rise to the level of inequality, it does not say whether it will always be true. A party's inability to understand a minor term of a contract, perhaps one that is not material to the dispute at hand, might rise to the level of inequality that could suffice to impugn the entire contract, or it might not. And if that contract contained an arbitration agreement, it is unclear whether that too could be impugned because there was inequality in the contractual relationship, even if that inequality did not stem from the arbitration agreement (which constitutes a separate agreement). To pick another example, the Court held that inequality could exist if "serious consequences would flow [for one party] from not agreeing to a contract".[76] However, we get little guidance from the Court as to how serious the consequences for the victim must be. The Court's example of a "rescue at sea scenario"[77] might be sufficiently egregious, but other situations of necessity are less obvious. Take, for example, a worker who was recently laid off and decides to drive for a ride-share company in order to earn income that would be used to pay for rent, groceries and other essential expenses. Serious consequences would follow from the worker not forming the contract – being without income, and therefore shelter, food and other essentials – but it is unclear whether this would, in and of itself, create a relationship of inequality under the Court's vague definition.

Likewise, in the United States, courts are often left with only vague guidance as to the meaning of procedural unconscionability. Although procedural unconscionability often does not need to be established for some consumer contracts, which eliminates the problem of unpredictability at this step of the test for those contracts, it must generally be established for other consumer contracts as well as other sorts

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[74] *Ibid* at [67].
[75] *Ibid* at [68].
[76] *Ibid* at [69].
[77] *Ibid* at [70].

of contracts, including employment and 'gig' economy contracts.[78] While procedural unconscionability can emerge due to the victim's frailties such as those that have been recognised in other jurisdictions, it can also emerge for a number of other reasons.[79] Much like in Canada, whether procedural unconscionability can be established "in a particular case can only be determined by consideration of all the circumstances surrounding the transaction".[80] Given the open-endedness of this standard, it is possible for the same difficulties that exist in Canada to also exist in the United States.

Moreover, in both Canada and the United States, courts have recognised that inequality could emerge through unclear drafting of written agreements.[81] As with other vague indicia of inequality, only egregious cases will produce obvious outcomes, such as if key obligations are drafted in exceedingly opaque language or if a written agreement contains unintelligible defined terms. The potential for unclear drafting to create inequality does not have clear boundaries. Therefore, it is unclear whether standard terms that are typical in consumer, employment and 'gig' economy contracts would ever create inequality, and if so, under what circumstances. These contracts tend to be drafted by lawyers and presented to lay consumers or workers, and they often contain language that is unfamiliar to lay people, such as "material adverse event" and "default." Would this sort of language be too opaque in some – or even all – circumstances? And if so, when?

Overall, instead of looking for pre-determined and clear indicia of inequality, courts in Canada and the United States must conduct a 'totality of the circumstances' analysis in order to determine whether, in their own views, there was inequality. To conduct this analysis, they can only rely on vague and confusing guidance, which "affords the court too much scope to decide on a subjective basis".[82] As one judge in Singapore wrote, this makes unconscionability "a broad discretionary legal device which permits the court to arrive at any decision which it thinks is subjectively fair in the circumstances".[83] This will inevitably mean that, in all but the most egregious cases of inequality, judges will need to insert their own sense of fairness and justice into the mix in order to decide where to draw the line between inequality and differences in bargaining power that are acceptable.[84]

The meaning of inequality is less amorphous in jurisdictions that require that the victim suffer from an identifiable frailty. In these jurisdictions, the sorts of situations that lead to unclarity and confusion in Canada and the United States do not lead to these problems as frequently because there cannot be inequality unless there is also an identifiable frailty. Of course, there are situations in which someone suffers from a frailty and is faced with a contract that they must either agree to or face serious consequences, which would likely rise to the level of inequality. But the requirement that there be a frailty works as a backstop to ensure that these situations are

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78 See *Gateway 2000*, *supra* note 69.

79 See generally *Williams, supra* note 68.

80 *Ibid*.

81 See generally *Heller*, *supra* note 5; *Gateway 2000*, *supra* note 69.

82 *BOK*, *supra* note 45 at [133].

83 *Ibid* at [148].

84 See generally Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56(4) U Chicago LR 1175.

not too numerous and that they only occur when the weaker party was objectively weak, and not merely weaker relative to the stronger party (as is almost always the case in consumer, employment and 'gig' economy contracts).

That said, the requirement that the victim suffer from an identifiable frailty is clearer in some jurisdictions than it is in others. In England and Singapore, the requirement that the victim be "poor and ignorant"[85] is of relatively narrow application.[86] By contrast, the Australian requirement that the victim suffer from "a special disadvantage which made [the victim] susceptible to exploitation"[87] is susceptible to a more amorphous range of interpretations.[88] Although Australian courts have set some boundaries for this range – for example, the High Court recently held that someone's "pathological interest in gambling"[89] was not a "special disadvantage" – there is still room to guess what will and will not count. Indeed, courts in Singapore have rejected the Australian approach to assessing whether the victim had a frailty because of its potential to "inject unacceptable uncertainty in commercial contracts and in the expectations of men of commerce".[90] Without a closed list of frailties, it could be difficult to know what will count as a sufficient frailty in all but the most egregious cases.

