COUNTY COURT

P317.026539-190917
380

P E L C I V I L A T I O N C O U R T

Judgment of April 23, 2020

Composition : Mme G I R O U D W A LT H E R , President
M. Oulevey and Ms. Cherpillod, Judges
Greffier : M. Valentino

* * * * *

Art. 8 CC; 18 para. 1, 337, 341 CO; 18 ff CL; 5 para. 2, 7, 15 ff, 121 para. 3, 177 LDIP; 12, 354 CPC

Ruling on the appeal filed by **C.____________**the defendant, against the judgment rendered on April 29, 2019 by the Tribunal de prud'hommes de l'arrondissement de Lausanne in the cause dividing the appellant from **G.__________**...], plaintiff, the Civil Court of Appeal of the Cantonal Court considers ...:

E n f a i t :

A. By judgment of April 29, 2019, communicated for notification to the parties on May 2, 2019, the Tribunal de prud'hommes de l'arrondissement de Lausanne (hereafter: the court or the former

judges) said that the application was admissible (I), admitted the application in part (II), said that C.__ was the debtor of G.______________________and owed him payment of the amounts of 6,798 Fr. 80 gross, 4,500 net and 6,694 Fr. 10 gross, with interest at 5% per annum from December 30, 2016 (III), dismissed the parties from all other submissions (IV), rendered judgment without costs (V), said that C.________owed G.____________________an indemnity of 4,500 fr. as costs (VI), fixed the ex officio indemnity of Mr. Rémy Wyler, lawyer, at 7,854 fr. 90, including VAT (VII), and said that the beneficiary of legal aid was, to the extent of Art. 123 CPC, bound to reimburse the indemnity of the counsel ex officio charged to the State (VIII).

As a matter of law, the first judges essentially considered that the agreement concluded by the parties on February 25, 2015 met all the characteristic elements of an employment contract. They retained on this point, by examining the practice of the application O.______used by the defendant's drivers, and therefore also by the plaintiff, that the defendant did not limit itself to putting its platform (O.__________________) at the disposal of self-employed drivers; on the contrary, it offered its customers passenger transport services through drivers who were directly subordinate to it. To this was added the fact that the plaintiff had undertaken to provide a personal activity as a driver over the long term and that he derived income from this activity which, for him, was of a principal nature. The court went on to note that since the contractual relationship between the parties was to be characterized as a contract of employment, the parties were not free to arbitrate disputes between them as they saw fit. Thus, since the plaintiff's claims - and then his immediate dismissal - arose from mandatory or semi- mandatory provisions that he could not renounce during the term of the contract and during the month following its termination, in accordance with art. 341 al. 1 CO (Code of Obligations of March 30, 1911; SR 220), the arbitration clause in favor of an arbitral tribunal located in Amsterdam contained in the contract of February 25, 2015, which was otherwise to be regarded as unusual, was not valid and could not be applied to the dispute within the meaning of art. 61 CPC (Code of Civil Procedure of December 19, 2008; SR 272), so that it could not be set up against the plaintiff. Furthermore, the court held that the choice of court contained in the said agreement was without effect, since it improperly deprived the plaintiff, the weaker party to the contract of employment, of the protection afforded to him by art. 34 CPC. In view of these elements, the nature of the contractual relationship between the parties, the fact that the defendant had a branch office in Lausanne, within the meaning of art. 12 CPC, and the fact that it was accepted that the plaintiff had habitually exercised his professional activity in the Lausanne district, it had to be concluded that the conditions of art. 34 para. 1 CPC were met and that the court had jurisdiction to hear the claim. Likewise, the choice of law in favour of Dutch law contained in the disputed clause was also not opposable to the plaintiff, pursuant to art. 17 LDIP (Federal Law on Private International Law of 18 December 1987; RS 291). The claim therefore appeared admissible.

Finally, the first judges considered that it was hastily that the defendant had retained - on the basis of five negative reports of clients taken care of by the plaintiff and which had reached him on his Internet site - that the relations of trust with the latter were definitively broken and that, at the very least, she should have, in case of doubt, notified her employee in writing and invited him to modify his behaviour, before putting an abrupt end to the contractual relations. Therefore, the just grounds invoked in support of the immediate termination on December 30, 2016 were not sufficient in this respect, so that the defendant had to compensate the plaintiff for the entire prejudice resulting for the plaintiff from his unjustified dismissal.

B. **a)** By deed of June 3, 2019, C.__appealed against this judgment, concluding mainly that G.'s claim.____s claim of June 14, 2017 be declared inadmissible, the aforementioned judgment set aside and G._____referred back to proceed by way of arbitration and, in the alternative, to the annulment of the aforementioned judgment and that G._____ _________is dismissed from all the conclusions reached in his request of June 14, 2017, the latter being in any event ordered to pay all legal costs and expenses. In support of her appeal, the appellant produced a list of exhibits.

b) By letter of August 6, 2019, the respondent requested the benefit of legal aid for the appeal proceedings as of June 5, 2019, indicating that "in view of the nature and scope of the case, it appeared necessary and relevant to begin drafting the response immediately, with a view to possibly setting a deadline (editor's note: for response on appeal) before the summer holidays".

By order of September 12, 2019, the Associate Judge of the Civil Court of Appeal (hereinafter: the Associate Judge) granted G._the benefit of legal aid for the appeal proceedings with effect from June 5, 2019, including exemption from advances and legal costs and the assistance of an ex officio counsel in the person of Rémy Wyler.

By reply dated October 10, 2019, G._________concluded, with costs, that the appeal was dismissed.

c) On November 21, 2019, i.e. within the time limit set for this purpose, C.____filed a reply, in which she confirmed the conclusions reached in her appeal.

d) On December 12, 2019, i.e., within the extended time limit set for that purpose, G. __________filed a rejoinder, in which he confirmed the conclusions reached in his response. In support of his writing, the respondent produced two exhibits.

e) December 27, 2019, C.___________spontaneously determined himself on this writing (supplication).

f) By notice of January 17, 2020, the delegated judge informed the parties that the case was reserved for trial, that there would be no further exchange of written submissions and that no new facts or evidence would be considered.

C. The Court of Civil Appeal retains the following relevant facts, based on the judgment supplemented by the exhibits in the file :

1. **a)** C._is a limited liability company (*Besloten Vennootschap*) under Dutch law with its registered office in [...]. It has been registered with the Amsterdam Chamber of Commerce since 3 February [...]. The stated corporate purpose is in particular the conclusion of agreements concerning on-demand transport services via mobile devices and web applications.

C.________is a subsidiary of [...], which is its sole shareholder. C.___________C. has no formal employees, its two directors being [...] and [...], with individual signatures.

b) ...] also owns as sole shareholder a subsidiary, [...] (hereinafter: [...]). It has been registered in the Commercial Register of the Canton of Zurich since [...]. Until November 27, 2017, its purpose is to support the transport services offered by the [...] Group's mobile communication and online applications and to provide all services directly or indirectly related to these services until November 27, 2017.

c) The denomination "O.________"refers to the system in place, of which the defendant was a part, whereby individuals order, through the software application of the same name, a vehicle with a driver for a private race.

2. O.___has made itself known through posters and advertisements, particularly in newspapers; it has also disseminated advertising on the Internet and social networks. Its advertising was aimed at aspiring drivers; it offered the prospect of easy money and high earnings, sometimes as high as 4'000 fr. per month. In January 2018, the O._______addressed the candidates in the following terms:

"Earn money

Do you have a car? Make the most of it! The city is full of energy and, with O.__________________it's easy to make money quickly. […]

Drive whenever you want

Looking for something outside of nine to five? Become self-employed with O.___________________________ and enjoy the freedom and flexibility to drive at your own pace. […]

No office, no boss

[…] O.________gives you the freedom to get behind the wheel when it suits you best. »

On another page of the O.______________s website, as of January 18, 2018 : the following was stated

"Choose your own schedule to balance your private and professional life.

Earn more money at every turn

[…]. »

The defendant, through its representative [...] - who started at O.___________in April 2016 and is General Counsel for O. Group's employment law business.__________Group's employment law affairs for Europe, the Middle East and Africa since August 2017 - explained that "apart from providing services to drivers through enforcement", she had "no connection with them", that O.'s role was "not related to the drivers", that O.'s role in the enforcement of the law was "not related to the drivers", and that the defendant's role was "not related to the drivers themselves".________s role was "that of a support company" for [...]'s operations in Switzerland and that the activities on behalf of the latter were carried out mainly by employees of another company, O._________________and that the activities on behalf of the latter were essentially carried out by employees of another company, O., belonging to the same group, and that in the event of a question, the driver could have contacted O.____or the defendant, "one being the interface the other". He added

O. ________ take any driver as long as he meets the conditions set by the law [and that] there is no limit on the number of employees.

3. came to Switzerland in March 2014 to join his family, after having completed higher education in economics and worked as a senior manager in a state-owned company in Bulgaria. At that time he did not speak French and did not have a job. In July 2014 he was employed as a diver in a restaurant. Dissatisfied with this job, he looked for another job and became interested in O.___________________________He was recommended by his friend [...], who was himself a driver for O.______________________and [...] self-employed.

4. **a)** As of February 10, 2015, the applicant has visited the O.______________________________. He filled out a form and indicated his interest in becoming a driver. He also created an account in his name in the application [...]. The applicant then received a message offering several dates to attend an information session.

b) The information sessions of O._______s information sessions were held in Geneva and Lausanne, in the Flon district. At this location, they were led by [...], an employee in charge of operations within the company [...], in the presence of about ten candidate drivers,

professional or not.

During this presentation, the operation of the application and the revenues that could be collected by the drivers were essentially discussed. At the end of these sessions, contracts were distributed for signature to the candidates present, so that they could access the application. [...] a

explained that it was a "commercial contract of adhesion drawn up by the defendant", that "there is no reason to negotiate it" and that "for the drivers, it was therefore take it or leave it". Because the session was short, some did not have time to read and understand the contract in detail. Candidates were given the opportunity to ask questions.

O.________ did not conduct personal job interviews with registrants. Instead, candidates were required to provide documentation to demonstrate to O.____________________ that they met the legal requirements to be able to drive, mainly an identity document, a driver's license and an extract from the criminal record, which had to be submitted annually, failing which they were disconnected from the application.

c) The applicant attended an information session on February 25, 2015, in Lausanne.

At the end of this session, a standardized contract, entirely pre-formulated and drafted in French, was first submitted to him (the content of which is reproduced below; cf. *infra* let. C/4d). As the plaintiff did not speak the language, he requested to be able to take the contract home with him in order to read and study it; this was refused.

A contract in English, a language that the applicant understood better than French, was then given to him for signature. While the other applicants were asking questions, the applicant went through this document. He found that it contained "rather special" clauses, but he did not understand them because of their meaning, not because of language problems.

According to the plaintiff's statements, he was served, at one point, that once he had read the contract and explanations had been provided by O.'s representatives, he had been served with the contract._____ during the session, it was up to him either to sign this document or to leave. The plaintiff thus signed the contract drafted in French, without having understood its clauses and without having been able to ensure that this document had the same content as the contract in English which he had read and of which no copy was left with him at the end of the session. The plaintiff stated that he was not aware at the time of signing that the arbitration clause could deprive him of the right to bring a dispute before the ordinary courts. The plaintiff initialled the odd pages of the French-language contract and dated and signed the last page (page 12), on the line
"The Driver". For the defendant, [...] dated and signed on line *"C.*__________________________».

The applicant stated that at the time the contract was signed, its intention was to transport people using the O application.______________________________ its principal activity. He also noted that since he was going to be unemployed as of April 2015, he attached more importance to the contractual clauses relating to remuneration and the automobile, which he owed to the company.

to the other clauses. It was only later, when he returned home, that he understood that the contract contained an arbitration clause for arbitration in the Netherlands.

d) The contract signed by the parties on February 25, 2015 - which the plaintiff has declared to allege in its entirety - corresponds to the one that the defendant submitted at the time to all the drivers [...] (on the difference between the drivers [...] and the drivers [...], cf. *infra* let. C/5b below). Entitled "Driver Service Contract" (hereinafter: the Contract), it has the following wording:

Contrat de Service de conducteur

Les conditions générales établies dans les présentes (le « Contrat ») constituent un accord juridique entre vous, un fournisseur indépendant de services de transport P2P (le « conducteur ») et C. (« » ou la « Société »). À l'exécution du présent Contrat, vous et la Société serez liés par les conditions générales établies dans les présentes.

ATTENDU QUE :

L'activité de C. consiste à proposer des demandes d'acte de transport à des conducteurs utilisant l'application mobile d' O. (les « Clients »). Par le biais de sa licence d'application mobile (le « Logiciel »), C. fournit une plateforme à ses Clients afin qu'ils puissent se connecter avec des Fournisseurs de transport indépendants.

C. ne fournit pas de services de transport et n'est pas transporteur. En fait, la Société ne possède pas, ni ne loue ou n'exploite aucun véhicule. Les activités de la Société se limitent à fournir à des conducteurs un accès, par le biais de sa licence avec O. , au service de demandes d'actes de transport fourni par le Logiciel, pour lequel la Société perçoit une rémunération (le « Service »).

Vous êtes un conducteur offrant des services de transport P2P, que vous êtes autorisé à fournir dans le ou les état(s) où vous agissez. Tel qu'utilisé dans les présentes, « Vous » inclut vos employés, sous-traitants, agents et représentants, qui seront tous liés par les conditions du présent Contrat.

Vous êtes le propriétaire ou le locataire, ou êtes autrement en possession de véhicules à moteur appropriés pour la réalisation des services de transport envisagés par le présent Contrat, lesdits véhicules étant conformes à toutes les lois nationales, d'État et locales applicables.

Vous souhaitez conclure le présent Contrat en tant que conducteur aux fins de recevoir le Service de la part de la Société.

En considération des déclarations ci-dessus et des engagements mutuels établis ci-dessous, et moyennant toute autre contrepartie valable, la Société et vous (collectivement, les « Parties ») convenez de ce qui suit :

CONDITIONS

Accord de Service

Sous réserve des conditions générales contenues dans les présentes, le présent Contrat vous donnera le droit d'accepter des requêtes afin de réaliser des services de transport sur demande (les « Demandes ») que vous recevrez via le Logiciel et pour lesquelles vous payerez des Frais de services (décrits plus en détail ci-dessous). Chaque Demande que vous accepterez constituera un engagement contractuel séparé.

La Société vous fournira le Service pendant les périodes où vous choisirez de vous rendre disponible pour recevoir les Demandes. Vous n'aurez aucune obligation d'utiliser le Service à un moment

G.

particulier ou pour une durée particulière. Vous aurez toute latitude pour déterminer quand vous serez disponible pour recevoir les Demandes. Cependant, si vous acceptez d'être disponible pour recevoir les Demandes, vous serez obligé de vous conformer aux conditions du présent Contrat.

Vous serez autorisé à accepter, à rejeter et à sélectionner les Demandes reçues via le Service. Vous n'aurez aucune obligation envers la Société concernant l'acceptation des Demandes. Cependant, à la suite de l'acceptation d'une Demande, vous devrez satisfaire ladite Demande conformément aux spécifications du Client. Le manquement à fournir les services promis lors de l'acceptation d'une Demande constituera une violation substantielle du présent Contrat et pourra vous exposer à des dommages.

Aucun élément du présent Contrat ne saurait être interprété comme la garantie que vous recevrez un nombre particulier de Demandes pendant une période de temps donnée.

Réalisation des Services de transport

Vous acceptez de réaliser pleinement toutes les Demandes acceptées conformément aux paramètres de la tâche et autres spécifications établis par le Client. La pleine réalisation d'une Demande inclut généralement, sans toutefois s'y limiter :

i. la notification au Client de l'arrivée d' O. par le biais de l'application mobile;

ii. attendre au moins 10 minutes la venue du client au point de ramassage convenu ;

iii. le transport en toute sécurité, direct et sans interruption du Client jusqu'à la destination spécifiée, selon les instructions du Client ; et

iv. la présentation en temps voulu de toute la documentation nécessaire requise par la Société.

Le non-respect du présent paragraphe constituera une violation substantielle du présent Contrat.

Vous comprenez que pour des raisons de responsabilité, les Clients pourront interdire le transport de personnes autres qu'eux-mêmes pendant la réalisation d'une Demande. Si vous acceptez une Demande soumise à une telle interdiction, vous acceptez de ne permettre qu'au Client ainsi qu' à toute personne qu'il aura lui-même autorisée ,de pénétrer dans votre véhicule pendant la réalisation de la Demande. Une restriction de passager imposée par un Client ne se limitera qu'à une Demande et ne s'appliquera que pendant la réalisation de ladite Demande. Cette disposition ne limitera en aucun cas votre droit à réaliser des services de transport pour d'autres clients ou à transporter des passagers dans votre ou vos véhicule(s) à tout autre moment.

Vous comprendrez que pour des raisons de responsabilité, tous les Clients seront transportés directement à la destination spécifiée, sans interruption ou arrêt non autorisé.

La Société n'aura pas le droit de vous demander d'afficher le nom, le logo ou les couleurs de C. sur votre ou vos véhicule(s) ni de demander que votre ou vos chauffeur(s) ne porte(nt) un uniforme ou tout autre vêtement arborant le nom, le logo et les couleurs de C .

La Société n'aura pas le droit de vous imposer, et ne contrôlera pas la manière ni ne recommandera la méthode que vous devrez utiliser pour réaliser les Demandes acceptées, sous réserve des conditions du présent Contrat. Vous serez seul responsable de déterminer la manière la plus efficace, la plus rentable et la plus sûre de réaliser les services concernant chaque Demande, sous réserve des conditions du présent Contrat et des spécifications applicables du Client. Les Parties reconnaissent que les dispositions du présent Contrat qui accordent un certain pouvoir à la Société ont été insérées uniquement afin de parvenir à garantir leur conformité avec les lois et les règles nationales, ou locales, et les interprétations de celles-ci.

Vous déclarez que vous êtes un entrepreneur indépendant dont l'activité est de fournir les services de transport décrits dans le présent Contrat et déclarez, en outre, qu'à la date de signature du présent Contrat, vous possédez un permis de conduire valide ainsi que l'ensemble des licences, permis et autres prérequis officiels, nécessaires à la réalisation des services de transport P2P, tels que requis par les états et/ou les localités dans lesquels vous agissez. Afin de respecter toutes les exigences légales, vous devez fournir des copies de l'ensemble desdits permis, licences et autres prérequis officiels avant la date de signature du présent Contrat. Par la suite, vous devrez soumettre à la Société des copies en cours de validité desdits permis, licences, etc., lors de leur renouvellement. Afin de s'assurer que l'ensemble desdits permis et licences demeurent valides, la Société sera autorisée, sur demande, à réexaminer lesdits permis et licences, le cas échéant. Le manquement à conserver la validité des licences, permis et autres prérequis officiels en vigueur, ou le non-respect de toute autre disposition du présent paragraphe, constituera une violation substantielle du présent Contrat. Dans l'hypothèse où vous utiliseriez des sous-traitants pour réaliser l'un des services prévus par le présent Contrat, vous comprenez et garantissez par les présentes que vous n'utiliserez que des sous-traitants qui se conforment à toutes les exigences qui vous sont applicables, telles que décrites dans le présent Contrat.

En signant le présent Contrat, vous certifiez que le personnel et l'équipement que vous utilisez pour réaliser les services conformément au présent Contrat respectent toutes les normes et qualifications industrielles et réglementaires. En outre, vous certifiez que tout employé, agent ou sous-traitant que vous nommez pour réaliser des services de transport en vertu du présent Contrat possédera les licences et permis nécessaires qui sont exigés de vous en vertu du présent Contrat, et aura satisfait à toutes les autres conditions préalables pour réaliser lesdits services exigées par les états et/ou les localités dans lesquels le service de transport est réalisé. Vous acceptez en outre que tous les sous-traitants aient l'obligation contractuelle de produire une preuve d'assurance et de respecter les exigences de notification qui vous sont applicables, tel que cela est établi ci-dessous.

Les Parties reconnaissent que vous et la Société êtes, ou pouvez être, engagés dans des contrats similaires avec d'autres. Rien dans le présent Contrat ne saurait empêcher la Société de faire affaire avec d'autres conducteurs, ni ne saurait vous empêcher de conclure des contrats similaires au présent Contrat avec d'autres fournisseurs de demandes d'acte de transport. La Société n'a ni ne se réserve le droit de restreindre votre capacité à réaliser d'autres services de transport pour une société, une entreprise ou un particulier, ou à entreprendre d'autres tâches ou activités, quelles qu'elles soient. Cependant, pendant le temps où vous êtes activement enregistré dans le Logiciel, vous ne pourrez réaliser des services de transport que pour satisfaire les Demandes que vous aurez reçues via le Logiciel. De plus, pendant le temps où vous êtes activement enregistré dans le Logiciel, vous n'afficherez pas sur votre véhicule d'insigne amovible fourni par des fournisseurs de services de transport tiers, ni par des fournisseurs de demandes d'actes de transport ou autres. Vous comprenez que, pendant la durée du présent Contrat, vous ne pourrez utiliser votre relation avec la Société (ou les informations acquises auprès d'elle) pour détourner ou essayer de détourner des affaires de la Société au profit d'une société qui fournit des demandes d'actes de transport en concurrence avec la Société ou O.

