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Delivering on the Binary Divide

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Abstract
Delivery companies have become a focal point of the 'gig economy', with Uber the most often identified entity. This commentary considers what recent cases involving delivery service companies suggest about labour law and the platform economy. Although these cases have focused on employment status, this commentary contends that the continuing lack of concerted engagement with the independent contractor status contributes to this spate of cases.

Cases:
Heller v Uber Technologies Inc. 2020 SCC 16.
Uber Cass Soc, Appeal no. S 19-13.316.
Uber v Aslam [2021] UKSC.

Keywords
Digital economy, employment status, labour law, binary divide, inequality of bargaining power

1. Introduction

Around the world, delivery companies have been defendants in many of the employment status cases since the teen years of the 21st century. These businesses have become touchstones for the 'gig economy'. Uber has become a frequent party to these cases. There have been a number of decisions in which Uber's model of engaging 'independent contractors' has been challenged. 2020-2021 has not only been a time of pandemic, but also further additions to the growing tome that is Uber litigation.

Within the smaller space of the European Developments section, this commentary uses some of the Uber cases as a basis for discussing the platform economy's interaction with labour law. Certainly employment status has been the headline and this is explored in the first two sections below. When looking at the French and UK appellate level decisions, a dominant point is each court's identification of the extent to which Uber exerted control over drivers. The fourth section of

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this article outlines some legislative and trade union responses to the platform economy business model. As will be seen, the success of these steps has been debatable. The aforementioned sections set up the final part of this piece which considers the contract implications of the platform economy. In particular, gig economy contracts are scrutinised for their one-sided nature which call attention to the imbalance of bargaining power between the parties. The aforementioned examples affirm the importance placed on the imbalance of bargaining power in situations where there appears to be an employment-type of relationship. Implicitly, an assessment is being made regarding those who are in a vulnerable position. This assessment then leads to further scrutiny of the contractual term regarding employment status. As it stands, though, we are really no closer to understanding the distinction between employees and independent contractors, which platform companies have astutely exploited. The imbalance of bargaining power is a robust concept and it can be deployed as a basis for argument regarding those who are classified as independent contractors as well as employees.[1]

II. Uber in France

The Court of Cassation (Labour Chamber) ruled on Uber drivers' employment status in a decision released on 4 March 2020. This is one more in a line of decisions that have largely found against Uber on the question of drivers' employment status. These decisions draw attention to how the avoidance of employment regulations by classification of the relationship as one of independent contractors has grounded a business model.[2]

Since signing a partnership registration form with Uber BV, the applicant (Mr. X) had been a driver with Uber since 12 October 2016. He also leased a car from an Uber partner and filed with the Trade Register (*Registre des Métiers*) as an independent contractor (passenger transport by taxi). Uber deactivated his account in April 2017. Mr. X subsequently petitioned the industrial tribunal seeking reclassification of his contractual relationship with Uber as one of an employment contract. The consequence of such a change in status was to permit his claims for retroactive salary and termination payments. The Paris Court of Appeal[3] found in favour of Mr. X, ruling that he held a fictitious status as an independent worker. The Court of Cassation dismissed Uber's appeal, awarding the applicant EUR 3000, as well as his legal costs. Its brief reasoning (presumably because it drew from the Paris Court of Appeal's decision of January 2019)[4] outlined a theme that has become common in decisions regarding the 'digital economy', the economic reality of the relationship between the parties.

The starting point for the case was L.8221-6 of the French Labour Code which presumes that individuals requiring a registration filing are not engaged in an employment contract. This presumption may be displaced where an employment contract is established pursuant to the provisions

1. Cass Soc, 4 mars 2020, Appeal no. S 19-13.316.
2. An elaboration of this business model's characteristics is set out in A. Todolí-Signes, 'The 'gig economy': Employee, self-employed or the need for a special employment regulation?' (2017) 23 *Transfer: European Review of Labour and Research* 193.
3. *Cour d'appel de Paris* – Pole 6, Ch.2, 10 janvier 2019, N°18/08357.
4. The issue before the courts was whether a commercial relationship could be reclassified as a contract of employment due to a legal relationship of subordination with an online platform operating an intermediated business. ('Existe-t'il un lien de subordination de nature à requalifier une relation commerciale en contrat de travail dans le cadre d'une activité d'intermédiation gérée par un opérateur de plateforme en ligne?')

of services under terms and conditions placing the individual in a permanent legal relationship of subordination to the principal. This relationship of subordination permits the employer to take a wide range of actions against the individual, up to and including sanction for breaches of the contract.