Even when there is a relatively clear frailty requirement, there is often still confusion as to whether independent legal or similar advice could remedy an apparent inequality of bargaining power. While it might be inevitable that relationships of inequality will be created in some, if not most, consumer, employment and 'gig' economy contracts, stronger parties could seek to "take comfort in the finality of their agreements"[91] by arranging for the weaker party to obtain independent advice. They could almost certainly do this in England since an absence of independent advice is a stand-alone element of the test for unconscionability.[92] Although this might be costly, it solves most, if not all, of the problems associated with the doctrine of unconscionability that we identify in this paper by effectively eliminating the possibility that the doctrine can apply. However, in other jurisdictions, an absence of independent advice is not an element of the test. Instead, this consideration plays a role in assessing whether there was a relationship of inequality or procedural unconscionability. The extent to which this is problematic, and whether it is at all, is unclear in the United States and Australia because it is unclear whether

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85 *Cresswell*, supra note 34.

86 For example, in one case, a victim's addiction to heroin was found to not meet this standard (see *Irvani v Irvani* [2000] 1 Lloyd's Rep 412). However, some judges have made relatively modest attempts to give these terms liberal interpretations (see Liew & Yu, *supra* note 58). For example, one judge wrote that someone can be "poor and ignorant" if they are "elderly, illiterate and on a very low income" (*Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221 at 229 (CA)). See also *Radley v Bruno* [2006] EWHC 2888 (Ch).

87 *Kakavas*, *supra* note 62 at [131].

88 There is debate in Singapore as to whether the English approach to frailties is markedly different than the Australian approach. Some judges have alleged that the English caselaw has trended closer to the Australian approach, while at least one scholar has pushed back against this argument (see Enonchong, *supra* note 43).

89 *Kakavas*, *supra* note 62 at [135].

90 *BOK*, *supra* note 45 at [112].

91 *Heller*, *supra* note 1 at [167].

92 See *Cresswell*, *supra* note 34.

independent advice alone is sufficient to remedy an apparent inequality of bargaining power in these jurisdictions. That said, the situation is slightly less ambiguous in Australia because of recent developments in the context of family law, which we will discuss later, that might also extend to commercial contracts and their associated arbitration agreements, but uncertainties remain.[93] By contrast, in Canada and Singapore, courts have clearly acknowledged the possibility that an inequality of bargaining power could co-exist with the victim receiving independent advice. One could interpret the claim by a court in Singapore that a "lack of independent advice would almost always deepen the weakness"[94] to mean that the presence of independent advice is a baseline that does not strengthen or weaken the victim rather than an antidote to inequality. This is made all the more explicit in Canada, where the Supreme Court has held that independent advice does not always effectively remove "the inequality of bargaining power experienced by the weaker party".[95] Given that courts in Singapore and Canada have indicated that independent advice might not have the sort of ameliorative effect that could remedy the problems with the doctrine of unconscionability that we have identified, and given that this issue remains unclear in the United States and, albeit to a lesser extent, in Australia, the doctrine of unconscionability is even more deeply problematic in these jurisdictions than it is in England.

Moreover, in Canada, the relationship between the inequality and unfairness elements of unconscionability can be circular, which makes the test for unconscionability even more confusing. In *Heller*, the Supreme Court held that "it is a matter of common sense that parties do not often enter a substantially improvident bargain when they have equal bargaining power", therefore "proof of a manifestly unfair bargain may support an inference that one party was unable to protect their interests".[96] In essence, the Court held that improvidence is a factor – maybe even a decisive factor – in assessing whether there was inequality between the parties. While there are arguably some indications that there is a relationship between inequality and improvidence in other jurisdictions,[97] the explicit link that the Court has drawn between the two elements of unconscionability appears to be unique in the common law world. This adds confusion to the test for unconscionability because the extent to which this provides a window through which judges can avoid a fulsome

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[93] For example, in *Amadio*, *supra* note 59, the High Court refers to the absence of independent legal advice on the victim's part. However, there is no clear indication, as there is in England, that independent legal advice is sufficient to wipe away the possibility that there was a sufficient degree of inequality. Some interpret *Amadio* to mean that the stronger party must "ensure that the weaker party has formed an independent and informed judgment; this duty may be discharged by allowing the weaker party an opportunity to seek independent legal advice" (IJ Hardingham, "The High Court of Australia and Unconscionable Dealing" (1984) 4(2) Oxford J Leg Stud 275 at 286 [Hardingham]). However, recent trends in the caselaw suggest that independent advice alone might not be sufficient to avoid the application of the doctrine of unconscionability (see, *eg*, *Thorne v Kennedy* (2017) 263 CLR 85 (HC) [*Thorne*]).

[94] *BOK, supra* note 45 at [120].

[95] *Heller*, *supra* note 1 at [83].

[96] *Ibid* at [79].

[97] See *Louth v Diprose* [1992] HCA 61 at [10]: "Her conduct was unconscionable in that it was dishonest and was calculated to induce, and in fact induced, him to enter into a transaction which was improvident and conferred a great benefit upon her."

