Cassels

Supreme Court of Canada Decision in Facebook May be the Harbinger of a General Law of Unconscionability in Consumer Contracts

Jonathan Fleisher, Mike R. Tallim

July 10, 2017

In the recent Supreme Court of Canada case, *Deborah Louise Douez v. Facebook, Inc.*, [2017 SCC 33] (*Douez*) the Supreme Court of Canada reviewed the forum selection clause which Facebook, Inc. (Facebook) had in its standard terms of use. As most readers know, Facebook requires its customers to accept the terms of use which are embedded in the Facebook site. In order to access the social media service, customers first have to click an "accept" box representing they have read and agree to be bound by Facebook's terms of use. The terms include a forum selection clause which provides that any claim relating to the terms of use, or Facebook specifically, would be governed pursuant to the laws of California. The Appellant, a resident of British Columbia brought an action in the British Columbia Supreme Court (BC Court) alleging that Facebook's product violated her rights under British Columbia's *Privacy Act* (the Act) by using her name and likeness without consent for the purpose of advertising. While the Act provides that actions flowing from violations fall exclusively within BC Court's jurisdiction, Facebook contended that the forum selection provisions of its terms of use displaced the BC Court's jurisdiction to hear the appellant's claim in favour of the courts of California.

The decision in *Douez* ultimately turned on whether the forum selection provision within the terms of use was enforceable. In determining this issue, the Court affirmed the two-step test established in *Z.I. Pompey Industrie v. ECU-Line N.V.* [2003 SCC 27] (Pompey): first, determine whether the clause is enforceable on its face; and, second, if the Court finds the clause is enforceable it then applies what's known as the "strong cause test", where the onus shifts to the disputing party to establish a "strong cause" for why the forum selection clause should nevertheless not be enforced. Typically, compelling considerations in determining if the strong clause test is met include questions of fairness, the interest of justice and public policy. Applying the test in *Douez*, the Court rendered split reasons, with (i) three justices holding that although the forum selection provision was *prima facie* enforceable, the appellant successfully met the strong cause test and therefore the forum selection clause was unenforceable (the Result), (ii) three justices holding that the forum selection provision was enforceable, and that the appellant had failed to meet the strong cause test; and (iii) Justice Abella's who for different reasons concurred in Result.

Despite concurring with the Result, Justice Abella's reasons departed entirely from her colleagues in holding that the first part of the Pompey test was not met. Among her reasons for finding the forum selection provision unenforceable, Justice Abella discussed the doctrine of unconscionability with respect to

consumer contacts. Citing *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010 SCC 4] Justice Abella affirmed the principle that the doctrine of unconscionability can be used to invalidate a single clause within an otherwise enforceable contract. Further citing Prof. John D. McCamus' *The Law of Contracts*, Justice Abella employed a two-step test for determining whether a clause may be considered unconscionable, requiring:

- inequality of bargaining power; and
- undue advantage or benefit secured as a result of that inequality by the stronger party.

While the doctrine of unconscionability was merely one ground on which Justice Abella held the forum selection clause unenforceable, its repercussions are noteworthy. In contextualizing her reasons, Justice Abella acknowledged that online contracts tested traditional principles of contract, and that legal acknowledgement should be given to the automatic nature of such contracts "not for the purpose of invaliding the contract itself, but ... to intensify the scrutiny for clauses that have the effect of impairing a consumer's access to possible remedies" [*Douez* at para 99]. Accordingly, her reasons do not broadly open the doctrine of unconscionability to commercial contracts, *per se*, but strengthens its relevance in litigating standard form commercial contracts.

Applied broadly, the first element of the unconsciounability test, as set out by Justice Abella, potentially captures most online "click" contracts, and many standard form commercial contracts. This interpretation shifts the weight of the analysis to the nature of the undue advantage or benefit such inequality creates. As noted by Justice Abella, forum selection clauses represent a high-water mark for undue advantage, as they potentially cause a consumer to alienate their constitutional or quasi-constitutional rights (as was the case in *Douez*). However, this is not to say that the undue advantage would necessarily need to reach this magnitude before invoking the doctrine of unconscionability; Justice Abella's reasoning could apply to any clause which impairs a consumer's remedial rights, including limitations on liability, consents with respect to use of information or pre-set damages for a breach.

While this particular finding by Justice Abella is not binding portions of the decision, it may leave the door open for other courts to utilize this reasoning in striking out clauses which they determine are unconscionable particularly where there is unequal bargaining power and distinct unfairness. This will be particularly true if the clause at hand also tends to violate general concepts of public policy. This has the possibility of requiring that all standard form consumer contracts be put to a higher test than may currently exist with respect to general fairness.

While the above-noted decision is far from definitive in this area, it is a harbinger of a possible shift in the court's direction as to contract interpretation particularly in a consumer context. Accordingly, drafters of consumer contracts, particularly where the consumer has little ability to negotiate the contract should be mindful that the provisions may require a general sense of "fairness" and not be over arching. While this is not currently, a governing legal doctrine in effect, it is something that may be a future development and

should be considered.

For more information, please contact Jonathan Fleisher, Mike Tallim or any member of our Financial Services or Intellectual Property Groups

---