For the Court, being an organised service appears to be one of the difficulties for Uber because it indicates subordination. Being a 'partner' with Uber was found to be a misleading term. Partnership obliged Mr. X to: file with the Trade Register as an independent contractor and to follow an organisational structure completely established and monitored by Uber. Moreover, this form of partnership precluded Mr. X from setting his own fares (which were, pursuant to the contract between the parties, determined by Uber's algorithm) or setting his own terms and conditions for conducting the business. And so, the freedoms upon which Uber relied in its argument (to connect to the application and select working hours) did not displace the relationship of subordination because connecting to the application entailed following an operation entirely organised by Uber. Uber's algorithmic determination of a specified route to take for a passenger serves as one example of the degree of subordination in this partnership. The applicant adduced evidence of several occasions in which fares were adjusted due to his taking an 'inefficient route'. Furthermore, the Court interpreted Art. 2.4 of the agreement[5] as being coercive towards drivers, leading them to remain connected in the hope of obtaining a fare. The Court found this to be at variance with the freedoms associated with an independent driver.

The Court of Cassation's decision is not the only instance against Uber in which drivers have been classified as being in an employment and not a commercial relationship. The same argument (that Uber is a technology company and not an employer) was also rejected in the American State of California in 2016.[6] The European Court of Justice dismissed this argument about one year later.[7]

III. Uber in the UK

There are some similarities between the Court of Cassation's ruling and those of other jurisdictions. The UK Supreme Court, in Uber v Aslam,[8] for example, ruled that drivers were in an employment relationship with Uber. Here too, drivers followed an operation created by Uber which undermined the company's contention that the drivers were independent contractors. A unique position in English law is the status of 'worker' which is a middle ground between independent contractor and employee status, pursuant to s.230(3) of the Employment Rights Act 1996. This classification has also been called the 'limb (b) worker'.[9] Unlike other courts, the Supreme Court viewed the matter as one of agency (more precisely the absence of agency). Uber London had a private hire vehicle licence for London. Drivers operated under this licence and not

5. 'Uber also retains the right to deactivate or otherwise restrict access to or the utilisation of the Driver Application or of Uber services by the Client or any of its drivers or for any other reason at Uber's reasonable discretion'.
6. *O'Connor et al v. Uber Technologies, Inc.*, C.A. No. 13-03826-EMC (N.D. Cal. 2016).
7. C-434/15, *Associación Professional* Elite *Taxi v Uber Systems Spain SL* (CJEU, Judgment 20 December 2017).
8. [2021] UKSC 5.
9. 'People who provide their services as part of a profession or business undertaking carried on by some-one else': *Clyde & Co v van Winkelhof* [2014] UKSC 32, [25]. Compatibility between worker status and EU has been discussed in this *Journal* by Elena Gramano, 'On the notion of 'worker' under EU law: new insights' (2021) 12 ELLJ 98.

on their own. As a result, Uber did not act as an agent for drivers. Instead, "Uber London contracts as principal with the passenger to carry out the booking. … Uber would have no means of performing its contractual obligations to passengers, nor of securing compliance with its regulatory obligations as a licensed operator …. It is difficult to see how Uber's business could operate without Uber London entering into contracts with drivers".[10] Even though this could have been the end point for the decision, the Court considered employment status because of "the importance of the wider issue".[11]

Like the Court of Cassation, the Supreme Court relied upon several similar aspects of the relationship between the parties in arriving at its conclusion. These included Uber controlling several factors: the information relating the provision of the service (also identified by the Court of Cassation); setting the route for the service; setting the fare; enforcing its terms and conditions through disciplinary measures such as forcibly logging drivers off. The UK Supreme Court identified remuneration as a matter of "major importance".[12] Uber determined drivers' remuneration, as well as its service fee. Uber and not the driver was paid for the service. These factors (the first and fifth in the UK Supreme Court's opinion) signalled the extent to which Uber interfered with interactions between the service provider and the customer. Moreover, the choice of accepting or declining opportunities (a matter which would have been at the discretion of an independent contractor) is absent, where Uber monitors the acceptance rate and takes coercive steps where a driver refuses a ride 'too many' times.