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assessment of inequality is unclear. One could argue that the Court has invited lower court judges to gloss over the inequality analysis if they find that a bargain was improvident. As we will discuss below, the meaning of improvidence can be unclear, therefore the test for unconscionability is even more confusing in Canada than it is in other jurisdictions.

B. *Improvidence, Unfairness or Substantive Unconscionability*

The second element of unconscionability – which goes by different names in different jurisdictions, including improvidence,[98] unfairness[99] and substantive unconscionability[100] – is also unclear and confusing. Courts have generally only provided vague guidance as to what level of unfairness would satisfy this step of the test. For example, in Canada, the Supreme Court held that "a bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable",[101] which is something that "must be assessed contextually".[102] Although the Court provided some examples of what sort of bargain might rise to the level of improvidence, the Court made it clear that this list is by no means exhaustive "because improvidence can take so many forms, [so] this exercise cannot be reduced to an exact science".[103] Thus, assessing whether a transaction is improvident in Canada is not simply a matter of looking to precedent or examples provided in *Heller* and reasoning by analogy. That sort of argument might be persuasive, but it is far from the only sort of argument that would be plausible given that improvidence is "assessed contextually"[104] on a case-by-case basis using a 'totality of the circumstances' analysis. Much like when Canadian courts assess inequality, this sort of analysis can go in many different directions that vary from judge to judge.[105]

Similar problems exist in other jurisdictions. In the United States, any number of unfair transactions might be deemed to be "unreasonably favorable to the [stronger] party"[106] since, generally speaking, "in determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made".[107] Indeed, Judge Wright, who articulated this test, went so far as to concede that "the test is not simple, nor can it be mechanically applied".[108] In Australia, whether an "unfair or unconscientious advantage is then taken of the opportunity thereby created"[109] is also examined contextually. There are some boundaries that limit the scope of this otherwise broad

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98 See, *eg*, *Heller*, *supra* note 5.
99 See, *eg*, *Harry*, *supra* note 50 at [14].
100 See, *eg*, *Gateway 2000*, *supra* note 69.
101 *Heller*, *supra* note 1 at [74].
102 *Ibid* at [75].
103 *Ibid* at [78].
104 *Ibid* at [75].
105 See Scalia, *supra* note 84.
106 *Williams*, *supra* note 68.
107 *Ibid*.
108 *Ibid*.
109 *Amadio*, *supra* note 59 at [6].

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standard. For example, "transactions conducted in the ordinary and undistinguished course of a lawful business" cannot give rise to unconscionability.[110] However, when a stronger party enters into a transaction with a weaker party and is judged to have taken advantage of that weakness, the answer to whether unconscionability can apply will often vary from judge to judge. Similarly, in the United Kingdom and Singapore, it could be unclear what "considerable undervalue" means in all but the most egregious cases. While a slight amount of disadvantage to the weaker party would almost certainly not rise to this level, judges are left to draw the line between "considerable undervalue" and less serious degrees of undervalue.

C. *Predictability and Freedom of Contract*

The vagueness and confusion regarding the doctrine of unconscionability that exists, to varying degrees, in Canada, Australia, the United Kingdom, the United States and Singapore – caused by uncertainty over the meaning of inequality and unfairness, an unclear role for independent advice, and a circular relationship in Canada between inequality and unfairness – make it difficult to predict how the doctrine will apply. Of course, some situations will be more obvious than others. An arbitration agreement that effectively blocks access to any opportunity for the weaker party to seek the resolution of a dispute such as the one seen in *Heller* – one that is, as Justice Brown wrote in his concurring reasons, "not an agreement *to* arbitrate, but rather *not* to arbitrate"[111] – is not particularly difficult to classify as unconscionable – at least in settings where the judicial alternative is cheaper than arbitration and actually accessible. But it is not hard to imagine many less egregious situations that would not be easy to classify as acceptable or unconscionable prior to them being tested in court. Take, for example, a situation in which a law student who drives part-time for Uber enters into the same standard-form contract with Uber as Heller did. The agreement would be equally improvident, but it is not clear that there would be a sufficient degree of inequality. One could persuasively argue that a law student is perfectly equipped to protect their own interests by understanding the contents of the contract and by making an informed decision as to whether to enter into it. But it could be just as persuasively argued, in jurisdictions that do not require that the weaker party have an identifiable frailty, that the law student was still at a considerable disadvantage relative to Uber's well-resourced team of lawyers. This sort of argument would be especially strong if the law student was desperate for a source of income. To give another example that illustrates how the doctrine of unconscionability as it currently exists undermines predictability, consider an arbitration agreement in an international employment contract which provides that the parties can only seek recourse through arbitration that must be conducted in a third country, but which is not as expensive relative to the employee's income as was seen in *Heller*. In such a situation, there would probably be an inequality of bargaining power, but it is not clear that the arbitration agreement would be improvident. Dispute resolution – be it through arbitration, litigation or other means – is almost never free, but

[110] *Kakavas*, *supra* note 62 at [20].

[111] *Heller*, *supra* note 1 at [102] [emphasis in original].

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without a clear answer from courts as to how much it is reasonable for a claimant to pay, it is difficult to know whether arbitration agreements will be improvident.