Vous convenez d'agir avec loyauté et diligence, et de consacrer vos efforts, vos compétences et vos capacités à la réalisation des paramètres de la tâche et des spécifications du Client relativement à toute Demande que vous aurez acceptée.

Équipement du Fournisseur de transport

Vous acceptez de conserver un véhicule qui soit un modèle approuvé par la Société. Les modèles de véhicule n'auront pas plus de dix (10) ans, et seront en bon état de marche. Avant la signature du présent Contrat, vous fournirez à la Société une description de chaque véhicule et une copie de l'immatriculation de chaque véhicule que vous avez l'intention d'utiliser pour fournir le service au titre du présent Contrat. Vous acceptez de notifier la Société de tout changement dans votre flotte en soumettant à la Société une description mise à jour et l'immatriculation de tout véhicule non signalé précédemment servant à réaliser les services en vertu du présent Contrat. L'objectif de la présente disposition est de permettre à la Société de déterminer si votre équipement se conforme aux normes du secteur. Toute fausse déclaration intentionnelle concernant la nature ou l'état de votre équipement sera considérée comme une violation substantielle du présent Contrat.

Conformément aux exigences légales, aux paramètres de la Demande, aux spécifications du Client, et/ou aux autres éléments stipulés dans le présent Contrat exclusivement, vous dirigerez tous les aspects de l'utilisation de l'équipement impliqué dans la réalisation du présent Contrat, et exercerez votre discrétion et votre jugement en tant qu'entreprise indépendante pour déterminer les moyens et les méthodes de ladite réalisation en vertu du présent Contrat.

À moins que cela ne soit spécifiquement établi dans le présent Contrat, vous avez l'entière responsabilité des frais et dépenses liés à votre personnel et à votre équipement intervenant dans la réalisation des services en vertu du présent Contrat, y compris, mais sans s'y limiter, les coûts de carburant, les taxes sur le carburant, les salaires, les taxes sur l'emploi, la taxe d'accise, les permis de tous types, les taxes sur le revenu brut, la taxe routière, les frais et taxes sur l'utilisation de l'équipement, les licences, la couverture d'assurance et toute autre taxe, amende ou dépense déterminée ou imposée à l'équipement ou à vous-même par une autorité d'État, locale ou nationale suite à une action effectuée par vous ou par vos employés, agents ou sous-traitants dans le cadre de la réalisation du présent Contrat.

Vous n'êtes pas tenu d'acheter ou de louer des produits, équipement ou services de la Société comme condition au présent Contrat.

Frais de service

En échange de l'acceptation et de la pleine réalisation d'une Demande, vous recevrez les Frais de service convenus au titre de la réalisation de ladite Demande. À moins que cela ne soit autrement négocié au moment où vous recevez la Demande, les Parties conviennent que vous recevrez les Frais de service au taux convenu pour chaque Demande réalisée qui sera établi dans la Grille tarifaire des frais de service. Vous reconnaissez que la Grille tarifaire des frais de service vous a été fournie avant la signature du présent Contrat. La Grille tarifaire des frais de service sera disponible sur demande. Avant tout changement effectif des taux établis dans la Grille tarifaire des frais de service, la Société vous adressera la notification dudit changement par courrier électronique, sur votre application mobile ou par tout autre moyen écrit.

Indépendamment des Frais de service convenus, vous aurez toujours le droit de refuser toute Demande et ce sans pénalité.

De la même manière, vous et la Société aurez toujours le droit de négocier des Frais de service différents des frais convenus. Les Frais de service convenus ont pour seul objectif de représenter des frais par défaut dans le cas où aucune des parties ne négocierait un montant différent.

Vous reconnaissez qu'aucun pourboire ne sera versé concernant les services de transport que vous fournissez conformément à une Demande reçue.

La Société vous versera électroniquement les Frais de service en conformité avec les pratiques de paiement de la Société relatives aux conducteurs, conformément à la Grille tarifaire des frais de service.

Dans le cas où le Client annulerait une Demande après votre arrivée au point de ramassage désigné ou n'arriverait pas après que vous ayez attendu au moins 10 minutes, la Société accepte de vous verser des frais d'annulation. Le montant des frais d'annulation sera spécifié dans la Grille tarifaire des frais de service.

Frais de C.

En échange de votre accès et de votre utilisation du Logiciel et du Service, y compris le droit de recevoir les Demandes, vous acceptez de payer à la Société un droit pour chaque Demande acceptée tel qu'indiqué dans la Grille tarifaire des frais de service.

Cadre qualité du Fournisseur de transport

À des fins d'assurance qualité, la Société a accès au système de classement par étoiles d' O. conçu pour déterminer le niveau de service fourni par les conducteurs, ayant conclu un contrat avec la Société, sur la base des commentaires de retour du Client. Dans un sens, le classement par étoiles est similaire au classement de ou de , puisqu'il est basé sur l'analyse en continu du nombre cumulé d'étoiles attribué par les Clients. La Société utilise le système de classement pour déterminer les meilleurs conducteurs, disponibles lorsqu'elle transmet les Demandes. Les conducteurs dont les résultats sont faibles pourront voir leur droit d'accepter des Demandes limité.

Assurance

Assurance automobile. En tant que condition expresse pour réaliser des affaires avec la Société, et à vos frais exclusifs, vous acceptez de maintenir en vigueur, pendant toute la durée du présent Contrat, une assurance automobile de responsabilité civile correspondant aux types et aux montants spécifiés dans les présentes pour chaque véhicule utilisé pour réaliser les services en vertu du présent Contrat. Vous reconnaissez qu'il est de votre responsabilité, avant que vous ne commenciez votre activité de service de transport P2P que, A) vous informiez votre assureur du fait que vous allez fournir des services de transport P2P, et que B) vous vous assuriez que votre police d'assurance couvre le fait que vous allez fournir un service de transport P2P. Si vous avez des questions ou des doutes au sujet de la portée ou de l'applicabilité de votre couverture d'assurance, il est de votre responsabilité et non pas celle de la Société de trouver les réponses pertinentes à ce sujet, la Société n'ayant aucune responsabilité à cet égard. Vous reconnaissez que le manquement à souscrire ou à conserver une couverture d'assurance satisfaisante constituera une violation substantielle du présent Contrat qui entraînera immédiatement sa suspension ainsi que la perte de votre droit à recevoir des Demandes en vertu du présent Contrat.

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i. Spécifications concernant la couverture. Pour réaliser les services en vertu du présent Contrat, vous devez conserver une assurance automobile dont la couverture correspond à la couverture minimale requise par la loi nationale, d'État ou locale.

ii. Notification de couverture. Vous acceptez de fournir la preuve d'une telle couverture d'assurance en adressant à la Société, avant que votre équipement ne réalise des services en vertu du présent Contrat, les certificats d'assurance en cours. Afin d'assurer la sécurité du public, vous acceptez en outre de fournir des certificats mis à jour à chaque fois que vous souscrivez, renouvelez ou modifiez votre couverture d'assurance. Par ailleurs, vous devez fournir à la Société une notification écrite au moins trente (30) jours avant d'annuler toute police d'assurance requise par la Société. La Société ne dispose d'aucun droit lui permettant de contrôler votre choix ou le fait que vous bénéficiez d'une police d'assurance.

Personnel du conducteur

Vous fournirez à votre entière discrétion et à vos propres frais le personnel requis ou occasionnel pour la réalisation des Services prévus par le présent Contrat. Vous serez seul responsable de la direction et du contrôle de vos employés, agents et sous-traitants, le cas échéant, qui réalisent les tâches conformément au présent Contrat, ce qui inclut leur sélection, leur recrutement, leur licenciement, leur supervision, l'attribution des tâches et leur direction, l'établissement des salaires, des horaires et des conditions de travail, et le traitement des griefs. Vous déterminerez la méthode, les moyens et la manière de réaliser le travail de vos employés, agents et sous-traitants.

Vous assumez l'entière responsabilité du paiement de tous les salaires, avantages et dépenses de vos employés, agents ou sous-traitants, le cas échéant, et des retenues fiscales, de l'assurance chômage et des contributions de sécurité sociale d'État et nationales, pour votre compte et pour le compte de toutes les personnes que vous employez dans le cadre de la réalisation des services en vertu du présent Contrat, et il vous incombera de respecter et de remplir les exigences de toutes les réglementations imposées par la loi aujourd'hui ou à l'avenir. La Société ne sera pas responsable des salaires, des avantages ou des dépenses dus à vos employés, agents ou sous-traitants ni des retenues fiscales, contributions de sécurité sociale, cotisations de chômage ou autres impôts sur les salaires de vos employés, agents ou sous-traitants.

La Société n'aura ni n'exercera aucune autorité disciplinaire ou de contrôle sur vous, vos employés, agents ou sous-traitants. Elle n'aura pas non plus le pouvoir de superviser ou de diriger vos employés, agents ou sous-traitants dans le cadre de la réalisation de leur travail pour la Société, et n'aura aucune autorité et aucun droit lui permettant de sélectionner, d'approuver, d'embaucher, de licencier ou de sanctionner l'un de vos employés, agents ou sous-traitants. Vos employés, agents ou sous-traitants ne pourront PAS avoir accès au Service sans avoir préalablement conclu un contrat écrit avec C .

La Société n'est pas autorisée à effectuer des retenues fiscales nationales ou d'État sur le revenu, ou au titre de la sécurité sociale, de l'assurance chômage ou d'autres taxes locales, d'État ou nationales pour votre compte ou pour le compte de vos employés, agents ou sous-traitants. Dans la mesure où un tribunal ayant autorité et compétence le prescrit, la Société se conformera aux dispositions de toute ordonnance de saisie, telle que la loi le requiert. La Société se conformera à toutes les exigences de la loi locale, d'État ou nationale pour déclarer les paiements que la Société fait aux [illegible]

locale, d'État ou nationale pour déclarer les paiements que la Société fait aux entrepreneurs indépendants. Vous serez averti de toute déclaration réalisée par la Société concernant vos services dans la mesure requise par la loi applicable.

Impôts

Vous vous engagez à respecter l'ensemble de vos obligations en vertu des lois fiscales et de sécurité sociale applicables à cet accord. Vous acceptez d'indemniser la Société de tous passifs d'impôts, droits, prélèvements, revendications et sanctions qui peuvent vous être imposées ou imposées à la Société à la suite de votre manquement à vos obligations fiscales. En particulier, mais sans s'y limiter ; taxes ou droits, salaires et autres droits ou retenues (incluant sans toutefois s'y limiter l'impôt sur le salaire, les primes d'assurance sociale, les primes d'assurance des employés) qui se posent dans le cas où la relation décrite dans le présent Accord, contrairement à l'intention et la signification des parties, serait tenu pour un contrat de travail entre la Société et vous, par l'autorité de sécurité financière ou sociale néerlandais ou l'autorité de sécurité financière ou sociale de tout autre pays.

Tests de dépistage de consommation de médicaments et d'alcool prescrits par la loi

Vous acceptez de vous conformer à toutes les lois nationales, d'État et locales réglementant l'usage de médicaments et d'alcool ainsi que les tests de dépistage. Le non-respect desdites exigences constituera une violation substantielle du présent Contrat. Vous reconnaissez que le personnel qui est testé positif aux médicaments et/ou à l'alcool ne pourra pas, par la suite, utiliser d'équipement en vertu du présent Contrat jusqu'à ce qu'il satisfasse à toutes les exigences des lois nationales, d'État et locales.

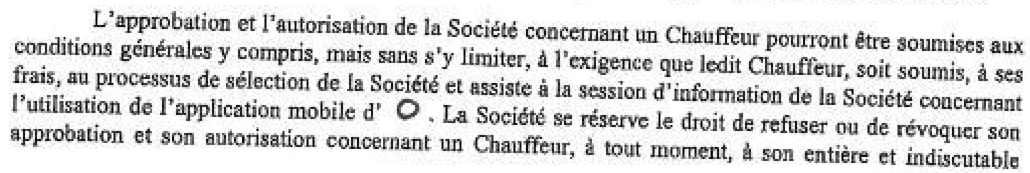
Équipement de la Société/Identifiant de chauffeur

Au moment de la signature du présent Contrat, et sous réserve des conditions générales établies dans les présentes, la Société vous accordera le droit d'utiliser un téléphone mobile « smartphone » fournit par la Société, qui est et demeurera la propriété de la Société (l'« Appareil »).

La Société livrera l'Appareil en bon état de fonctionnement au Fournisseur de transport. L'Appareil disposera du Logiciel chargé. La Société assurera l'entretien normal de l'Appareil ; cependant, ledit entretien n'inclura pas les réparations et les services requis à la suite d'un dommage (y compris, mais sans s'y limiter, l'infiltration d'eau) sur l'Appareil, qu'il soit causé par un accident, une négligence, une mauvaise utilisation ou une violation du présent Contrat. Toutes les réparations et tous les services requis à la suite d'un accident, d'une négligence, d'une mauvaise utilisation ou d'une violation du présent Contrat seront à la seule charge du conducteur, et seront réalisés dans un centre de service désigné par écrit par la Société comme centre de service dûment autorisé. Vous assumez également tous les risques de perte ou de dommage à l'Appareil, y compris, mais sans s'y limiter, la perte ou les dommage causés par le feu, par un vol, par un choc, par l'eau, que la perte ou le dommage soit imputable ou non à la négligence du conducteur.

La Société délivrera également un identifiant et un mot de passe (chacun étant un « Identifiant de chauffeur ») au Fournisseur de transport pour vous permettre et permettre à votre personnel d'accéder au Service. Vous assurerez la sécurité et la confidentialité de chaque Identifiant de chauffeur. La Société aura le droit, à tout moment et à son entière discrétion, de vous interdire ou de restreindre votre accès au Service ou celui de l'un quelconque des membres de votre ...

quelconque des membres de votre personnel, pour quelque raison que ce soit.



L'approbation et l'autorisation de la Société concernant un Chauffeur pourront être soumises aux conditions générales y compris, mais sans s'y limiter, à l'exigence que ledit Chauffeur, soit soumis, à ses frais, au processus de sélection de la Société et assiste à la session d'information de la Société concernant l'utilisation de l'application mobile d' O . La Société se réserve le droit de refuser ou de révoquer son approbation et son autorisation concernant un Chauffeur, à tout moment, à son entière et indiscutable

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discrétion. Lors de la résiliation du présent Contrat, que ce soit par défaut ou autrement, l'Appareil, dont vous reconnaissez qu'il est et demeure à tout moment la propriété de la Société, sera restitué à la Société.

Droits de propriété intellectuelle

Les Parties comprennent que pour réaliser les services prévus par le présent Contrat, il pourrait être nécessaire pour les Parties d'échanger certaines informations confidentielles et exclusives concernant leurs opérations, leurs Clients et d'autres détails sensibles que les Parties considèrent confidentiels. Les informations confidentielles (les « Informations confidentielles ») incluent, notamment, ce qui suit :

i. Informations de la Société. (1) le Service, et les méthodes qui y sont liées, les processus et la technologie ; (2) le prix, les méthodes de fixation des prix et les pratiques de facturation ; (3) le marketing et les plans financiers ; (4) les lettres, les notes de service, les contrats et autres documents internes ; et (5) les informations financières ou autres concernant la Société et ses Clients qui n'ont pas été divulguées au public.

ii. Informations du conducteur. (1) les informations concernant vos clients ; (2) vos prix, méthodes de fixation des prix et vos pratiques de facturation ; (3) votre adresse et vos personnes-ressources ; (4) vos propositions et offres commerciales ainsi que l'ensemble des lettres, notes de service, contrats et autres documents internes confidentiels qui y sont associés ; et (5) les informations financières vous concernant qui n'ont pas été divulguées au public.

Sauf en vertu de l'ordonnance d'une autorité gouvernementale ayant juridiction, en cas de réception de la demande écrite d'un Client ou si l'autre partie y consent par écrit, la Société et vous-même acceptez que les informations confidentielles confiées par l'autre partie ou ses Clients dans le cadre de la réalisation des services en vertu du présent Contrat ne soient pas divulguées à des tiers ou utilisées pour votre propre bénéfice ou le bénéfice d'une tierce partie.

Le présent Contrat n'est pas un contrat de vente et ne vous confère pas de droits de propriété afférents ou liés au Service ou au Logiciel, ou un droit de propriété intellectuelle détenu ou accordé sous licence par la Société. Le nom de la Société, le logo de la Société et les noms de produit associés au Service et au Logiciel sont des marques de commerce de la Société ou de tierces parties, et aucun droit ou licence d'utilisation n'est accordé.

Indemnisation

En concluant le présent Contrat, vous acceptez de défendre, d'indemniser, de protéger et de mettre hors de cause la Société, ses titulaires de licence et ses sociétés affiliées, société mère, dirigeants, directeurs, membres, employés, avocats et agents, en cas de réclamation, de demande, de dommage, de

procès, de perte, de responsabilité, de dépenses (y compris les frais et honoraires d'avocats), et de causes d'action découlant directement ou indirectement de ou en lien avec (a) vos actions (ou omissions) découlant de la réalisation des services en vertu du présent Contrat, y compris les préjudices corporels ou le décès d'une personne (y compris vous et/ou vos employés) ; (b) la responsabilité engagée au titre d'une infraction civile et/ou pénale (par ex., agression, batterie, fraude) ; (c) toute responsabilité découlant de votre non-respect des conditions du présent Contrat, y compris eu égard au paiement des salaires, des avantages sociaux ou des dépenses dus à vos employés, agents ou sous-traitants ; et (d) votre utilisation (ou votre mauvaise utilisation) du Logiciel ou du Service.

Réclamations en matière de dommage ou de préjudice

Vous serez responsable envers le Client pour toute réclamation en cas de dommage et/ou de préjudice subi par un Client alors que vous le transportiez. Vous acceptez de notifier la Société de tout dommage ou préjudice dès que possible après que le dommage ou le préjudice se sera produit. Vous reconnaissez que l'assurance peut ne pas couvrir le dommage ou le préjudice subi ou que la couverture peut ne pas garantir l'intégralité du dommage ou du préjudice subi.

Vous acceptez de coopérer pleinement avec le Client et/ou la Société pour résoudre les demandes en matière de préjudice ou de dommage aussi rapidement que possible.

Vous acceptez le fait que, dans le cas où la Société serait responsable envers un Client d'un préjudice ou d'un dommage causé par vous, la Société ait le droit de recouvrer le montant réclamé auprès de vous. De la même manière, si la Société choisit volontairement de payer un montant dû à un Client pour un dommage ou un préjudice causé au Client par vous ou pour lequel vous êtes responsable, la Société disposera du même droit que le Client de recouvrer le montant engagé auprès de vous (c.-à-d. que la Société se subrogera au Client).

À moins qu'elle ne soit résolue de manière informelle ou par un tribunal d'instance, toute réclamation pour dommage ou préjudice vous opposant à la Société (y compris les réclamations où la Société « se subroge » à un tiers) sera résolue conformément à la disposition relative à l'arbitrage figurant ci-dessous.

Relation entre les Parties

Le présent Contrat est établi entre deux sociétés égales et indépendantes qui sont détenues et exploitées séparément. Par le présent Contrat, les Parties entendent créer une relation entre entrepreneurs souverains et indépendants et non une relation d'employeur à employé. Une Partie ne saurait être considérée comme l'employé, l'agent, le coentrepreneur ou le partenaire de l'autre, pour quelque motif que ce soit.

En tant qu'entrepreneur indépendant, vous reconnaissez que vous n'êtes pas autorisé à percevoir des indemnités de chômage au terme de la relation entre les Parties.

Résiliation du Contrat

Le présent Contrat demeurera en vigueur jusqu'à ce qu'il soit résilié comme suit :

i. A tout moment sur consentement mutuel écrit des Parties aux présentes.

ii. Si l'une des parties viole de manière substantielle le Contrat, moyennant notification écrite de sept (7) jours adressée à la partie défaillante, ladite notification spécifiant la violation invoquée.

iii. Par l'une des parties sans motif moyennant un préavis écrit de trente (30) jours adressé à l'autre partie, le préavis de trente (30) jours prenant effet à la date d'envoi.

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iv. Le Contrat sera automatiquement résilié en cas d'inactivité de plus de 90 jours, la date de résiliation étant alors fixée au 90ème jour suivant la date de la dernière Demande acceptée et accomplie par vous.

