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Comment

Global social media vs local values: Private international law should protect local consumer rights by using the public policy exception?

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A B S T R A C T

This article focuses on the relationship between forum selection clauses, choice of law clauses and data protection and privacy protection. In particular, it discusses the question whether and why jurisdiction and choice of law clauses used in the terms of social media providers should not be enforced against social media users located in a different jurisdiction. The article distinguishes between the contractual, private law analysis and the application of public policy as part of the private international law analysis. The contract law analysis is centred on doctrines such as unconscionability, which in turn examines issue such as fairness and overwhelming bargaining power of one party. By contrast, the public policy analysis in private international law focuses on fundamental rights, legality of contractual clauses according to the local law of the forum and the interests of justice. It is argued here that both aspects (contractual and public policy doctrines) are paramount for achieving not only justice between the parties of a dispute but also ensuring good administration of justice in the public interest.

1. Introduction

In *Douez v Facebook*[1], the Canadian Supreme Court has recently held that the choice of jurisdiction clause contained in *Facebook's* terms with its Canadian users should be displaced as unenforceable in a tort class action alleging an infringement of the Privacy Act of British Columbia, thus recognizing the jurisdiction of the local courts in British Columbia to protect local consumers under their local privacy standards.

In a similar case, *Max Schrems* began a collective redress action alleging a long list of infringements of EU data protection law before the Austrian courts in 2014, likewise arguing that the jurisdiction clause in his contract with *Facebook* selecting the Irish Courts should not apply, basing his argument on Articles 17 and 18 (1) of the Brussels Regulation Recast.[2] *Max*

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[1] [2017] SCC 33, Judgment of 23. June 2017, available from CanLII https://www.canlii.org/en/ca/scc/doc/2017/2017scc33/2017scc33.html.

[2] Regulation EU/1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 12 December 2012, OJ L351/1.

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Schrems is suing on his own behalf and in a collective action, on behalf of 25,000 other Facebook users who have ceded their claims to him online. While this case raises procedural issues under Austrian law (which does not recognize class actions as such), it additionally raises questions about the extent of the special consumer protection rules in the Brussels Regulation Recast, including the question whether Mr *Schrems* is acting as a consumer in the meaning of the Regulation if he acts as a representative for the class, albeit unpaid.[3] The Supreme Court of Austria has referred questions to the Court of Justice of the EU in an action, which is currently pending.[4]

Both these cases concern the question whether a jurisdiction or forum selection clause used in the terms of social media providers should be enforced against social media users located in a different jurisdiction. This question is inextricably linked to differing privacy and consumer protection standards in the country of origin of the social media provider and the country of destination of the user, and the business model of such providers based on the exploitation of users' private information in exchange for "free" services. This article does not examine any of the substantive privacy and consumer protection issues but instead focuses on the relationship between forum selection clauses, choice of law clauses and data protection and privacy protection.

In particular, it examines whether and *why* such clauses may be invalid and unenforceable in relation to privacy tort claims analysing US and Canadian laws. In doing so, the article distinguishes between the contractual, private law analysis and the application of *public policy* as part of the private international law analysis. The contract law analysis is centred on doctrines such as unconscionability, which in turn examines issue such as fairness and overwhelming bargaining power of one party. By contrast, the *public policy* analysis in private international law focuses on fundamental rights, legality of contractual clauses according to the local law and the interests of justice.

It is argued here that considerations relating to transactional efficiency focusing on consent and the "free will" of the parties may favour the purely contractual analysis. By contrast, a rights' based approach focuses on the public interest function of the courts ("interests of justice"), taking into account interests beyond the contractual relationship between the parties to the dispute. The article finds that *public policy* as a tool for restricting the enforceability of forum selection and choice of law clauses had receded into the background in recent years, but may now resurface in the context of privacy protection in view of cases such as *Douez, Schrems* and *Re Facebook Biometric Information Privacy Litigation*. The article concludes that both, the contractual analysis and the *public policy* analysis should be part of the test for examining the enforceability of forum selection and choice of law clauses.

2. Jurisdiction clauses: freedom to contract and risk management – the diminishing role of public policy

In a globalised world with an increase of transnational commercial relationships, the benefits of express jurisdiction clauses[5] are risk management[6] (from the viewpoint of the person using the clause), legal certainty[7] and economic efficiency, thus encouraging transnational commerce and trade. The US Supreme Court held in *M/S Bremen* in 1972: "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts"[8] and that "the choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honoured by the parties and enforced by the courts".[9] Legal certainty and transactional efficiency is achieved by lowering transactional cost through the reduction of litigation processes necessary to establish the relevant court and the associated costs and delay.