This lack of predictability ultimately undermines the parties' freedom of contract. Freedom of contract is perhaps best defined as the position that parties should be free to agree to any contract that they wish, within certain boundaries imposed by law, because "it is in the public interest to accord individuals broad powers to determine their affairs through agreements reached by themselves".[112] Without a high degree of predictability that makes it possible for parties to know with a reasonable degree of certainty that their agreements will be given legal effect, freedom of contract suffers because parties will hesitate to form certain agreements out of fear that they will not be enforced. For example, parties might wish to agree to arbitration, but the stronger party might hesitate to do so because they cannot confidently predict whether an arbitration agreement will be enforced. This undermines their freedom of contract by influencing their contractual behaviour. They might, for example, insist on a higher price in a consumer contract, or a lower wage in an employment or 'gig' economy contract, to compensate for the risk that they are taking on that a dispute will be resolved through litigation rather than international arbitration, to the potential detriment of neutrality, cost-effectiveness, and expeditiousness. Of course, as Justice Binnie of the Supreme Court of Canada wrote, "like any freedom, [freedom of contract] may be abused".[113] It "must be set [against] the value of protecting the weak, the foolish, and the thoughtless from imposition and oppression".[114] Patently unfair agreements, such as the one seen in *Heller*, would be abusive and therefore unconscionable, even under more stringent tests for unconscionability. Indeed, the Ontario Court of Appeal refused to enforce the arbitration agreement in *Heller* after applying the more restrictive four-part test for unconscionability that the Supreme Court of Canada later rejected.[115] That said, in all but the few exceptional cases of abuse, parties should be entitled to expect that their agreements will be given legal effect as a consequence of their freedom of contract.

D. *Arbitration in Consumer, Employment and 'Gig' Economy Contracts and Beyond*

The manner in which the doctrine of unconscionability was applied in *Heller* poses a challenge to the arbitration of disputes arising out of consumer, employment and 'gig' economy contracts, as well as to arbitration's legal framework more generally.

The challenge to arbitration's legal framework lies in the decision's erosion of the competence-competence principle. This internationally recognised principle underpins the important rules that define the relationship between courts and arbitral tribunals. The principle was at issue in *Heller* because a ruling that the arbitration clause is unconscionable is also a ruling that the tribunal lacks competence to hear the dispute.

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[112] Mo Zhang, "Freedom of Contract with Chinese Legal Characteristics: A Closer Look at China's New Contract Law" (2000) 14(2) Temp Intl & Comp LJ 237 at 241.

[113] *Tercon, supra* note 31 at [118].

[114] S M Waddams, "Unconscionability in Contracts" (1976) 39(4) Mod L Rev 369.

[115] See *Heller (ONCA)*, *supra* note 49.

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Although the details vary significantly between jurisdictions, the most arbitration-friendly seats tend to recognise not only positive effects to the principle – *ie*, subject to *post-facto* judicial review, the arbitral tribunal has the power to rule on its own jurisdiction and to do so either as a preliminary matter or in the final award – but also negative effects, which in the service of efficiency discourage, curb, or postpone judicial consideration of arbitral competence. In such jurisdictions, in appropriate cases, courts will refrain from making a ruling on arbitral jurisdiction before the arbitral tribunal has considered and decided the issue.[116] The doctrine of unconscionability as applied directly by the court in *Heller* creates a broad window through which courts may assess arbitral jurisdiction before the arbitral tribunal gets to do so, which inevitably creates opportunities for the delaying tactics that the negative effects of competence-competence are intended to prevent. What is more, applying the *Heller* test requires a factual enquiry going beyond a superficial review of the record by the court, thus greatly increasing the potential for costly duplication in the taking of evidence.[117] Certainly, an exception to the competence-competence principle can be justified in a case where the arbitration clause actually prevents arbitration as well as litigation. Such a case, however, is better viewed as raising a narrow public policy exception tied to access to justice. The judicial application to arbitration agreements of contract doctrines that are both expansive and fact-intensive does not sit well with the broad implementation of competence-competence seen in most of the arbitration-friendly jurisdictions under study.[118]

The expansive doctrine of unconscionability seen in *Heller* is particularly problematic in the context of arbitration agreements in international consumer, employment and 'gig' economy contracts. Without pre-determined criteria for inequality and guidelines for what counts as unfairness, or without the 'cure' of independent advice available in the alternative, arbitration agreements will become a much less attractive option for international vendors and employers. If they do not have confidence in their arbitration agreements, these parties will probably fear that, in the event of a dispute, they will spend time and money on hearings that focus exclusively on the validity of their arbitration agreements, which may well result in those agreements not being enforced. This will have a chilling effect on arbitration agreements not only in the area of adhesion contracts but also in the broader context of negotiated business agreements. This may stop many from doing business at all in

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[116] Each jurisdiction applies its own version of the principle. A widely accepted version among Model Law jurisdictions is that of Singapore, which has courts refer issues of competence to the arbitral tribunal if there is a *prima facie* case that a valid arbitration agreement exists. See, notably, *Malini Ventura* v *Knight Capital Pte Ltd & others* [2015] SGHC 225. The United States has a version of its own whereby the principle is triggered only when the determination of competence can be said "clearly and unmistakably" to have been contractually entrusted to the arbitral tribunal, in which case any form of judicial intervention or review will generally be excluded. The leading case is *First Options of Chicago, Inc* v. *Kaplan* 514 U.S. 938 (1995).