Les actes ou occurrences suivantes constitueront une violation substantielle du présent Contrat :

i. Votre manquement à conserver une couverture d'assurance en vigueur représentant les montants et les types requis dans les présentes.

ii. Le manquement par la Société à vous remettre tous les Frais de service dus dans un délai de 30 jours à compter de la date à laquelle le montant devient exigible.

iii. Votre refus de rembourser un Client ou la Société concernant tout dommage ou préjudice que vous avez causé.

iv. Le refus par la Société de vous fournir la documentation raisonnablement demandée par vous en lien avec une réclamation pour dommage ou préjudice en vertu du présent Contrat.

v. Votre refus d'accomplir une Demande après l'avoir acceptée sans que le Client ou la Société y ait renoncé.

vi. Le manquement par l'une des parties à conserver toutes les licences et tous les permis requis par la loi et/ou par le présent Contrat.

vii. L'assignation par vous d'une tâche à un employé, à un agent ou à un sous-traitant qui ne possède pas les licences, la couverture d'assurance ou les permis requis de vous au titre du présent Contrat, ou permettant à n'importe qui d'accéder au Logiciel ou au Service sans que la Société ait donné son autorisation préalable écrite à ladite personne d'accéder au Logiciel ou au Service.

viii. Une violation majeure du code de la route donnant lieu, par exemple, à une citation à comparaître pour conduite dangereuse pendant le transport d'un Client.

ix. Le retrait de votre permis et/ou de vos pleins droits de conducteur automobile, ou votre utilisation d'un chauffeur qui ne possède pas un permis en bonne et due forme et qui n'est pas approuvé par la Société pour réaliser la tâche proposée par le biais du Service

x. Une fausse déclaration intentionnelle faite par vous, vos employés, vos agents ou vos sous-traitants à un Client ou à la Société, y compris le fait d'effectuer intentionnellement un détour pour parvenir à la destination spécifiée par le Client.

xi. La violation par l'une des parties de la disposition relative aux droits de propriété intellectuelle du présent Contrat.

xii. La plainte documentée d'un Client selon laquelle vous et/ou votre employé ou sous-traitant avez adopté une conduite qu'une personne raisonnable jugerait physiquement menaçante, hautement offensante ou harcelante.

Loi applicable et juridiction

À l'exception de ce qui est établi autrement dans le présent Contrat, le présent Contrat sera exclusivement régi et interprété conformément aux lois des Pays-Bas, à l'exception de leurs règles relatives aux conflits de lois. La Convention de Vienne sur les contrats de vente internationale de marchandises de 1980 (CVIM) ne s'appliquera pas. Tout conflit, différend ou litige découlant pour quelque motif que ce soit ou plus généralement liés au présent Contrat, y compris, notamment, ceux qui sont liés à sa validité, à sa structure ou à son applicabilité, seront d'abord obligatoirement soumis à une procédure de règlement amiable en vertu des Règles relatives au règlement amiable des litiges de la Chambre de commerce internationale (Règles ADR de la CCI). Si ledit litige n'est pas réglé dans un délai de 60 jours après qu'une demande de règlement amiable aura été soumise en vertu desdites Règles ADR de la CCI, ledit litige sera exclusivement et définitivement résolu par arbitrage en vertu des Règles d'arbitrage de la Chambre de commerce internationale (Règles d'arbitrage de la CCI). Les dispositions d'urgence des Règles d'arbitrage de la CCI sont exclues. Le litige sera résolu par un arbitre nommé conformément aux Règles de la CCI. Le lieu d'arbitrage sera Amsterdam, aux Pays-Bas. La langue de l'arbitrage sera l'anglais.

Notification

La Société pourra vous avertir au moyen d'une notification générale par le biais du Logiciel, d'un courrier électronique envoyé à votre adresse électronique enregistrée sur votre compte par la Société, ou par communication écrite envoyée par courrier recommandé avec accusé de réception à l'adresse principale de votre société enregistrée dans votre compte par la Société. Ladite notification sera réputée avoir été remise 48 heures après envoi du courrier (en cas d'envoi par courrier prioritaire ou courrier affranchi) ou 12 heures après son envoi (en cas d'envoi par courrier électronique ou par le biais du Logiciel).

Vous pourrez notifier la Société (ladite notification sera réputée envoyée lorsque la Société l'aura reçue) à tout moment par l'un des moyens suivants : (a) une lettre envoyée par courrier électronique à support@ O .com ; ou (b) une lettre envoyée par un service de messagerie rapide reconnu nationalement ou par courrier prioritaire affranchi envoyé à la Société à l'adresse suivante : C.

, Pays-Bas, adressé à l'attention du : Directeur des affaires juridiques.

Cession

Vous ne pouvez céder le présent Contrat sans l'autorisation préalable écrite de la Société. Toute cession effectuée en violation de la présente section sera nulle et non avenue. La Société aura le droit, sans votre consentement et à sa seule discrétion, de céder le Contrat ou tout ou partie de ses droits et obligations en vertu des présentes sous réserve que le cessionnaire des obligations de la Société en vertu de ladite cession soit, selon le jugement raisonnable de la Société, capable de réaliser les obligations de la Société en vertu du présent Contrat. Lors de ladite cession, la Société n'aura aucune autre responsabilité envers le Fournisseur de transport eu égard aux obligations cédées.

Confidentialité de l'Accord

Vous déclarez que vous n'avez pas divulgué et que vous acceptez de garder confidentiels les contenus et conditions du présent Contrat, à moins que lesdites informations ne soient autrement disponibles publiquement ou que leur divulgation ne soit exigée par la loi. Vous acceptez de prendre toute précaution raisonnable pour prévenir la divulgation des contenus et conditions du présent Contrat, y compris par votre personnel, à des tierces parties, et acceptez qu'il n'y ait aucune publicité, directe ou

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indirecte, concernant les conditions générales contenus dans les présentes. Vous acceptez de ne divulguer les conditions générales du Contrat uniquement aux avocats, comptables, autorités gouvernementales et membres de la famille qui ont besoin de les connaître et uniquement dans la mesure strictement nécessaire. Si vous devez divulguer certaines conditions générales du Contrat auxdites tierces parties qui ont besoin de les connaître, vous acceptez d'informer C. de la nature et de la mesure de la divulgation, et acceptez en outre d'informer lesdites tierces parties de la présente disposition de confidentialité et de prendre toutes les précautions pour vous assurer que lesdites parties ne divulguent pas elles-mêmes les conditions générales du Contrat.

Généralités

À l'exception de ce qui est explicitement établi dans le présent contrat, si l'une des dispositions du Contrat est déclarée invalide ou inapplicable, ladite disposition sera considérée comme nulle et non avenue, et les dispositions restantes seront appliquées dans toute la mesure permise par la loi. Le manquement de la Société à appliquer tout droit ou disposition du présent Contrat ne constitue pas une renonciation audit droit ou à ladite disposition à moins que la Société y consente par écrit. Le présent Contrat contient l'intégralité de l'accord entre vous et la Société concernant l'objet des présentes et remplace l'ensemble des négociations, discussions ou accords antérieurs ou concomitants, qu'ils soient écrits ou oraux, entre les Parties concernant l'objet des présentes.

EN FOI DE QUOI, les Parties aux présentes ont permis que le présent Contrat soit dûment signé à la date indiquée ci-dessous.

Date : 25.02.2015.

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Date : 25.02.2015

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Le \ La Conducteur (trice)

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e) The attention of the candidates present at the information sessions was not drawn to certain clauses of the contract. In particular, the submission of disputes to an arbitral tribunal having its seat in the Netherlands, the applicability of Dutch law or the obligation to indemnify the defendant or its representatives in the event of a dispute were not discussed. As a result, some of the candidates who attended one or other of these sessions did not see the above-mentioned clauses. The witness [...] - driver
O.________active since December 2015 and independent driver, as well as president of
the association [...] created at the request of O.____to defend the situation of the drivers vis-à-vis the cantonal and municipal authorities - who admitted having spoken before his hearing with a lawyer for the appellant based in Amsterdam, stated that he no longer remembered that the contract contained an arbitration or applicability clause under Dutch law. He nevertheless considered that this knowledge would not have led him to refuse to sign the contract. The witness [...], who had worked for a year and a few months as driver O., had been working for a year and a few months._____who ceased all activity on behalf of the defendant in 2016, and the witness [...] explained that they thought that Swiss law was applicable in Switzerland despite the terms of the contract. The witnesses [...], driver O.____ since December 2015, and [...], driver O.___________________driver O. since December 2015, and [...], driver O. and [...] self-employed, stated that they saw that the contract contained these clauses. They were all unaware of the rules of the International Chamber of Commerce (ICC), to which the contract referred disputes. With respect to the arbitration clause, the defendant conceded that "this clause was not particularly emphasized.

f) Under the ICC Rules of Arbitration (Exhibit 26; also available at
https://iccwbo.org/content/uploads/sites/3/2017/02/ICC-2017-Arbitration-and-2014-Mediation-Rules-

english-version.pdf.), ICC arbitration proceedings involve, inter alia, the payment of a "advance for the advance on arbitration costs, the amount of which is set to cover the costs of the arbitration.

costs of arbitration" (art. 37 para. 1). It is provided in this respect that "each request for arbitration submitted under the Rules must be accompanied by the payment of a registration fee in the amount of USD 5,000" (Appendix III, Art. 1 para. 1). In addition, the arbitrator's fees shall be paid in an amount ranging from USD 3,000 to 18.02% of the amount in dispute up to USD 50,000 (Appendix III, art. 3 para. and Table B).

...], for whom the arbitration clause is a "fairly common" clause between companies and private individuals, said that despite the thousands of drivers working for O.____________________, "no case was submitted to the arbitral tribunal".

5. **a)** The applicant has been granted access to application O.____________on April 2, 2015. From that date, he or she has been running races using this application.

b) At the time of the events, two statuses of drivers O.________coexisted: or [...] or [...]. The plaintiff belonged to the category of drivers [...]. Unlike the drivers [...], those of [...] had to have a professional driving licence and adequate liability insurance coverage. O._O. provided a list of vehicles that could be used by a driver ..., while drivers ... could have any vehicle as long as it had four doors, was less than 10 years old and was in good working order; professional drivers who wanted to acquire a vehicle not listed had to submit the desired model to O. for approval.____. In addition to the higher rates for professional support, the O .________________...] and [...], at the very least in terms of passenger search and the course of the journey.

c) There is a "customer" version of the application; to install it, the future customer must insert his credit card details and accept the general terms and conditions. When a customer wants to order a race, he is geolocated by the application. He indicates whether he wants to be picked up from this location or from another address. The customer enters the desired destination and can see on his application the available vehicles in the vicinity of his location and an estimate of the price of the trip. The customer cannot choose his driver, as the application does not have this functionality. When the passenger confirms his request, it is transmitted to the driver who is closest to him, connected to the application and available.

For his part, the driver uses the version intended for him ([...]) on his own phone or the one provided by O.____________. The driver then sees a request appear on his application, which only mentions the place of the pick-up with, possibly, the estimated time to get there, the customer's evaluation on a scale of 1 to 5 (cf. *infra* let. C/5f) and the name under which the customer wishes to present himself (which may not correspond to his identity). The driver, who is not paid by the defendant for waiting for applications nor for the time he spends getting there, is not paid by the defendant.

at the place where the customer who wishes to be transported and wait for it and who alone bears the costs to get there, then has a few seconds (between 10 and 20 seconds) to accept or refuse the said request. Witness [...], driver O.____and Secretary General of the association [...], as well as the witness [...] felt pressured, as this time frame was too short to make a decision. Witnesses [...] and [...], on the other hand, stated that this time frame was sufficient for them, or at least with experience. The purpose of this time limit is to assign a driver as quickly as possible and not to extend the waiting time for the customer indefinitely. It also tends to prevent a driver from remaining connected to his application without consulting the requests addressed to him. If this time limit expires without the trip being accepted, the driver is deemed to have refused it. In all cases where the request is not accepted, it is transferred, by means of a computer algorithm, to the next available and connected driver who is closest to the customer.

At the time the applicant was using the application, the driver was disconnected from the application for a few minutes (between 3 and 5 minutes) if he refused three races in a row. No explanation was required from the driver when he refused a race. The driver could refuse or cancel the trip until the passenger was actually picked up, but received an O message._in the event that the driver abused the option to cancel a trip after accepting it. After a certain number of refusals or cancellations, the drivers received a message from O.__________drawing their attention to the fact that it was not good for the customers; this message could contain statistics of acceptance and refusal of races.

If the client cancels a trip after the driver arrives at the designated pick-up point or does not show up at the designated location, after the driver has waited at least 10 minutes, O. will pay a cancellation fee to the driver according to an internal fee schedule.

Neither the carrier nor the passenger has access to the other party's telephone number. The eventual call between them is only done through a dematerialized platform.

According to the O system.___system, only when the passenger is inside the vehicle and the driver starts the journey is the desired destination indicated to the driver.

d) The application O.______application allows the use of various satellite geo-positioning systems (hereafter: GPS), including Google Maps, Wise or, by default, the application's own. The GPS is activated at the start of a race and guides the driver on his route, and the driver must follow the route shown on the application. However, the driver can adapt the route suggested by the GPS according to his personal appreciation and experience, in case of works or if a road is closed, for example. Witnesses [...] and [...] indicated that drivers generally seek the customer's consent beforehand, unless the customer's consent is presumed, for example if the new route is a shortcut and the trip is cheaper. The

GPS continues to follow the vehicle in real time and adapts the suggested route according to the actual positioning of the driver. If the route taken lengthens the route suggested by the GPS, the driver receives, in case of customer complaint, a message informing him that the route is too long and inviting him to follow the route suggested by the GPS. When O.___receives customer complaints about the length and duration of the trip, explanations are requested from the driver. If these are not convincing, O.____________offers compensation to the customer. Unless there is obvious abuse on his part, no deduction is made from the balance due to the driver.

e) When the customer has arrived at the destination, the final price of the trip is displayed on the application and this amount is debited from the customer's credit card by O.________. According to the defendant, the price of the trip can be set in two ways. The first, very little used, because it is inconvenient and ignored by most clients and drivers, consists in fixing by agreement between the latter two a price that differs from the one suggested. . explained in this regard : "...neither the driver nor the passenger has the time and inclination to discuss the price of the trip. If, however, the parties wish to do so, they have the opportunity to do so, but must give notice to O.________________so that the fare can be adjusted. In concrete terms, O. must be called._______and tell him that the fare will be different from the suggested fare. (...) In 2015 and 2016, in the canton of Vaud, I have no information, but I suppose that this possibility has not been used very often (...)". The second way to set the price of the race is to accept the price suggested by the application as the final price. This suggestion results from a computer algorithm operated by the application O._____This suggestion is the result of a computer algorithm operated by the O. application, based on the basic rate of 3 fr. per pickup, the price per kilometer of 1 fr. 35 and the price per minute of 30 centimes, the minimum rate for a trip being 6 francs. In addition, an increase in the price of the trip is available in case of high demand. All of the drivers heard as witnesses stated that the defendant alone set the price of the trip and the amount due to them, and most of them, i.e., [...], stated that they could not agree on another price with the customer, while the witness [...] explained that it was "unthinkable that they would have to negotiate the price with the customer every time".

f) Once the ride is completed, the driver rates the passenger on a scale of 1 to 5 and vice versa. The rating is a mandatory step for the driver to receive new races. While he can consult, on the application, his general evaluation, which is based on an average of the individual evaluations made by the customers over a certain period of time, the driver does not know, on the other hand, the individual evaluations made about him by the customers at the systematic request of the defendant, nor the identity of the latter. Likewise, he is not entitled to know the complaints addressed to O._____ nor of the comments made about him.

At the time of the events, when a driver's overall rating was not excellent, either from 4.45 out of 5 and below, the caller would issue a *"warning"* and/or put the caller on a *"Driver waitlisted"* (see Exhibit 113). The appellant could also decide to summon the caller

to show him how to behave with customers. She could finally decide to permanently disconnect the driver. Moreover, the Contract expressly specified that "drivers whose results are 'low' may have their right to accept requests limited" (Contract, p. 5). In addition, the appellant could contractually disconnect a driver "at any time, at its sole and indisputable discretion" (Contract, p. 7).

The summary of incidents relating to the Applicant's activity (*"History of incidents"*; Exhibit 113) indicates that the Applicant received nine warnings ("*small warning"*, "*strong warning")* for *low* ratings and in relation to the quality of its conduct.

g) Each week, the defendant sends the drivers the weekly activity statements drawn up by it and showing the connection time, the number of journeys, etc., and the number of times the drivers are on the road.
"This includes the time the trip was started, the vehicle used, the duration and the distance travelled.

6. **a)** In the event of high demand for races, O.________________________________sends drivers, whether they are connected or not, day or night, during the weekend or during the rest period, e-mails and/or SMS messages encouraging them to connect.

The defendant, via the application, also gave a number of additional instructions, in particular on driving style and on the maintenance of the vehicle and its cleanliness, and could send messages, in the form of advice, containing statistics on undesired braking or sudden acceleration.

b) O.______had at his disposal at the time the facts of offices in Crissier, to which drivers, including the plaintiff, could turn to ask questions, for example about the price of a trip when the amount had been adjusted, or to resolve certain problems, in particular when the application had been blocked following a complaint from a client (see *infra* let. C/10). One of the contact persons was [...].

c) According to the Contract, while actively registered in the software, the driver cannot use his relationship with O.______________________(or information acquired from it) to divert the latter's business to another company that provides transport services in competition with O.________and may not display removable badges provided by third party transportation service providers. The defendant's representative nevertheless asserted that drivers could use their own business cards, even at the end of a ride with O.___________. In fact, many drivers have developed their own clientele through O._. Business cards for non-O. transport.______________________were handed out and phone numbers given out for customers met through O._________________can use the private services of the driver in question.

In addition, although the contract prohibits it, some drivers accepted tips at the end of a race.

7. It appears from the plaintiff's statements and from the testimony of witnesses...that the fines imposed on them for contravening the administrative cab regulations while they were working for the defendant - a total of six fines for the plaintiff - were fully reimbursed by O._____. The witness ... even stated that he was provided with counsel by the defendant to oppose the fines.

However, no fines of any other type, e.g. for traffic offences, were reimbursed by O._____.

8. **a)** For a limited period of time, when launching [...],O.______________________participated in financing the training of certain professional drivers, organizing theory courses followed by practical sessions with a vehicle provided and a driving instructor. The applicant was able to benefit from a partnership set up with a driving school.

b) In addition, O._______has set up partnerships with garages, so that drivers can acquire a vehicle at a preferential price. However, drivers are under no obligation to do so and are free to decide how to acquire and finance their car.

9. On May 11, 2016, a document entitled "Contract for the Provision of Services", dated May 10, 2016, appeared on the application used by the Applicant. It is not known whether this document was in English or French.

stated that when drivers are notified of new conditions, they must accept them in order to continue to use the application and that in this case, "according to the information, the applicant had accepted the new conditions submitted to it in May 2016", stating that "if the applicant continued to use the application as of this month, it must have accepted the new conditions". For the reasons that will be set out below (see *infra* consid. 3.4), the court will not accept the explanations of [...], which are supposed to demonstrate, according to the defendant, that the plaintiff would have accepted this contract as early as May 11, 2016.

10. **a)** On June 12, 2016, the plaintiff sent an e-mail to ... indicating that his account had been deactivated after a customer complained that he (the plaintiff) was driving while intoxicated. He strongly disputed the merits of this complaint. His account was subsequently reactivated.

b) On September 21, 2016, the plaintiff again contacted [...] by email, following an account freeze. Several passengers had reported unsafe driving on his part. The plaintiff was invited to report to Crissier's offices so that his account could be reactivated, which was subsequently done.

c) On December 18, 2016, two clients complained to ... that the plaintiff's conduct was dangerous. One indicated that his conduct "strongly resembled *that of* a person under the influence of alcohol.

d) On December 29, 2016, a passenger addressed O.______with the following report about the claimant:

"First he forgot to put his headlights on when it was night. And several times he almost hit the sidewalk because he had to (sic) go both on the right and on the opposite lane. Moreover he looked very tired. His driving was very dangerous for me as well as for the motorists on the road. You might have problems with this kind of driver. ».

11. **(a)** On December 30, 2016, while at home, the claimant received a message on his telephone from O._____The message informed him that the application had been blocked after passengers complained that he had driven in an unsafe manner and while intoxicated.

The plaintiff, who has always strongly contested having driven under the influence of alcohol, then tried to log on to the application, which did not open until certain documents, including the "Contract for the Provision of Services" of May 11, 2016, had been accepted. The applicant then clicked on "accept" these documents (which were not signed) on his cell phone in order to access the application. However, it was indicated that access to the application was blocked.

b) The applicant has written to O.______dated January 8, 2017, expressing disappointment and disapproval of the reasons for the disconnection. In particular, he indicated that his version of events had not been requested. Following an invitation on the same day from "O._____Support" to make an appointment on its website ([...]) "for a meeting in [its] offices in Lausanne" in order to discuss his complaint regarding the blocking of his account, the plaintiff went to the offices of O. Support.________________________________s offices in Crissier, where it was explained to him that the application had been blocked from the Netherlands and that nothing could be done pending a decision from headquarters. On January 17, 2017, the applicant received an email, in French, by which the "Equipe O._____Equipe O." confirmed the definitive suspension of the application and the end of its collaboration with "O.".____________________"(Exhibit 11).

The applicant wrote again to ... on January 17, 2017, asking if he could have more information about the discontinuance of the application than he had received.

February 9, 2017, O.________sent the same e-mail to the Applicant as the one sent on January 17, 2017, also in French (Exhibit 13).

The applicant's application has never been unlocked since then and he has received nothing from O.___________except for the payment made in January 2017 for the races still run during the month of December 2016.

12. The applicant used the O application._______________from April 2, 2015 to December 31, 2016. During this period, the applicant ran 9,163 races, an average of 100 races per week. He spent a total of 4'608 hours connected to the application, corresponding to more than 50 hours per week on average. The driving time was 2'470 hours and his average acceptance rate was 85%.