This decision in *Uber* impacted other cases which were awaiting the Supreme Court's ruling. The Court of Appeal in *Addison Lee v Lange*[13] had granted Addison Lee leave to appeal to the Supreme Court. However, the Court of Appeal set aside this leave because the appeal did not have a real prospect of success as a result of the Uber judgment.

IV. Responses to the Platform Economy

A. Unionisation of Platform Workers

The platform economy has presented an opportunity which some trade unions have taken up. The International Workers' Union of Great Britain[14] has been an impressive example, particularly since it is a newer union. It has been at the forefront of litigating the employment status issue in the gig economy, having brought cases against Uber, Foodora, and Deliveroo.

A case from Ontario, Canada, brought by a trade union, reminds that the platform economy also operates in a familiar manner when it comes to unionisation. In *Canadian Union of PostalWorkers, Applicant v Foodora Inc. d.b.a. Foodora*,[15] Foodora challenged the certification of Foodora couriers by the applicant union. Foodora argued that the couriers were independent contractors, whereas CUPW argued they were dependent contractors.[16] Under Ontario labour law, the

10. *Uber* [56].
11. *Ibid* [57].
12. *Ibid* [94].
13. [2021] EWCA Civ 594.
14. https://iwgb.org.uk.
15. OLRB Case No: 1346-19-R (25 February 2020).
16. This concept dates back to H. W. Arthurs, "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power" (1965) 16 *University of Toronto Law Journal* 89.

definition of an employee includes dependent contractors.[17] The Labour Relations Board found in favour of the couriers and certified them as a bargaining unit.[18] Almost exactly two months after this decision was released (28 February 2020), Foodora reported on 29 April 2020 that it had closed its Canadian operations as of 11 May 2020.[19] The company also initiated bankruptcy proceedings with approximately $4.7 (CAD) million in debts.

There must be some level of scrutiny over Foodora's decision to leave, combined with its unsuccessful challenge against certification. The announcement arose during the lockdown phase of the Covid-19 pandemic when most individuals had been selecting home delivery options in order to adhere to public health guidelines. Additionally, food delivery seemed to generate a competitive amount of income. UberEats, as one example, takes a commission of between 15% and 30% on deliveries.[20] Competitors charge between 10% and 20% commission.[21] UberEats, Door Dash,[22] and Skip the Dishes[23] each engaged in reduced fees for local restaurants that qualify. There seemed to be a momentum in the industry at the time of Foodora's announcement.

B. Legislation and Gig Work

The aforementioned cases are two of the many decisions that have ruled that delivery personnel work in an employment relationship with an employer. It may be questioned, then, what legislative attempts[24] have there been to address this work relationship issue. Largely, any legislative efforts have been discrete. These pinpoint efforts are typical of government actions regarding the platform economy.

France passed Law 2016–1088 (8 August 2016). This law only applies to self-employed platform workers. One of its provisions extends social security coverage against accidents at work to platform workers. It also provides platforms with a voluntary system for paying social security contributions for their workers. Additionally, the regulation supports platform workers in exercising their right to take collective action, to access continuing vocational education and to validate acquired experience. Of interest, an 'electronic platform' is defined in this legislation as a 'company that irrespective of its place of establishment puts into electronic contact a client and a worker, with the purpose of selling or exchanging a good or service'.

17. The term is defined in the *Labour Relations Act*, 1995 S.O. 1995, C.1, Sched.A, s.1(1): "a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor". See also s.9(5) of the *Act* which permits the labour relations board to certify a bargaining unit consisting solely of dependent contractors.
18. *Foodora* [45].
19. https://www.cbc.ca/news/business/foodora-canada-closing-may-1.5546642.
20. https://toronto.ctvnews.ca/the-surprising-amount-food-delivery-apps-take-from-ontario-restaurants-when-you-order-1.4900419.
21. https://www.blogto.com/eat_drink/2020/05/toronto-restaurants-are-planning-boycott-uber-eats/.
22. https://medium.com/m/global-identity?redirectUrl=https%3A%2F%2Fblog.doordash.com%2Faround-the-table-our-commitment-to-local-restaurants-483c6e4352de.
23. https://www.newswire.ca/news-releases/skipthedishes-commits-a-total-of-over-15-million-to-help-canadians-during-covid-19-crisis-885815368.html.
24. There have been steps in the EU to consider legislative action regarding platform work. *Cf* Eurofound, 'Platform economy and precarious work: Mitigating risks' (June 2020).