[117] The importance of keeping stay proceedings to a "superficial consideration of the evidentiary record" was recently highlighted again by a (differently constituted) majority of the Supreme Court of Canada in *Peace River Hydro Partners* v *Petrowest Corps* [2022] SCC 41 at [42].

[118] Of the five jurisdictions under study, Australia is the only one that has not yet recognised negative effects to the competence-competence principle. See *Samsung Corporation* v *Duro Felbuera Australia Pty Ltd* [2016] WASC 193; Ozlem Sussler, "The Jurisdiction of the Arbitral Tribunal: A Transnational Analysis of the Negative Effect of Competence" (2009) 6 Macq J Bus L 119 at 140-146.

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jurisdictions with vague and confusing doctrines of unconscionability because they might judge that it simply does not make good business sense to assume, on one hand, the risk of costly and time-consuming litigation over arbitration agreements, and, on the other hand, the risk that dispute resolution will be confined to courts that are perceived to lack expertise, be too costly and perhaps even not neutral (although the latter problem is less likely in sophisticated legal systems such as those of the jurisdictions that we have examined). This is especially significant for jurisdictions with relatively smaller economies, such as Australia, Canada and Singapore, since large multi-national players can often afford to stay away from these jurisdictions without significantly choking their potential for growth.

IV. How Unconscionability Could be Made More Manageable

All that being said, these undesirable outcomes can be avoided not only legislatively but also judicially, by courts taking steps to limit the scope of the doctrine of unconscionability. We propose two options that are open to common-law courts. Either (or both) of these steps would make the doctrine less vague and confusing, and neither of them would be particularly inventive since each has at least some basis in caselaw from some jurisdictions.

A. *Frailties*

One step that can be taken is to follow the lead of jurisdictions, including the United Kingdom, Singapore and to a lesser extent Australia, which require that the victim suffer from an identifiable frailty in order for there to be a relationship of sufficient inequality. Of course, as we noted earlier, requiring that there be an identifiable frailty is not a panacea for the problems with the doctrine of unconscionability if the list of potential frailties is vague and easily expandable, as is the case in Australia. However, by shifting the focus to the victim's frailties, or lack thereof, courts avoid the undesirable situation of focusing instead on the relative inequality between the parties in the abstract, even if one party was by and large capable of protecting their own interests. In doing so, they avoid much of the vagueness and confusion that makes it difficult for parties to predict whether their contracts, including their arbitration agreements, will be enforced.

There is a solid basis in the caselaw from several jurisdictions to support a shift in focus from relative inequality to the victim's frailties. Not only is this focus part of the test for unconscionability in several jurisdictions, but courts in jurisdictions that have later rejected this focus also have an ample body of caselaw to work with. For example, in Canada, prior to the Supreme Court's recent turn toward a focus on relative inequality in *Heller*, lower courts had recognised a number of frailties that could establish that there was a relationship of sufficient inequality. For example, in *Harry v Kreutziger*,[119] Justice McIntyre of the British Columbia Court of Appeal wrote

[119] *Harry*, *supra* note 50.

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that, for unconscionability to apply, "it must be shown … that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker" party.[120] In that case, the weaker party's inequality was established "by education, physical infirmity and economic circumstances".[121] Canadian courts have recognized other frailties, including mental incapacity,[122] illiteracy[123] or language improficiency,[124] intoxication,[125] and even insufficient business experience.[126]

Although the Supreme Court of Canada in *Heller* stated clearly that inequality can be established without a recognised frailty, this does not mean that prior case law is useless. Indeed, the Court wrote that their discussion of inequality (particularly the examples that they provided) was "intended to assist in organizing and understanding prior cases of unconscionability".[127] This is because the Court "[saw] no reason to depart from the approach to unconscionability endorsed in" prior cases.[128] Therefore, even in Canada, it could be argued that courts have at least some flexibility to focus on the alleged victim's frailties, or lack thereof, when they determine whether there was a relationship of inequality.

Courts in the United States arguably have the same sort of flexibility since there is a long history of finding that there is procedural unconscionability in "cases [that] involved parties who in one or more senses were at a bargaining disadvantage in the transactions at issue".[129] American courts have found that there was procedural unconscionability due to several frailties,[130] including a lack of education or economic clout,[131] membership in a minority group that faces discrimination[132] and a lack of proficiency in English.[133] Therefore, even though, much like in Canada, a recognised frailty is not strictly required for there to be a finding of procedural unconscionability, American courts could, if they wish to change their approach, rely on a body of caselaw to help them focus their analyses on frailties rather than relative inequalities.