The applicant's earnings from this activity - 38,026 fr. 80 in 2015 and 56,460 fr. 97 in 2016 - were the only income he received during the entire period in which he was engaged in passenger transport with O.____as his main activity.

He received a total of nearly 80 comments, of which about three-quarters were positive and were essentially thank-you comments. One of the most frequent "tags" (mode of evaluation) was the professionalism demonstrated by the applicant. However, the applicant received nine warnings regarding his or her evaluation, with the average falling to 4.3 out of 5 on one occasion. On this occasion, the applicant was sent to a coaching session.

13. **a)** By application filed in court on June 12, 2017, G. ________ has formally waived the conciliation procedure in accordance with Art. 199 para. 2 let. a CPC, insofar as the the defendant's head office is located abroad, and entered into an agreement for payment by C.__ a 30,000, i.e., Fr. 9,000 gross as salary during the legal two-month leave period, Fr. 7,868 gross as vacation pay and Fr. 13,131 net as compensation for termination with immediate unjustified effect, all with interest at 5% per annum as of December 30, 2016.

b) In its pleadings of August 4, 2017, the defendant raised the lack of jurisdiction of the court *ratione materiae* and *ratione loci*, invoking the arbitration clause contained in the contract binding it to the plaintiff. It therefore requested the court to limit the proceedings to the question of admissibility only, in connection with its jurisdiction.

The plaintiff objected to a separate hearing on the issue of jurisdiction, denying that it was bound by an arbitration clause.

In a letter dated August 24, 2017, the president of the tribunal refused to limit the proceedings to the question of admissibility.

On September 21, 2017, the defendant requested an extension of the deadline for response.

c) By Answer of December 6, 2017, the Defendant concluded, with costs and expenses, primarily that the application be declared inadmissible and, in the alternative, that the Claimant be dismissed from all its claims.

d) A second exchange of entries took place between the parties.

e) At the preliminary hearing of January 31, 2018, the plaintiff requested that a legal opinion be requested from the Swiss Institute of Comparative Law (hereinafter: ISDC), should the court consider applying Art. 16 LDIP, prior to the determination of the qualification of the contract that has bound the parties, this legal opinion must relate to the elements in Dutch law that are essential to the qualification of the employment contract, the conditions and effects of the immediate and ordinary termination of the contract, the effects of such termination, as well as the rights of the employee to compensation and vacations.

The defendant concluded that the requisition was rejected, finding that the notice of right requested was neither necessary nor relevant.

This requisition has not been acted upon.

f) The court held six investigative and trial hearings, during which G.__and, for the defendant, [...] were heard as parties. . were heard as witnesses. Their statements have been summarized above to the extent of their usefulness.

At the hearing of December 17, 2018, the plaintiff reduced its conclusion to 6,694 fr. 10, plus interest, that the defendant should pay a vacation indemnity to take into account the week of vacation he had taken during the year 2016.

I n d r o i t :

1.

1.1 In patrimonial cases, the appeal is admissible against final decisions of the first instance provided that the value in dispute, at the last state of the conclusions before the lower authority, is at least 10,000 fr. (Art. 308 para. 1 let. a and para. 2 CPC). It must be submitted in writing and reasoned, within 30 days of the notification of the reasoned decision or of the subsequent notification of the reasoned decision (Art. 311 al. 1 CPC).

1.2 In this case, lodged in due time by a party with an interest worthy of protection (Art. 59 para. 2 let. a CPC) against a final decision of the first instance in a patrimonial case with a litigious value of more than 10'000 fr., the appeal is admissible.

The answer on appeal, filed within the time limit of Art. 312 para. 2 CPC, is also admissible. So are also the reply and the rejoinder, filed within the time limit set by the delegated judge, as well as the spontaneous (suppletive) determinations of the defendant of December 27, 2019, filed within the time limit admitted by the jurisprudence (ATF 138 I 484 consid. 2; ATF 133 I 98 consid. 2.1; TF 5D_81/2015 of April 4, 2016 consid. 2.3.3 and the ref. cited).

2.

2.1 The appeal may be filed for breach of law or for incorrect findings of fact (Art. 310 CPC). The appellate authority may review all applicable law, including questions of appropriateness or discretion left by law to the decision of the judge, and must apply the law ex officio if necessary in accordance with the general principle of Art. 57 CPC. It may freely review the assessment of the facts on the basis of the evidence adduced at first instance and verifies whether the first judge could have admitted the facts he has retained (ATF 138 III 374 consid. 4.3.1; TF 4A_238/2015 of 22 September 2015 consid. 2.2).

2.2 According to art. 311 al. 1 CPC, the appeal must be reasoned, i.e. show the erroneous nature of the contested motivation. The appellant must explain how his argumentation can influence the solution retained by the first judges (TF 4A_607/2019 of 22 April 2020 consid. 4.5; TF 4A_474/2013 of 10 March 2014 consid. 3.1). It is not sufficient to refer to the pleas raised in first instance, nor to engage in general criticism of the contested decision. The reasoning must be sufficiently explicit for the appellate body to understand it easily, which presupposes a precise designation of the passages of the decision that the appellant attacks and the documents in the file on which his criticism is based (ATF 138 III 374 consid. 4.3.1; TF 4A_610/2018 of August 29, 2019 consid. 5.2.2.1; TF 5A_396/2013 of February 26, 2014 consid. 5.3.1). In the absence of sufficient motivation, the appeal is inadmissible (TF 4A_610/2018 cited above; TF 5A_209/2014 of September 2, 2014 consid. 4.2.1; TF 4A_101/2014 of June 26, 2014 consid. 3.3).

2.3

2.3.1 According to art. According to art. 317 para. 1 CPC, new evidence is only taken into account at the appeal stage if it is submitted without delay (subpara. a) and could not be taken into account at the first instance even though the party availing itself of it had exercised due diligence (subpara. b).

2.3.2 This rule also applies in simplified procedure, in which the judge is subject to an increased duty to question the parties (Art. 247 para. 1 CPC), even in disputes governed by the social inquisitorial maxim in application of Art. 247 para. 2 CPC (ATF 138 III 625 consid. 2.2; TF 4A_415/2015 of 22 August 2016 consid. 3.5). A distinction is made between true and false nova. True nova are facts or means of proof that are only born after the end of the hearing of the main trial proceedings; they are admissible on appeal when they are invoked without delay after their discovery. False nova are new facts or means of proof that already existed at the hearing of the main proceedings; they are not admissible on appeal if they could have been invoked at first instance with due diligence. It is up to the litigant, where applicable, to demonstrate the reasons why he did not assert the fact in first instance (ATF 143 III 42 consid. 4.1, JdT 2017 II 342; TF 5A_866/2018 of March 18, 2019 consid. 3.3).

Notorious facts, which need neither be alleged nor proven, are those whose existence is so certain as to win the conviction of the judge, whether they are facts known generally to the public or only to the judge (e.g. extract from the Commercial Register or currency conversion rate; ATF 143 IV 380 consid. 1.1; ATF 137 III 623 consid. 3). They may be

retained ex officio by the appeal authorities (TF 4A_261/2013 of October [1,] 2013 consid. 4.3; TF 4A_412/2011 of May 4, 2012 consid. 2.2, not published in ATF 138 III 294). To this extent, notorious facts are exempted from the prohibition of nova (TF 5A_719/2018 of 12 April 2019 consid. 3.2.1).

2.3.3 In the present case, in support of his appeal, C.________produced, in addition to the copy of the judgment under appeal (Exhibit 11), thirteen exhibits. Exhibit 1, which is an extract from the Commercial Register concerning the appellant, is admissible, since the information contained therein is a matter of common knowledge. Exhibits 2 to 10 and 13 are already in the first instance file. Exhibit 12, which is an undated article in English, "[...]" entitled "[...]", is admissible, as it is a doctrinal opinion, even if the appellant does not explain why this exhibit could not already have been produced before the first instance (art. 317 para. 1 let. b CPC). This document, to which the appellant refers in support of its assessment that the arbitration clause contained in the Contract binding the parties would be valid "even from the point of view of Dutch law" (appeal, p. 15 *in fine*), is in any event irrelevant, given the outcome of the dispute on this issue (see *infra* consid. 4.2.3). Finally, the judgment of the Chambre des actions en cessation of the Tribunal de l'entreprise francophone de Bruxelles of 16 January 2019 (exhibit 14) is also admissible. However, it is not relevant either (cf. *infra* consid. 4.1.6.2.7).

The exhibits produced by the respondent in support of its rejoinder are also admissible, namely the decision of the Paris Court of Appeal of January 10, 2019 (exhibit 1001) and the decision of the Court of Appeal of England and Wales of December 19, 2018 (exhibit 1002).

3. The appellant reviews the facts of the case as found by the previous authority.

3.1 As a preamble, she declares that she refers to the allegations in her writings and to the record of the first instance proceedings. Such an allegation does not constitute sufficient grounds for demonstrating an inaccurate finding of a fact in the judgment under appeal (cf. *supra consid.* 2.2). Such a claim is inadmissible.

The same is true of the appellant's very general challenge to the scope given by the first judges to the testimony, without even indicating which testimony should be assessed otherwise or on which specific fact (Appeal, p. 11 ch. 1.2; Reply on Appeal, p. 6-7 and Supplication, p. 3). The possibility used by the appellant to disconnect drivers, as well as the lack of possibility for them to negotiate their conditions, cited as examples, were retained without violation of the law by the previous authority, as will be seen below. Moreover, as regards more precisely the possibility that the appellant had of disconnecting drivers, a possibility that the appellant contests before the Court of Appeal, it was used in relation to the respondent and the appellant duly admitted it during the proceedings through its representative (see *infra* consid.

4.1.6.3.3, 5th paragraph).

3.2 The appellant alleges that the respondent had time during the single information session of February 25, 2015, to sit at a table and carefully read the Agreement, before signing it by hand, on each page, with full knowledge of the facts.

This cannot be withheld.

3.2.1 First, the Agreement is not signed "on every page" by the respondent: only the odd-not the even-numbered pages are initialled and the last page, page 12, is signed by the respondent. Next, and most importantly, it is established that the respondent, a Bulgarian national, did not speak French at the time of the sitting of February 25, 2015, which is why a contract in English was submitted to him. It is not known whether this contract, which was not left with the respondent at the end of the hearing and which the appellant did not produce, corresponded, in whole or in part, to the contract signed on February 25, 2015. The appellant in support of the appellant has not demonstrated this in any way. The fact remains that it was not the contract in English that the respondent was asked to sign, but only the one in French, which the appellant therefore knew was incomprehensible to the respondent.

3.2.2 The Contract is, moreover, long and complex, very little accessible in its concrete scope for a

lay person, which was clearly the case for those attending the session and hoping to

work for "O.______________"as drivers, including the Respondent. It has been established that the latter was refused the right to take the contract with him in order to be able to read it calmly if necessary by asking for the assistance of a third party, and thus be able to sign it knowingly.

3.2.3 In addition, the Agreement, drafted by and for the appellant (see hearing of [...] of October 2, 2018,

p. 2), was offered for signature at the end of the "information" sessions it organized for candidate drivers. It can therefore be assumed that at the end of this session the candidate drivers thought that, by signing the documents submitted for their signature, they were signing contracts that would give concrete expression to the project presented to them during the session.

The appellant organized the February 25, 2015 session. This session took place in French-speaking Switzerland, in the premises of a Swiss company in Le Flon. Only representatives of the Swiss company participated in this session. In addition, the session was held in French and the Contract that was submitted for signature to the candidate drivers at its conclusion was in French. The respondent came there to find an individual activity as a driver enabling him to earn a living. This session could thus seriously give the appearance of a purely Swiss work context. At no time did the appellant draw the respondent's attention to the fact that she intended to enter into a contract with him that contained numerous formulations that could lead one to believe that their relationship did not fall within the scope of employment law. Moreover, the persons who were supposed to inform the respondent and the other drivers never communicated to them during the session that their co-contractor would in fact be a company under Dutch law. Nor did they ever draw their attention to the fact that the company intended to subject all of their reports - for services provided solely in Switzerland - to a foreign law - that of [...] - and that, moreover, any dispute would have to be submitted to an arbitration procedure in English conducted in Amsterdam.

In this respect, the Court of this case can only be struck by the fact that the Contract drafted and proposed for signature by the appellant does not contain an indispensable piece of information of any contract, namely the identity of the parties. While it is understandable, in view of the generic nature of the contract submitted to the candidate drivers, that the name and domicile of the respondent are not pre-indicated, nothing explains why the head office of the appellant, for whom the contract was drawn up, is not stipulated therein. However, such an indication would have been likely to make the contracting party understand that he was concluding with a company governed by foreign law and that there was thus an international aspect to the contract he was signing, an element on which the choice of law clause provided for by the appellant depends (cf. *infra* consid. 5). Such an omission, in the circumstances of the case and taking into account in particular the precision of the clauses provided for by the Contract, notably in terms of applicable law and competent authority in matters of litigation, cannot be attributed to an oversight on the part of the appellant. Its absence cannot be justified by any defensible reason.

Moreover, the session of February 25, 2015, in which the respondent participated,

brought together individuals wishing to find a lucrative activity as a driver on an individual basis. The respondent,

A foreigner who does not speak French, came there to get a job as a driver to earn a living. He never claimed to be a representative of a company or to be at the head of a company. However, the Contract submitted to him stipulated the following: "Relationship between the Parties: This Agreement is established between two equal and independent companies that are owned and operated separately. By this Agreement, the Parties intend to create a relationship between sovereign and independent contractors and not an employer-employee relationship" (Agreement, p. 9). The difference between the reality of the relationship between the respondent and the appellant (cf. *infra* consid. 4.1.6.2 ff.) and what the Contract provides for is particularly striking here.

3.2.4 With regard to the fact that the terms of the Contract not only did not correspond to the appearances and information given during the session that preceded its proposed signature, but also did not correspond to the reality of the relationships that it was supposed to govern, the investigation made it possible to establish that the Contract, pre-drafted in its entirety, was "take it or leave it" and that therefore no term could be discussed by the candidate drivers (cf. in particular the hearing of [...] of October 2, 2018, p. 2: "it is a contract that is not subject to negotiation. For the drivers it is therefore to be taken or left"). The same applied, in particular, to the fee schedule for services fixed by the appellant, which she was free to modify (Contract, p. 4 *in fine*). The clause in the Contract stating that "you and the company will always have the right to negotiate service fees that differ from the agreed fees. The sole purpose of the agreed service fees is to present default fees in the event that neither party negotiates a different amount" is thus completely inconsistent with the reality of the relationship between the parties, and in particular with those desired by the appellant. The explanations of [...] on the procedure that could have been followed to obtain a change in the price decided by the appellant are not credible in this regard (hearing of November 28, 2018, pp. 3-4). The appellant's representative also admitted, on the one hand, that it was ultimately up to the appellant to decide whether or not to change the price and, on the other hand, that he was not aware that a price had been discussed in the Canton of Vaud in 2015 and 2016.

Likewise, the alleged freedom of the driver in his activity, reaffirmed on multiple occasions in the Contract, is clearly contradicted either by other provisions of the Contract, which are equally clear, or by the actual arrangement of the parties' relationship, as will be seen below.

3.2.5 In light of these elements, we cannot conclude that the respondent would have had the time to understand all of the clauses contained in the Contract submitted to him and would have been willing to accept them by the mere fact of his signature. On the contrary, the foregoing elements show that everything was done to ensure that he signed, in confidence, without understanding the ins and outs of what he was signing, which did not correspond in part to what had been presented to him, nor to the relationship that the parties wished to have. In these circumstances, the Court of Appeal considered that the signature of the contract by the respondent did not mean that he would by this mere fact have accepted and wanted all of the innumerable assertions attributed to him contained in this document, even less so that

these would be representative of the relationship between the parties. Other elements are necessary to make such a finding.

3.3 The appellant criticizes the trial authority for having taken into account facts relating to the respondent's personal situation, considering these elements to be irrelevant.

These facts are relevant to understanding what the respondent wanted at the time the contract was entered into, as well as to determining who was the weaker party to the contract, who could be protected by law. The grievance is therefore unfounded.

3.4 The appellant states that the respondent allegedly accepted a "second contract", which it believes was dated May 10, 2016, on May 11, 2016.

The appellant refers on this point to Exhibit 106 [*Recte* 107], which according to its docket, is the respondent's "*personal* details" information sheet. However, neither the author of this exhibit, nor the circumstances in which it was prepared and the data incorporated are known. At most, it can be noted that this exhibit was prepared after the end of the parties' reports since it indicates the *rejection* date of December 30, 2016. It is thus improper to establish that the respondent would have already accepted on May 11, 2016 a document supposedly dated the day before.

The appellant also refers to the testimony of her representative ... who stated that when drivers are notified of new conditions, they must accept them in order to continue using the application. This witness is the legal director for O.'s employment law business._As such he is not *a priori* neutral. Especially as such, and in the absence of other elements, we do not see that he himself has noticed the fact that he is invoking, even less so in the case of the respondent. There is nothing in his testimony to support his claim. Thus, it is only a question of information that was reported to him ("according to my information", cf. the hearing of October 2, 2018, p. 2) without knowing either the identity of his source or the elements on which it is based. Such elements alone are insufficient to demonstrate the reality of the fact invoked. Moreover, [...] says nothing about the period of time within which the acceptance was to take place, moreover in Switzerland, by the respondent.

In these circumstances, the Court of Appeal sticks to the statements of the respondent who indicated that he "accepted" the contract allegedly dated May 10, 2016, on December 30, 2016 only. It follows, as a matter of law and given the scope of CC art. 8, that the Court does not find that the respondent would have accepted before that date the contract supposedly dated May 10, 2016. Consequently, the contract cannot govern in any way the relationship of the parties which ended on December 30, 2016 at the latest. It will therefore not be taken into account in the following developments.

3.5 Otherwise, the appellant's other admissible grievances against the facts upheld by the trial authority will be examined below, in the context of the interpretation and the

qualification of the parties' reports (see *below* consid. 4.1.6).

3.6 The appellant criticizes the respondent for attempting, through its writings in the appeal proceedings, to complete the statement of facts retained in the first instance and thus to assert an inaccurate finding of facts. Since he would not have filed a joint appeal, such a supplement would be inadmissible, or would have to be rejected.

According to settled case law, the party who is required to file a response is entitled to criticize, in the said response, the recitals of the first instance decision that could be unfavorable to him if the appeal authority judged the case differently from the first judge (TF 5A_804/2018 of January 18, 2019 consid. 3.2; TF 5A_403/2016 of February 24, 2017 consid. 4.2.2; TF 4A_258/2015 of October 21, 2015 consid. 2.4.2 and references). The respondent was thus entitled to criticize the findings of fact of the previous authority in order to ensure that the decision in its favor was upheld. The grievance is therefore unfounded.

4. The appellant contests that the authority of first instance may have been competent to hear the present dispute. She invokes on this point the arbitration clause inserted at the end of the Contract.

4.1 Before examining whether the first judges should have declined jurisdiction in favor of the arbitral tribunal invoked by the appellant, it is already necessary to verify that they were indeed the state court or one of the state courts competent to hear the dispute.

4.1.1 In view of the appellant's seat in the Netherlands and the respondent's Swiss domicile, this case is international in nature. Indeed, according to the case law, a case is international in nature when it has sufficient connection with the foreign country, which is always the case when one of the parties has his domicile or seat abroad, regardless of whether it is the plaintiff or the defendant, and regardless of the nature of the case (ATF 141 III 294 consid. 4).

The competence of the authority of first instance must therefore be examined in the light of the LDIP (art. 1 para. 1 let. a LDIP), which reserves international treaties (art. 1 para. 2 LDIP). In view of the nature of the dispute, the jurisdiction of the Swiss authorities must be decided in the light of the provisions of the Lugano Convention (art. 1 CL [Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters concluded at Lugano on 30 October 2007 between, inter alia, the European Union and Switzerland, known as the "Lugano Convention"; RS 0.275.12]), to which both the Netherlands and Switzerland are signatories. The rules of jurisdiction of this Convention prevail over the rules of national jurisdiction, and in particular those of

the LDIP (art. 1 al. 2 LDIP; ATF 124 III 134 consid. 2b/aa; TF 4C.189/2001 of [1] February 2002 consid. 3; TF 4C.87/2003 of 25 August 2003 consid. 3.1).

4.1.2 Both the PILA and the LC make special jurisdictional provisions regarding labour relations. The same applies in domestic law with regard to determining the competent Swiss authority. It must therefore first be determined whether the parties were bound by such a legal relationship.

According to the case law, the qualification must be made according to the law of the forum (ATF 127 III 123 consid. 2c; ATF 128III295 consid. 2a and the judgments cited; TF 4C.87/2003 of 25 August 2003 consid.
3.4; TF 4C.9/2005 of March 24, 2005 consid. 1.2). It must be done on the basis of the concepts of domestic law (Bonomi, Commentaire romand, Loi sur le droit international privé, Convention de Lugano, Bâle 2011, n. 3 ad art. 115 LDIP). In this respect, the notion of employment contract referred to in the LC must be interpreted autonomously, but it does not diverge from that of Swiss substantive law. The classic essential elements are the subordination of the employee to the employer and his integration into a structure (cf. Bonomi, op. cit., n. 6 ad art. 18 LC; Donzallaz, The Lugano Convention, vol. II, 1997, n. 4878).