A bolder step was taken in California. The State of California passed a law in force as of 1 January 2020 that classifies 'gig' workers as employees of the platforms engaging their services 'unless the hiring entity demonstrates that the person is free from the control and direction of the hiring entity in connection with the performance of the work, the person performs work that is outside the usual course of the hiring entity's business, and the person is customarily engaged in an independently established trade, occupation, or business.'[25] This law has been the subject of criticism. A coalition has argued the law ignores the growing trend and choice of Californians to work independently.[26] Business press has contributed its own critique of the outdated nature of the law with the commensurate economic lag it will produce.[27] The law codifies the 'ABC Test'[28] which had been applied by the California Supreme Court in *Dynamex Operations West Inc. v Superior Court of Los Angeles*.[29] While it is early to say what impact the law will have, consider that a Massachusetts law with a similar aim was passed about 15 years earlier.[30]

In the 3 November 2020 American elections, the State of California placed Proposition 22 on the ballot.[31] The Proposition was supported by a majority of those responding to it.[32] A vote for Proposition 22 supported classifying only app-based drivers (such as Uber drivers) as independent contractors and therefore placing them outside of the scope of the aforementioned new law. This was a contested item.[33] Dara Khosrowshahi (Uber CEO) argued that three-quarters of current US drivers would be lost if they were classified as employees.[34] Uber, Lyft and similar companies launched a campaign of support for the Proposition, amounting to over USD 188 million in contributions.[35] Opposition to Proposition 22 came in at just under USD 16 million.[36] Amongst other points, Proposition 22 guaranteed '120 percent

25. Legislative Counsel's Digest for St.2019 c.296, *An act to amend Section 3351 of, and to add Section 2750.3 to, the Labor Code, and to amend Sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment, and making an appropriation therefor*.
26. See I'm Independent Coalition: https://imindependent.co/about/.
27. See for example, Matt Cooke, 'California's Gig Worker Law . . . Is Going to Fail' *Forbes* (30 September 2019) https://www.forbes.com/sites/mattspoke/2019/09/30/californias-gig-worker-law–is-going-to-fail/
28. 'Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.'
29. (2018) 4 Cal.5th 903.
30. This legislation (Chapter 193 of the Acts of 2004 Amendments to Massachusetts Independent Contractor Law, M.G.L. c. 149 sec. 148 2004/2) dealt with construction workers who were improperly classified as independent contractors.
31. California Secretary of State, 'Official Voter Information Guide – Proposition 22' https://voterguide.sos.ca.gov/propositions/22/. The text of Proposition 22 can be found at https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop22.pdf.
32. 9,958,425 (58.6%) for the Proposition; 7,027,820 (41.4%) against: State of California, 'Statement of Vote: General Election November 3, 2020' https://elections.cdn.sos.ca.gov/sov/2020-general/sov/complete-sov.pdf.
33. There may be no better measure of a matter's attention than the creation of a Wikipedia page: https://en.wikipedia.org/wiki/2020_California_Proposition_22.
34. Dara Khosrowshahi, 'The High Cost of Making Drivers Employees' *Uber Newsroom* (5 October 2020) https://www.uber.com/newsroom/economic-impact/.
35. Sara Ashley O'Brien, 'The $185 million campaign to keep Uber and Lyft drivers as contractors in California' *CNN Business* (8 October 2020) https://www.cnn.com/2020/10/08/tech/proposition-22-california/index.html.
36. George Skelton, 'It's no wonder hundreds of millions have been spent on Prop. 22. A lot is at stake.' *Los Angeles Times* (16 October 2020) https://www.latimes.com/california/story/2020-10-16/skelton-proposition-22-uber-lyft-independent-contractors.

of minimum wage earnings with no maximum.'[37] The calculation of working time would not include any wait periods between journeys (a period that court rulings have included in working time). The 120% figure has been challenged as amounting to USD 5.64 per hour.[38]

The matter continues. As set out in Proposition 22, the law can be amended by a seven-eighths majority;[39] a threshold that drew dismay from Professor William Gould IV.[40] The Service Employees International Union (SEIU) is amongst a group of litigants seeking to overturn Proposition 22. Prior to the case working its way through the courts, the group unsuccessfully tried to obtain a declaration that Proposition 22 is invalid,[41] but has refiled its request for an emergency order.[42] While still an important labour issue, this matter seems to have extended into how influential these types of ballots (and their associated campaigns) may be in setting law.[43]

V. The blurred binary divide

Engagement with the digital economy has drawn attention to the vulnerability of gig workers as individuals who are improperly classified by platform companies.[44] Categorisation of these individuals as being in an employment relationship with the platform company is only one part of the discussion. The binary divide between an employment relationship and the status of an independent contractor is one area in need of further consideration. The usual distinction has been unhelpfully circular: an employee is a person in an employment relationship; and an independent contractor is not. The platform companies' business models have aptly exploited the absence of more detailed engagement with the binary divide where the independent contractor status has been left relatively untouched. Consequently, gig workers have the employment relationship argument as the only means by which to attempt to recalibrate the situation.

The imbalance of bargaining power has grounded the basis for courts to look beyond the written contract and to determine the 'economic reality' where there is an employment relationship. In comparison, an independent contractor does not necessarily possess greater access to assistance, let alone knowledge, experience, or awareness than these employees when it comes to contracts. The

37. Proposition 22, Art.1(f)
38. Ken Jacobs and Michael Reich, 'The Effects of Proposition 22 on Driver Earnings: Response to a Lyft-Funded Report by Dr. Christopher Thornberg' Research Brief. Center for Labor Research and Education and Center on Wage and Employment Dynamics, University of California, Berkeley (26 August 2020) https://laborcenter.berkeley.edu/the-effects-of-proposition-22-on-driver-earnings-response-to-a-lyft-funded-report-by-dr-christopher-thornberg/.
39. Proposition 22, Art.9.
40. '"I've never seen anything like that. The companies are trying to divest the Legislature of any authority," said William Gould, a labor lawyer and professor emeritus at Stanford University who studies the gig economy': Suhauna Hussain, 'What Prop.22's defeat would mean for Uber and Lyft – and drivers' *Los Angeles Times* (19 October 2020) https://www.latimes.com/business/technology/story/2020-10-19/prop-22-explained.
41. https://news.bloomberglaw.com/daily-labor-report/california-ballot-measure-survives-legal-attack-by-uber-drivers.
42. https://news.bloomberglaw.com/daily-labor-report/uber-lyft-drivers-revive-proposition-22-challenge-in-california.
43. 'If giant corporations are allowed to bankroll ballot initiatives that circumvent the California Constitution, it sets a precedent that any right can be rolled back just by spending enough money. The court must strike down Proposition 22 because it is unconstitutional': Sara Ashley O'Brien, 'Drivers and labor union seek to overturn new California Prop 22 law' *CNN Business* (12 January 2021) https://www.cnn.com/2021/01/12/tech/california-prop-22-lawsuit/index.html.
44. See, for example, Valerio De Stefano, 'The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy' (2016) 37 *Comparative Labor Law and Policy Journal* 471; Jeremias Prassl, *Humans as a Service* (Oxford: Oxford University Press, 2018).

basis for different treatment of the small business or sole trader and the individual worker remains unclear. If subordination forms a foundation for analysis, as it did in the Court of Cassation's and the UK Supreme Court's[45] decisions, how can we differentiate, in law, the forms of redress available to the Uber driver from those for an independent contractor? Although there is a remarkable gap between these two identities when it comes to the law, both may be viewed as vulnerable to larger entities. The difficulty laid out here should not be viewed as a gateway to seeing all small commercial entities.[46] Rather, the digital economy challenges the distinction that, to this point, has been underdetermined, and the time has come to engage with it.

Consider the following passage from the decision of the English Court of Appeal in *Addison Lee*: "From an economic standpoint, all this obliges the drivers to log on and drive, so as to cover fixed hire costs. It is perhaps, the central point, because it is the mechanism by which the Respondent can be close to certain that its drivers will log on. Addison Lee needs them to log on; and they need to do so in order to pay the overheads and then start earning money."[47] This quotation, drawn from the decision of the Employment Tribunal at first instance, speaks of drivers' contracts as obliging performance because the economics of the contract require it. This is more than incentivising because drivers must meet the costs of carrying out this work, let alone earn income to support themselves or a family.

The binary divide, then, entails engaging with employment and (commercial) contract law. With the latter, there must be a greater awareness of the force of the boilerplate or standard form contract. The binary divide has relied upon the distinction between commercial and employment contracts,[48] and in particular the notion of freedom to contract associated with independent contractor status. The simplicity of the binary divide, then, contributes to the relative underdetermination of the independent contractor status. Beyond the consumer-business distinction which has been the subject of much regulation in the European Union, (commercial) contract law should be recognising the independent contractor or small enterprise as a category of party to a contract that warrants attention. Freedom of contract (as an informing notion) should be more critically assessed when it comes to independent contractors. The imbalance of bargaining power between employees and employers can also be found where an independent contractor contracts with a large corporate entity. There remains much value in Baroness Hale's statement that subordination "is not a freestanding and universal characteristic of being a worker."[49] An independent contractor's consent to contractual terms which were drafted by a large corporate entity leaves the assenting party open to the drafting party's advantage. As it currently stands, the binary divide leaves only one route (classification as an employment relationship) for redress. There is a need for further development of forms of redress on the contract law side for those in the situation of independent contractors.

Lord Leggatt in *Uber* wrote of the drivers' rights originating in legislation, not contract. The contention here is that in a situation where there is an imbalance of bargaining power, there should also be avenues for redress that are part of contract law (if they are not stated in the contract itself).[50] Karl Llewellyn, the American scholar, put the matter this way:

45. See *Uber* [72]ff.
46. Lord Leggatt noted this in *Uber* [68].
47. *Addison Lee* [8].
48. There is a further difference to be made with regards to Lord Clarke's distinction between commercial and employment contracts in *Autoclenz v Belcher* [2011] UKSC 41, [21].
49. *Bates von Winkelhof* [39].
50. It is not simply about protecting "vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing)", as Lord Leggatt wrote in *Uber* [71].

> There has been an arm's-length deal, with dickered terms. There has been accompanying that basic deal another which … at least involves a plain expression of confidence, asked and accepted, with a corresponding limit on the powers granted: the boiler-plate is assented to en bloc, ''unsight, unseen,'' on the implicit assumption and to the full extent that (1) it does not alter or impair the fair meaning of the dickered terms when read alone, and (2) that its terms are neither in the particular nor in the net manifestly unreasonable and unfair.[51]

With platform contracts, an important question remains to be answered: whether signees understand the obligations they are entering into? The UK Supreme Court in Uber also raised this point.[52] It is not simply a matter of working when you like (as the advertising suggests). The language of the contract may not clearly enunciate for a non-legal reader the extent of the obligations being entered into; such as the associated costs arising from the contract (purchase-hire agreements for vehicles, their maintenance, insurance). Arguably, it is only when a matter arises that the signee confronts the 'unfair' reality. This is the difference between ''real consent'' and ''hypothetical consent'', where the latter is buoyed by heuristic bias towards the notion of freedom to contract.[53] The next decision inches towards one way in which contract law may offer some form of redress.

The Canadian Supreme Court, in *Heller v Uber Technologies Inc.*,[54] was not tasked with resolving the employment status issue. Instead, Uber brought a preliminary motion arguing that any dispute between itself and a driver must be raised by way of arbitration in Amsterdam and not in a Canadian court. The contract between Uber and Ontario-based drivers contained a dispute resolution clause that also pertained to jurisdiction.[55] It applied Dutch Law and required mediation and arbitration to be held in Amsterdam, subject to International Commercial Court (ICC) Rules.[56] Heller (the lead litigant) earned in the range of CAD 400 and CAD 600 per week based upon weekly work hours totalling between 40 to 50. Annually, Heller grossed between CAD 20,800 to CAD 31,200. The ICC process would have taken up a substantial portion of Heller's gross income. This situation evidently raised questions regarding access to justice[57] and fairness.

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51. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown & Co., 1960), 371.
52. *Uber* [77].
53. Margaret Jane Radin, ''Reconsidering Boilerplate: Confronting Normative and Democratic Degradation'' (2012) 40 *Capital University Law Review* 617.
54. 2020 SCC 16.
55. For discussion purposes, it is useful to reproduce the relevant portion of the clause from *Heller* [11] here: ''Governing Law; Arbitration. Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws. … Any dispute, conflict or controversy howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules (''ICC Mediation Rules''). If such dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce (''ICC Arbitration Rules''). … The dispute shall be resolved by one (1) arbitrator appointed in accordance with ICC Rules. The place of arbitration shall be Amsterdam, The Netherlands. …'
56. The ICC's rules for mediation and arbitration, respectively: https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/; https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/.
57. See elaboration in *Heller* [29] ff.

Heller prompted important questions stemming from the *Uber* litigation: if we accept Uber's argument that these drivers are their own commercial entities, is this an instance of a larger entity taking advantage of a smaller, more vulnerable one? If Uber drivers are self-employed, are there private law tools available which provide a means to contest such a clause? The majority decision of the Canadian Supreme Court deployed the common law contract concept of unconscionability to find that the clause was of no effect.[58] Unfortunately, the decision suggested that the Court ruled in this way based upon a presumption of an employment relationship between the parties; again a matter that was not decided upon in this case. As well, Mister Justice Brown's minority opinion offers a sounder basis for the decision in *Heller*. Unlike the majority, he found that the dispute resolution clause should be set aside based upon public policy, as opposed to unconscionability.

Heller raises the possibility of contract law arguments in a situation where advantage has been taken by one party over another. Vitiating factors, such as unconscionability or public policy, have not been frequently deployed in this situation. In part, this is attributable to the fact that these arguments have more often been used to nullify the existence of a contract. Presently, *Heller* is an attempt to sever a specific clause from the contract, while preserving the contractual relationship. The possible development of these contract law arguments is one way in which the independent contractor status may be provided with some means of addressing an imbalance of bargaining power.

Still, there are issues with *Heller*. For example, it affirms the treatment of all commercial entities as a homogenous group. Protection for Uber drivers could only, it would seem, come in the form of classifying them as employees so that they fall under employment regulation. Conversely, classification as self-employed (a commercial entity in some form) precluded legal protections from this dispute resolution clause.[59] And yet, the 'unconscionability' of such a clause does not differ for a person who is an employee or self-employed. The lopsided nature of the contract in favour of Uber must be a point that factors into a court's determination. Whether it is the dispute resolution clause from *Heller* or the economic burden taken on by drivers in *Addison Lee*, the 'reality' of the contractual relationship should also entail recognition of the advantage (and the extent of that advantage) taken by the party drafting the contract.

VI. Conclusion

The challenges put forward by platform economy companies require much discussion. They also demand that steps be taken. Employment status has been a preoccupation, but one which is

58. As a private common law matter, there is much to be said about the Supreme Court of Canada's decision in *Heller* with regards to its reformulation and application of unconscionability. For private law commentary see John D. McCamus, *The Law of Contracts* 3rd edn (Toronto: Irwin Law, 2020), 468-475 (reformulation) and 481-493 (application to terms instead of rescission of contract).

59. The consumer/business classification evidences another binary divide. See the Canadian Supreme Court decision in *Telus Communications Ltd. v Wellman* 2019 SCC 19 where consumer and business customers of Telus sued the mobile phone provider for rounding up their billing (i.e. a call lasting for one minute and fifteen seconds would be rounded up to two minutes for billing purposes). The standard terms and conditions of the service contracts included an arbitration clause stipulating that all claims arising out of or in relation to the contract, apart from the collection of accounts, must be determined through mediation and, failing that, arbitration. The Supreme Court ruled that this clause did not apply to consumers (pursuant to legislation (*Consumer Protection Act*)), but that it did apply to all business customers, regardless of their size.

narrowly construed. The benchmark of vulnerability is not exclusive to the employment relationship (broadly understood). Independent contractors also call for protections against exploitation due to their vulnerability. The absence of measures taken regarding the independent contractor side of the binary divide contributes to the persistence of the employment status issue.

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