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• RECENT DEVELOPMENTS IN THE LAW OF FORUM SELECTION CLAUSES AND PUBLIC POLICY •

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On January 21, 2020, the British Columbia Court of Appeal issued its decision in *Schuppener v. Pioneer Steel Manufacturers Limited*.[1] The decision offers guidance with respect to the threshold to be met in order for considerations to rise to the level of public policy factors compelling enough to justify judicial intervention with freedom of contract in the context of forum selection clauses.

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BACKGROUND

In *Schuppener*, the plaintiff/respondent purchased a steel storage building from the defendant/appellant, a manufacturer. The respondent allegedly became injured during his use of the building and commenced an action in the British Columbia Supreme Court against the appellant in negligence and breach of contract.

The contract between the appellant and respondent contained a forum selection clause which provided that any claim in connection with the supply of the building had to be commenced in the Ontario courts. Accordingly, the appellant brought an application seeking an order staying the proceedings in British Columbia on the basis that the forum selection clause applied to the claim and there was no reason not to enforce it.

The chambers judge hearing the application was required to apply the "strong cause" analysis,

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which is a two-part analysis applied to determine the enforceability of forum selection clauses. This analysis was settled by the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU Line N.V.*,[2] and recently modified in the consumer context by the Supreme Court of Canada in *Douez v. Facebook, Inc*., a three-way split decision.[3]

In *Douez*, the plaintiff brought a proposed class action against Facebook, the large social network, for infringing the privacy rights of almost two million Canadian customers. This gave rise to complex legal issues regarding statutory privacy rights. The plaintiff's standard form electronic contract with Facebook contained a forum selection clause providing that disputes would be litigated in California. Relying on the forum selection clause, Facebook moved to have the British Columbia action stayed. The Court applied the strong cause analysis and ultimately declined to enforce the forum selection clause on the application of the second stage of the analysis, which engages public policy. Three judges of the Court with Abella J. concurring in the result (and McLachlin C.J. and two others in strong dissent) found that "strong cause" existed due to the gross inequality of bargaining power and other "reasons of public policy that are compelling", including the interest in Canadian courts adjudicating cases "impinging on constitutional and quasi-constitutional rights because these rights play an essential role in a free and democratic society and embody key Canadian values."[4]

Post-*Douez*, the two-part legal analysis requires that courts first determine whether the forum selection clause is enforceable and applies to the claim. The party seeking to enforce the forum selection clause bears the burden of proof at this stage. If this part of the test is met, courts then turn to assessing whether there are strong reasons not to give effect to an otherwise enforceable forum selection clause. The party seeking to displace the forum selection clause bears the burden of proof at this stage of the analysis. In addition, when the forum selection clause in question is contained in a consumer contract, courts should take account of all the circumstances

of the particular case, "including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake."[5]

The chambers judge in *Schuppener* began by correctly determining that the forum selection clause, which was broadly worded, applied to the claim. Turning to the second stage of the analysis, the chambers judge properly considered a variety of circumstances, including the convenience to the parties, fairness between the parties, and the interests of justice. In addition, the chambers judge correctly identified that the consumer context required that he consider a "broader range of circumstances", namely public policy factors.[6]

In particular, the chambers judge found it "highly relevant" that the forum selection clause was contained in a standard form contract, meaning that the respondent had no ability to negotiate the applicability or terms of the clause. This determination was made notwithstanding the fact that the chambers judge had concluded, earlier in his reasons, that there was "no significant inequality of bargaining power" between the parties.[7]

In addition, the chambers judge relied on the fact that the action sought damages in negligence for personal injury and was not a mere commercial dispute over a breached contract. The chambers judge appeared to be of the view that public policy interests were furthered by having the personal injury claim in negligence and product liability heard in British Columbia as opposed to Ontario. This determination was made notwithstanding that the chambers judge determined, earlier in his reasons, that there was no reason to believe that the governing law in Ontario would differ significantly from the law of British Columbia.

Lastly, the chambers judge relied on the fact that the respondent had alleged that the appellant sold the building to the respondent with knowledge that the product was unsuitable for the climatic conditions in British Columbia. The chambers judge reasoned that the public had an interest in seeing such a claim litigated in British Columbia where the issue arose and the damages were suffered.

APPEAL DECISION

The British Columbia Court of Appeal allowed the appeal and transferred the claim to the Ontario courts. The Court acknowledged that the chambers judge's decision was discretionary and that the standard of review is deferential, but concluded that the chambers judge "erred in principle by characterizing ordinary considerations as matters of public policy compelling enough to justify overriding the forum selection clause."[8]

In the course of its analysis, the Court held that it is "important in conducting the strong cause analysis to bear in mind the principle that courts do not have discretion to refuse to enforce valid contracts unless there is some paramount consideration of public policy sufficient to override the public interest in freedom of contract."[9]

The Court held that the chambers judge erred in elevating the three factors described above to public policy factors sufficient to override the forum selection clause. With respect to the first factor, the Court held that the law "does not support the proposition that inclusion of a forum selection clause in a non-negotiable standard form consumer contract always raises a public policy concern sufficient to offset the public policy interest in holding parties to the terms of their bargain."[10] In addition, the Court held that "[n]either standard form contracts nor forum selection clauses raise public policy interests per se" and that courts will "generally give effect to the terms of standard form consumer contracts absent legislative intervention."[11]

As the Court recognized, it is not the fact that a forum selection clause is in standard form that gives rise to public policy concerns, but rather the existence of gross inequality of bargaining power between the parties. Because the chambers judge had found that there was no significant inequality of bargaining power, "the standardized form of the contract itself does not raise a public policy concern."[12]

In addition, the Court noted that "[i]n many respect, the contract in issue falls closer to the sophisticated commercial contract end of the spectrum",[13] unlike

the contract at issue in *Douez,* which was a "minor consumer transaction" entered into electronically. As the Court noted, in the present case the transaction had significant value, and was "more akin to the purchase of a vehicle". The Court further held that transactions of this kind "occur infrequently in the lifetime of the average consumer and command heightened attention and scrutiny."[14]

Turning to the second factor relied upon by the chambers judge, the Court held that the claim at issue was categorically different than that in *Douez*. In particular, in *Douez* "the matter engaged a unique British Columbia statute which had no equivalent in the other jurisdiction." In addition, in *Douez* "the nature of the claim was a strong reason to override the forum selection clause because it involved the choice between a Canadian and a foreign court and involved a quasi-constitutional right."[15] In contrast, the "present case concerns two competing Canadian forums with roughly equivalent laws of contract, personal injury and product liability."[16]

With respect to the third factor, the Court held that there was nothing unique to British Columbia about the cause of the building's collapse as allegedly related to the climatic conditions in British Columbia. The Court observed that the difficulty in relying on that factor is that "there will always be a public interest in seeing cases with facts and damages arising in a particular province litigated in that province." The Court accepted that this is a factor which relates to the balance of convenience and should be considered as part of the second stage of the strong cause analysis, but held that "it will rarely rise to the level of a public policy concern."[17] (emphasis in original)

Although the Court did not articulate the threshold to be met in order for a factor to raise to the level of a public policy concern, it confirmed that the power of courts to refuse enforcement on the grounds of public policy is a power which should be "rarely exercised" and only in compelling cases where "the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds."[18] In addition, the Court noted that it is "helpful to consider the categories of public policy interests traditionally held to be sufficient to override a contractual bargain", which include those that are found to be injurious to the state, injurious to the justice system, in restraint of trade, involving immortality or affecting marriage. While the Court held that "the categories of public policy are not closed", it cautioned that "significant judicial restraint is called for".[19]

ANALYSIS

Following the decision of the Supreme Court of Canada in *Douez,* there was considerable uncertainty regarding the manner in which the strong cause test would be applied in future cases involving consumer contracts. In particular, there was uncertainty as to the manner in which courts would apply the two public policy factors noted in *Douez* – namely those related to "gross inequality of bargaining power" and the "nature of the rights at stake". The decision in *Schuppener* provides some guidance on both factors.

Inequality of Bargaining Power

In *Douez*, the majority held that there was gross inequality of bargaining power because the forum selection clause in that case was contained in a "consumer contract of adhesion" which was not subject to negotiation. Following that decision, there was concern that all consumer contracts of adhesion would have this public policy factor weighing against them.

The decision in *Schuppener* clarifies that the public policy factor related to gross inequality of bargaining power will not invariably arise whenever the contract at issue is in standardized form and non-negotiable. To the contrary, the decision confirms that there is nothing wrong with standard form, non-negotiable agreements in and of themselves. They only become concerning when they arise in an environment of gross inequality of bargaining power. Accordingly, what must be examined is the power dynamic between the parties. While the fact that a contract is in standard form may be a contextual factor to consider in that analysis, it is not determinative.

As the appellant submitted before the Court in *Schuppener*, there is a distinction to be drawn between bargaining *power* and bargaining *position*. Whether or not there is gross inequality of bargaining power in any given case is a function of market factors, not the parties' bargaining positions. This can be illustrated with the following hypothetical.

Imagine a consumer in need of legal services. Those services are required very urgently, and the consumer resides in a small town with only one lawyer. Suppose that this consumer wishes to hire the lawyer, and that the lawyer presents the consumer with a non-negotiable, standard form engagement agreement. In these circumstances, one might argue that the consumer's free will has been vitiated by an overwhelming imbalance of bargaining power. They are in need of legal services urgently, and, given the market factors, they essentially have no choice but to accept the lawyer's standard form, non-negotiable terms. This is a classic monopoly scenario, and it's a situation where a standard form, non-negotiable agreement is troubling from a public policy perspective. But what makes it troubling is not the standard form nature of the agreement, but the environment of unequal bargaining power caused by market factors.

Now, let's modify that hypothetical. Presume the facts are the same, except that there is no urgency to the legal services and the consumer resides in a large city with a multitude of different lawyers offering the same services. In those circumstances, it is much harder to argue that the consumer's agreement to the lawyer's terms occurred in a context where their free will had been vitiated by an overwhelming imbalance of bargaining power. The consumer had other options and ample time to consider those options. This is a situation where a standard form, non-negotiable agreement should not be troubling from a public policy perspective because the environment is not one of unequal bargaining power. In fact, in a highly competitive marketplace, it may well be the consumer that has the greater bargaining power. If in such a situation a supplier or service provider takes a non-negotiable position which the consumer dislikes, the consumer can turn to a different supplier or service provider.

In sum, bargaining power is not the same thing as bargaining position, and just because a party takes a non-negotiable position does not mean they have any bargaining power. It is for this reason that the Supreme Court of Canada in *Douez* was clear that the relevant question is whether there is gross inequality of bargaining power. The Court, in answering that question, implicitly canvassed the market factors that effectively put Facebook in a near monopoly position and, by the same stroke, put consumers in a position of gross inequality of bargaining power. That is not an outcome that will arise in every case involving a standard form contract. In the author's view, it should be limited to cases where the service provider or supplier is essentially in a monopoly position and the service or product is essential to the consumer. In *Douez,* the Court reasoned that the service provided by Facebook met the latter requirement because it had "become increasingly important for the exercise of free speech, freedom of association and for the full participation in democracy" with the result that "[h]aving the choice to stay 'offline' may not be a real choice in the Internet era."[20] This should be distinguishable from cases where the product or service is either available from another supplier or service provider or is not essential to consumers, as in *Schuppener.*

The reasons of the Court in *Schuppener* also suggest that the weight to be given to forum selection clauses falls onto a spectrum, with sophisticated commercial contracts deserving of more weight and unsophisticated consumer contracts deserving of less weight. The analysis does not call for a binary determination, and not all contracts must be treated the same merely because one of the parties is a "consumer".

Nature of the Rights at Stake

With respect to the other public policy factor – namely the "nature of the rights at stake" – *Schuppener* clarifies that the threshold is a high one.

The Court essentially distinguished *Douez* as an outlying case on the basis that it concerned a statute unique to British Columbia, constitutional and quasi-constitutional rights of great importance to Canadian society, and the prospect that a foreign court would adjudicate such uniquely Canadian issues.

Read together, *Douez* and *Schuppener* arguably suggest that the nature of the rights at stake will not give rise to a public policy factor unless (1) the court specified in the forum selection clause would be unable to properly adjudicate the claim; or (2) litigation in the specified forum would deprive Canadian society of a compelling public good.

Those requirements were not met in *Schuppener* where there was neither a basis to conclude that the Ontario courts could not properly adjudicate the somewhat standard claim, nor a basis to conclude that litigating the claim in Ontario rather than British Columbia would deprive Canadian society of a compelling public good.

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1 *Schuppener v. Pioneer Steel Manufacturers Limited*, 2020 BCCA 19 [*Schuppener*].

2 *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 (CanLII) [*Pompey*].

3 *Douez v. Facebook, Inc.*, 2017 SCC 33 (CanLII) [Douez].

4 *Douez*, at para 58.

5 *Douez*, at para 38.

6 *Schuppener v. Pioneer Steel Manufacturers Limited*, 2019 BCSC 425 (CanLII) at para 49 [*Schupener Application*].

7 *Schuppener Application*, at para 50.

8 *Schuppener*, at para 12.

9 *Schuppener*, at para 23.

10 *Schuppener*, at para 14.

11 *Schuppener*, at para 14.

12 *Schuppener*, at para 14.

13 *Schuppener*, at para 17.

14 *Schuppener*, at para 17.

15 *Schuppener*, at para 20.

16 *Schuppener*, at para 20.

17 *Schuppener*, at para 22.

18 *Schuppener*, at para 23.

19 *Schuppener*, at para 24.

20 *Douez*, at para 56.