It should be noted here that the theory of double relevance (on this theory, which allows a more succinct examination in matters of jurisdiction, cf. ATF 141 III 294 consid. 5.2), invoked by the appellant, does not come into play when the jurisdiction of an arbitral tribunal is contested. According to the case law, it is indeed excluded to force a party to suffer that such a tribunal rules on disputed rights and obligations if they are not covered by a valid arbitration agreement (ATF 141 III 294 para. 5.3; TF 4A_264/2018 of 7 June 2018 para. 2.3).

4.1.3 In the presence of a dispute over the interpretation of a contract, the court must first of all seek to ascertain the real and common intention of the parties, without dwelling on the inaccurate expressions or names which they may have used, either by mistake or to disguise the true nature of the agreement (art. 18 para. 1 CO). Indications in this sense are not only the content of the declarations of will, but also the general context, i.e. all the circumstances making it possible to discover the will of the parties, whether it be declarations made before the conclusion of the contract, draft contracts, correspondence exchanged or the attitude of the parties after the conclusion of the contract (TF 4A_65/2012 of May 21, 2012 consid. 10.2 and the authors cited). The search for the realwill of the partiesisqualified assubjective interpretation(ATF131III606 consid. 4.1p611;ATF125III305consid. 2b p.308).

If the real will of the parties cannot be established, or if the intimate wills of the parties differ, the judge must interpret the parties' statements and behavior according to the principle of trust, looking for how a statement or attitude could be understood in good faith according to all the circumstances (ATF 133 III 61 consid. 2.2.1). This so-called objective interpretation, which is a matter of law, is made not only on the basis of the text and context of the statements, but also on the basis of the circumstances that preceded and accompanied them (ATF 131 III 377

4.2.1; ATF119 II 4493a), excluding subsequent circumstances (ATF 132 III 626consid3.1The application of the principle of trust is a question of law that the Federal Supreme Court may examine ex officio (art. 106 para. 1 FSCA [Law of 17 June 2005 on the Federal Supreme Court; RS 173.110]). However, in order to decide this question, it must rely on the content of the expressions of will and on the circumstances, the finding of which is a matter of fact (ATF 135III410 consid. 3.2).

The legal qualification of a contract is a question of law (ATF 131 III 217 consid. 3 p. 219). The court is thus free to determine the nature of the agreement according to the objective arrangement of the contractual relationship (objektive Vertragsgestaltung), without being bound by the classification, even if it is concordant, given by the parties (ATF 84 II 493, recital 2; TF 4A_194/2011 of 5 July 2011, recital 5.3, summary in JdT 2012 II 198). The denomination of a contract is not decisive in assessing its legal nature (art. 18 para. 1 CO; ATF 129 III 664 consid. 3.1; TF 4A_484/2018 of December 10, 2019 consid.4).

In short, the judge must endeavour to seek the real and common intention of the parties on all points on which such a will can be established. When the real will of the parties cannot be established or when the intimate wills of the parties diverge, the judge must interpret the statements and conduct of the parties according to the principle of trust. On the basis of all these elements, he determines the legal nature of the agreement by referring to the constituent elements of the types of contracts under consideration and to the criteria of distinction laid down by case law and doctrine (TF 4A_200/2015 of 3 September 2015 consid. 4.1).

4.1.4 The individual employment contract commits the worker, for a fixed or indefinite period of time, to work for the employer and the latter to pay a salary fixed according to the time or work performed (Art. 319 para. 1 CO). The characteristic elements of this contract are a work performance, a subordination relationship, an element of duration and remuneration (TF 4A_200/2015 of 3 September 2015 consid. 4.2.1 and 4P.337/2005 of 21 March 2006 consid. 3.3.2).

The employment contract differs above all from other contracts for the provision of services, in particular the mandate, by the existence of a subordination link (ATF 125 III 78 consid. 4; ATF 112 II 41consid.1a/aaand consid. 1a/bb in fine),*which* places the employee in a position of dependence on the employer from a personal, organisational and temporal point of view, and to a certain extent economically. The worker is subject to the supervision, orders and instructions of the employer. Classically, he is integrated into the work organization of others and is given a specific place in it (cf. the aforementioned judgment of 3 September 2015, point 4.2.1 and the judgments cited above). Although the representative must follow the instructions of the client, he acts independently and under his sole responsibility, while the employee is in the service of the employer. Other clues can also help to distinguish, such as the element of duration peculiar to the employment contract, while the mandate may only be occasional (the aforementioned judgment of 21 March 2006, point 3.3.2 and the cited references), the fact that the conditions of time and place in which the work is to be carried out are laid down in the contract,

the provision of work instruments and the reimbursement of expenses, as well as economic independence; this last criterion must, however, be put into perspective, given that economic dependence may exist in other types of contracts than the employment contract, on the one hand, and that it does not necessarily exist in all employment contracts, on the other hand (TF 4A_592/2016 of March 16, 2017 consid. 2; TF 4C.276/2006 of 25 January 2007 consid. 4 and the references cited). An essential clue in deciding on the dependence of the service provider is whether he works exclusively for a single company (TF 4A_553/2008 of February 9, 2009 consid. 4.2; TF 4C.276/2006 of January 25, 2007 consid. 4.6.1).

Formal criteria, such as the title of the contract, the declarations of the parties or social insurance deductions are not decisive. Rather, material criteria relating to the manner in which the work is actually performed, such as the degree of freedom in the organization of work and time, the existence or not of an obligation to report the activity and/or follow instructions, or the identification of the party bearing the economic risk, must be taken into account (TF 2C_714/2010 of December 14, 2010 consid. 3.4.2). In principle, instructions that are not limited to simple general guidelines on how to perform the task, but which influence the purpose and organization of the work and establish a right of control of the entitled party, reveal the existence of an employment contract rather than a mandate (cf. TF 4A_592/2016 of March 16, 2017 consid. 2; TF 4C.216/1994 of March 21, 1995 consid. 1a).

Only the examination of all the circumstances of the concrete case makes it possible to determine whether the work is carried out in a dependent or independent manner (ATF 129 III 664 consid. 3.2 p. 668; ATF 112II 41 consid. 1a/aa p. 46; TF 4A_592/2016 of 16 March 2017 consid. 2).

4.1.5 Art. 2(2) CC, which prohibits fraud, precludes the conclusion of "chain contracts" ("Kettenverträge") whose fixed duration is not justified by any objective reason and whose purpose is to evade the application of the provisions on protection against leave or to prevent the emergence of legal claims dependent on a minimum duration of the employment relationship (ATF 129 III 618 para. .2). As examples of objective reasons for the successive conclusion of fixed-term contracts, the Federal Supreme Court has mentioned the employment of artists, professional sportsmen and women or teachers who give courses per semester or academic year (TF 4A_215/2019 - 4A_217/2019 of October 7, 2019 consid. 3.1.2). In the latter judgment, the Federal Court held that the plaintiff, teaching the same subjects under identical or similar conditions over a long period of time, was on the contrary *de facto in* an employment relationship of indefinite duration with the defendant (consid. 3.1.3). He therefore confirmed the cantonal assessment that the successive contracts concluded by the parties should be reclassified as a single contract of indefinite duration.

With regard to successive employment contracts in the field of service leasing, the Federal Court also stressed that the question of abuse of right or fraud involves

to assess in light of the facts of the case, in particular the duration of successive assignments, the periods of vacancy between two successive engagements and the identity of the company or companies renting services, whether the employer's intention was to evade the provisions concerning protection against vacations or the emergence of legal claims dependent on a minimum duration of employment relationships (TF 4A_428/2016 of February 15, 2017 consid. 1.1.2).

4.1.6

4.1.6.1 In this case, the investigation established that the relationship between the parties took place in several stages. First, a group session was held during which certain points of collaboration between the appellant and the applicant drivers were discussed. At the end of this session, the respondent was offered the opportunity to sign the Contract, which he accepted under the conditions set out above (see *supra* consid. 3.2). Subsequently, as soon as the respondent was registered, he received requests for races from the appellant. If he accepted them (his right in this matter being restricted in many ways, cf. *infra consid.* 4.1.6.5.1), he had to go to the place where the caller's customer was picked up and then take him to the place indicated by the latter on the application. The respondent was then paid by the caller for the trip, with compensation for expenses in both directions. In the end, the respondent was paid by the appellant for each trip made.

The particularly contested issue of the appellant's subordinate relationship to the respondent in the performance of its duties (*infra* consid.

4.1.6.2 to 4.1.6.6), before analyzing the existence of the other characteristic elements of the employment contract (*infra* consid. 4.1.6.7).

4.1.6.2 The appellant argues - and her representative [...] also asserted at her hearing - that she did not control the intensity of the respondent's activity and that her activity would be limited to making the application available, as an intermediary between the drivers and passengers using the application. The drivers would thus only be its clients, like the persons transported.

However, the Direction established that once the respondent accepted a request for transportation from the appellant, the appellant was particularly focused in carrying out this task:

4.1.6.2.1 First, the appellant had control over the vehicle her drivers were going to use. The drivers could only use a model "approved" by the appellant, which must not be more than ten years old, have four doors and be in good working order (Contract, p. 4; hearings of ... May 23, 2018, p. 3; hearings of ... May 23, 2018, p. 3; hearings of ... June 25, 2018, p. 5). The appellant further required the driver to provide her with a description of the vehicle and a copy of its registration card, as well as any changes to its "fleet" (Contract, p.

4 ; in this sense also hearing of [...] of May 23, 2018, p. 3). Any violation of these requirements was qualified by the Contract as a "material breach" of the contract (Contract, p. 4).

4.1.6.2.2 The driver's other working tool was a cell phone, on which was loaded the software necessary to use the "O" services._______________________________The other tool used by the driver was a cell phone on which was loaded the software needed to use the "O" services, receive transportation requests from the caller and be given the route to reach them and take them to where they wanted to go. The title "Company Equipment / Driver ID" in the Agreement states that the caller will have complete control over the driver, as the caller provided the respondent with the phone on which the application was loaded and the identifiers to register and use the application. The appellant further reserved the right to revoke its approval or authorization of the respondent "at any time in its sole and indisputable discretion". The device was then to be returned to the appellant (Contract, pp. 7-8). There is no real and common will of the parties to leave the respondent any freedom of action.

4.1.6.2.3 The appellant also required drivers, on pain of not being able to log on, to submit an annual extract from the criminal record (hearing of [...] of June 26, 2016, p. 3; in this sense also hearing of [...] of June 26, 2018, p. 1). Such a requirement also speaks in favour of a subordinate relationship between the appellant and the respondent.

4.1.6.2.4 In addition to the prerogatives that the appellant gave herself in the equipment necessary for the respondent to carry out her task, she was the only one who knew the data of the drivers on the one hand, and the customers on the other hand. She did not share her information with the respondent, which she would logically have had to do if she had only been an intermediary between the respondent and the persons transported by him. When she received a request from one of her clients, she alone decided who would be put in contact with whom among the drivers and her clients. Moreover, it was she who alone knew the financial data of both the drivers and the clients to be transported and who organized the payments. Again, she did not pass on this information to the driver. It was the caller who then collected the amounts from the customers and it was she who assumed the risk of non-payment by them. Thus, here again and in spite of the contractual terms, one does not distinguish any real will of the parties and in particular of the appellant to let the respondent organize himself independently in the setting up of the transport services and their payment by the transported persons. On the contrary, by the organization wanted by the appellant and accepted by the respondent, the latter in fact totally supervised these elements.

4.1.6.2.5 With respect to the transportation of the client, it was the appellant who indicated to the respondent the precise location of the pick-up of the client who had requested an errand from the appellant, and then where he was to be taken. As will be seen below, she only transmitted this information to the respondent on a drop-in basis and as late as possible. The respondent had no opportunity to discuss it.

4.1.6.2.6 As for the actual execution of the race, despite certain terms of the contract, it was in reality very much in line with a transport service. The Contract thus required the respondent to perform the task "in accordance with its parameters" and other client specifications. In addition, the respondent was required to notify the client "of the arrival of O.________________s arrival" through the mobile application. The respondent was required to present himself to the clients, at the caller's request, not as working on his own behalf and in his own name, but as working on behalf of O.______ ________________. The Agreement further required the respondent to wait at least ten minutes for the customer to arrive at the specified pick-up point (although he was not paid for this waiting time if the trip was to take place afterwards). The Agreement then required the respondent to provide direct and uninterrupted transportation. It further required the respondent to follow the instructions of the appellant's customers in the execution of the trip. Finally, the Agreement provided that the respondent could be prohibited by the client from taking persons other than himself.

The appellant argues that these instructions were not instructions imposed by her on the respondent but "real common sense advice, not sanctioned" (appeal, p. 22). This cannot be followed, since the Agreement expressly states that "failure to comply with this paragraph [containing said instructions] constitutes a material breach of this Agreement" (Agreement,
p. 2), thus enabling the appellant to terminate the said contract by giving seven days' notice (Contract, p. 9 let. ii). These were thus important (substantial) directives from the appellant to the respondent, whose failure to comply with them, even under the contract, gave the appellant the right to terminate the contract in the very short term. Unless the respondent risked losing its source of income, it had to follow them.

The appellant, through the application, also provided a number of additional instructions, including instructions on driving style, vehicle maintenance and cleanliness (Hearings of [...] May 23, 2018, p. 3, and [...] June 26, 2016, p. 3). The appellant admits in her reply on appeal that she also sent the respondent recommendations on politeness and decorum towards the passengers carried and a report on minimum safety rules, particularly on the road. It is not clear what such "recommendations" meant if, in the minds of the parties and particularly of the appellant, the respondent was supposed to be operating independently.

In addition, drivers regularly received messages containing statistics on untimely braking or sudden acceleration (hearings of [...] of May 23, 2018, p. 3 *in fine and of* [...] of June 26, 2018, p. 3 *in initio*).

Finally, the driver was not free to follow the route he wanted. He had to follow the one resulting from a GPS, in the absence of instructions from the customer. The appellant argued in this regard that he could have used other GPS applications, on another phone, than those installed on the phone she had made available to him. However, the investigation established that the respondent did not learn, via the appellant's application, where to drive the customer until after the customer was in his vehicle and the

stroke started (see *below* consid. 4.1.6.5.2). It is therefore not apparent that the respondent, when he had started to drive, stops to enter the address of the customer's pick-up on another cell phone, respectively another GPS, than the one on which the caller had communicated the destination to be reached. The manner in which the caller gave the respondent the information necessary for the performance of his task thus led him *de facto* to use one of the GPS installed on the phone given by the caller (in this sense, hearings of [...] of May 23, 2018, p. 2, and [...] of June 25, 2018, p. 2), i.e., one of the routes decided by the caller via the application. The drivers felt obliged to follow it (hearings of [...] of June 25, 2018, p. 2, and [...] of June 26, 2016, p. 3).

4.1.6.2.7 The appellant, in addition to the terms and conditions of carriage imposed on the respondent, also unilaterally and alone fixed the price to be paid by the customer and the amount to be paid to the driver (see hearings of [...], May 23, 2018, p. 1; of [...], May 23, 2018, p. 3; of [...], June 25, 2018, p. 2; of [...], June 26, 2016, p. 2; of [...], September 27, 2018, p. 2). The judgment of the Chambre des actions en cessation of the Tribunal de l'entreprise francophone de Bruxelles of January 16, 2019 (produced as Exhibit 14 by the appellant), to which the latter refers in support of its assessment that its drivers are "free to deviate from the proposed price", is not relevant. At page 32 of that decision, it is stated that the contract provides for an "indicative" rate and that the company in question, as a party to the contract, may negotiate other prices, which is not the case here, where we are dealing with a private individual and not a business partner who may choose to use staff to perform services and enter into rental contracts with other clients. This decision is thus not transposable; would it be transposable that the Court would not be bound by it in any case.

In addition, the Contract prohibited the respondent from accepting a tip (Contract, p. 5).

4.1.6.2.8 Finally, the appellant participated in financing the training of certain professional drivers, organizing theory courses, followed by practical sessions with a vehicle made available and a driving instructor (hearing of [...] of June 25, 2018, p. 1). The plaintiff himself benefited from a partnership set up with a driving school, as appears from the exchange of e-mails he had with the appellant on June 9, 2016 (Exhibit 35). Moreover, the appellant did not contest having set up partnerships so that drivers could acquire a vehicle on a preferential basis (see hearing of [...] of June 25, 2018, p. 5). Finally, the respondent stated, like the other witnesses heard in the proceedings (hearings of [...] of May 23, 2018, pp. 1 and 3; of [...] of May 23, 2018, p. 3; of [...] of September 27, 2018, p. 2), that the fines imposed on him for contravening the administrative regulations on cabs - six in all - while he was working for the appellant had all been reimbursed by the appellant. The witness ... even testified that he was provided with counsel by the appellant to oppose the fines.

Such interventions on the part of the caller within the framework of the execution of the driver's tasks are not those of a co-contractor in relation to an independent service provider, but those of the caller in relation to the execution of the driver's tasks, but those of a co-contractor in relation to an independent service provider.

of an employer in relation to its employee. Here again, these are additional indications that speak in favour of a concrete relationship of dependence of the appellant on her drivers and the position of employer that she occupied, and this despite the terms of the contract.

4.1.6.3 In addition to these elements and the instructions given to the respondent by the appellant via the Agreement, the application and its GPS, respectively its clients, the appellant exercised particularly tight control over the manner in which the respondent carried out the tasks entrusted to it.

4.1.6.3.1 Through the cell phone on which the application provided by the caller was downloaded and which remained connected during the trip, the caller could control the respondent's position. She could make sure in real time that he went to the customer and started the race. She could also control the route taken by him to get the customer where he wanted to go (Hearings of [...], June 26, 2018, p. 3, and [...], September 27, 2018, p. 3), as well as the progress of the trip and the time the respondent took to complete it. The respondent therefore knew that it was being particularly monitored.

The appellant used this data to pick up a driver when she received a comment from one of her customers that the route was not the fastest (Exhibit 36; hearings of ... June 25, 2018, at pp. 2-4, and of ... June 26, 2016, at p. 3).

She also drew up a weekly report on the driver's activity, including his connection time, the number of "accepted" runs, the runs made and the routes used (see interview with [...], pp. 2 and 3), which she sent to the driver, reminding him that she followed him in the execution of each run, as well as during his connection time. The appellant could not in these circumstances seriously argue that she was not actively monitoring this data (reply on appeal, p. 29). Indeed, she does not, as she claims, simply use the data to find out *before* a race where the drivers and customers are. It also uses this data *during* the trip to monitor drivers during the execution of the trip and *afterwards* to remind them that it is following them closely and, if necessary, to pick them up again.

4.1.6.3.2 As seen above, the appellant alone managed - and therefore controlled - the financial aspect of the entire process, over which the respondent had no control, and was even prohibited from accepting tips.

4.1.6.3.3 The appellant's control over how the respondent ran its race was finally achieved by an additional means, namely the assessment of clients.

The appellant was in fact asking its customers, via the application, that they evaluate a completed race before being able to order another one (cf. hearing of [...] of November 28, 2018, p. 4).

The driver had no control over this rating system. At most, he could consult his general assessment of the application, which was based on an average of the individual assessments made by the clients (hearing of [...], May 23, 2018, p. 2). However, the appellant did not communicate to him the individual assessments made about him by the clients, nor the identity of the latter (hearings of [...] of May 23, 2018, p. 2 *in fine*; of [...] of June 26, 2016, p. 2; of [...] of September 27, 2018, p. 2), keeping this information for herself. There is no doubt that if she had been, as she maintains, only an intermediary between the clients and the respondent and the latter an independent, she would have transmitted to him this information which concerned him in the first place. The withholding of this information is further evidence of the appellant's subordination of the respondent.

Through the information that the appellant requested from the clients, the appellant knew exactly whether or not the respondent had correctly performed the service she had entrusted to it, either to the full satisfaction or not of her client - full satisfaction that the instructions given by the appellant were intended to achieve -, race by race, client by client. Would she have put one of her employees next to the respondent during each race that she could not have had a much more precise appreciation, nor such a tight control of the services provided.

Moreover, these assessments were not inconsequential and were not merely intended to increase the respondent's references on the application, as the appellant argues (appellant's s. 273). It appears from the instruction that when a driver's overall rating was not excellent, i.e. when it was 4.45 out of 5 and less (see Exhibit 113) - the witness [...] mentions 4.6 out of 5 (hearing of June 25, 2018, p. 4), [...] (hearing of June 26, 2018, p. 2) and [...] (hearing of September 27, 2018, p. 2) 4.(hearing of June 25, 2018, p. 4) - Exhibit 113 thus mentions nine warnings addressed to the respondent for "*low* ratings" and in relation to the quality of his conduct - and/or put him on a waiting list (Exhibit 113 "*Driver waitlisted"*). The appellant could also decide to summon the driver to show him how to behave with clients (hearing of [...] of June 25, 2018, p. 4; in this sense also hearing of [...] of November 28, 2018, p. 3). In such a configuration - and not only when a risk to safety would have been proven - the appellant could finally decide to disconnect the driver definitively (hearing of [...] of November 28, 2018, pp. 3 and 4; measure also confirmed by the hearings of [...] of June 25, 2018, p. 4; of [...] of June 26, 2016, p. 2; of [...] of September 27, 2018, p. 2). Moreover, the Contract expressly specified that "drivers with poor results may have their right to accept applications limited" (Contract, p. 5). In addition, the appellant reserved the right to disconnect a driver contractually "at any time, at its sole and indisputable discretion" (Contract, p. 7). These evaluations were thus far from insignificant since they led the appellant to regularly take back the driver who did not receive sufficiently excellent evaluations and could lead to the driver's disconnection, or the pure and simple loss for him of the possibility of offering services and making income through this means. It is therefore wrong to

claim, as the appellant argues, that the existence of such a rating system "in the absence of any possibility of making binding decisions on the performance of the activity of the service provider" would not in any way imply any relationship of subordination between it and its drivers (cf. all. 404 of the appellant).