B. *Independent Advice*

Another way to make the doctrine of unconscionability more manageable would be to make it clear, as is at least arguably the case in England,[134] that there generally

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[120] *Ibid* at [14].
[121] *Ibid* at [15].
[122] See, *eg*, *Marshall, supra* note 50.
[123] See, *eg*, *Taylor, supra* note 50.
[124] See, *eg*, *Royal Bank, supra* note 50.
[125] See, *eg*, *Stubbs, supra* note 50.
[126] See, *eg*, *Stephenson, supra* note 50.
[127] *Heller, supra* note 1 at [72].
[128] *Ibid* at [65].
[129] Knapp, *Unconscionability, supra* note 11 at 312.
[130] See generally *ibid*.
[131] See, *eg*, *Weaver v American Oil Co* 276 NE 2d 144 (Ind, 1972).
[132] See, *eg*, *Kugler v Romain*, 279 A 2d 640 (NJ, 1971).
[133] See, *eg*, *Frostifresh Corp v Reynoso*, 274 NYS 2d 757 (NY Dist Ct, 1966).
[134] Although there is no mention of independent advice as a component of the test for unconscionability in the relatively recent case of *Strydom*, *supra* note 40, older cases have placed emphasis on whether the alleged victim received independent advice (see, *eg*, *Cresswell, supra* note 34).

cannot be a relationship of sufficient inequality if the weaker party received suitable independent advice, especially legal advice. As discussed earlier, this would provide a safety valve for parties who fear that their arbitration agreements (and other contracts) might not be enforced, which would restore a measure of predictability that the doctrine of unconscionability could otherwise take away.

Although it might be hard to argue that courts have a basis to move in this direction in some jurisdictions, a closer look at some bodies of caselaw could offer promising options. Even in Australia and Canada, which are jurisdictions in which courts have not clearly ruled out the possibility that independent advice will always stop the application of the doctrine of unconscionability, courts could find at least some support to move in this direction. In Australia, although there is not the sort of direct support for this position in the caselaw like there is in England as mentioned above, some scholars are of the view that cases such as *Amadio* can be read to mean that the stronger party can avoid the application of the doctrine of unconscionability "by allowing the weaker party an opportunity to seek independent legal advice".[135] Although a recent case from the High Court of Australia "apparently changes"[136] the often-held assumption that independent legal advice can eliminate or significantly reduce the likelihood that the doctrine of unconscionability will apply, this case was decided in the context of the Family Law Act,[137] therefore its broader implications for commercial contracts and their associated arbitration agreements are not obvious. Thus, it is at least arguable that courts could find support in the caselaw, if they look hard enough, for the position that the doctrine of unconscionability cannot apply if the victim received adequate independent advice. In Canada, although the Supreme Court has held in *Heller* that "independent advice is relevant only to the extent that it ameliorates the inequality of bargaining power experienced by the weaker party",[138] prior caselaw, which *Heller* was "intended to assist in organizing and understanding",[139] has supported the position that suitable independent advice always, or almost always, prevents a finding that there was a relationship of inequality.[140] Thus, *Heller* could arguably be read to mean that, while "*pro forma* or ineffective advice may not improve a party's ability to protect their interests",[141] competent and personalised advice will usually remedy any apparent inequalities.

C. *Compatibility with Theoretical Justifications for Unconscionability*

Not only are these steps grounded (at least arguably) in caselaw, but as we will now show, they are consistent with the five leading theoretical justifications for the doctrine of unconscionability. Therefore, if courts decide to take either or both of these steps to make the doctrine of unconscionability more manageable, they will

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[135] Hardingham, *supra* note 93 at 286.

[136] Felicity Maher & Stephen Puttick, "Reconsidering Independent Advice: A Framework for Analysing Two-Party and Three-Party Cases" (2020) 43(1) UNSWLJ 218 at 219.

[137] 1975 (Cth). See *Thorne*, *supra* note 93.

[138] *Heller*, *supra* note 1 at [83].

[139] *Ibid* at [72].

[140] See, *eg*, *Titus*, *supra* note 49.

[141] *Heller*, *supra* note 1 at [83].

not flout the purposes for which the doctrine of unconscionability exists in the first place.

Some, including Richard Epstein, argue that the doctrine of unconscionability is justified because it ensures that contracts formed due to some sort of procedural unfairness, such as duress or mistake, are not enforced. Epstein argued that the doctrine of unconscionability "should not … allow courts to act as roving commissions to set aside those agreements whose substantive terms they find objectionable".[142] Courts should instead use it as a vehicle to "police the process whereby private agreements are formed, and in that connection, only to facilitate the setting aside of agreements that are as a matter of probabilities likely to be vitiated by the classical defenses of duress, fraud, or incompetence".[143] Although this justification might make it seem as though the doctrine of unconscionability is redundant since its functions can be performed through other legal tools, as Stephen Smith explains, "in this view, what makes unconscionability cases special … is that the available evidence regarding the contract's formation supports no more than a suspicion of the relevant procedural defect".[144] In essence, by this view, unconscionability works as a backstop to ensure that inadequate evidentiary records do not prevent relief from being available in situations in which other doctrines ought to be available. Although requiring that there be a recognised frailty might make it harder for the doctrine of unconscionability to serve such a flexible function by limiting its scope of application, it will nevertheless work to ensure procedural fairness because, so long as the weaker party does not have a frailty, they will generally be equipped to protect their own interests. Of course, they will not be able to fully protect their own interests in the cases when other formation defences, such as duress or mistake, might apply. But they should at least be able to protect their own interests to the extent that they can maintain evidence that could support reliance on those defences. For example, a person who is generally able to protect their own interests would probably be expected to retain records and remember names of potential witnesses. Moreover, although the existence of procedural unfairness is still possible if the weaker party received independent legal advice, it is less likely to occur. One role of the lawyer or other provider of independent advice is to ensure that situations that could give rise to other formation defences do not occur, and if they do, to at least preserve evidence and act as a witness if need-be.