The downside of express jurisdiction clauses are that the parties' interests as to the preferred forum are likely to diverge and in many situations one party may be in a much stronger, if not overwhelming, bargaining position compared to the other. Furthermore, the party with the stronger bargaining position is likely to contract using its own standard terms, so frequently the stronger party dictates the choice of forum and the choice of law, which means that the weaker party will find it harder, if not impossible, to access justice. Cross-border litigation is more costly, requires the appointment of foreign lawyers, may necessitate translation, the travelling of witnesses and transfer of evidence, but most importantly may subject the weaker party to a foreign law, potentially avoiding the protection of consumer and privacy rights arising in the weaker party's local jurisdiction.

This situation includes business-to-consumer (B2C) contracts, but may encompass many business-to-business (B2B) contracts, where increasingly there may be a similar imbalance of power where a small-to-medium sized business contracts with a large multinational corporation. For example, a franchisee will not be able to negotiate jurisdiction or choice of law with *Burger King* and an Adword advertiser on Google search,[10] likewise, will not be able to change these provisions put forward by Google. However, the law in many jurisdictions mainly makes a distinction between B2C and commercial B2B contracts assuming that for B2C contracts there is a natural imbalance of negotiation power, which may lead to the as-

[3] https://www.ft.com/content/77da4ebc-791e-11e6-97ae-647294649b28.

[4] Case C-498/16 *Schrems* filed on 11 November 2016 and the Decision of the Austrian Supreme Court: http://www.europe-v-facebook.org/EN/en.html.

[5] See further NJ Davis "Presumed Assent the Judicial Acceptance of Clickwrap" (2007) 22 *Berkeley Technology Law Journal* 577-598, 578.

[6] See *Carnival Cruise Lines v Shute* 499 U.S. 585, 593-4; 111 S.Ct. 1522 (1991).

[7] *Ibid*.

[8] 407 U.S. 1, 9; 92 S.Ct. 1907 (1972).

[9] At 12.

[10] TradeComet.com *LLC v. Google Inc.* 647 F.3d 472 (2nd Cir 2011).

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sessment that forum selection and choice of law clauses are unfair.[11]

The internet has exacerbated this power imbalance: because of potentially large-scale exposure to being sued in courts near and far internet companies have even more of an incentive to include jurisdiction and choice of law clauses in their lengthy terms and conditions. However if the parties are established in different jurisdictions the weaker party may find it even more difficult to obtain redress if the dominant party fails to fulfil the contract or commits a tort (such as privacy-related torts[12]). Social media in particular because of network effects are frequently in an overwhelming bargaining position- Facebook, for example, has 1.8 billion users spread across the globe.

Before the 1972 landmark US Supreme Court ruling in *M/S Bremen*,[13] it was disputed in the different Circuits whether forum selection clauses in advance of the dispute were against public policy, as was held, for example, in *Carbon Black Export Inc. v The Monrosa*.[14]

It is clear that after *M/S Bremen,* US law recognizes and enforces express jurisdiction (forum selection) clauses in contracts[15] as an expression of the choice of the parties in the absence of some compelling and countervailing reason making enforcement unreasonable.[16] Consent is one of the traditional bases for a finding of jurisdiction over a defendant under US law.[17] Thus, a "freely negotiated private international agreement, unaffected by fraud, undue influence or overweening bargaining power should be given full effect".[18] The clause can only be set aside if it contravenes the *strong* public policy of the forum[19] and the party who applies to have the clause set aside has a heavy burden of proof showing such countervailing strong public policy or that the clause is contained in an unenforceable adhesion contract or that the particular dispute is outside the contract.[20]

US law now even recognizes and enforces jurisdiction and choice of law clauses in contracts with a significant power imbalance between the parties, including B2C contracts.[21] These are, in principle at least, valid and enforceable. In *Burger King v Rudzewicz*[22] the US Supreme Court found: "a defendant who has purposefully derived commercial benefit from his affiliations in a forum may not defeat jurisdiction there simply because of his adversary's greater net wealth".[23]

It therefore upheld jurisdiction in favour of *Burger King's* local courts in Florida against a Michigan established franchisee[24] (who clearly had no negotiation power in this respect[25]). The franchise agreement did not provide for an express jurisdiction clause but provided that the franchise relationship was based in Miami, that the contract was governed by Florida law and that all payments had to be made to, and all notices given to *Burger King's* headquarters in Miami. The US Supreme Court held that an individual's contract with a party in another state *alone* might not be sufficient to establish minimum contacts with that other state, but that the antecedent negotiations, anticipated consequences, the contract terms, and the course of dealing between the parties may. The US Supreme Court in particular considered that "Upon approval [of the contract], he [*Rudzewicz*] entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida. In light of *Rudzewicz'* voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters" he was taken to have minimum contacts with that state.[26]

M/S Bremen was applied in a B2C dispute in *Carnival Cruise Lines v Shute*.[27] This case concerned a cruise customer suing in tort for personal injuries sustained on a cruise ship because of the alleged negligence of staff. The US Supreme Court held[28] that the forum selection clause in favour of Florida contained in the consumer contract for the cruise was valid and

[11] *Adams Reload Co Inc. v International Profit Associates* 143 P.3d 1056 (2005).

[12] Examples include Case C-498/16 *Schrems* (pending before the CJEU); *Douez v Facebook Inc*. 2017 SCC 33, Supreme Court of Canada Judgment of 23. June 2017; *Vidal-Hall v Google* [2016] QB 1003 (CA).

[13] 407 U.S. 1, 12–13; 92 S.Ct. 1907 (1972).

[14] 254 F.2d 297, 301 (CA5 1958), cert. dismissed, 359 U.S. 180, 79 S.Ct. 710 (1959): "universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced", see also *Insurance Co of North America v N. Stoomvaart-Maatschappij* 201 F Supp 76, 78 (ED La 1961).

[15] American Law Institute, Restatement of the Law Third "Foreign Relations Law of the US, Jurisdiction" (1987) 308; Restatement of the Law Fourth- the Foreign Relations Law of the US Jurisdiction, Tentative Draft No. 2 (22. March 2016) §302 Reporters Notes p. 112; *National Equipment Rental Ltd v Szukhent* 375 US 311,316 (1964): "parties to a contract may agree in advance to submit to the jurisdiction of a given court".

[16] *M/S Bremen v. Zapata Off-Shore Co.* 407 U.S. 1, 12–13; 92 S.Ct. 1907 (1972); see also TradeComet.com *LLC v. Google Inc.* 647 F.3d 472 (2nd Cir 2011); Article 5 (1) Hague Convention on the Choice of Court Agreements of 30. June 2005, this has not (yet) been ratified by the US.

[17] S Emanuel *Emanuel Law Outlines: Civil Procedure* (25th Edition *Wolters Kluwer* 2015) 15.

[18] *M/S Bremen v. Zapata Off-Shore Co.* 407 U.S. 1, 12–13; 92 S.Ct. 1907 (1972).

[19] See also Article 6 (c) Hague Convention on the Choice of Court Agreements of 30 June 2005.

[20] At 15–19.

[21] *Carnival Cruise Lines v Shute* 499 U.S. 585, 111 S.Ct. 1522 (1991).

[22] 471 U.S. 462, 105 S.Ct. 2174 (1985).

[23] 471 U.S. 462, 484; 105 S.Ct. 2174 (1985).

[24] The Florida long-arm statute provided that courts in Florida have jurisdiction in disputes about a contractual obligation which should have been performed in Florida and here the contractual obligation was payment, which the contract located at the Miami headquarters.

[25] However the US Supreme Court did point out that the two franchisees were experienced business people and were legally advised throughout their negotiations with Burger King- I would argue though that there probably was no room for any negotiation on the terms of the franchise agreement, which is borne out by the facts described by the Court, the franchisees negotiated for five months and managed to obtain only some very minor concessions. It seemed that the Court would only consider the proposing party's bargaining advantage as relevant if it amounted to fraud or economic duress, see at 2189.

[26] At 2185-6.

[27] 499 U.S. 585, 111 S.Ct. 1522 (1991).

[28] In a majority opinion of Justices Blackmun, Rehnquist, White, O'Connor, Scalia, Kennedy, Souter with Justices Stevens and Marshall dissenting.