On the contrary, by this simple means - the evaluation of a driver requested from the customers after each race and the consequences that could ensue in the event of a non-excellent evaluation.

– the appellant ensured that the respondent performed the service it wished to provide to its clients in accordance with the contractual requirements and communicated via the application. Compliance with the appellant's instructions was thus mainly done through the assessment of the driver by the clients (hearing of [...] of May 23, 2018, p. 3; also hearing of [...] of May 23, 2018, p. 3). The balance of power is clear here.

In these circumstances, the appellant's client and driver assessments of the appellant's clients on the one hand, and the drivers on the other, cannot be described as a "reciprocal system between passengers and drivers" (Appeal, p. 24). The consequences of an assessment were not the same for clients and drivers. In the event of a poor assessment, the former would lose the opportunity to be transported by O.______________________In the event of a poor assessment, the client would lose the opportunity to be transported by O. at worst, while the driver would lose his or her livelihood.

4.1.6.3.4 In view of the foregoing, it is constant that the appellant not only prescribed precisely to the respondent how his task was to be carried out, but also had the real will, accepted by the respondent and carried out, to control the proper follow-up in a very strict manner. In these circumstances, it must be noted that the contractual statement that "the company will not have or exercise any disciplinary or control authority over you [the driver]" (Contract, p. 6) is completely contrary to the reality intended and implemented by the appellant and accepted by the respondent. The appellant, by the manner in which she organized, alone, the performance of the tasks she wanted to entrust to the respondent, clearly wanted to place the respondent in a subordinate relationship. Clauses in the written contract that proclaim the contrary do not correspond to the appellant's real will and, since they do not correspond to the respondent's real will either, they are devoid of any contractual effect.

4.1.6.4 The respondent used the application from April 2, 2015 to December 31, 2016. During this period, it was connected in order to receive requests for transportation from the caller - requests that it had a few seconds to accept (see *infra* consid. 4.1.6.5.1) - for more than 50 hours per week on average. He thus placed himself entirely at the disposal of the appellant throughout this period, which the appellant was well aware of given the supervision she exercised over the respondent's activity. During this period, the respondent worked exclusively for the appellant.

In this regard, the Court cannot follow the appellant when she claims, in particular

through her representative [...], that the respondent would have been entitled to work during the aforementioned period for other persons.

than it, including for other similar platforms.

It is clear from the Agreement that the Appellant declares that it does not reserve the right to restrict the Respondent's ability to perform other transportation services for any company, firm or individual, or to undertake any other tasks or activities whatsoever. However, this sentence is immediately followed by a very clear cautery that reads: "during the time you are actively registered in the software, you may only perform transportation services to satisfy requests you have received through the software" (Agreement, p. 3). The term "actively registered" is not defined in the Contract. It cannot be equated with the narrower notion of "use of service" (e.g. Contract, p. 1 *in fine*), otherwise the term would have been used. The use of a service also presupposes prior registration in the software allowing its use. The notion of registration is thus broader than the mere occasional use of the software. In other words, and based on the general meaning given to the notion of registration, the Court noted that by the Agreement, the appellant had the intention to prohibit the respondent, as soon as it was registered in the software, whether or not it was connected, from providing transportation services to persons other than the appellant and the appellant's clients. Therefore, it cannot be concluded that the parties - and in particular the respondent, for whom there is no evidence of such a will - initially wanted the respondent, while registered in the appellant's software, to remain free to offer transportation services to others. At the very least, it should be noted that during the time he was connected, he was not entitled to provide transport services for others. The appellant, who alleges that the respondent read and accepted the entire Agreement, cannot claim today that while the respondent was constantly connected to its application, he would have been entitled to provide transportation services to others. The clauses she had prepared and whose application she requested expressly prohibited her from doing so. Her attitude, which was contradictory, was contrary to good faith. In view of the respondent's connection time, i.e., nearly fifty hours per week, it is not apparent that he could at the same time, as the appellant contends, have offered work services to third parties.

Similarly, the appellant argues, also through its representative [...], that the drivers, including the respondent, would have been free to develop their own clientele, including from passengers encountered through the application. Such a will of the parties is not established in the case of the respondent, since the Contract, prepared by the appellant, stipulates precisely the contrary (Contract, p. 3). It is therefore not possible to conclude that the parties would have been willing, despite the work commitment that the respondent wished to provide to the appellant in return for remuneration, to allow the respondent to take advantage of the contacts it obtained in this context to perform other transportation services.

4.1.6.5 The appellant again argues that once an application was granted, the respondent was free to refuse to carry it out. Consideration of such an assertion implies first understanding the

information that was provided to the respondent in support of the appellant's "request" and the respondent's alleged freedom to accept the said request.

4.1.6.5.1 In this respect, the appellant invokes that the reports were arranged in such a way that the respondent was completely free to accept or not to accept a racing request that she notified him on his cell phone.

This is not correct. On the one hand, as we have seen, the appellant had contractually provided that the person "whose business is to provide transportation services described in the contract" was "a person whose business is to provide transportation services described in the contract".

(Contract, p. 3, 2nd par., 1st phr.) was not allowed, when registered in the application, to work for others than herself (cf. *supra* consid. 4.1.6.4). It was thus intended that, once registered, the respondent could no longer provide transport services to others, even though he was required to have a vehicle at his disposal. Unless the respondent agreed to have no income from transportation services, it was therefore relatively economically constrained to accept requests notified by the appellant.

The respondent's freedom on this point was furthermore three-fold limited in reality:

On the temporal level, on the one hand, the respondent was notified of a "request" for transportation on his telephone. He had only a few seconds to "accept" it (10 seconds according to [...], [...] and [...], 15 seconds according to [...], 15 to 20 seconds according to [...] and 20 seconds according to [...] and [...]). This period of time was already short, since the respondent had to be able, during these few seconds, to calculate the time - not paid for by the appellant - necessary to get from the place where he was to the place where the client was waiting for him, in order to know whether the journey (the length of which he did not know, moreover, was not known, cf. infra) could be worthwhile. The instruction also shows that if the driver did not carry out any manipulation showing that he accepted the request for transport formulated by the appellant within the short time allowed, he was deemed to have refused it (cf. in particular the hearings of [...] of November 28, 2018, p. 2, and of [...] of May 23, 2018, p. 2). His right to accept or refuse a request was thus conditioned on the fact that he was, at the time of receipt of the request, very close to the telephone and able to read it while it remained on his screen, to accept it within a few seconds and to leave within a few seconds in order to run the race.

At the material level, the respondent's freedom to accept an application was also clearly restricted. The respondent was not paid for waiting for applications from the appellant - even though under the Agreement, once registered on the software, the respondent was no longer entitled to provide transportation services to others. Nor was the respondent paid to go to the location of a person wishing to be transported and wait for him. He was paid only for the journey he made with the customer in his vehicle, depending in particular on the duration of the journey. However, when the caller received a request for transportation from a customer, she knew by said request where the

customer was and where he wished to go. The caller could thus estimate the distance to the destination.

The driver is responsible for the duration of the trip, the foreseeable duration of the trip and therefore the foreseeable price to be invoiced to the customer and the price that would be charged to the driver. However, it appears from the testimony of [...] (hearing of May 23, 2018, pp. 2 and 4) that when the appellant sent a "request" to the driver to "offer" to make a trip, her request was configured by her so as to communicate to the driver only the place where the customer wished to be picked up and possibly an assessment of the customer. The statements of the other drivers heard as witnesses also point in this direction, none of them having indicated that they had received from the caller any information other than the only place where the customer was picked up, possibly more precisely the distance between the place where the driver was and the place where the customer was, as well as the name under which the customer wished to be picked up (hearings of [...], [...], [...], [...], [...], [...], [...], [...], [...], [...], [...]).May 23, 2018, p. 2; June 25, 2018, p. 2; June 26, 2018, p. 2; June 26, 2018, p. 2; September 27, 2018, p. 2). The appellant thus did not inform the respondent of either the place where he was supposed to take the customer or the price he could expect to pay for his trip. In other words, she did not transmit to him the information, which she nevertheless held, allowing him to know how long the proposed trip would take him - which conditioned the possibility of running other trips - and how much the trip would bring him if necessary. It is thus erroneous to argue, as the appellant does, that the respondent would have had the opportunity to refuse an errand if the fare did not suit him (Appeal, at p. 23): at the time he received the request, the respondent did not have this information. He also did not know whether it was worth agreeing to go to the customer when he could travel many kilometers to reach him and then have only one kilometer of travel to do, only the latter being paid for (see hearings of [...] of June 25, 2018, p. 4, and of [...] of June 26, 2018, p. 2). Thus, upon receipt of a request, which the respondent had, at best, only a few seconds to accept, he could either accept it blindly and hope to gain from its execution - without knowing how long the race would take him or whether and how much it would ultimately bring him - or refuse it and thus lose any possibility of gaining.

The appellant, who is invoking here the respondent's right to freely accept or not accept a task, is acting in bad faith: while the Contract prepared by her repeatedly asserts this freedom, the appellant has in fact configured its application in such a way as to prevent the respondent from enjoying this right. The Court thus noted that, in light of the foregoing, the appellant, despite certain contractual terms, never had the real will to leave the respondent free to knowingly accept a task she proposed to him. On the contrary, she was clearly willing to subject him, in the performance of the tasks entrusted to him, to her instructions. As for the respondent, the circumstances of the case, and in particular his willingness to find a job to earn enough to support himself and his family, do not allow us to conclude that he would have had the will to provide services to the appellant, in particular by connecting to the application, while reserving the right to accept or refuse them when he wished to do so. Notably in view of the manner in which he submitted to the appellant's directives, race after race, the Court noted that the respondent's real will was also to accept to be bound to the appellant by a relationship of subordination.

In addition, the fact of refusing a request was not without consequences, in addition to the economic ones already mentioned above: according to witnesses, when a driver refused several requests, he was disconnected for a few minutes (between 3 and 5 minutes). During this time, he could no longer hope for any gain, and in particular that the caller would offer him a ride closer to the place where he was (knowing that the trip between the place where the driver was and the place where the client was picked up was not compensated by the caller) and therefore more profitable for him. It is thus indeed a "sanction" on the part of the appellant (cf. hearing of [...] on June 26, 2018, p. 2). In order to avoid this, the respondent was thus relatively forced to accept requests blindly, rather than being without any errand to run.

The drivers, when they did not connect sufficiently - in order to accept requests (the Court does not see otherwise for what purpose) - were also encouraged to do so by the caller by SMS and/or email (cf. hearings of [...] of June 26, 2016, p. 1, and of [...] of September 27, 2018, p. 3), without the latter being concerned in any way about the time and day when it did so (cf. hearing of [...] of September 27, 2018, p. 3). The appellant admits the sending of such incentive messages but justifies this pressure by arguing that it is a "marketing approach", an approach that she would also use towards her clients. However, she does not establish this, and it is not clear that they would accept such a way of doing things. The caller was thus clearly pressuring her drivers to connect and thus accept the requests that reached them, without respecting the moment (day/night, weekend, rest period) when they were made. This prevented them from being able to devote themselves effectively to another task that would enable them to earn a living, which further increased their economic dependence.

The appellant's pressure in this regard was further manifested in the weekly statements she sent to the respondent, which included the rate of applications
This is the only way to ensure that your data is "accepted" as well as the connection time. Finally, the Agreement stipulated that if no application was accepted within 90 days, it was automatically terminated (Agreement, p. 10). In these circumstances, it is wrong to argue that the parties would have wanted the respondent to have the right and the actual ability to accept or not accept, without consequence, requests for carriage that it received. In reality, everything was done, by the will of the appellant, to compel him to do so as much as possible.

4.1.6.5.2 With respect to the respondent's right to refuse to execute a request that he had "accepted", it appears from the instruction that the respondent did not learn from the appellant the destination to which he was to take the customer until the customer was in his vehicle and the respondent started the race (cf. the hearings of [...] of May 23, 2018, p. 3, and [...] of June 25, 2018, p. 4). Only then could he estimate how long the race would take him and how much money he could make from it. It was therefore only then, depending on the organization sought by the appellant, that he knew what service was expected of him and what he could expect to gain, once his expenses to get to the place of pick-up - not paid for by the appellant - had been compensated.
– the appellant's request for fees and the amounts paid by the appellant to the appellant.

being always superior to the second. However, at that time, he could hardly, except to stop his vehicle and put the customer out, refuse to perform. Moreover, there is no doubt that such conduct would have led the customer to rate the respondent very badly - [...] admitting in such a hypothesis the possibility for the customer to complain (hearing of November 28, 2018, p. 2) -, which could then have had serious consequences for him. Moreover, the Contract expressly stipulated on several occasions that once the respondent had accepted a request, he could no longer renounce its execution without committing a "material breach of this Contract" (Contract, p. 2 on two occasions and p. 10 ch. V). As already mentioned, such a breach allowed the appellant to terminate the contract upon seven days' notice (Contract, p. 9).

The respondent, once the application had been blindly accepted, could no longer evade it without consequence. It is therefore erroneous to argue, as the appellant does, that drivers retained the option of freely refusing a trip if the rate suggested for it did not suit them (appeal, p. 23): the drivers only received this information once the request had been accepted and the appellant's client was sitting in their car. This mode of "proposing" tasks, organized voluntarily by the appellant in a unilateral manner, does not allow one to consider that their relationship would be balanced and that the appellant would not have wanted to have and had on the respondent a position enabling him to impose his wishes and in particular the services she expected from him.

4.1.6.6 In conclusion, the Court noted that, despite certain terms of the contract, the appellant alone chose the mission to be entrusted to the respondent, the place where he was to pick up the client and the place where he was to drop him off, and *de facto* determined the route to be followed, the price of the trip and the amount to be paid to the respondent. Once the respondent had agreed - blindly according to the organization set up by the appellant - to take such a trip for her, he had to carry it out according to the appellant's multiple instructions. This ranged from the choice of the vehicle used, which had to be approved by the appellant, to the continuous monitoring of the vehicle, which included the cleanliness of the vehicle, the manner in which the customer was treated, the time taken to wait for the customer and then make the trip, to the monitoring of the route chosen. The appellant closely monitored compliance with the instructions given, using the data collected on the application used by the respondent on the one hand, and the assessment she asked the customers transported on the other. The drivers knew that they were being evaluated by the people they had transported and that if they received a failing grade they could be prevented by the appellant from continuing to work for her temporarily or permanently. The appellant also reminded her drivers that she monitored compliance with instructions by sending them weekly reports indicating the trips they had made and the routes they had taken.

In addition, the appellant was alone in charge of the collection and assumed the risks in case of non-payment, and finally, the respondent had worked only for her during the litigious period.

In these circumstances, the appellant cannot argue that she merely put people who wanted to run a race in contact with someone who was willing to do so. She had the real will to control everything in the execution of the respondent's task and her organization was made so that her drivers were only performers, having a minimum of information allowing them only to execute the race entrusted to them, at the price set by the appellant, on which there was no discussion possible in fact, and according to the terms imposed and verified by the appellant.

These elements make it necessary to conclude that the appellant had a relationship of subordination to the respondent's transportation activity, a relationship that she wanted and that he accepted, both personally, organizationally and temporally, as well as economically (in this sense, too, the hearing of [...] of May 23, 2018, p. 3). With regard to the organizational aspect, one cannot emphasize here on a traditional organization of work, including in particular a fixed workplace: the appellant in fact arranged the execution of the services she asked the respondent to provide in such a way that the organization was as dematerialized as possible, giving her instructions and taking back the respondent through the application and by e-mail and/or SMS and thus virtually eliminating human and physical interference. However, the power it had over the respondent's performance of the work was no less effective.

In view of these elements, it must be noted that the real will of the parties, manifested not only by the contractual document but also and above all by the way in which the parties executed the said contract - i.e. by their behaviour during their collaboration - was to create a relationship of subordination and dependence of the driver towards the operator of the platform. The clauses of the contract which proclaim the contrary - but which are thwarted by so many others and never received any concrete execution during the working relationship - do not correspond to the real and common will of the parties. Everything indicates that the appellant introduced them into the written contract for the sole purpose of concealing the true nature of the contractual relations she entered into with her drivers.

4.1.6.7 With respect to the other characteristic elements of the employment contract, the appellant asserts that the respondent failed to demonstrate the existence of a performance of work and the duration element of the employment contract and that he received remuneration from the appellant for the work he performed. However, she does not present any argument challenging the first judges' assessment on these three points. Her grievance is inadmissible. It is also unfounded for the following reasons:

4.1.6.7.1 The hearing established that the respondent was willing to commit to working for the appellant to earn enough to contribute to the needs of her family. It was for this purpose that he signed the Agreement. The appellant cannot have understood it otherwise. The respondent then logged on to the application for nearly 21 months, 91 weeks, more than 50 hours a week,

demonstrating concretely his willingness to work for the appellant. The appellant, who very regularly monitored the respondent's connection time, which was aimed solely at obtaining tasks, was well aware of this and accepted the respondent's commitment, which she acknowledged (appeal, p. 5 all. 18). During the aforementioned period, the respondent also ran 9,163 errands for the appellant, or approximately 100 errands per week. If he is given the rest time to which all workers are entitled, including 4 weeks of vacation per year, the number of errands run by the respondent for the appellant would amount to 109 errands per week, or nearly 22 errands per day for a 5-day week. It cannot be denied in these conditions that the respondent not only undertook to provide a work service to the appellant, but that he actually provided it, this during the entire period when he was connected to the appellant's application. During this period, he worked only for the appellant and had no other sources of income. Moreover, he could not contractually provide transportation services to others.

Moreover, the relationship between the parties would be considered distinct from one transport to another, and it should also be admitted that the respondent, as soon as he accepted a task, undertook to provide it to the appellant (cf. *infra* consid. 4.1.6.8).

4.1.6.7.2 The appellant undertook to compensate the respondent for each race performed. The existence of the element of compensation is also established here.

4.1.6.7.3 Finally, with regard to the element of duration, the preceding elements demonstrate its existence. Moreover, again, even bearing in mind that the relationship binding the parties was distinct from one transport to another, the existence of the element of duration should also be admitted for the time of execution of the accepted task (see *infra* consid. 4.1.6.8).

4.1.6.8 The Contract, prepared by the appellant, states in the first paragraph of the conditions that "each application you accept will constitute a separate contractual undertaking" (Contract, p. 1). The respondent admitted to having some freedom to accept a request for transportation that the appellant notified him of on his cell phone. The appellant emphasizes this alleged freedom.

4.1.6.8.1 Even if such a distinction is accepted between each transport carried out, despite the fact that they are all governed by the same agreement between the parties and all carried out according to the same modalities, it must be noted that the relationship between the parties from the "acceptance" of the request by the respondent must be qualified, in view of the preceding elements, as a contract of employment: the respondent undertakes, by accepting a request, to provide a service to the appellant, which the latter accepts, in return for remuneration, in accordance with the strict instructions given by the respondent, if necessary by the client, and under the equally strict supervision and control of the appellant.

4.1.6.8.2 As indicated above, the respondent logged on to the caller's application for 21 months and, during this period, made 9,163 trips for her. Thus, if one follows the desired conception, respectively accepted by the parties, that each transport should be apprehended separately from the others, one should consider that the parties concluded, during the 21 months when the respondent logged on to the appellant's application, 9,163 successive employment contracts, i.e. more than 100 per week.

4.1.6.8.3 The question therefore arises as to whether the possibility contractually provided for by the appellant to consider each transport - qualified as an employment contract - separately is justified on objective grounds or whether this possibility has the sole purpose of evading the application of the provisions on protection against leave or of preventing the emergence of legal claims dependent on a minimum duration of the employment relationship.

In this case, an examination of the circumstances of the case at bar indicates that there was no objective, arguable reason justifying the use of such a procedure: the task was always the same, carried out under the same conditions imposed and verified by the appellant, and remunerated under the same conditions. The legal document binding the parties and the application used were the same for all races. The only reason for providing for chain contracts in this way can only be - the appellant offering no other justification - to evade the application of any provision, particularly in labour law, aimed at providing minimum protection to the weaker party to the contract, i.e. the driver.

In these circumstances, it must be considered that despite the very theoretical freedom unilaterally granted by the appellant to the respondent to accept races, a freedom equally unilaterally limited in fact by the latter, the parties were in an employment relationship of indefinite duration and that the successive contracts concluded by them must be requalified into a single employment contract of indefinite duration (cf. *supra* consid. 4.1.5). In this case, the clause providing for a fixed term has no effect and the duration of the employment relationships will be calculated on the basis of the sum of all periods of employment (TF 4A_216/2007 of September 13, 2007 consid. 1.3; Carruzzo, Le contrat individuel de travail, Zurich 2009, pp. 466-467; Aubert, in

Commentaire romand, Code of Obligations I, 2nd ed. 2012, n. 6 ad art. 335 CO; Carron, in Commentaire du contrat de travail, 2013, n. 33 ad art. 334 CO).