Karl Llewellyn articulated what could be called a 'realist' justification for the doctrine of unconscionability. He argued that, one way or another, courts refuse to enforce contracts that are patently unfair. Therefore, the doctrine of unconscionability is justified because it provides a transparent legal avenue for courts to do what they would do anyway. Without it, courts would create "unnecessary confusion and unpredictability" by relying on other doctrines to achieve this end even when they are not well-placed to do so.[145] As others have noted, according to Llewellyn,

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[142] Richard A Epstein, "Unconscionability: A Critical Reappraisal" (1975) 18(2) JL & Econ 293 at 294.

[143] *Ibid* at 295.

[144] Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 348.

[145] Karl N Llewellyn, "The Standardization of Commercial Contracts in English and Continental Law. By O. Prausnitz" (1939) 52(4) Harv L Rev 700 at 703.

this would involve manipulation of those other doctrines[146] through "tortuous use of judicial techniques".[147] Llewellyn's concern is arguably well-founded in light of some case law. For example, in *US v Bethlehem Steel Corp,*[148] Justice Felix Frankfurter of the Supreme Court of the United States wrote that "the courts will not permit themselves to be used as instruments of inequity and injustice", therefore "courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other".[149] In a Canadian case, Justice Davey of the British Columbia Court of Appeal wrote: "I cannot believe that the law is so deficient that it cannot reach and remedy such a gross abuse of overwhelming inequality between the parties."[150] However, the doctrine of unconscionability could serve this sort of role, even if its scope of application is narrower, because it could still apply to egregiously unfair situations in which the victim suffered from a frailty and did not receive independent advice. Moreover, even if it cannot apply but there is an egregiously unfair situation, courts could refuse to enforce contracts in those circumstances for public policy reasons. As we argued, public policy is a tool that allows courts to set aside patently unfair contracts when there is no formation defence available, which means that it functions as a 'catch all'.[151] Justice Brown's concurring reasons in *Heller* serve as a helpful illustration of how this would work; he would have refused to enforce the arbitration agreement for public policy reasons. Resorting to public policy is preferable to resorting to a broader doctrine of unconscionability because it forces courts to regard those cases as exceptional – and to limit the normative reach of their decisions to only situations that are directly comparable – rather than relying on broader versions of the doctrine of unconscionability which can be applied more broadly to less comparable situations.

Others have also argued that the doctrine of unconscionability is justified because it ensures substantive fairness. These arguments have hinged on the idea that substantive fairness is a goal to be pursued in its own right rather than, as Llewellyn argued, a way to avoid problematic judicial manipulation of legal doctrines. For example, James Gordley expressed the simple, and indeed "ancient", "idea that in an exchange the value of what each party gives should be equal to the value of what he receives".[152] Others have expressed this concept in economic terms, such as Arthur Leff who wrote that unconscionability is "one technique for controlling the quality of a transaction when free market control is considered ineffective".[153] However, even a narrower version of unconscionability ensures a degree of substantive fairness. When it does not do so, this is because such substantive unfairness is

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146 See John McCamus, *The Law of Contracts*, 3d ed (Toronto: Irwin Law, 2020) at 480.

147 S M Waddams, "Unconscionability in Canadian Contract Law" (1992) 14(3) Loy LA Intl & Comp LJ 541 at 543.

148 315 US 289 (1942) [*Bethlehem*]. See also Reuben Hasson, "Unconscionability in Contract Law and in the New Sales Act - Confessions of a Doubting Thomas" (1980) 4(4) Can Bus LJ 383.

149 *Bethlehem*, *ibid*.

150 *Morrison*, *supra* note 51 at 716.

151 See Fabien Gélinas & Zackary Goldford, "Rethinking Consideration in Contract Law: Could We Just Do Without It?" (2021) 65(2) Can Bus LJ 219 at 243–245.

152 James Gordley, "Equality in Exchange" (1981) 69(6) Cal L Rev 1587 at 1587.

153 Arthur Allen Leff, "Unconscionability and the Crowd - Consumers and the Common Law Tradition" (1970) 31(3) U Pitt L Rev 349 at 350.

tolerable for some reason, such as generosity or "donative intent",[154] one party's willingness to subject themselves to what looks like an unfair transaction for their own personal reasons (perhaps to build business good will), or because one party (at least somewhat) voluntarily failed to protect their own interests. In these situations, apparent substantive unfairness must be tolerated because the apparently disadvantaged party created such a situation voluntarily in the exercise of their freedom of contract.

Peter Benson's justification for the doctrine of unconscionability is centered around his definition of what a contract is.[155] He argued that a contract is a transfer of ownership. For him, in order for ownership to be transferred, and thus for a contract to be formed, there must be a relationship of bilaterality and mutuality between the parties.[156] Unconscionability puts apparent contracts to the test "to see whether they can reasonably count as between the parties as genuine equivalents or, if not, whether the non-equivalence may be explained on the basis of donative intent or assumption of risk".[157] However, a narrower test for unconscionability would still allow this to happen. If a recognised frailty is required, a contract could only be unconscionable if one party had a characteristic that made them incapable of protecting their own interests. If they lack such a characteristic, they will either protect their own interests or voluntarily opt not to do so. Either way, they will either find themselves with a substantively fair contract or they will 'assume the risks' of their imprudence; in either situation, there would be sufficient bilaterality and mutuality in Benson's sense.[158] Moreover, if a party, even one with a frailty, receives independent advice, they will likewise be better equipped to make the decision to insist that the contract be fair or voluntarily 'assume the risks' that it will be unfair.

Smith explained a fifth leading justification for the doctrine of unconscionability, which he called the "orthodox view". By this view, "*both* the procedural and substantive elements of unconscionability … are important in principle".[159] Indeed, by this view, procedural and substantive unconscionability – otherwise put, inequality and unfairness – "give rise … to a distinct 'combination' defect" which justifies the non-enforcement of contracts that suffer from this defect.[160] However, a narrower test for unconscionability would be, at most, a modest limitation to the doctrine's ability to guard against this 'combination' defect. So long as the victim suffered

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[154] Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Cambridge: Harvard University Press, 2019) at 321 [Benson, *Justice in Transactions*].

[155] Benson has offered a somewhat different justification in his earlier work, which Smith calls the "the 'Hegelian' justification" (see Smith, *supra* note 144 at 357; Peter Benson, *The Theory of Contract Law* (Cambridge: Cambridge University Press, 2001); Alan Brudner, "Reconstructing Contracts" (1993) 43(1) UTLJ). In addition to the apparent retreat from this justification in Benson's later work, we do not discuss this justification because we agree with Smith that "it is not possible—in my view anyway—to present a comprehensible explanation of this justification other than as one element in a long and highly abstract discussion of Hegelian philosophy (and even then, I am not sure the explanation is comprehensible)" (Smith, *supra* note 144 at 357).

[156] Benson, *Justice in Transactions, supra* note 154 at 321.

[157] *Ibid*.

[158] See generally *ibid*.

[159] Smith, *supra* note 144 at 357 [emphasis in original].

[160] *Ibid*.

from a frailty and did not receive independent advice, the 'combination' defect would render the agreement at issue unconscionable. Without a frailty or with the presence of independent advice, it is less likely that there will be severe inequality because the alleged victim would have at least some capacity to protect their own interests. Moreover, the presence of independent advice could both reduce inequalities between the parties and result in an agreement being fairer to the alleged victim. A lawyer or other advisor might, for example, suggest that the victim insist that the terms of the contract be more favourable to them.

Overall, the two ways to narrow the scope of the doctrine of unconscionability that we have proposed – requiring that the victim suffer from an identifiable frailty and clarifying that independent advice works to remedy apparent inequalities – would not frustrate the five leading theoretical justifications for the doctrine. Therefore, it would be hard to claim that there are significant theoretical concerns that would weigh against the practical appeal that comes with moving towards a narrower test for unconscionability.

V. Conclusion

With all of this in mind, as problematic as the doctrine of unconscionability may be, it is not broken beyond repair. Courts could prevent the doctrine from marking the end of arbitration (without a legislative mandate) in the context of consumer, employment and 'gig' economy contracts by adhering, even if selectively, to a line of precedent that requires that the victim suffer from an identifiable frailty and that the victim did not receive independent advice. Courts should do so if they recognise the possible benefits of international arbitration in the context of these types of contracts and if they care about the benefits of contractual predictability in the conduct of business. As we mentioned earlier, parties often prefer to turn to international arbitration because they regard domestic courts are lacking expertise or neutrality,[161] or because courts of law actually do not, in any event, provide the meaningful access to justice in the name of which they close the door to arbitration. But perhaps more importantly, if courts fail to enforce arbitration agreements more often than not, parties might lose confidence in the integrity of their contracts, which will harm the business climate of those jurisdictions.

Even if courts are of the view that arbitration agreements in international consumer, employment and 'gig' economy contracts can be problematic – perhaps because too many look like *Heller*'s – there is still much to be said in favour of moving towards a more restrained application of the doctrine of unconscionability. The evolution of the unconscionability doctrine in this area makes clear that legislators are better placed to draw clear lines of arbitrability in these areas. The vagueness and confusion that we have identified, and the problems related to predictability and freedom of contract that this causes, are not unique to the context of consumer, employment and 'gig' economy contracts. Indeed, the doctrine of unconscionability as it currently exists could extend these problems to a wide variety of contracts,

[161] See Born, *International Commercial Arbitration, supra* note 24 at 73.

particularly adhesion contracts, including those that might be much more desirable to enforce than *Heller*'s arbitration agreement. Overall, when presented with appropriate cases to do so, courts in a variety of common law jurisdictions should reflect on the scope of the doctrine of unconscionability and use the avenues that we have identified to make the doctrine less problematic.