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enforceable, even though the clause was non-negotiated and may have made access to the courts for the consumer domiciled in Washington impossible. The Court focused on the transactional efficiency of such clauses and in particular risk management[29] and legal certainty[30] stating that consumers ultimately benefit from this transactional efficiency through lower prices.[31] Essentially the US Supreme Court only focused on the contractual analysis and refused to recognize a principle why such a clause should be invalid and unenforceable as a matter of *public policy* embodying consumer protection. The Court ignored the fact that forum selection clauses constitute a "powerful litigation weapon for large-scale corporate defendants or the extent to which such clauses impact materially, adversely, and unfairly on the merits of consumers' substantive claims".[32] As pointed out elsewhere it is also questionable whether transactional efficiency translates into economic efficiency and greater wealth, as the inability of consumers to litigate may well mean that companies perform less well.[33]

The Court focused only on the particular contractual relationship and fairness in the contract at hand: "forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness. In this case, there is no indication that petitioner set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims".[34]

After *Carnival Cruise Lines*, it seemed that public policy has only a small role to play in deciding whether a forum selection and choice of law clause contained in a B2C contract are enforceable and control of such clauses has been mainly based on a contractual analysis, *i.e.* unconscionability and fairness. However, as will be discussed further below the Californian courts and in particular, the 9th Circuit Court of Appeal have relied on *public policy* to disregard forum selection clauses or apply mandatory laws of the consumers' domicile.

3. Contract (Private Law) doctrines to provide fairness: notice and unconscionability

Since contractual clauses are based on consent, the party imposing standard terms and conditions must ensure that the terms have been brought to the reasonable attention of the other party- otherwise the terms have not been incorporated in the contract and are not part of it. This is a question of contract law, which will largely be governed by applicable state law with variations in the requirements imposed. The standard has been described in respect of Californian law by Judge (as he then was) Sotomayor: *"[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility"*.[35]

On a fundamental level, a distinction can be made between online contracting processes which require affirmative action (more likely to lead to successful incorporation[36]) and those which do not. Thus, it could be said that what is required for incorporation of online terms is notice and affirmative action.

In online contracts, the terms and conditions are normally provided by a link on the webpages or as part of the contracting interface ("browse-wrap"). Alternatively, they may appear as a pop-up window encouraging the party to scroll through the terms. Sometimes, in addition, before the contract is concluded the party has to click on a button or check a tick box taking action indicating explicitly that she agrees to terms ("click-wrap").[37] Courts have held both click-wrap[38] and, less so,[39] browse-wrap[40] forum selection clauses regularly valid and enforceable, sometimes on the basis that otherwise the online provider using the clause could be sued in many different locations, such that the clause is required as a risk management tool.[41] As with other contracts, not reading the terms and conditions is not a defence for asserting that a jurisdiction clause is not incorporated in the online contract.[42]

A few courts have held forum selection clauses in the internet context unenforceable[43] on the basis that the clause could not easily be found. This is due to the structure of the webpage (for example where it is not obvious that the customer has to

[29] "a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different for a" at 593.

[30] [a forum selection clause] "has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pre-trial motions to determine the correct forum and conserving judicial resources (. . .)" at 594.

[31] *Ibid*.

[32] Edward A Purcell, "Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court" (1992), 40 *UCLA Law Review* 423–515, 425.

[33] Edward A Purcell, "Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court" (1992), 40 *UCLA Law Review* 423–515, 432.

[34] At 595.

[35] *Specht v Netscape Commc'ns Corp* 306 F.3d 17, 35 (2d Cir.N.Y.2002).

[36] *Hancock v American Tel and Tel Co* 701 F.3d 1248, 1257 (10th Cir. 2012); *In Re Facebook Biometric Information Privacy Litigation* 185 F.Supp.3d 1155, 1166 (US District Court N.D. California 2016); *Nguyen v. Barnes & Noble Inc.* 763 F.3d 1171, 1176-7 (9th Cir.2014).

[37] As to the distinction between the two see RL Dickens "Finding Common Ground in the World of Electronic Contracts"(2007) 11 *Marquette Intellectual Property Law Review* 307–410, 386-7.

[38] *Caspi v Microsoft Network* 323 N.J.Super. 118, 125-6; 732 A.2d 528 (Superior Court of New Jersey, Appellate Division 1999) Cert Denied: 162 N.J. 199,743 A.2d 851 (Supreme Court of New Jersey 1999); *Feldman v Google, Inc.* 513 F. Supp. 2d 229, 233, 237 (E.D. Pa. 2007); *Forrest v. Verizon Communications Inc.* 805 A.2d 1007, 1010–11 (D.C.2002); *Scherillo v Dun & Bradstreet, Inc.* 684 F. Supp. 2d 313, 320-1 (E.D. N.Y. 2010).

[39] *Nguyen v. Barnes & Noble Inc.* 763 F.3d 1171, 1176 (9th Cir.2014): "[c]ourts have (. . .) been more willing to find the requisite notice for constructive assent where the browse wrap agreement resembles a click wrap agreement."

[40] *Kilgallen v. Network Solutions, Inc.* 99 F. Supp. 2d 125, 129–130 (D. Mass. 2000); *In Re Facebook Biometric Information Privacy Litigation* 185 F.Supp.3d 1155, 1166 (US District Court N.D. California 2016).

[41] *Feldman v Google, Inc.* 513 F. Supp. 2d 229, 242-3 (E.D. Pa. 2007).

[42] *Barnett v Network Solutions, Inc.* 38 S.W.3d 200, 204 (Tex.App.2001); *Feldman v Google, Inc.* 513 F. Supp. 2d 229, 238 (E.D. Pa. 2007).

[43] *Janson v* LegalZoom.com, Inc., 727 F. Supp. 2d 782 (W.D. Mo. 2010).

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scroll through lengthy text to find it)[44] or on the basis that the chosen court is entirely inaccessible to the party challenging the forum selection clause[45] (such that it would deprive the party of her day in court[46] – a high burden of proof) or that it would deprive the plaintiff(s) of the benefit of class action.[47]

4. Protecting privacy: resurgence of public policy?

In recent privacy class action cases the Californian courts have used *public policy* arguments to apply the law of the consumers' domicile as mandatory law over and above the law chosen by the social media provider or to oust a choice of forum clause if it deprives claimants of the availability of class actions.

In Re Facebook Biometric Information Privacy Litigation[48], the Californian courts are examining the compatibility of Facebook's facial recognition and tagging practices with the Illinois Biometric Information Privacy Act (BIPA) in a putative class action by Facebook users from Illinois. The plaintiffs agreed to the transfer of their case to California, but the question arose whether they were bound by the choice of law in Facebook's terms in favour of California. The three plaintiffs had all joined Facebook at different points in time, but all of them had a notice during the contracting process that they would have consented to terms with a hyperlink to these terms and they had to take action to sign up.[49] While the Court was critical of this approach, stating that it was more on the unenforceable "browse-wrap" scale it decided that the notice that terms are being agreed to close to the button to sign up was sufficient for the choice of law to be *incorporated* to the contract.[50] However, it applied the Illinois BIPA nevertheless, as it represented *fundamental public policy* and the Court refused to enforce the Californian choice of law provision for that reason.[51]

In *Doe 1, Doe 2 and Kasadore Ramkisson v AOL* the 9th Circuit Court held that a forum selection clause in favour of the courts of Virginia was unenforceable for the reason that this would have deprived the plaintiffs of the availability of a class action in California.[52] This case arose from the publication of the AOL search records of 650,000 AOL subscribers in 2006. The claimants alleged infringements of federal privacy laws and Californian law. The Court held that California *public policy* would be violated if the plaintiffs were forced to waive their rights to a class action and remedies under California consumer law by having to litigate in Virginia. For this reason the Court held that the forum selection clause was unenforceable for public policy reasons.[53]

The Canadian Supreme Court in *Douez v Facebook* has reached a similar conclusion concerning consumer adhesion contracts and public policy.[54] This case concerned a privacy class action[55] against *Facebook* by British Columbia residents under a statutory tort contained in the Privacy Act of British Colombia.[56] The alleged privacy infringement related to "sponsored stories advertising"; whereby Facebook had used the profile picture and name of Facebook account holders who had "liked" a product to advertise this fact to other users without consent. The Privacy Act confers jurisdiction to claims under the Act to the (Canadian) Supreme Court.[57] *Facebook* sought dismissal of the claim on the basis that its term of use with its Canadian users contained an exclusive jurisdiction clause in favour of the Californian Courts and a choice of law clause in favour of Californian law.

The Supreme Court held that the jurisdiction clause in the Privacy Act did not apply to international conflicts of law,[58] but was merely a domestic jurisdiction rule. It furthermore held that although the Court Jurisdiction and Proceedings Transfer Act[59] had codified the common law of *forum non-conveniens*, this doctrine did not apply to the question of whether the Canadian courts should decline jurisdiction to give effect to an exclusive jurisdiction clause in favour of a foreign court contained in the contract between *Facebook* and its users.[60] Instead, the Court relied on the common law doctrine[61] concerning forum selection clauses in *Pompey Industrie v ECU Line N.V.*, a commercial shipping case.[62] The Court held by a narrow majority of four to three that the forum selection clause could not

[44] *Hoffman v Supplements Togo Management, LLC* 419 N.J.Super. 596, 598, 610-11; 18 A.3d 210 (Superior Court New Jersey Appellate Division 2011) "website was evidently structured in an unfair manner"; *Specht v. Netscape Commc'ns Corp* 306 F.3d 17, 31–32 (2d Cir.N.Y.2002) (in respect of an online arbitration clause, which was contained in scroll-down text on the screen submerged far below the download button and therefore easy to overlook); *Pollstar v Gigmania Ltd* 170 F.Supp.2d 974, 981 (E.D.Cal.2000) (hyperlink in small grey print on a grey background).

[45] *Carfax, Inc. v Browning* 982 So. 2d 491, 492-4 (Ala. 2007).

[46] *M/S Bremen v Zapata Off-Shore Co* 407 U.S. 1, 18; 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

[47] *Dix v. ICT Group, Inc.* 160 Wash. 2d 826, 841; 161 P.3d 1016 (2007): "If a forum selection clause precludes class actions and thereby significantly impairs Washington citizens' ability to seek relief under the CPA for small-value claims, the clause violates the public policy" at 842–3.

[48] 185 F.Supp.3d 1155 (US District Court N.D. California 2016).

[49] At 1162-3.

[50] At 1166-7.

[51] At 1169-70.

[52] 552 F.3d 1077 (2009).

[53] At 1084; see also for an earlier precedent in the Californian courts: *America Online, Inc. v. Superior Court of Alameda County (Mendoza)*, 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699 (2001).

[54] [2017] SCC 33, Judgment of 23 June 2017, available from CanLII https://www.canlii.org/en/ca/scc/doc/2017/2017scc33/2017scc33.html.

[55] The proposed class comprising all British Columbia residents who had their name and picture used in sponsored stories advertising, about 1.8 million people.

[56] Privacy Act, RSBC 1996, c.373, s.3 (2) "It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose."

[57] s.4.

[58] Paras 4 and 44 (Majority) and Para 142 (Dissent) but see dissent in the Concurring Opinion of Justice Abella at paras 107–110.

[59] Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28, s. 11.

[60] Paras 17–22 (Plurality), para 108 (Dissenting Opinion).

[61] Paras 17–22 (Plurality) and Paras 88–94 (Concurring).

[62] [2003] 1 S.C.R. 450.

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be used to stop the class action in the courts of British Columbia and refused to order a stay. The outcome was that the forum selection clause was unenforceable. A minority of three dissenting Justices held that the Canadian class action should be stayed, as the plaintiff had *not* shown the required "strong cause".[63]

Pompey had set out a two-step test for assessing whether or not a forum selection clause was enforced under Canadian law: first the party relying on the clause had to prove that the clause was valid and clear and applied to the dispute,[64] then the burden of proof shifted to the party who claimed the clause was unenforceable, who had to show "strong cause" why the clause should not be enforced.[65]

A plurality of three judges[66] found that the plaintiff succeeded at this *second* step, saying that here the convenience of the parties, the fairness between the parties and the interests of justice as well as public policy had to be taken into account.[67] This plurality found that while the "strong cause" had been applied very restrictively in commercial cases[68] this was very different in consumer cases.[69] Significantly, the plurality held that the traditional consumer "fairness" considerations had to be supplemented *by public policy* considerations. The emphasis on public policy is interesting in that the Court clearly acknowledged that adjudication is not (always) about the private interests of the parties to the dispute but also a "public good": "Courts are not merely "law-making and applying venues"; they are institutions of "public norm generation and legitimation".[70] The plurality opinion also pointed out the market power of *Facebook* and its ubiquitous reach: "access to Facebook and social media platforms, including the online communities they make possible, has become increasingly important for the exercise of free speech, freedom of association and for full participation in democracy. Having the choice to remain "offline" may not be a real choice in the Internet era."[71]

Here the fact that an individual consumer contracted with a large multi-national corporation with overwhelming bargaining power *and* the fact that privacy was a fundamental right with quasi-constitutional rank implicating strong public policy considerations came together to oust the express jurisdiction clause.[72] The plurality held that Canadian courts had a strong public interest in adjudicating cases of constitutional rights such as privacy.[73] Furthermore, the Court found two secondary reasons: first, that not staying proceedings was in the interests of justice as the British Columbia courts were better placed than the Californian courts to decide privacy rights interpreting British Columbia legislation.[74] This is similar to a *forum non-conveniens* analysis, but puts the burden of proof on the person who opposes the foreign forum selection clause.[75] The choice of law clause in the *Facebook* contract was relevant here as Californian law might deprive the plaintiff of her rights under the fundamental rights under the laws of British Columbia.[76]

Secondly, the plurality also pointed to the expense and inconvenience of British Columbia residents litigating in California relative to the expense and inconvenience caused to Facebook in defending this action in British Columbia.[77]

The concurring fourth Justice[78] by contrast found that the *Facebook* forum selection clause is already invalid under the first step of the *Pompey*[79] analysis (where the burden rests on the party relying on the clause, here *Facebook*).[80] Like the plurality, the concurring Justice held that the grossly uneven bargaining power of the parties combined with public policy considerations tilts the balance in favour of not enforcing the clause.[81] Furthermore, unlike the plurality she found the clause also unconscionable because of its unfairness and the inequality of bargaining power.[82]

5. Conclusion

As the preceding discussion has shown, there are two distinct aspects to how private international law controls the enforceability of forum selection clauses: first, a contractual analysis based on unconscionability and secondly, privacy and consumer rights as an aspect of the application of public policy. While in practice both doctrines may overlap in the argumentation of the courts, conceptually it is important to make a distinction between them, for the reason that contract law is based on the free will of the parties and a respect for their negotiated agreement, which is only restricted to the extent that adhesion contracts do not give sufficient notice and/or contain unconscionable clauses. By contrast, public policy and the protection of privacy as a fundamental right override the free will of the parties in the public interest. While public policy has receded in the background for a number of years, the most recent case law is based on strong public policy arguments.

It is argued here that both aspects (contractual and public policy doctrines) are paramount for achieving not only justice between the parties of a dispute but also ensuring good administration of justice in the public interest. In particular, in cases where fundamental rights such as the right to privacy are engaged, public policy should play a role in upholding local values and protecting consumers from having to litigate in

[63] Para 125 perMcLachlin C.J. and Moldaver and Côté JJ.
[64] This involves applying contract law principles such as incorporation, unconscionability, undue influence and fraud, see Para 28.
[65] Paras 28–29.
[66] Justices Karakatsanis, Wagner and Gascon.
[67] Paras 29, 49.
[68] Forum selection clauses are "generally encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law", citing *Pompey* fn 210 para 20 and Para 31.
[69] Paras 1, 33.
[70] Paras 25, 26.
[71] Para 56 omitting internal references.
[72] Paras 4, 51–63 (Plurality) and 104–105 (Concurring).
[73] Ibid.
[74] Paras 4, 64.
[75] Para 65.
[76] Paras 68–69, 71–72.
[77] Paras 4, 73.
[78] Justice Abella.
[79] FN 210.
[80] Para 96.
[81] Para 111.
[82] Para 114–116.

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distant courts under unfamiliar laws. Thus, public policy has a role to play both in respect of court jurisdiction as well as in respect of applying local (privacy) laws as mandatory laws.

Purely focusing on transactional efficiency and a contractual analysis misses two distinct points namely that justice is about local rights and secondly, that courts have a role in not merely adjudicating on the dispute before them, but must also uphold the administration of justice. It is for this reason that both, the contractual analysis and the public policy analysis should be part of the test for examining the enforceability of forum selection and choice of law clauses. This is all the more important in respect of social media providers such as Facebook who have a significant share of the world's population as users on their platform and whose vast resources puts them at a significant advantage to litigate in a foreign place vis-à-vis the individual user.

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