4.1.6.9 The assessment that the parties were bound by a contract of employment can only be further supported by the following example. Thinking of more traditional, less dematerialized relationships, one could compare the case in point to that of a major commercial brand that knows it will have customers to serve and that it will need employees to serve them, but that would decide overnight to no longer be bound to its salespeople and cashiers by an employment contract. Instead, she would offer them, when she knows very well that they have to earn a living, to come to her business premises every morning to tell her if by chance they would agree to work for her that day,

which of course they would be free to refuse to do. Each proposal would relate to the same type of work, to be carried out as soon as accepted in accordance with the instructions of the sign, for the duration of the day. Such a system and the alleged freedom of ex-employees would constitute such a crude attempt to evade the protective provisions of labor law, against the clear will of the legislator, that the alleged contracts would be qualified as a global labor contract, with the protection that derives from it.

In the present case, this conclusion is even easier to reach. The appellant had so many customers to satisfy in 2015 that she was advertising for drivers, offering them the prospect of substantial profits, and organizing so-called group information sessions at the end of which she signed contracts with anyone interested in working as a driver. In doing so, the appellant sought to establish long-term relationships with her drivers, not relationships limited to a piecemeal, one-off transport operation. The respondent, for its part, had clearly demonstrated its willingness to work for her, without restriction, in particular by signing the Contract. He had then logged on to the application for 21 months for more than 50 hours a week, waiting for work, thus showing his full availability to perform the tasks covered by the signed Contract. The appellant, through the monitoring of the respondent's activities that it carried out, knew perfectly well that the respondent was connected approximately 50 hours per week and that it was therefore economically dependent on it, not being able, according to its wishes expressed in the Agreement, to carry out parallel transport activities for third parties and waiting for work from it. Moreover, contrary to the preceding example, the appellant, who needed drivers, and the driver, who needed work, did not meet each morning at the appellant's premises. The caller had set up the software that the driver had to install on the cell phone and asked the driver, regardless of his location, an average of almost fifteen times a day if he wanted to perform the same task for her, according to her instructions, always the same instructions, at very short notice. At the end of the contract, the caller will have thus solicited the respondent, available for her since he was connected more than 50 hours a week, 9'163 times, where he will have answered positively to her requests.

The appellant furthermore drastically limited the respondent's alleged freedom to accept an errand, requiring him to have a vehicle allowing the transportation of persons, while at the same time prohibiting him from providing transportation for others as soon as he was registered, pressuring him to log on and accept the requests made to him, while knowingly omitting to give him the information allowing him to understand what working hours and what gain were at stake. This alleged freedom granted contractually by the appellant to the respondent - and which the latter was not seeking, wishing only to earn a living - and in fact limited as much as possible by the appellant thus clearly appears to have been intended to be invoked in order to improperly attempt to escape what must be qualified as a labour relationship and the protection that flows from it. The Court does not perceive in this manner of proceeding, however dematerialized it may be, any signs of effective and sufficient independence of the respondent from the appellant. Following the example of the commercial sign in the above-mentioned example, the latter offers work to the driver, who accepts it, in such a way that the driver's job is not dependent on the appellant.

repeated and identical in duration, following his instructions in the execution of the tasks entrusted by the caller. These are no more and no less than working relationships.

4.1.6.10 Contrary to this assessment and to the judgment under appeal, the appellant again criticizes in particular the authority of first instance for having retained that it was carrying out a transport activity in relation to its customers. It refers to the decision 2C_500/2016 of the Federal Court of 31 October 2016 arguing that it had not been considered as a transport company.

Apart from the fact that it does not bind the civil judge and that the respondent was not a party to the proceedings before the Federal Court, this judgment does not settle the issue, since it simply states that, even assuming that the appellant was not a transport company, it had standing to appeal.

The appellant complains that the trial authority has withheld character considerations. These considerations, whether or not they are retained, do not alter the characterization of the contract, made on the basis of the actual relationship between the parties and in the light of art. 319 et seq. of the Code of Obligations. The grievance is unfounded.

The appellant also criticizes the authority of first instance for not having systematically examined the existence of a temporal, geographical/spatial, hierarchical and then economic subordination relationship, aspects required by the Federal Court. The criticism is so surprising because it is obvious that the appellant tried to conceal the reality of the parties' relationships, by the information session that she organized during which she ignored crucial information for the respondent, by the Contract which is not representative of the real relationships of the parties and by the way she configured its application so that the rights of the respondent provided for contractually were in fact as limited as possible, if not eliminated. The fact remains that it follows from the foregoing that through this new relational or organizational mode, mainly through an application made available to the employee, the appellant did indeed exercise a power of subordination over the respondent in the manner in which he personally, temporally and geographically performed the agreed-upon tasks. To use the terms adopted by the Federal Court to describe traditional employment relationships, the respondent was indeed subject to the supervision, orders and instructions of the appellant in the performance of its duties. However dematerialized the relations between the parties may have been, the respondent did have, in the virtual space managed by the appellant, i.e. its organization, a specific position, namely that of a driver working within a specific (broad) perimeter and available to run errands. As such, he received, like the other drivers, personalized weekly statements established by the appellant, demonstrating day after day his activity for her. The appellant states that she did not want the respondent to appear as her employee. The argument is irrelevant: just as personnel would be employed without being declared, for example, it takes nothing away from the respondent's actual membership in the appellant's organization - albeit a very dematerialized one. In addition, the Contract, on page 2, required the respondent to announce not his arrival but that of O.______. The respondent thus presented himself to the client, by the will of the appellant, for O._____and not in his

name and on his behalf

own. Again with respect to the geographic aspect, it cannot be argued that the respondent could be wherever it wanted: if it wanted to receive requests, it had to be close to the appellant's customers, otherwise it would have had to turn to other drivers (in this sense, the [.May 23, 2018, p. 2; May 23, 2018, p. 2; June 25, 2018, p. 2; June 26, 2016, p. 2). In addition, it was in his interest to be near the places where the appellant's clients were located, since he was not paid by the appellant to travel to the place of care. He had to be within the perimeters where the clients were located, particularly in large cities. Finally, if he wanted to be able to run the errand he had "accepted" within a reasonable time, he logically had to be in his car or at least close by and be ready to leave. He was therefore limited geographically and personally in several respects, which could not escape the caller's notice. The grievance is thus unfounded.

Finally, the appellant invokes the alleged freedom that its drivers would have had to use the application. As stated above, this point is not decisive for the respondent: as soon as the respondent used and accepted a task for remuneration, he found himself subordinate to the appellant in the execution of that task, race after race, i.e. on the occasion of 9,163 races in total. It is abusive to argue that a person is not an employee for the sole reason that he or she can come and look for work when he or she wants, when he or she needs it, that his or her employer knows it, that he or she needs employees himself or herself, that he or she encourages him or her to come and log on and that the employee "accepts" in these circumstances, repeatedly, the same work, offered by the same employer, under the same conditions.

On these points again, the appellant attempts to support her assessment of the situation by relying on the statements of "one of the witnesses" that "I have never felt so free" (Appeal, p. 33). The Court notes that this witness, who was ..., acknowledged that he had spoken with an Amsterdam-based lawyer for the appellant prior to his hearing. Moreover, during his hearing, which was lengthy, he omitted to indicate that he was the president of the association created at O.'s request to defend the situation of the drivers vis-à-vis the authorities (cf. hearing of [...] on June 26, 2018, p. 1). Finally, this witness was unable to say whether the contract binding him to O.
_________________________was the same as the one at issue here. We do not see that his statements could in these conditions modify anything in the foregoing assessment in favor of the appellant. The same is true of the statements of the witnesses who stated that they were free to carry on the activity of transporting persons as they wished, in particular for O.__
September 2018, pp. 2 and 3).

4.1.7

4.1.7.1 In view of the characterization of the relationship between the parties as an employment contract, international jurisdiction is determined in accordance with Art. 18 ff. of the Civil Code. In accordance with Art. 19 para. 2 let. a CL, the Swiss courts have jurisdiction.

4.1.7.2 At the domestic level, Art. 12 CPC provides that the court of the defendant's domicile or seat or the place where he has his establishment or branch is competent to decide on actions arising out of the commercial or professional activities of an establishment or branch. According to case law, a branch is a commercial establishment which, in dependence on a principal undertaking of which it is legally a part, carries on a similar activity on a permanent basis, in separate premises, enjoying a certain autonomy in the economic and business world (ATF 117 II 85 consid. 3; ATF 116 V 307 consid. 4a). Even if the branch is devoid of legal existence and does not have the capacity to institute legal proceedings (ATF 120 III 11 consid. 1a; TF 4A_510/2016 of 26 January 2017 consid. 3.2; TF 4A_533/2015 of 20 December 2016 consid. 2.3; TF 4A_422/2011 of 3 January 2012 consid. 2.3.1), its registered office is likely to establish a forum in various legal fields. In this sense, case law admits that actions based on employment law can be brought not only at the defendant's domicile or seat or at the habitual place of work, but also at the court of the seat of the branch, where the work was performed for the branch (ATF 144 V 313 consid. 6.3 and the references cited).

In this case, the appellant is based in the Netherlands. At the time of the facts, it had offices in Lausanne, at the [...]. These offices were open three working days a week, from 9 am to 1 pm and from 2 pm to 6 pm. Several of the witnesses heard, as well as the respondent, went there to attend the information session during which the appellant presented the operation of the application and gave them his instructions and, for some of them, a contract to be signed on the spot (cf. hearings of [...] of May 23, 2018, p. 1; of [...] of June 25, 2018, p. 1; of [...] of June 26, 2016, p. 1). It is moreover admitted that on February 25, 2015, the respondent went "to the former premises of [...] located in the Flon district of Lausanne" and that both the appellant and the appellant are subsidiaries of [...] (reply, ad all. 1-4). Moreover, it appears that the appellant also operated an office in the western district of Lausanne, since several witnesses indicated that they went to Crissier at the premises of the appellant (cf. hearings of [...] of May 23, 2018, p. 4, and of [...] of June 26, 2015, p. 1). It was also in this office that it received the requests, possible complaints and other grievances of the drivers. Connections to the application were furthermore blocked or unblocked by people working in this office and the respondent was invited by the appellant on January 8, 2017 to make an appointment on its website (...) "for a meeting in [its] Lausanne office" in order to discuss its complaint of the same day regarding the blocking of its account (respondent's exhibit 11). It must therefore be admitted that the appellant operated a branch office in Lausanne, within the meaning of art. 12 CPC, since it carried on a similar activity on a permanent basis, in premises separate from the head office, while enjoying a certain degree of autonomy. Consequently, the authority of first instance, like the court of this court, was, respectively is, competent to hear the present dispute.

Since the relations of the parties must be qualified as employment relations, the above-mentioned authorities are also competent *rationae materiae* and *valoris* (Art. 1 let. a and 2 para. 1 let. a

LJT [Labor Jurisdiction Act of January 12, 2010; BLV 173.61] and 308 para. 2 CPC).

The previous authority erroneously considered the question of the validity of a choice of court. There is none, as the place indicated in the contract of 25 February 2015 concerns only the place of arbitration.

4.2 The question therefore arises whether the authority of first instance should have declined jurisdiction in view of the arbitration clause inserted in the Contract.

4.2.1 In addition to the domicile, respectively the seat of the parties in different states, the arbitration clause also introduces an international element by providing that the seat of the arbitral tribunal shall be in the Netherlands. From this point of view, the case also has an international character.

The question of the validity of the arbitration clause must therefore be examined under the PILA. However, the latter gives way to the international treaties applicable in this area (art. 1 para. 2 PILA). In this case, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded in New York on June 10, 1958 (RS 0.277.12; hereinafter CNY), to which both Switzerland and the Netherlands are parties. The CNY is applicable to the recognition by the authority of first instance of a written agreement providing that the parties shall submit their disputes to arbitration (ATF 121 III 38 consid. 2).

4.2.2 Under the terms of art. II para. 1 CNY, each of the Contracting States recognizes the written agreement by which the parties undertake to submit to arbitration all or some of the disputes which have arisen or may arise between them in connection with a particular legal relationship, whether contractual or non-contractual, relating to a matter capable of settlement by arbitration. According to Art. II para. 3 CNY, the court of a Contracting State, seised of a dispute on a question in respect of which the parties have concluded an agreement within the meaning of art. II CNY, will refer the parties to arbitration, at the request of one of them, unless it finds that the said agreement is null and void, inoperative or incapable of being enforced. This provision does not differ in scope from art. 7 LDIP (ATF 124 III 83 consid. 5 p. 87).

According to art. 7 LDIP, if the parties have concluded an arbitration agreement concerning an arbitrable dispute, the Swiss court seized shall decline jurisdiction unless the defendant has proceeded on the merits without making a reservation, the court finds that the arbitration agreement is null and void, inoperative or incapable of being enforced or the arbitral tribunal cannot be constituted for reasons manifestly due to the defendant to the arbitration.

We can already see at this stage that art. II al. 1 CNY, to which Art. II al. 3 CNY, as well as art. 7 LDIP, condition the validity of an arbitration clause to the fact that it relates to an arbitrable dispute.

4.2.3 The parties do not dispute that the court seized of a plea of arbitration must review the validity of the arbitration clause on the basis of the law of the State of the court seized, i.e. the Swiss law (cf. in this sense Oetiker, in Zürcher Kommentar zum IPRG, 3rd ed. 2018, n. 11-12 ad art. 177LDIP; Vischer/Huber/Oser, Internationales Vertragsrecht, 2nd ed., 2000, n. 1386).

The appellant recalled the content of ss. 176 and 177 PIDA. She then argued that the validity of the disputed arbitration clause should have been determined in light of art. 177 LDIP - which provides that any case of a proprietary nature may be submitted to an arbitrator -, the only provision in Swiss law that, in her view, governs arbitrability in an international context. This point of view cannot be followed: the legislator, in adopting a broad definition of arbitrability in art. 177 LDIP, did so in consideration of the fact that this provision applies only if the seat of the arbitral tribunal is in Switzerland (art. 176 LDIP; ATF 121 III 38 consid. 2a) - which provides certain guarantees. In this case, however, the arbitration clause provides that the seat of the arbitral tribunal shall be in the Netherlands. It follows that art. 177 LDIP does not apply here. The appellant's objections to the application of art. 177 PILA to the present case are therefore unfounded. The appellant also clearly ignores s. 7 of the PIPA and the case law on adjudicability.

4.2.4 Arbitrability is a condition for the validity of the arbitration agreement and thus for the jurisdiction of the arbitral tribunal. In its objective sense, arbitrability refers to the causes that can be decided by arbitration, i.e., arbitrability ratione materiae (ATF 118 *II 353 consid. 3a*; TF 4A_515/2012 of April 17, 2013 consid. 4.1).

In this case, the Federal Supreme Court recently confirmed, whether from the perspective of the requirements of Art. 354 of the Swiss Code of Civil Procedure or of Art. 61 of the Swiss Code of Civil Procedure - the content of which is the same as that of Art. 7 of the Federal Act on the Protection of Industrial Property - that the claims referred to in Art. 341 para. 1 of the Swiss Code of Civil Procedure may not be subject to an arbitration clause until one month after the end of the employment relationship. This was the case in particular for claims based on unjustified termination of employment under Art. 337c para. 1 and 3 of the Swiss Code of Obligations (ATF144 III 235para2 and the references cited; TF 4A_432/2018 of 28 September 2018para6). The compensation for vacation not taken is also a claim covered by Art. 341 para. 1 CO (cf. art. 361 para. 1 and art. 362 para. 1 CO; TF 4A_96/2017 of December 14, 2017 considering 4.1.2 and the references cited). However, there is no justification for having a broader notion of arbitrability than that of art. 354 CPC if the seat of the arbitral tribunal were to be abroad, given the insecurity of such a choice in particular for the employee.

In this respect, the appellant incorrectly quotes the Federal Council's message of 24 October 2018 (FF 2018 7153, p. 7170), arguing that "patrimonial disputes arising out of [an employment relationship, editor's note] can always be submitted entirely to arbitration". However, this reference only concerns workers domiciled abroad, which is not the respondent's position, the message insisting for the rest on the need for protection of workers. The message refers to the surplus without criticizing

it to the

jurisprudence given in the aforementioned ATF 144 III 235. The reference to the report of the Council

Federal Law of November 8, 2017 ("Consequences of digitization on employment and working conditions: opportunities and risks"), as long as it is admissible, is not conclusive either, since the extract quoted conditions the assessment that "arbitration may include disputes in the field of labor law" to the fact that "art. 177 LDIP applies", which is not the case here.

4.2.5 In this case, the respondent argued in his application that his employment contract had been terminated with immediate effect without just cause. He therefore claimed what he would have been entitled to if the employment relationship had been terminated at the end of the period of leave (art. 337c para. 1 CO) and compensation for termination with immediate effect without just cause (art. 337c para. 3 CO). He also requested payment of compensation for his vacation in accordance with Art. 329d para. 1 OR.

All of these claims are based on provisions that cannot be derogated from to the detriment of the worker (art. 362 CO; TF 4A_608/2010 - 4A_610/2010 of January 10, 2011 consid. 2.1). In accordance with the aforementioned case law, it was not possible to foresee at the time of the conclusion of the Contract that such claims would be settled by arbitration within the meaning of the aforementioned provisions and in particular of Art. II para. 1 CNY. Consequently, the previous authority rightly refused, without violating art. II al. 3 CNY, to decline jurisdiction despite the arbitration clause contained in the Agreement.

4.2.6 By way of overabundance, the Court considers, in view of the circumstances of the case at hand, that the above-mentioned clause should in any event have been considered as being removed from the agreement of the parties.

4.2.6.1 According to the so-called *Ungewöhnlichkeitsregel* (*Ungewöhnlichkeitsregel*), all unusual clauses, to the existence of which the attention of the weaker or less experienced party in business has not been specially drawn, are subtracted from the adhesion supposedly given globally to general terms and conditions. In order to determine whether a clause is unusual, it is necessary to look at it from the point of view of the party consenting to it, at the time of the conclusion of the contract. In addition to this subjective criterion, the clause in question must, by its subject-matter, be alien to the case, i.e. it must substantially alter the nature of the case or substantially change the legal framework of a type of contract (ATF 138 III 411 recital 3.1; ATF 135 III 1 recital 2.1; ATF 119 II 443 recital 1a; TF 4A_166/2014 of 16 September 2014 recital 2.1.1).

Case law has in particular applied the so-called "insolvency rule" to an arbitration clause contained in an operating contract (TF 4C.282/2003 of December 15, 2003 consid. 3.1) or when the clause limits the employee's (in this case dismissed) right to the benefits of the collective insurance for loss of earnings (TF 5C.74/2002 of May 7, 2002 consid. 2c). The Federal Court also did not rule out, in principle, the application of this rule to a termination clause contained in the general terms and conditions of a teaching contract, limiting itself to concluding, in the case in point, that the offending clause merely took over the legal system which the claimants, who had completed their legal studies,

could not ignore (TF 4A_601/2015 of 19 April 2016 consid.

2.2.3). Moreover, in insurance law, case law has held that the so-called "unusualness rule" could be applied when the clause has the effect of drastically reducing insurance coverage so that the most frequent risks are no longer covered, while excluding the application of Art. 8 UWG (Federal Act against Unfair Competition of 19 December 1986; SR 241) on the grounds that the contractual partners do not fall within the circle of consumers (TF 4A_186/2018 of 4 July 2019 consid. 4.1; TF 4A_152/2017 of 2 November 2017 consid. 4.3 and references). It cannot therefore be asserted, as the appellant does, that the theory of the unusual clause is aimed solely at protecting the good faith of consumers in connection with art. 8 UWG.

4.2.6.2 In this case, the appellant itself twice referred to the Contract as "general terms and conditions" (Contract, p. 1). The validity of the arbitration clause provided for therein must therefore also be examined in the light of the so-called "unusual theory".

There is no dispute that the respondent was the weakest and least experienced party in business. The facts established during the trial show that when these "general conditions" were submitted to him in French, he did not understand that language. Moreover, the appellant had no reason to believe that the respondent, a foreign national who did not speak the language of the place, had any legal training that would enable him to understand the scope of the complicated clauses she submitted to him.

The arbitration clause in favour of an arbitral tribunal located in Amsterdam was contained in a long and complex contract, drafted in French, which the respondent was invited to sign without discussion after an "information" session. The latter took place, at the appellant's request, in Lausanne, Switzerland, on the premises of a Swiss company, in French, for a transport activity to be carried on in Switzerland (at least not in the Netherlands). No reference was made to the effect that the respondent, in the event of a dispute, could not bring the matter before the ordinary courts of his place of work or domicile, but would have to proceed before an arbitral authority, which is moreover located abroad. Inexplicably, while the appellant intended to impose such a clause, no reference was made, even in the content of the contract, to the fact that the context was not purely Swiss. Thus, as already mentioned, the appellant did not mention in the Contract the fact that it had its seat abroad. Such elements made the disputed arbitration clause totally unusual for the respondent.

Objectively, this clause also drastically modified the situation of the weaker party to the contract, that is, according to the appellant, all the drivers [...].Indeed, in 2011, when the Federal Code of Civil Procedure was introduced, the Swiss legislator reiterated its will that the employee, especially when the value of his claims is low, may bring his case before a court geographically close to his home or workplace and this according to a simplified procedure, in this case the simplified procedure known as the social procedure. The language of the proceedings should of course be that of the court seized, that is to say, a language that the parties can understand.

the employee knows a *priori*. Furthermore, the Swiss legislator has prescribed that the procedure is in principle free of charge and that the employee may, if he does not have the means and his claims do not appear to be unfounded, obtain the ex officio commission of a legal advisor (FF 2006 6841, n. 5.16, pp. 6953 ff.).

However, the disputed arbitration clause leads no more and no less than to the removal of all this protection. Intended to apply to the claims that drivers, i.e. natural persons having a *priori* only what they could hope to earn in Switzerland in a low paid job, could assert, if they want to assert their claims, even if they are based on provisions of a mandatory nature and even of little litigious value, they would have to seize a court abroad, hundreds of kilometers away from their home, in a foreign language, according to an unknown and relatively expensive procedure (see "The arbitration clause"). *supra* let. C/4f p. 21) and without being able to benefit from free ex officio counsel (the ICC arbitration rules do not provide for this possibility). This means that the Respondent, who, given his limited financial resources, meets the conditions for the granting of legal aid (allowing him to seize the State authorities), would most probably not be able to assert his rights against the Respondent before the ICC, as soon as he would not be able to make the required advance of costs (of 5'000 USD) (ICC Rules of Arbitration, Appendix III, Art. 1 para. 1). In other words, under the pretext of providing for an alternative procedure to the state judicial procedure, the arbitration clause, integrated in all contracts intended for Swiss drivers [...] (paragraphs 222 and 225 of the appellant), led them to waive their rights for lack of means in particular, without this being justified by any reason worthy of protection for the appellant. It must therefore be noted that the disputed arbitration clause, given the circumstances of the case, leads to *de facto* depriving its recipients of access to justice.

The effect has already been achieved: the legal director for employment law matters for Group O.__________for Europe, Middle East and Africa, for whom the arbitration clause is a "fairly common" clause between companies and private individuals, said that despite the thousands of drivers working for O.________________________(Hearing of October 2, 2018, p. 1; uncontested in the appeal reply dated November 21, 2019, p. 20, para. 2.4). Under these circumstances, the court considers that the arbitration clause is also objectively unusual.

In spite of these circumstances, the appellant - even as she was organizing "information sessions", such as the one at the end of which the interested party signed the contract - did not draw the respondent's attention to the arbitration clause, its existence or its scope for him. The respondent, who clearly happens to be the weaker and less experienced party in business, cannot therefore be said to have knowingly adhered to it when he signed the contract. This clause, which is subjectively and objectively unusual, cannot be set up against him on this ground either.

4.2.7 Moreover, the arbitration clause, as provided for in the contract, leads to the pure and simple annihilation of all the protection that Swiss law provides in favour of employees with claims of low litigious value and to deprive them in reality of the possibility of asserting their claims in court, without this being justified by any grounds worthy of protection. Such a result is shocking and incompatible with Swiss public order. Art. 17 LDIP, which excludes the application of provisions of designated foreign law when they lead to a result incompatible with Swiss public policy, must be applied here by analogy. This solution is also reached by applying art. 5 para. 2 LDIP, also by analogy, since, taking into account the effects of the arbitration clause, the application of the latter would have the effect, in this case, of depriving the respondent of the protection that would be afforded to him by the rules of public policy, in particular the rules of procedure that would otherwise be applicable (cf. Bucher, Commentaire romand, LDIP et Convention de Lugano [CR-LDIP], Basel 2011, n. 29 to art. 5 LDIP).

4.3 It follows from the foregoing that the authority of first instance was right to consider, on the one hand, that it was competent to hear the dispute and, on the other hand, that it did not have to refer the parties to arbitration.

5. The appellant complains that the previous authority applied Swiss law and not the Dutch law provided for in the Agreement to the case. She invokes a violation of art. 16 LDIP.

5.1 The appellant erroneously criticized the first judges for not having examined this question, since they had considered that this clause was not enforceable against the respondent since it led to a result incompatible with Swiss public policy.

5.2 The examination of the law applicable to a contract takes place on the basis of Swiss law as the lex *fori (cf.* ATF 111 II 276 consid. 1c; ATF 79 II 295 consid. 1a), in particular the LDIP (ATF 130 III 417 consid. 2).

5.3 According to art. 121 al. 1 LDIP, the employment contract is governed by the law of the State in which the worker habitually carries out his work. However, according to art. 121, para. 3 LDIP, the parties may submit the employment contract to the law of the State in which the employee has his habitual residence or in which the employer has his establishment, domicile or habitual residence.

On the sole reading of these provisions, it can be seen that the law applicable to the employment contract concluded by the parties should have been Swiss law. However, according to art. 121 al. 3 LDIP, the parties could theoretically choose the law of the appellant's seat.

5.4 It is not disputed that the appellant, through its representatives, did not draw the attention of the respondent, clearly the weaker and less experienced party, to the existence of a clause

leading to the application of Dutch law to their entire legal relationship, despite the absence of any connection between the two.

Moreover, such a clause was embedded in the Contract, which was long and often contradictory. Moreover, it was worded in such a way as to be difficult to understand, containing in the same sentence two exceptions without the reader being able to grasp which one took precedence over the other. The statement that the CISG does not apply is also meaningless, since it is a question of transport services, whereas the CISG deals with the sale of goods. More broadly, the Agreement was offered to the Respondent after an information session held in Lausanne by a Swiss company, in French, for transportation services to be performed in the vicinity. During the session allegedly intended to inform him of the important points for a possible collaboration between him and the appellant, the respondent was not informed that he would contract with a company of foreign law, which could have questioned him on the applicable law and which, moreover, conditioned the validity of the choice of law clause (cf. art. 121 al. 3 LDIP). The Contract submitted to him did not mention this, as already pointed out. The work context, according to the appearance created by the appellant, was thus clearly strictly Swiss and nothing could lead the respondent to believe that his rights as an employee would depend on a foreign law without any link with him, his work or his apparent co-contracting party. Moreover, since the appellant did not mention in the Agreement that its seat was in the Netherlands, the choice of law, even if read by a professional, did not appear to be valid at the time the Agreement was concluded. In these circumstances, the choice of law clause appears subjectively unusual.

In addition, art. 121 para. 3 LDIP is intended to allow the case to be linked to a right that has meaning for the parties and in particular for the so-called weak party, i.e. the employee (Message du Conseil fédéral du 10 novembre 1982 [FF 1983 I 255, pp. 396 and 402]; Dutoit, Droit international privé suisse,

5th ed. 2016, n. 5 ad art. 121 LDIP). In the case at bar, the appellant had and does have its registered office in [...]; however, she does not allege that she had an employee there and has never indicated, much less demonstrated, that she carried on any activity there. Thus, it was not she who took the appropriate measures directly from her seat so that a driver could use her application, be solicited, monitored in the performance of the tasks accepted, taken over and paid for the services provided. The appellant's representative ... stated himself that "apart from providing services to drivers through the application", the appellant - which is a subsidiary of ..., as is O.______________- had "no connection with them", that O.'s role was "unrelated" to that of the appellant.______was "that of a support company" for the Swiss operations of [...] and the appellant, and that the activities on behalf of the appellant were carried out for the most part by employees of another company, O._______ belonging to the same group. He further indicated that, in the event of a question, the driver could have contacted O.______________________or the appellant, "one being the interface of the other" (hearings of October 2, 2018, p. 2, and November 28, 2018, p. 4). The information session that gave rise to the signing of the Contract was thus conducted by a Swiss company. After the blocking of the respondent's account, it was also this Swiss company that the appellant indicates as having contacted

the respondent to discuss his account on the application (appeal, all. 32, p. 7). Similarly, it is

still this Swiss company which sent the respondent an e-mail in February 2017, in French, by which the "Equipe O.____________Equipe O." confirmed the definitive end of its collaboration with "O.".__ "(Exhibit 13). Finally, the address indicated in the "notification" chapter of the Agreement, which was suitable to enable the driver to reach the appellant, was not that of its head office. That is to say, to what extent the connection to the law of the appellant's registered office, which the appellant deemed useful not to mention in the Contract, appears purely artificial, of pure expediency and devoid of any connection with the transport activity that it entrusted to its drivers based in Switzerland.

Moreover, according to the Contract which the appellant had prepared and which it submitted to all its drivers [...] working in Switzerland, all of its relations with them were to be subject to the law of the latter country, even though they related to an activity carried on purely in Switzerland, without any connection with the Netherlands. The use of such a clause thus prevented the drivers, natural persons who did not a *priori* have significant resources, from easily knowing their rights. They could therefore not have recourse to associations or trade unions in their home or workplace on this point since it is not apparent that they had any knowledge of Dutch law, a law that is not usual in Switzerland. They should have thus, in order to know their rights and whereas they often have few means to do so, had recourse to a lawyer who would himself have to carry out research into foreign law in order to determine the rights of the drivers under Dutch law.

In these circumstances, the Court considers that the use of the choice of law clause in favour of the law of the registered office of the appellant for a contract concluded with drivers domiciled in Switzerland and exercising in Switzerland is objectively intended, like the arbitration clause, to reduce substantially and without any arguable reason the possibility for them to know and assert their rights. The choice of law clause must therefore also be qualified as objectively unusual. If the appellant has not made the respondent aware of its existence, it cannot be opposed to it either.

Moreover, since this choice of law aims, in the context of the case in point, in conjunction with the arbitration clause provided for in the same paragraph, to deprive the respondent in an abusive manner of the effective possibility of asserting his rights, it must be considered ineffective under art. 5 para. 2 of the LIPA - applicable by analogy to the choice of law (cf. Brunner, Basler Kommentar, Internationales Privatrecht, n. 42 to art. 121 of the LIPA) - and 17 of the LIPA.

5.5 The foregoing solution is still imposed by the appellant's conduct in the proceedings.

During the latter, the appellant had requested that the previous authority limit the proceedings to the question of admissibility of the application only, in relation to its jurisdiction. This was denied on August 24, 2017. In other words, the trial authority intended to decide the entire dispute, i.e., if it refused to decline jurisdiction, to consider and decide the

claims of the respondent. The appellant reacted to this letter by requesting only an extension of time to respond, by letter dated September 21, 2017.

In its response, filed on December 6, 2017, it demanded the application of Dutch law, without however providing any information either on its content or on the scope that the application of this law would have on the outcome of the present dispute. During the hearing of January 31, 2018, the respondent therefore requested that the ISDC (Swiss Institute of Comparative Law) be mandated to draw up a legal opinion in order to establish the elements of Dutch law necessary, in particular, to determine the rights of the employee with respect to the termination of the employment relationship, the indemnities that may result from it, as well as the employee's right to vacation. The appellant, while the court had refused to limit the proceedings to the sole question of the admissibility of the application, found that the notice of law requested was "neither necessary nor relevant". She never reiterated this point of view, which was clearly expressed in court through her counsel, particularly during the seven hearings that followed.

Now the appellant is the party who chose to provide for the election of the disputed law in the contract that it submitted to its drivers [...] (cf. hearing of [...] of October 2, 2018), including the respondent. It may therefore be thought that it was not supposed to ignore this right, especially when it intended to subject all its co-contractors to it. It was thus the party best able to provide information on this right and should have been the party with the burden of proof within the meaning of art. 16 para. 1 of the LIPA. While it invoked the choice of law clause, it never provided the slightest indication as to this right, nor its possible scope in the present case in relation to Swiss law. Moreover, it still does not do so in its appellate writing or in its reply on appeal. Moreover, it expressly objected to the measures of inquiry which the respondent had formulated in good time on this point in order to establish the content of this foreign law, without ever going back on its position thereafter.

In these circumstances, the appellant cannot today, without proceeding in a contradictory manner and violating the principle of good faith enshrined in particular in art. 52 CPC, reproach the previous authority for not having established - and applied - Dutch law, which it itself declared to be irrelevant, even though the proceedings concerned the entire dispute.

5.6 With regard more specifically to the alleged violation of art. 16 of the PILA, it is understandable that the authority of first instance, considering that Dutch law was *ultimately not* applicable, made an early assessment of the necessity or not to establish it and concluded in the negative on this point, due to the lack of scope of this law in the case in point. The appellant does not complain about this and does not even allege that this assessment, had it been different, would have led to a different result. The grievance is therefore unfounded.

5.7 In view of the foregoing, the reports of the parties must be examined in the light of the Swiss provisions on labour law.

6. The appellant disputes that she did not have just cause to terminate her employment relationship with the respondent with immediate effect.

6.1

6.1.1 According to art. 337 para. 1 1st sentence CO, the employer and the employee may terminate the contract immediately at any time for just cause. In particular, all circumstances which, according to the rules of good faith, do not allow the person who has given notice of termination to be required to continue the employment relationship must be considered as just grounds (cf. Art. 337 para. 2 CO).

According to the case law, immediate termination for "just reasons" is an exceptional measure, which must be admitted restrictively (ATF 137 III 303 consid. 2.1.1). Only a particularly serious breach can justify such a measure (ATF 142 III 579 consid. 4.2). Breach of duty is generally understood to mean the violation of an obligation arising from the employment contract, but other incidents may also justify such a measure (ATF 137 III 303 consid. 2.1.1; ATF 130 III 28 consid. 4.1; ATF 129 III 380 consid. 2.2). This breach must be objectively such as to destroy the relationship of trust essential to the employment contract or, at least, to achieve it so profoundly that the continuation of the employment relationship cannot reasonably be demanded; moreover, it must have actually led to such a result (TF 4A_124/2017 of January 31, 2018 consid. 3).

If the breach is less serious, it can only lead to immediate termination if it has been repeated despite a warning (ATF 142 III 579 consid. 4.2; ATF 130 III 28 consid. 4.1; ATF 129 III 380 consid. 2.1; ATF 127 III 351 consid. 4a). The employer must formulate the warning clearly and in accordance with the rules of good faith. The worker must understand the threat of immediate dismissal. This threat must at least be deductible from the content of the warning. The employee must know precisely what behaviour he must adopt in the future and what will no longer be tolerated by the employer (TF 4C.10/2007 of 30 April 2007 consid. 2.1 *in* JAR 2008 p. 188; TF 4C.364/2005 of 12 January 2006 consid. 2.3, *in* Revue suisse de jurisprudence [RSJ] 2006 p. 2014 ;

Favre/Munoz/Tobler, Le contrat de travail, Annotated Code, 2nd ed. 2010, n. 1.33 *ad* art. 337 CO).

Thus, the drunkenness of the employee at his workplace cannot justify the immediate dismissal of the worker if he has not been duly warned beforehand that the repetition of such a breach would henceforth be considered as a just reason for abrupt leave (cf. Rehbinder/Stöckli, Berner

Kommentar, 3rd edition, Bern 2010, n. 8 to art. 337 CO; Brunner/Bühler/Waeber/Bruchez, Commentary

of the employment contract, 4th ed. 4th edition, Bern 2019, n. 8 ad art. 337 CO p. 276). On the other hand, if the employee caused damage to the employer while performing his work under the influence of alcohol, for example if he destroyed the company vehicle that he was driving, he has committed serious misconduct, so that

his immediate dismissal is then authorized without prior notice (Tercier/Favre, Les contrats spéciaux, 4th ed., 2009, ch. 3759 p. 561).

6.1.2 In accordance with CC Art. 8, the party who relies on a fact to derive a right from it has the burden of proving that fact. Thus, it is up to the party who has terminated the employment contract with immediate effect to establish the existence of the material and formal conditions required for this measure (proper reasons, warnings, immediacy, compliance with the agreed forms) (Gloor, Commentary on the Employment Contract, 2013, n. 71 *ad art.* 337 CO).

6.2 The appellant submits that when it suspended the respondent's account on December 30, 2016, it gave the respondent an opportunity to come forward and explain and discuss his situation. However, the appellant does not establish this fact. On the contrary, it was only in January 2017, after the respondent complained to the appellant, that the appellant invited him to visit her offices (see C/11b *supra*). For the rest, the employer must discuss with its employee before, and not after, dismissing him with immediate effect. This alleged proposal is thus unsuitable to justify *a posteriori the* reasons invoked.

As the early judges correctly noted, the negative comments of December 27 and 28, 2016 that the respondent's conduct elicited from certain clients, such as those of June and September 2016, were not made known to or discussed with the respondent prior to the disconnection that resulted in immediate dismissal. Apart from the undisputed failure of the appellant to investigate whether the alleged breaches of the respondent's obligations were justified, which could have been done by interviewing affected customers whose contact information (e-mail address or cell phone number) was known to the appellant, there is no evidence or suggestion that the appellant would have issued a warning to the respondent because of the customers' allegations of misconduct. Moreover, the identity of the whistleblowers is unknown, and they themselves did not find the respondent's conduct serious enough to do anything other than send a message to O._In particular, they tolerated the respondent's continued driving. These simple accusations, which, incidentally, in matters of drunkenness are based solely on the passengers' feelings, and on which the respondent was unable to determine, do not appear to be sufficient to justify the dismissal, especially since the respondent had previously received many positive comments (three quarters out of 80 comments) during his 9,163 trips in 21 months, most of which referred to his professionalism.

It follows that the court's assessment must be upheld, as the appellant has not established that the respondent's immediate dismissal was justified.

Since the calculations of the first judges regarding the prejudice resulting for the respondent from his leave were not contested, the judgment must therefore be upheld in this respect as well.

7.

7.1 In light of the foregoing, the appeal must be dismissed and the judgment under appeal upheld.

7.2 In view of the dismissal of the appeal, the court costs of the second instance, set at 450 fr (Art. 62 para. 1 and 67 para. 3 TFJC [Tariff of Civil Court Costs of 28 September 2010; BLV 270.11.5]), are charged to the appellant, who succumbs (Art. 106 para. 1 CPC).

In addition, the latter will pay to the respondent the costs of the second instance set at 20,000 francs (art. 7 and 20 para. 1 CCT [tariff of costs in civil matters of 23 November 2010; BLV 270.11.6]).

7.3 In his capacity as ex officio counsel for the respondent, Me Rémy Wyler is entitled to equitable compensation for his transactions and disbursements in the appeal proceedings. In his list of transactions dated December 12, 2019, to which he referred in a letter dated April 2, 2020, he indicated that he had devoted
68.95 hours on file, no disbursement having been announced. In view of the nature of the dispute and the difficulties of the case, this count may be admitted. It follows that at an hourly rate of 180 fr. (art. 2 al.
1 let. a RAJ [regulation on legal aid in civil matters of December 7, 2010; BLV 211.02.03]), Mr. Wyler's ex officio compensation is set at 12'411 fr. for his fees (180 fr. x
68.95 hours), to which VAT at the rate of 7.7% must be added, by 955 fr. 65, which corresponds to a total sum of 13'366 fr. 65.

The beneficiary of legal aid will, to the extent provided for in Art. 123 CPC, be bound to reimburse the compensation to the council ex officio provisionally assumed by the State.

For these reasons,
the Court of Civil
Appeal for the first
time:

I. The appeal is dismissed.

II. The judgment is confirmed.

III. The legal costs of the second instance, stopped at 450 fr. (four hundred and fifty francs), are charged to the appellant C.

IV. Appellant C.__________shall pay to the respondent G.___the sum of 20'000 fr. (twenty thousand francs) as costs of the second instance.

V. The ex officio indemnity due to Me Rémy Wyler, counsel for the respondent G._______ is fixed at 13,366 Fr. 65 (thirteen thousand three hundred and sixty-six francs and sixty-five cents), including VAT and disbursements.

VI. The beneficiary of legal aid is, to the extent provided for in Art. 123 CPC, obliged to reimburse the compensation to his counsel ex officio provisionally charged to the State.

VII. The judgment is enforceable.

La présidente : The clerk:

From

This judgment, the operative part of which was communicated in writing to the parties concerned on 24 April 2020, shall be notified in full to :

- Me Rayan Houdrouge (for C.__________),
- Me Rémy Wyler (for G.__________),

and communicated, by sending photocopies, to :

- Mr. Vice-president of the Industrial Tribunal of the district of Lausanne.

The Civil Court of Appeal considers that the litigious value is higher than 15'000 francs.

The present ruling may be appealed in civil matters before the Federal Supreme Court in accordance with Art. 72 ff. of the Federal Law on the Federal Supreme Court (Law of 17 June 2005 on the Federal Supreme Court - RS 173.110), and, if necessary, a subsidiary constitutional appeal in accordance with Art. 113 ff. of the Federal Law on the Federal Supreme Court. In pecuniary cases, the civil appeal is admissible only if the value in dispute amounts to at least 15,000 Fr. in labor law and rent law, 30,000 Fr. in other cases, unless the dispute raises a legal question of principle (art. 74 FSCA). Such appeals must be filed with the Federal Supreme Court within 30 days of this notification (art. 100 para. 1 FSCA).

The clerk: