CONTRACT LAW UPDATE: DEVELOPMENTS OF NOTE (2017)

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For just over a decade, I have published this (almost) annual update on contract law. I identify cases decided over the past year that articulate new principles, modify existing principles or illustrate longstanding principles. I focus on cases of interest to lawyers in commercial practice, including commercial litigators.[1]

Attached to the back of the paper is a table listing topics covered in previous years. Those prior updates are available on Lawson Lundell LLP's website under my profile (http://www.lawsonlundell.com/team-Lisa-Peters.html).

I am always surprised by the connectivity among topics that I have chosen somewhat randomly. One recurring theme in this year's cases is the question of whether existing contract law principles need to be modified in light of the prevalence of online contracts, which are often "take it or leave it" contracts of adhesion.

This year's topics are:

- Rectification of contracts to meet tax planning objectives (and more generally) – the Supreme Court of Canada weighs in;
- Forum selection clauses – the strong cause test for their enforceability is modified, at least in a consumer contract setting;
- Arbitration clauses – what is the test for assessing their enforceability?
- Spotlight on releases – are there special interpretative principles applying to them?
- This year's boilerplate clause – "no suit" clauses; and
- Smart contracts and blockchain – what is all the buzz about?

[1] I am indebted to Lawson Lundell LLP summer student and University of Victoria student Jennifer Hunt-Poitras for her assistance in choosing this year's topics and, in particular, her assistance in researching and writing about blockchain and smart contracts, topics very new to an older academic, and to my associate, Heidi Rolfe, for her careful proofreading and editing.

Rectification

I last wrote about rectification in 2006. At that time, I focussed on the Supreme Court of Canada ("SCC") decision in *Sylvan Lake Golf & Tennis Club Ltd*., 2002 SCC 19, and its discussion of the equitable remedy of rectification and its availability where a party alleged a unilateral mistake (*i.e*., could not establish mutual mistake).

The SCC touched on rectification again in *Shafron v. KRG Insurance Brokers (Western) Inc*., 2009 SCC 6, a case primarily concerned with the concept of notional severance and restrictive covenants.

In late 2016, in two decisions, the SCC revisited the parameters of rectification as a remedy in the context of transactions having unintended tax consequences that the parties thereto sought to address *ex post facto*. In that one case was on appeal from the Quebec Court of Appeal and one from the Ontario Court of Appeal ("ONCA"), the SCC also took the opportunity to compare the approach to rectification in equity to the approach under Quebec civil law.

The facts in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 ("*Fairmont Hotels*"), are probably of interest to lawyers who advise on the tax ramifications of transactions, but all of the details are not necessary to understanding what the SCC decided. I will oversimplify them here.

In 2002/2003, Fairmont was involved in the financing of a purchase of two other hotels by Legacy Hotels REIT. The financing arrangement was intended to be tax neutral. Because the financing was in U.S. currency, there was a potential exposure to foreign exchange tax liability. The fix for that potential exposure was having Fairmont and two subsidiaries, FHIW and FHIS, enter into reciprocal loan agreements with Legacy in U.S. currency.

That tax planning was frustrated when Fairmont was acquired in 2006 by other corporations, a transaction that would result in Fairmont, FHIW and FHIS realizing a deemed foreign exchange loss without corresponding foreign exchange gains. A modified plan was put in place that allowed Fairmont to hedge against exposure to prospective foreign exchange tax liability. While putting a plan in place to protect the subsidiaries as well was considered, no specific plan was formulated or implemented.

In 2007, Legacy wanted to terminate the reciprocal loan agreements with Fairmont and its subsidiaries so it could sell the hotels it had acquired on an urgent basis. Fairmont, mistakenly believing that something had been put in place to secure the subsidiaries' foreign exchange tax neutrality, complied with Legacy's request by redeeming its shares in FHIW and FHIS through directors' resolutions of those entities.

It is those directors' resolutions that the applicants sought to have rectified after they learned that the subsidiaries were not protected from potential foreign exchange tax liability.

The view of the majority in *Fairmont Hotels* is encapsulated in the statement by Mr. Justice Brown that "rectification is not equity's version of a mulligan."[2]

He went on to stress that courts rectify agreements that do not correctly record agreements but do not rectify agreements where their faithful recording in an instrument has led to an undesirable or otherwise unexpected outcome.

The majority's decision confirms that where mutual mistake is alleged:

1. Rectification is available where it is established that the written agreement, which is purportedly still in effect, does not accurately record the parties' agreement.

2. Rectification is not available to rectify the agreement itself (such as when the parties say that the agreement has led to unintended or unexpected results).

3. The party seeking rectification must show that the contracting parties shared a common continuing intention, up to the time the written instrument was executed, that the provision in question stand as agreed rather than as reflected in the instrument (*i.e.*, an antecedent agreement on the point whose terms are definite and ascertainable). In other words, they must establish that the instrument, if rectified, would carry out the parties' prior agreement by showing not only the putative error, but also the way in which the instrument should be rectified in order to correctly record what the parties intended.

4. The standard of proof remains the civil standard of balance of probabilities. However, the court will typically require evidence exhibiting a high degree of clarity, persuasiveness and cogency before substituting the terms of a written instrument.

Referring to the Court's decision on the same day in *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55 ("*Jean Coutu*"),[3] Justice Brown stated that equity and the Quebec civil law were *ad idem*, albeit each system arrived at the same conclusion via different routes (with equity focussing on correcting the document and civil law on its interpretation).

Mr. Justice Brown stated that in cases of unilateral mistake, the party seeking rectification must also show that the other party knew or ought to have known about the

[2] *Fairmont Hotels* at para. 39.
[3] *Jean Coutu* at para. 33.

mistake and that permitting the defendant to take advantage of the erroneously drafted agreement would amount to fraud or the equivalent of fraud.

While articulating these principles in a case involving unanticipated, adverse tax consequences, Mr. Justice Brown made it clear that they applied more generally, whenever rectification was sought.

It was not enough, on application of these principles, for Fairmont to show a common continuing intention that the value of the shares in FHIW and FHIS be transferred in such a way as to avoid tax liability. An inchoate or otherwise undeveloped intention is not enough. They needed, and failed, to show that an antecedent agreement, with definite and ascertainable terms, was inaccurately recorded. They also failed to show how the common continuing intention was to be achieved.

There is a recent example of a party successfully presenting a case meeting the test for rectification, which illustrates how narrow the scope of the remedy is. In *Intergulf Investment Corporation v. 0954704 B.C. Ltd.*, 2017 BCSC 430, the plaintiffs sought rectification of sloppily drafted contracts of purchase and sale of three properties in North Vancouver, B.C.

Offers to purchase, and subsequently contracts of purchase and sale, referred to Intergulf Development Corporation rather than Intergulf Investment Corporation because the agent drafting the documents relied on a business card with the first corporation's name on it provided by one of the officers of the plaintiff corporation. In addition, the agreed purchase price of $1,150,000 was written as “one million one hundred and fifty dollars” (the word “thousand” was missing after “fifty”), although it was correctly written numerically.

The error as between “Development” and “Investment” was corrected by the parties in some places in the agreements, but they missed some references. Mr. Justice Greyell was satisfied on the evidence that the parties intended the plaintiff corporation to be the purchaser and that the missing “thousand” was an error as the agreed upon price was $1,150,000. Rectification was granted.

Bottom line: There are no mulligans in contract law to remedy a failure to deal with an issue by explicit terms in a contract or for fixing unintended or unforeseen consequences of a transaction. Rectification is not available to amend agreements. There are limited mulligans for bad drafting that fails to reflect the parties' common intention, but mustering a case to meet the test for rectification for mutual mistake will be challenging. The party seeking rectification must show that the contracting parties shared a common, continuing intention, up to the time the written instrument was executed, that the provision in question stand as agreed rather than as reflected in the instrument, (*i.e.*, an antecedent agreement on the point whose terms are definite and ascertainable). They must establish that the instrument, if rectified, would carry out the parties' prior

agreement by showing not only the putative error, but also the way in which the instrument should be rectified in order to correctly record what the parties intended.

Forum selection clauses[4]

The interpretation and enforceability of forum selection clauses is not simply a matter of contract law, but also a matter of private international law.

Enforcement of a forum selection clause by a Canadian common law court is discretionary, not mandatory.

Until this year, the go-to case for parties seeking to avoid the application of, or conversely to enforce, forum selection clauses was the SCC decision in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 ("*Z.I. Pompey*").[5]

Z.I. Pompey articulated the strong cause test. Under this two-part test, the party relying on the forum selection clause must establish that the clause is valid, clear and enforceable and applies to the circumstances. Then, the party asking the Canadian court to take jurisdiction in the face of a forum selection clause selecting another forum as the exclusive forum for adjudication of the dispute must establish strong cause for not giving effect to the clause.

The types of factors identified in the jurisprudence that could amount to strong cause include:

- fraudulent inducement of the party to agree to the clause;
- the contract is otherwise unenforceable;
- the court in the jurisdiction selected will not accept jurisdiction;
- the plaintiff can no longer expect a fair trial in the selected forum due to events that could not have reasonably been anticipated;
- the claim or the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause;
- enforcing the clause would frustrate some clear public policy; and

[4] The cases I discuss here are about exclusive forum selection clauses. Where such a clause confers non-exclusive jurisdiction, it merely relieves a party from proving territorial competence/jurisdiction *simpliciter* in relation to the chosen forum.

[5] And to a lesser extent, the decision in *Momentous.ca v. Canadian American Association of Professional Baseball Ltd.*, 2012 SCC 9, which made it clear that *Z.I. Pompey* was not restricted to the maritime context.

- inordinate delay by the party seeking to rely on the forum selection clause such that entering a stay of the domestic proceeding would cause significant prejudice to the other party.

The above list of exceptional circumstances that would establish strong cause is not a closed list.

The usual result in commercial cases where the strong cause test was applied: forum selection clauses were enforced and freedom of contract prevailed.

In *Douez v. Facebook, Inc*., 2017 SCC 33 ("*Douez*"), the SCC changed the landscape when it revisited the test from *Z.I. Pompey* in the context of a contract of adhesion entered into by a consumer online. While the Court affirmed the *Z.I. Pompey* strong cause test in the context of commercial contracts, it emphasized different factors particular to the consumer context. Three of the seven justices held that when considering whether it is reasonable and just to enforce an otherwise binding forum selection clause 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.

The decision is a difficult one to follow, in part because of the need to reconcile the various decisions (there is a 3-1-3 split, with Abella J. concurring in the result but applying a different analysis to conclude that the forum selection clause in question was unenforceable).

The case is worthy of article in its own right, dealing with both conflict of laws and contract law ramifications. Professor Elizabeth Edinger of the Allard School of Law and I plan to publish such an article later this year.

Here, I will focus on some key challenges related to the enforceability of forum selection clauses from the perspective of solicitors advising clients who want to insert this type of clause in their agreements.

The particular facts of *Douez* may limit its application going forward. Ms. Douez brought an action in British Columbia against Facebook alleging that it used her name and likeness without consent for the purposes of advertising, in contravention of subsection 3(2) of British Columbia's *Privacy Act*.[6] She sought to have the action certified as a class proceeding.

[6] *Privacy Act*, R.S.B.C. 1996, c. 373.

When registering with Facebook, users needed to consent to the terms of use. The terms of use included the following choice of law and forum selection clause:

> You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for purpose of litigating all such claims.

Section 4 of the B.C. *Privacy Act* provides that:

> Despite anything contained in another Act, an action under this Act must be heard and determined by the Supreme Court [of British Columbia].

After rejecting the proposition that section 4 of the *Privacy Act* was mandatory legislation that overrode a forum selection clause, Justices Karakatsanis, Wagner and Gascon (the "KWG Panel") embarked on an analysis of how the strong cause test should apply in the consumer context.

In reiterating the strong cause test as a two-part test, the KWG Panel stated that at the second stage of the analysis, a court must consider "all the circumstances," including the "convenience of the parties, fairness between the parties and the interests of justice" and that public policy may also be a relevant factor at this step. In making this observation, the KWG Panel did not limit itself to the consumer contract context.

One of their observations that I will pick up again under a subsequent topic in this paper is that forum selection clauses divert public adjudication of matters out of the provinces, and court adjudication in each province is a public good. Thus, they stated, while parties are generally held to their bargain, Canadian courts do not simply enforce them like any other clause because forum selection clauses encroach on the public sphere of adjudication. In common law provinces, a forum selection clause cannot bind a court or interfere with a court's jurisdiction. While this observation is made in the context of forum selection clauses, it is also relevant to non-suit clauses (this year's boilerplate clause, discussed later in this paper).

The new ground that the KWG Panel tills relates to what circumstances will be relevant in assessing whether the plaintiff has established strong cause in the context of a consumer contract:[7]

> [38] Therefore, we would modify the *Pompey* strong cause factors in the consumer context. When considering whether it is reasonable and just to enforce an otherwise binding forum selection clause 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. The burden remains on the party wishing to avoid the clause to establish strong cause.
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> [39] Although the steps are distinct, some considerations may be relevant to both steps of the test. For example, a court may consider gross inequality of bargaining power at the second step of the analysis, even if the circumstances of the bargain do not render the contract unconscionable at the first step. Taking into account the fact that the parties did not negotiate on an even playing field recognizes that the reasons for holding parties to their bargain carry less weight when there is no opportunity to negotiate a forum selection clause. This is not to say that the gross inequality of bargaining power will be sufficient, on its own, to show strong cause. However, it is a relevant circumstance that may be taken into account in the analysis.

While the KWG Panel found that the forum selection clause in the Facebook Terms of Use survived the first prong of the test, they held that Ms. Douez had made out strong cause. The key factors that resulted in Ms. Douez meeting that standard cumulatively were the fact the claim involved a consumer contract of adhesion and a statutory cause of action implicating the quasi-constitutional privacy rights of British Columbians.

The KWG Panel found that there was "gross inequality of bargaining power" based on the take-it-or-leave-it nature of the terms, but also, it would seem, based on Facebook's economic power. They emphasized the nature of privacy legislation as quasi-constitutional and the importance of domestic courts adjudicating constitutional and quasi-constitutional claims of residents in the jurisdiction. They cited the position of the Canadian Civil Liberties Association that access to social media platforms has become increasingly important for the exercise of free speech, freedom of association and full participation in democracy.

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[7] *Douez* at paras. 38-39.

The KWG Panel found that the interests of justice and comparative convenience and expense of litigating in the alternate forum supported these primary factors that gave rise to strong cause for not enforcing the forum selection clause.

As will be obvious, the reasons I have just described were the reasons of only three of the seven judges who heard the case. Madam Justice Abella concurred in the result, finding the forum selection clause to be unenforceable under the *Z.I. Pompey* test. However, she did so under the first stage of the test on two grounds. She held that when online consumer contracts of adhesion contain terms that unduly impede the ability of consumers to vindicate their rights in domestic courts, particularly their quasi-constitutional or constitutional rights, public policy concerns outweigh those favouring enforceability of a forum selection clause. She also held that the clause was unenforceable based on unconscionability. On the latter point she held that the inequality of bargaining power between Facebook and Ms. Douez in an online contract of adhesion gave Facebook the unilateral ability to require that any legal grievances Ms. Douez had could not be vindicated in British Columbia where the contract was made, but only in California where Facebook has its head office, giving Facebook an unfair and overwhelming procedural — and potentially substantive — benefit.

The remaining three justices (McLachlin C.J.C., Moldaver and Côté JJ.) dissented, stating, *inter alia*, that while the court can refuse to enforce otherwise valid contractual provisions that offend public policy, the party seeking to avoid enforcement of the clause must prove the existence of an overriding public policy that outweighs the very strong public interest in the enforcement of contracts. They found no such overriding public policy to be made out on the facts. Further, they opined, forum selection clauses, far from being unconscionable or contrary to public policy, are supported by strong policy considerations.

Where does all this leave us?

Overriding public policy has always been a potential basis for a court finding that there is strong cause to not enforce a forum selection clause. But now, at least as regards consumer contracts, the list of considerations that can be cumulated to give rise to a public policy override has changed. They include:

- the contract was entered into online;
- the contract is a contract of adhesion;
- the consumer had no ability to negotiate the contract terms; and
- the counterparty is a large corporation with significant resources.

As I noted earlier, the fact that the cause of action in *Douez* was in relation to a quasi-constitutional right (privacy) loomed large in the decision. Will public policy overwhelm

freedom of contract only in cases involving constitutional or quasi-constitutional causes of action? The answer to that question will presumably arise out of the post-*Douez* jurisprudence.

In terms of commercial contracts, ostensibly nothing has changed. We already knew that the list of what could constitute strong cause is not closed. But I wonder about the emphasis of the KWG Panel on "all the circumstances," their seeming endorsement of local adjudication as a public good and what I see as the continued blurring of the boundaries between *forum non conveniens* factors (convenience, expense, *etc.*) and the strong cause test.[8] In light of the decision in *Douez,* will lower courts feel empowered to find strong cause in more commercial cases?

Bottom line: Forum selection clauses in commercial contracts negotiated between sophisticated parties will still be enforced by the courts in the majority of cases. The first part of the strong cause test will typically only result in the clause being unenforceable where classic contract law defences, such as fraud, duress and unconscionability, arise. And while the list of circumstances in which strong cause for not enforcing a forum selection clause in a commercial setting may be made out is not closed, instances of success on stage two of the strong cause test in this setting are very rare.

In a consumer contracting context, the outcome is less certain. The SCC's elaboration[9] of what might constitute strong cause to not enforce a forum selection clause in a consumer contract opens the door to more rulings that forum selection clauses in such contracts are unenforceable.

Arbitration Clauses

It seems apt, after considering forum selection clauses and the test to be applied to assess their enforceability, to consider their second cousin, the arbitration clause, from the same perspective.

I will start with what appears to be confusion in the jurisprudence about what constitutes a forum selection clause and what constitutes an arbitration clause. Distinguishing between the two types of clauses matters because different policy considerations inform the approach to and test for enforceability of each category of clause.

I have already outlined above the policy considerations that inform the strong cause test applied to forum selection clauses. That test balances freedom of contract against other considerations such as unfairness, convenience to the parties, inordinate delay, *etc.*

[8] This blurring pre-existed the *Douez* decision. It was present in *Z.I. Pompey* itself and in the English cases cited therein.
[9] At least that of the KWG Panel and Madam Justice Abella.

Arbitration clauses are enforced because Canada has embraced arbitration as a desirable form of dispute resolution, a policy that is reflected in domestic and international arbitration statutes.

The provincial and territorial domestic arbitration statutes contain provisions under which courts are required to stay proceedings before them in the face of an arbitration agreement, except in very conscribed circumstances, *e.g.*, the arbitration agreement is void, inoperative or incapable of being performed.[10] Each common law province and territory has also enacted an *International Commercial Arbitration Act* that adopts the UNCITRAL Model Law on International Commercial Arbitration or implements the New York Convention,[11] containing equivalent provisions.

Not surprisingly, then, there is judicial and legislative enthusiasm for enforcing arbitration clauses (or at least for staying judicial proceedings in the face of such a clause), and for interpreting them liberally. An arbitration agreement can survive even where the contract in which it is found is determined to be invalid.[12]

Parties often specify that the arbitration will be conducted under the rules of a particular arbitral institution, *e.g*., the London Court of International Arbitration Rules, but also that the seat of arbitration will be that institution's premises. Under the standard form of *International Commercial Arbitration Act* based on the UNCITRAL Model Law, the parties are free to agree on the place of arbitration. But leading textbooks on arbitration confirm that it is not necessary that all of the arbitration tribunal's hearing be held at the seat of arbitration selected by the parties.

In a pragmatic sense, then, there can be a geographical component to an arbitration clause. However, in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, the SCC said that arbitration is an institution without a forum or geographical basis, despite the fact that parties may end up having to arbitrate in another jurisdiction.[13] Accordingly, I have never understood arbitration clauses to be subject to the *Z.I. Pompey*

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[10] This is the formulation from the *Arbitration Act*, R.S.B.C. 1996, c. 55, s. 15. In a number of other provinces, including Alberta and Ontario, the grounds for refusing a stay are:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under local law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

[11] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).

[12] See, for example: *Arbitration Act*, R.S.A. 2000, c. A-43, s. 17(3).

[13] Admittedly, the case involved questions of applicability of particular provisions of the *Civil Code of Québec*. If the dispute in question involves a "foreign element," Art. 3149 of the Civil Code prohibits the waiving of the jurisdiction of Quebec courts in certain cases. It was in this context that the majority of the SCC in *Dell* concluded that an arbitration clause was not "in itself" a foreign element warranting application of the rules of Quebec private international law.

strong cause test: I have always assumed that their enforceability is to be tested before the arbitrator under general principles of contract law (by way of a parallel to the first prong of the strong cause test, considering allegation of duress, fraud, unconscionability, *etc*.), with the overlay of the stay test in the relevant statute where the question of enforceability is raised in the context of a stay application before a court.[14]

While the granting of a stay may notionally be an exercise of the court's discretion, in the context of a binding arbitration clause, the court has a duty (typically framed as "the court shall") to stay the court proceedings absent the exceptional circumstances listed in the particular arbitration statute.

I was taken by surprise, therefore, when the ONCA recently subjected a clause that I would have described as an arbitration clause to the *Z.I. Pompey* strong cause test in the context of a stay application.

In *Novatrax International Inc. v. Hägele Landtechnik GmbH*, 2016 ONCA 771 ("*Novatrax*"), the plaintiff Novatrax distributed industrial reversible fans in Canada and the U.S. under an Exclusive Sales Agreement ("ESA") with the defendant ("HLG"). Either party was entitled to terminate the ESA on 12-months' notice or without notice in specified circumstance.

Section 18 of the ESA contained a clause which the ONCA described as a "forum selection clause:"

> The contractual parties agree that German law is binding and to settle any disputes by a binding arbitration through the "Industrie und Handelskammer" (Chamber of Commerce) in Frankfurt.

Novatrax brought an action in the Ontario court for damages alleging wrongful termination of the ESA. The action included contract and tort claims against HLG and tort claims against the other defendants. HLG and the other defendants to the court proceeding brought an application for a stay, relying on section 18, which they apparently characterized as a forum selection clause. In paragraph 5 of his reasons, Justice Brown[15] notes that all the parties agreed that the governing law was *Z.I. Pompey* and related cases, which may explain why the Court adopted that approach.

Because it treated section 18 of the ESA as a forum selection clause, the ONCA did not deal with the competence-competence principle and, in particular, what the SCC has said

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[14] The Federal Court carefully drew a distinction between the two types of clauses in *Comtois International Export Inc. v. Livestock Express BV*, 2014 FC 475, overruling a prothonotary who had refused to stay a court proceeding in the face of an arbitration clause by applying the stay provision in the *Commercial Arbitration Code* set out in the schedule to the *Commercial Arbitration Act*, R.S.C. 1985, c.17 (2nd Supp.)).

[15] Justice Doherty concurred in the reasons of Justice Brown.

about leaving final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement to the arbitral tribunal.[16]

The Court embarked on an analysis of the scope of section 18 and a consideration of whether the motions judge erred in staying the action in Ontario against the two individual respondents, German residents who were principals of HLG, and against a related corporation ("Cleanfix"), none of whom were parties to the ESA. Based on Justice Brown's reasons, he was applying the test for a forum selection clause, despite the fact that section 18 of the ESA was clearly an arbitration clause.

This conceptual confusion carried over into the second issue. Justice Brown upheld the ruling of the motions judge to stay the court proceeding against the respondents who were not parties to the ESA, stating in part:

> …Even though Cleanfix and the individual respondents are not parties to the ESA, the claims pleaded against them all arise out of the same transactions and occurrences and raise common questions of fact and law linked to the claims pleaded against Hägele. The factually-intertwined nature of the claims pleaded by Novatrax against all respondents requires, at this stage of the litigation, that the forum selection clause drive the stay analysis.

Justice Brown relied on the decisions of the ONCA and SCC in *Momentous.ca Corporation v. Canadian American Association of Professional Baseball Ltd.*, 2010 ONCA 722, aff'd 2012 SCC 9 ("*Momentous.ca*").

Momentous.ca is, in my view, a confusing case. The principal clause under consideration in that case, contained in the League[17] Affiliation Agreement, had characteristics of both an arbitration clause and a forum selection clause:

> Subject to the arbitration provisions set forth in the League Agreements, the parties submit to personal jurisdiction in the State of North Carolina, the courts thereof…for the purposes of any action affecting the League Agreements or this Agreement.

Admittedly, there were arbitration provisions in the various League Agreements and League Bylaws. But I have always seen the inclusion of the language giving jurisdiction to the courts of the State of North Carolina as the reason that the Ontario courts, and the

[16] In earlier decisions, including *Seidel v. Telus Communications Inc.*, 2011 SCC 15.

[17] The judgments at all levels refer to the Canadian American Association of Professional Baseball, Ltd. as the "League."

SCC, applied the *Z.I. Pompey* test in that case. The ONCA and SCC decisions in *Momentous.ca* are consistently cited in cases dealing with forum selection clauses.

In *Novatrax*, Justice Brown, by way of acknowledging the dissent of Justice Feldman, agreed that generally, a court cannot force a non-party to an arbitration agreement to submit its claims to arbitration (implicitly acknowledging that the clause at issue is an arbitration clause). However, he then went on to find that the claims pleaded by Novatrax against all the respondents, including Cleanfix and the two individuals who were not parties to the ESA, were factually intertwined and turned on the determination of the threshold issue of whether HLG wrongfully terminated the ESA. He held that the motion judge's exercise of his discretion to require the issue of whether HLG wrongfully terminated the ESA be decided first in an arbitration was entitled to deference.

In dissent, Justic Feldman agreed that Novatrax failed to show strong cause why "the choice of law, choice of forum and arbitration clause" in the contract should not be enforced (a statement that confuses me even more, in that it suggests that each of those three types of clauses is subject to the strong cause test).

Justice Feldman dissented on the issue of whether Novatrax's claims against Cleanfix and the individuals who were not parties to the ESA was properly stayed by the motions judge. She states that it is trite law that: (1) an arbitration agreement gives an arbitrator jurisdiction over disputes between parties to the agreement; and (2) that an arbitrator cannot make an arbitral award that disposes of rights between a party and non-party to the agreement. In her view, the decision in *Momentous.ca* did not purport to contravene these propositions but was based on other factors. First, the plaintiffs in that case specifically pleaded that the claims were all related and that joinder of them would promote the convenient administration of justice. Second, based on this pleading, the court understood that the plaintiffs were approaching jurisdiction as an all-or-nothing proposition, and were thereby expected to consent to arbitration in North Carolina against all defendants, including those not party to the arbitration agreement, if the court in Ontario stayed the proceedings.

Justice Feldman went on to consider whether the court should have ordered a stay of the non-arbitrable claims pending the outcome of the arbitration between Novatrax and HGL. Endorsing the approach to that issue taken in the Alberta courts,[18] she ruled that such a stay was not appropriate on the facts.

So is the ONCA saying that a clause like section 18 in the agreement between Novatrax and HLG is a hybrid, to be treated like a forum selection clause for some purposes but recognized as an arbitration clause for others?

[18] Including *UCANU Manufacturing Corp. v. Calgary (City of)*, 2015 ABCA 22.

There are other fairly recent cases in which what I would view as arbitration clauses were subjected to the strong cause test for forum selection clauses. See, for example, *Oppenheim v. Midnight Marine Limited*, 2010 NLCA 64.

It will be interesting to see how the courts apply *Novatrax* going forward and whether another appellate court or the SCC weighs in on whether the strong cause test properly applies to a clause requiring arbitration of disputes that names an arbitration chamber in particular jurisdiction. Some might say that there is no practical difference between the strong cause test applied in the context of a forum selection clause in a commercial contract and the test applied under the arbitration statutes when a stay of court proceedings is sought due to an arbitration clause. The outcome might be the same (*i.e.*, the local court proceedings will be stayed), but in my view the underlying policy rationales for a stay in each scenario matter. And with the SCC emphasizing in *Douez* that all the circumstances are relevant at the second stage of the strong cause test, including the interests of justice, there is clearly more scope for a court to exercise its discretion not to enforce a forum selection clause than there is when a stay is sought under the arbitration legislation.

Returning to the theme of how contract law has been adapted in the context of online contracts of adhesion with consumers, in some jurisdictions, arbitration clauses that prevent a consumer from commencing statutory actions under consumer protection legislation are unenforceable;[19] in other jurisdictions, clauses that prevent a consumer from having recourse to the courts more generally or that require them to arbitrate are invalid.[20]

A third type of provision, invalidating clauses by which consumers waive rights, benefits or protections under the consumer protection statute are void, has been held to permit court proceedings in which remedies under the statute are sought to proceed, notwithstanding an arbitration clause.[21]

Parties wishing to use a standard form contract such as an online contract of adhesion may have to tailor the standard form accordingly or accept in advance the non-enforceability of any included arbitration clause where the counterparty is a consumer from one of the jurisdictions with applicable legislation.

Bottom line: Some lawyers view arbitration clauses as providing more certainty about how and where disputes between contracting parties will be resolved. When the statutory regimes mandating stays of court proceedings in the face of such a clause (except in narrow circumstances) are applied, that certainty should follow. Cases which subject arbitration clauses to the same enforceability test as forum selection clauses, if applied

[19] See, for example: *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, s. 7(2).
[20] See, for example: *Consumer Protection Act*, C.Q.L.R., c. P-40.1, s. 11.1.
[21] This is the model in B.C.'s *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, s. 3, applied to this effect by the SCC in *Seidel v. TELUS Communications Inc.*, 2011 SCC 15.

more broadly, could undercut that certainty. Direction from the SCC on whether these two types of clauses are properly assessed under different tests with different underlying policy imperatives would be welcomed.

When drafting online or other contracts of adhesion meant to be applicable to both consumers and commercial counterparties, solicitors should keep in mind the express provisions in various consumer protection statutes that invalidate clauses requiring consumers to arbitrate claims they could otherwise pursue under the statute, or those that restrict consumers' rights to pursue court actions for statutory remedies more generally.

Releases – are they interpreted like any other contract?

Releases are simply a category of contract. As such, the principles of contract law and contract interpretation apply generally to releases.

However, recent cases have highlighted a principle of contract interpretation specific to releases: the so-called principle from *London and South Western Railway v. Blackmore*, (1870), L.R. 4 H.L. 610 (*"London and South Western Railway*)."

Under this interpretative principle, the general words in a release are construed in light of the circumstances that existed at the time of its execution, *i.e.*, it will be limited to that thing or those things that were specifically in the contemplation of the parties at the time the release was given.

This principle results in releases being construed narrowly; parties rely upon this principle to argue that a particular claim arose or became known after the execution of the release, was not in the contemplation of the parties, and is therefore not caught by the general language of the release.

As applied, this principle puts an onus on a party seeking to cover an unknown or not yet arisen claim at the time of release execution to use very explicit language to achieve that result.

In some of the existing case law, the claim in question had arisen, but was not known to the parties. In others, the claim in question had not yet arisen at the time the release was executed and was a true "future claim."

Courts have always looked at the surrounding circumstances leading up to the execution of a release, a practice that now dovetails with the more generally applicable interpretative approach from *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

A 2017 decision of the ONCA revisited the principle in *London and South Western Railway* and modified, or at least clarified, the principle in light of a more recent decision of the House of Lords.

In *Biancaniello v. DMCT LLP*, 2017 ONCA 386 ("*Biancaniello*"), the plaintiffs (a corporation and its principals) decided to divide their software and consulting business. They retained the defendant accounting firm ("DMCT") to advise them. DMCT recommended transferring the software assets to a new corporation via a "butterfly transaction" and advised that this could be achieved on a tax-deferred basis. The plaintiff then proceeded with the transaction as recommended.

Subsequently, a dispute arose over the fees charged by the defendants for three matters, including the butterfly transaction. DMCT commenced an action to recover its fees, which totaled $66,632. The parties settled the claim for $35,000, and as part of the settlement, executed a Mutual Release on March 31, 2008.

In the Mutual Release, the plaintiffs agreed to remise, release and forever discharge DMCT:

> …of and from all manner of actions, causes of actions, suits, debts, duties, accounts, bonds, covenants, claims and demands which against each other they had, now have or hereafter may, can or shall have for or by reason of any cause, manner or thing whatsoever existing to the present time with respect to any and all claims **arising from any and all services provided by DMCT to Prinova through to and including December 31, 2007 and, without limiting the generality of the foregoing, with respect to any and all claims, counterclaims or defences that were pleaded or could have been pleaded in the action commenced in the Ontario Superior Court of Justice, as court file no. 08-CV-349246 PD3**. [Bold in original.]

Subsequently (in late 2010/early 2011), the plaintiffs learned that DMCT gave erroneous advice: the butterfly transaction, rather than being carried out on a tax-free basis, in fact could result in tax liability of approximately $1.24 million.

The plaintiffs retained counsel, who obtained an order rescinding the transaction. They then commenced an action against DMCT for negligence, breach of contract, misrepresentation and breach of fiduciary duty, seeking damages in the amount of the legal and accounting fees they incurred to obtain the rescission order (the "negligence claim").

DMCT brought a motion for summary judgment, asserting that the Mutual Release barred the plaintiffs' claim.

The motion judge held that the Mutual Release did not encompass the negligence claim. She noted the words "existing to the present time" and the fact that the plaintiffs did not

know of DMCT's negligence until 2011. She accepted the plaintiffs' evidence that the underlying basis for the dispute that led to the settlement was that excessive fees were charged, not the quality of service provided.

DMCT appealed to the Ontario Divisional Court. That Court also focussed on the words "any cause, manner or thing…existing to the present time" and the fact that at the time the Mutual Release was signed, the plaintiffs had no idea about the defendants' negligent provision of advice. Justice Baltman noted that the Mutual Release did not contain express language that excluded potential or undiscovered negligence. She concluded that the fact that the plaintiffs had to spend approximately $250,000 rescinding the butterfly transaction because of the tax liability it gave rise to was not known to them until well after the execution of the Mutual Release and therefore was not in the contemplation of either party at that time.

The case went to the ONCA, which allowed the appeal.

Justice Feldman led off the analysis by citing *London and South Western Railway* and citing it as the seminal case on point. However, she then went on to consider at length a more recent decision of the House of Lords, *Bank of Credit & Commerce International SA (In Liquidation) v. Ali (No. 1),* [2001] 1 All E.R. 961 ("*Ali No. 1*").

The significance accorded to *Ali No. 1* by the ONCA is interesting. The House of Lords dismissed the appeal in that case in three concurring judgments (Lord Hoffman dissenting) on the basis that the release in question did not capture the claim being pursued.

However, the three judgments in favour of dismissing the appeal are difficult to reconcile. The case involved a claim by former employees of a bank who had signed a release on termination of their employment.[22] When the bank was wound up, it was found to have engaged in corrupt practices. The employees sued for so-called stigma damages said to arise from their association with the bank. The employees' claim was dismissed by the lower court, based on the release, but that result was overturned by the Court of Appeal, which held that it would be unconscionable for the bank to rely on the release in all the circumstances. The case was appealed to the House of Lords.

Lord Bingham of Cornwall, with whom Lord Browne-Wilkinson concurred, expressly endorses the older case law, including *London and South Western Railway*, ruling that these authorities are neither spent nor a dead letter, although he says that they provide a

[22] The release read in part:

> The Applicant [Mr Naeem] agrees to accept the terms set out in the documents attached in full and final settlement of all or any claims whether under statute, Common Law or in Equity of whatsoever nature that exist or may exist and, in particular, all or any claims rights or applications of whatsoever nature that the Applicant has or may have or has made or could make in or to the Industrial Tribunal, except the Applicant's rights under the Respondent's [the bank's] pension scheme.

cautionary principle,[23] not a rule of law. He does note that the cases should be read in light of their peculiar facts and cautions that some judges in the past expressed themselves in terms more general than was necessary. He found that the employees had no knowledge of the bank's corrupt practices and even if they did, could not have supposed that a claim for stigma damages lay within the realm of practical possibility. Thus, he reasoned, it was not a fair construction of the release to conclude that the employees' claims were in the contemplation of the parties. To achieve such a result, the parties would have had to have used language which left no room for doubt.

There are passages in the reasons for judgment of Lord Nicholls of Birkenhead suggesting that principle in *London and South Western Railway* has been replaced by ordinary principles of contract interpretation. This judgment supports a larger and more liberal interpretation of general words in a release, at least insofar as one is asking whether factually unknown claims are captured. Lord Nicholls states that the mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope of the release – in his view the parties did not intend to limit the release to known claims. But, he was persuaded that the employees could not reasonably be regarded as having taken upon themselves the risk of a subsequent retrospective change in the law (a claim for stigma damages was not known to English law at the date of the release).

Lord Clyde concluded that the stigma damages claim was one which neither party could have contemplated even as a possibility as the law stood at the time when the agreement was made. He appears to do so based on what facts were known by the parties and the novelty of the claim.

Reconciling these three sets of reasons is vexed. The ONCA in *Biancaniello v. DMCT LLP* chose to extrapolate from two of them as follows:[24]

> 1. One looks first to the language of a release to find its meaning: at para. 8.
>
> 2. Parties may use language that releases every claim that arises, including unknown claims. However, courts will require clear language to infer that a party intended to release claims of which it was unaware: at paras. 9-10.
>
> 3. General language in a release will be limited to the thing or things that were specially in the contemplation of the parties when the release was given: at para. 13.

[23] That in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware.
[24] *Biancaniello* at para. 42.

> 4. When a release is given as part of the settlement of a claim, the parties want to wipe the slate clean between them: at para. 23.
>
> 5. One can look at the circumstances surrounding the giving of the release to determine what was specially in the contemplation of the parties: at para. 28.[25]

On their face, these five propositions are consistent with the principle in *London and South Western Railway* as described and applied in earlier Canadian jurisprudence. So has the law been modified in any way?

The application of these propositions to the facts in *Biancaniello* by the ONCA is revelatory.

> [49] Although the release does not specifically say that it includes unknown claims, it includes all claims arising from the services provided by the accountants up to the end of December 2007. By including all claims, but limiting the description of the claims that are intended to be covered both by subject matter and by time frame, there is no need to further specify the types of claims that are included. The language is specific and fully understandable: it includes all claims related to professional services provided during the specified time frame. There is no need, for example, to say, "including tort claims, negligence claims, breach of contract claims, costs claims", etc. They are all included unless specifically excluded. The same analysis applies to unknown claims – by specifying the claims contemplated by the parties and describing them inclusively, all claims in the defined category are included unless specifically excluded. Had it said "including known and unknown claims", that would just have been another way of saying that the release includes all claims.
>
> [50] In my view, the language used by the parties in this release was clear and unequivocal in its intent and effect. The Divisional Court did not find the language "exceptionally comprehensive" enough to include the claim that arose. I do not agree. More words would not assist. I agree with the observation by Lord Hoffmann in *Ali*, at para. 38, that the solution does not lie with more verbiage.

[25] *Ibid*, citing *Ali No. 1* per Lord Bingham and Lord Nicholls.

> [51] The problem for the client here is not that the words used are unclear, but that the claim that arose was unanticipated. In signing the release, the parties intended to fully and finally settle the fee dispute – a dispute that arose because the client was unhappy with both the time spent and the quality of service provided by the accountants. The language of the release covers all claims arising from the work the accountants did on the butterfly transaction in 2007. The parties were wiping the slate clean in respect of that work. Had the client wished to exclude claims it might later discover arising from that work, it could have bargained for that result.
>
> [Emphasis added.]

This seems to me to constitute a notable shift in the interpretative approach. Rather than starting with the proposition that a party seeking to capture unknown or unformed claims (the releasee) has to ensure that explicit words to that effect are included, the onus instead is on the releasor to explicitly exclude them from the release (at least as regards undiscovered (unknown claims)).

Biancaniello was subsequently applied in *Kerzner v. American Iron & Metal Company Inc.*, 2017 ONSC 4352 ("*Kerzner*") and *Barrs v. Trapeze Capital Corp.*, 2017 ONSC 5466 ("*Barrs*"). Neither of those subsequent decisions signals an obvious shift in the relevant law that places the onus on the releasor to insist on language that carves out unknown or unformed claims from the release. Rather, they are fact-specific interpretations of particular releases signed in particular contexts.

In *Kerzner*, a release signed by a director, shareholder and employee of a corporation acquired by Arcelor Mittal was found to encompass claims arising out of his pre-release employment with the corporation. In *Barrs*, the defendants were portfolio managers and investment dealers. The plaintiff was a criminal lawyer who invested with them. For reasons that are unclear, Barrs was a signatory to a release that came about when a suit brought by his partner was settled. Noting that there was no existing dispute between Barrs and the defendants at the time the release was signed, the court concluded that Barrs was in fact unaware that he had a claim at that time. Justice Hood held that the wording contained no clear basis for an inference that Barrs intended to release claims of which he was unaware (which sounds like an application of the principle in *London and South Western Railway*).

I note that the principle in *London and South Western Railway* has been consistently endorsed by the British Columbia Court of Appeal.[26]

Bottom line: It is possible that courts, going forward, will give short shrift to the principle in *London and South Western Railway* and construe general words in releases more liberally where the larger context suggests that the parties intended to capture unknown or unformed claims or both. Because surrounding circumstances now inform all exercises of contract interpretation, there may be a tacit rejection of the proposition that there are special interpretative rules applying to releases.

Will releasees take comfort from the ONCA decision in *Biancaniello* and stop using explicit language referring to unknown or unformed claims in their releases? Time will tell, but I doubt it. However, releasors will want to consider explicitly excluding either unknown or unformed claims from the scope of the release on the basis that the case law discussed above may signal a trend towards placing the onus on them to do so.

At the end of the day, context will continue to be critical. Formulaic recitations of every type of claim imaginable in the release will not necessarily bulletproof the releasee from all future claims where it is clear from the surrounding circumstances that the parties were only contemplating claims arising from a particular event or in a particular time frame, for example.

Non-suit Clauses

Clauses in which a party covenants not to initiate a lawsuit or commence an action are perhaps less common than clauses excluding or limiting liability.

The reason for this may be, in part, an older body of law standing for the proposition that a clause purporting to oust the court's jurisdiction to regulate contracts is contrary to public policy and therefore void.[27]

Is the body of law labelling non-suit clauses as void as being contrary to public policy still relevant today?

Professor Fridman says it is:[28]

> Contracts which purport to oust the jurisdiction of the courts will be invalid as against public policy. If sued, a party cannot raise as a defence that the other party agreed that resort would not be had to the courts. However, there is a distinction between an agreement to oust the jurisdiction of

[26] See *Keefer Laundry Ltd. v. Pellerin Milnor Corp*., 2009 BCCA 273, which is cited in turn in later cases.
[27] A frequently cited case for this proposition is the decision of Lord Denning in *Lee v. Showmen's Guild of Great Britain*, [1942] 1 All E.R. 1175 (Q.B.).
[28] G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 371-2.

> the courts altogether, in respect of the settlements of disputes as to the law, and an agreement to leave the settlement of disputed questions of fact to another body, or to submit a dispute to arbitration. Indeed, it may be lawful to make a submission to arbitration a condition precedent to approaching the courts, such that if a party does so before the arbitration, such proceedings may be stayed by the court. Further, if there is a procedure for the settlement of disputed questions of fact (and even law, as long as nothing is said as to finality) by a particular domestic tribunal or set of tribunals, the courts have held that recourse to them may not be made unless and until all domestic tribunals have been applied to by the complainant and he still has a grievance, whether it be of law or interpretation of fact.

He goes on to later explain that the right to sue for damages for breach of contract may be waived by the injured party (*e.g*., by settlement or election of remedies).[29]

A leading English text contains a parallel explanation:[30]

> A contract is at common law contrary to public policy if it purports to deprive the courts of a jurisdiction which they would otherwise have. …Such agreements are contrary to public policy because they would, if valid, make it possible to evade or contravene many peremptory rules of law. It follows that they are invalid only so far as they purport to exclude the jurisdiction of the courts on a point of *law*. An agreement is not invalid to the extent that it gives a non-judicial body power to make final and binding decisions on questions of *fact*. Such a provision does not, moreover, normally rule out the possibility of a legal challenge to the decision on the grounds of "unfairness, bad faith or perversity", so that the provision does not wholly exclude the jurisdiction of the courts even on questions of fact.

While there was hostility towards arbitration clauses at one time, particularly towards those that purported to preclude recourse to the courts, that attitude has changed. As discussed above, the SCC has evinced a pro-arbitration orientation.[31] But in this context, what *prima facie* would have been an illegal clause purporting to oust the jurisdiction of the courts is now expressly contemplated and validated in arbitration statutes.

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[29] *Ibid.* at 672.
[30] Edwin Peel, *The Law of Contract*, 13th ed. (London: Sweet & Maxwell, 2010) at ¶11-047.
[31] See, for example: *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 and *Seidel v. Telus Communications Inc.* 2011 SCC 15.

Can parties agree to oust the jurisdiction of the courts to hear an appeal from an arbitration award? The answer is "yes" but how that is accomplished will depend on the jurisdiction in question's arbitration statute.

Section 35 of the *Arbitration Act*, R.S.B.C. 1996, c. 55, provides as follows:

> **35** (1) If, after an arbitration has commenced, the parties to it agree in writing to exclude the jurisdiction of the court under sections 31,[32] 33[33] and 34,[34] the court has no jurisdiction to make an order under those sections except in accordance with the agreement, but otherwise an agreement to exclude the jurisdiction of the court under those sections has no effect.
>
> (2) Despite subsection (1), an agreement to exclude the jurisdiction of the court under section 31, 33 or 34 by the parties to an arbitration in respect of a family law dispute has no effect.

In other provinces, governing arbitration statutes have been interpreted as permitting parties to agree to contractually preclude any appeal under the statute or at all.

A decision in August of this year from the Court of Queen's Bench for Saskatchewan illustrates that proposition. In *Home Automated Living, Inc. v. Securtek Monitoring Solutions Inc*., 2017 SKQB 249, the plaintiff (HAL) was a party to three contracts with the defendant (Securtek), a Sasktel subsidiary. Securtek wanted to have the exclusive right to market, licence and distribute HAL's products in Canada and the three contracts were designed to accomplish that goal. Each contract contained an arbitration clause pursuant to which the parties agreed that any controversy, claim or dispute that could not be resolved amicably would be settled by final and binding arbitration. The clause went on to state:

> No Court shall have subject matter jurisdiction after the arbitrators has (sic) rendered a reasoned opinion. The arbitrators' decision shall be final without any possibility of appeal other then (sic) the issues of whether this arbitration clause is valid.

A dispute arose as to licence fees payable and Securtek's right to give notice that it would not be renewing (was terminating) the agreements.

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[32] Deals with appeals to the court.
[33] Deals with applications to the court to require an arbitrator to give detailed reasons.
[34] Deals with applications to the court to determine a question of law.

An arbitration panel was constituted to resolve the dispute and ruled 2-1 in favour of Securtek. HAL then sought leave to appeal the arbitrators' majority decision. HAL argued that there was an implied condition in the agreements permitting the parties to appeal arbitrators' decisions with leave on the basis of errors of law, pursuant to subsection 45(2) of *The Arbitration Act, 1992*, S.S. 1992, c. A-24.1.

Securtek submitted that the effect of the arbitration clause was to contract out of subsection 45(2), so that no appeal could be brought.

Mr. Justice Kalmakoff agreed with Securtek, ruling in part: [35]

> [24] Section 4 of the Act provides that parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provisions of the Act (subject to certain exceptions which are not applicable to this case). It is trite law that parties who have a commercial contractual relationship, which contains an arbitration agreement for dispute resolution, can, by agreement, abrogate appellate review of the arbitrator's decision: [citations omitted]. *In Labourers' International Union of North America, Local 183 v Carpenters and Allied Workers Local 27* (1997), 34 OR (3d) 472 (WL) (Ont CA) the court noted at paras. 22-23 that "final and binding" clauses, such as the ones used in the agreements between HAL and SecurTek, while not necessarily precluding judicial review, certainly reflect an intention to exclude all rights of appeal, even those conferred by statute.
>
> [25] Parties to a contract can, in essence, agree to structure dispute resolution mechanisms in any fashion they want. This may include eliminating statutory appeals. As I read the relevant jurisprudence, where the language used in the agreement between parties is clear and precise, and indicates a clear intention on their part to treat the decision of an arbitrator as final and binding, the balance tips very heavily in favour of finding that the parties intended to eliminate any ability to appeal from the arbitrator's decision. The use of the words "final and binding" demonstrates that the parties have made the choice to resolve disputes through the expeditious process of arbitration; a choice which reflects an intention to avoid the prospect of potentially protracted and costly

[35] For examples from Ontario, see: *Nasjjec v. Nuyork*, 2015 ONSC 4978 and *Highbury Estates Inc. v. Bre-Ex Limited*, 2015 ONSC 4966.

> litigation, even if it means there is a chance they will be bound by an unfavourable decision from the arbitrator.

As Justice Kalmakoff noted, an arbitration clause precluding appeal should not affect the power to judicially review an award for things like bias, corrupt or fraudulent behaviour, the panel exceeding its powers, *etc*.

Final and binding arbitration clauses precluding appeal to the courts are presumably not viewed as improperly ousting the court's jurisdiction because of the acceptance of arbitration as a legitimate method of dispute resolution, a view reflected in the statutory overlay and international conventions on arbitration.

So what about clauses that purport to oust the courts' jurisdiction without providing for arbitration?

The Ontario Superior Court had occasion to consider what I will call a "true" non-suit clause this year in *Ottawa Humane Society v. Ontario Society for the Prevention of Cruelty to Animals*, 2017 ONSC 5409.

The applicants in that case were non-profit, animal welfare organizations that subscribed to the objects of the respondent, the OSPCA.

The *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O-35, expressly provides for affiliated societies being members of the OSPCA, along with individual members and honorary members, the rights and obligations of each of these classes of member to be provided in the by-laws. Initially, the by-laws of the OSPCA gave the affiliated societies sole voting rights which they exercised through one or more representatives at meetings of the members.

In April of 2016, the OSPCA board sought to alter the by-laws with the expressed intention of promoting "governance-focused" membership. A new by-law (bylaw no. 10) replaced the previous three class of membership with a single voting class of membership composed entirely of the directors of the OSPCA board. The affiliated societies took umbrage and demanded that these changes be undone. The board passed a new bylaw in July 2016 (bylaw no. 11) which provided for a class of membership for affiliates, but left sole voting rights in the board.

The affiliated societies took the position that the actions taken by the board were illegal and in bad faith and brought an application seeking declaratory relief. Before the matter could be heard, a new by-law (By-law no. 12) was lawfully passed at the annual general meeting of the OSPCA in November of 2016, which changed the OSPCA governance model from an open-ended membership to a closed-membership model, with voting rights in favour of the board. The majority of the affiliated societies (not including the applicants) voted in favour of this new by-law.

When the application was finally heard by Justice Beaudoin in May of 2017, he identified three issues to be resolved: (1) the validity of By-law no. 12; (2) an issue as to the suspension of one applicant's enforcement agents; and (3) the issue relevant here, the enforceability of a non-suit clause in the OSPCA's Funding Agreement.

To understand the non-suit clause issue, some background on the suspension issue is required.

The Ontario Humane Society ("OHS") was one of the applicants. In July of 2016, the OSPCA suspended the OHS and its agents, who provided enforcement services. In broad terms, the OSPCA is the body charged with legislative responsibility to enforce the protection of animals and the prevention of animal cruelty in Ontario. The government partially funds the OSPCA's enforcement work. The OSPCA and its affiliates entered into a Funding Agreement to govern the enforcement work performed by the affiliates under OSPCA supervision and their funding relationship. Under the Agreement, provided an affiliate met its contractual obligations, it would receive an allocation of the provincial funding under a formula.

Justice Beaudoin concluded that the Chief Enforcement Officer did not act arbitrarily in implementing the decision of the board to suspend the OHS (which meant that its enforcement agents had to be suspended as well).

The OSPCA took the position (apparently accepted by the Court)[36] that the OHS was in breach of the Funding Agreement in that it brought the application for declaratory relief contrary to the non-suit clause in the Funding Agreement.

In that context, the Court considered the enforceability of the non-suit clause, which read as follows:

> 3.4(p) The Affiliate will not initiate any legal action(s) or claims against the Ontario SPCA, its Affiliates, board of directors, officers, agents, staff or volunteers.

By-law no. 12 also contained a clause prohibiting legal action.

The applicants argued that the non-suit clause interfered with the administration of justice and was contrary to public policy. As they described the principle, any attempts to oust the Court's jurisdiction in civil matters are illegal at common law, subject only to very circumscribed exceptions.

[36] The reasons for judgment suggest that the non-suit provision was added to the Funding Agreement after the litigation was commenced and that the OHS in fact refused to sign the amended Funding Agreement. Nonetheless, the Court finds that the applicants were in breach of the Funding Agreement because they brought the court application.

The OSPCA maintained that there was nothing inherently illegal in a non-suit clause, emphasizing its role in an agreement meant to reflect the shared, supportive relationship between the OSPCA and its affiliates. It argued that foregoing a right to sue is a well-recognized form of consideration in exchange for payment.

The OSPCA submitted that the enforceability of a non-suit clause should be addressed under the test in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 ("*Tercon*"),[37] rather than under the older case law relied upon by the applicants.

Justice Beaudoin agreed. He distinguished the older jurisprudence cited by the applicants. On the application of the *Tercon* test, he held that the third branch of that test "establishes a high public policy bar" that was not met. Accordingly, the non-suit clause was enforceable against the OHS.

Assessing the enforceability of a non-suit clause under the *Tercon* test makes sense to me. In articulating the *Tercon* test, the SCC[38] described it as "a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed."[39] Subsequently the *Tercon* test has been applied to clauses that might be described as cousins to a non-suit clause, including limitation of liability clauses, entire agreement clauses, releases and waivers.[40]

The more interesting question is what courts in subsequent cases will do with the public policy component of the *Tercon* test as it applies to non-suit clauses. Justice Beaudoin did not directly address whether the desirability of adjudication by the courts is a public policy consideration that could trump freedom of contract, either generally or in specific scenarios.

In *Douez*, the SCC stated that court adjudication in each province is a public good that needs to be weighed in the balance with freedom of contract in the context of forum selection clauses. Should that public good not also be weighed in the balance when the clause at issue is a non-suit clause?

When assessing whether a non-suit clause is contrary to public policy, what factors will be relevant? For example, there is a substantive difference between such a clause as part and parcel of a release settling extant disputes and as a pre-emptive block to court process for adjudication of inchoate disputes arising in the future. Should it make a difference if the clause is included in a contract of adhesion as opposed to a freely negotiated contract? Whether the parties are both sophisticated commercial parties?

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[37] For more detailed discussion of this 2010 case and its progeny, see my annual updates from 2011 through 2016.
[38] Binnie J. wrote the dissenting judgment, but this aspect of it was adopted by the majority.
[39] Emphasis added.
[40] And there is an earlier decision of the B.C. Supreme Court taking the same approach: see *Hans v. Volvo Trucks North America Inc.*, 2011 BCSC 1574.

In my prior papers I have noted the rarity of an exclusion clause failing under the third prong of the *Tercon* test as being contrary to public policy. Mr. Justice Beaudoin in *OSPCA* rightfully describes it as setting a high bar, in light of the examples given by Mr. Justice Binnie in *Tercon*, *e.g.*, a milk supplier who adulterates its baby formula with a toxic compound to increase its profitability or a chemical supplier who knowingly supplies defective plastic resin to a customer who uses it to fabricate natural gas pipelines.

But given that the SCC has now identified court adjudication as an important public good, should a clause barring access to the courts in advance be enforced, particularly if the contract in question is a contract of adhesion, such as an online contract consumers have to accept to receive a product or service? Time will tell.

Bottom line: A clause ousting the right of appeal from an arbitral decision is enforceable, provided that it is consistent with the applicable arbitration statute. But other contractual clauses that simply oust the courts' jurisdiction in advance (without providing for alternative dispute resolution procedures) are susceptible to attack as being contrary to public policy, and therefore void. The unanswered question, in my view, is whether such clauses should be invariably found to be unenforceable on public policy grounds on the basis that access to court adjudication is a fundamental public policy imperative, or whether they will be examined under a more forgiving lens, (*i.e.*, the public policy prong of the *Tercon* test) and survive in most or all commercial contracts.

Contract law is dead. Long live contract law.

In a recent and interesting article in the Canadian Business Law Journal entitled "The Death of Contract, Redux: Boilerplate and the End of Interpretation",[41] the authors consider how the increasing use of boilerplate clauses and standard form contracts pose a challenge for courts applying the law of contract, particularly the law of contractual interpretation.

At the start of the article, they provocatively ask the question: "Is there still such a thing as contract law?"[42]

The authors propose reforms to the law, which I will not discuss here, premised on the recognition that many varieties of boilerplate do not readily fit into the categories of contract law and arguably should not be treated as enforceable contracts at all.

And if you have perused any of the online hype about "smart contracts" and blockchain, you would be justified in wondering, for at least a moment, whether classic contract law is on the wane. I am not an expert in these concepts. What follows is an overview of

[41] Anthony Duggan, Jacob S. Ziegel and Jassmine Girgis, "The Death of Contract, Redux: Boilerplate and the End of Interpretation" (2016) 58 C.B.L.J. 290.
[42] *Ibid*.

what some of the literature has to say about them rather than my assessment of their nature and content.

"Blockchain is a decentralised, immutable public ledger operating on cryptographic technology."[43] The blockchain public ledger is a "dynamic registry for the exchange of assets and payments as well as for the verification of dynamic information."[44] Blockchain enthusiasts believe it can be used to make any function that relies on a centralized authority to maintain and verify records, or to act as a trusted intermediary for transactions, radically more efficient.[45] Blockchain (it is said) is an escrow of conclusive transaction evidence, and as such, it is predicted to eliminate litigation over transactions in its escrow and to automate enforcement.[46] It is the technology behind digital currencies and some say it holds the potential to transform the financial services industry.[47]

Based on what I have read on the topic, to embrace blockchain is to embrace cryptocurrencies as a mode of payment.

Smart contracts are another conceptual layer added to the mix. Smart contracts (also called self-executing contracts, blockchain contracts, or digital contracts) are "simply computer programs that act as agreements where the terms and conditions of the agreement are preprogrammed into the computer code making it possible for a contract to self-execute and self-enforce itself."[48] The purpose of this technology is to allow a platform for two anonymous parties to trade and do business with one another, usually over the internet, without the need for a middle man. Smart contracts operate much like escrow. "The smart contract code places digital currency tokens in a suspended state on the blockchain and they stay there suspended until performance of the contract."[49]

The concept of smart contracts actually outdates bitcoin, originally conceived of by one of bitcoin's alleged creators, Nick Szabo, and refers to "self automated computer programs that can carry out the terms of any contract."[50] Today blockchain enthusiasts

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[43] Anurag Bana & Maxine Vuertmann, *The-not-so-distant-future: Blockchain and the legal profession* (London, UK: International Bar Association, February 2017) at 4, online: <https://www.ibanet.org/Document/Default.aspx?DocumentUid=92F2723C-DF49-41E7-9E76-224CD67331DB> [Bana & Vuertmann].

[44] Johannes-Tobias Lorenz *et al.,* "Blockchain in insurance - opportunity or threat?" (July 2016) online: McKinsey &Company < https://www.mckinsey.com/industries/financial-services/our-insights/blockchain-in-insurance-opportunity-or-threat >.

[45] Bana & Vuertmann at 5.

[46] Pulat Yunusov, "What is blockchain and why it's so important for the law practice" (7 July 2016) online: Slaw <http://www.slaw.ca/2016/07/07/what-is-blockchain-and-why-its-important-for-law-practice>.

[47] Bana & Vuertmann at 5.

[48] "Smart contracts explained: The ultimate guide to understanding blockchain smart contracts," online: <www.blockchaintechnologies.com/blockchain-smart-contracts>.

[49] Kevin Werbach & Nicolas Cornell, "Contracts Ex Machina" (DRAFT March 2017), 67 Duke Law Journal (forthcoming) at 25, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2936294> [Werbach & Cornell].

[50] Nick Szabo, "Smart Contracts: Building Blocks for Digital Markets" (1996), online: <http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.be

see this technology being used to construct self-executing, cryptographically coded smart contracts, which rely on an intrinsic mechanism: if the rules and or the conditions (programed into the code) are met, the contract self executes, but if the rules are broken or unfulfilled, an error returns and no activity occurs. Think of a vending machine, if you insert $2.50 and press the button, you will get a Diet Coke. That is actually a small transaction based on code written into the machine beforehand, which is triggered when you hit the button. These kinds of automated contracts already exist, but what distinguishes smart contracts from today's online contracts is the fact that the digital code is not just a representation of the agreement, it is the agreement.[51]

In a recent paper for the Duke Law Journal, Kevin D. Werbach and Nicolas Cornell explore the question of whether digitally enforced "smart contracts" based on the distributed cryptocurrency technology of Bitcoin and the blockchain have the potential to displace the legal system's role of enforcing agreements. Werbach and Cornell quote Thomas Hobbes who described the impossibility of binding agreements without the law four centuries ago when he said:

> If a covenant be made wherein neither of the parties perform presently, but trust one another, in the condition of mere nature (which is the condition of war of every man against every man) upon and reasonable suspicion it is void: but if there be a common power set over them both, with a right and force sufficient to compel performance then it is not void. For he that performeth first has no assurance the other will perform after, because the bonds of words are too weak to bridle men's ambition, avarice, anger, and other passions, without the fear of some coercive power…But in a civil estate, where there a power set up to contrain those that would otherwise violate their faith…he which by the covenant is to perform first is obliged so to do.[52]

Hobbes' point was that binding agreements require a central system or overriding coercive power structure to enforce compliance otherwise there would be no assurance that either party would live up to their word. The most avid of blockchain enthusiasts say that is no longer true because smart contracts are self-executing digital transactions that use decentralized cryptographic mechanisms for enforcement, and they don't need a legal

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st.vwh.net/smart_contracts_2.html>; Max Raskin, "The Law and Legality of Smart Contracts (2017) 1 Geo. L. Tech. Rev. 304 (defines a smart contract as "an agreement whose execution is automated").

[51] Werbach & Cornell at 24.

[52] Thomas Hobbes, *Leviathan* (1st ed. n.p. 1651) at ch. XIV, para. 18-19; see also Anthony T. Kronman, "Contract Law and the State of Nature" (1985) 1 J.L.Econ. & Org. 5 (examining the possibilities for assurance without state-imposed enforcement).

system to exist.[53] Werbach and Cornell take a more nuanced approach to the subject. They see smart contracts as "representing the mature end of a spectrum of electronic agreements that has been evolving over several decades."[54] They say that there is no question that the new technology offers law firms both cost savings and efficiency gains as new platforms are opened up for the secure exchange of value without mutual trust.[55] They concede that the changes to the commercial world that this new technology is poised to usher in will require new legal responses. However, rather than displacing contract law, they believe smart contracts bring into focus the "core function" of contract law.[56]

One of the biggest questions that arises is: if a smart contract enforces itself, does that remove the role of the courts as enforcement agents? Werbach and Cornell don't think so. They posit that "contract litigation plays a role in our social system that smart contracts do not even purport to replicate."[57] This is where one must consider what the objective of contract law is? Is it about compelling the promisor to perform a promise? Then, yes, maybe, smart contracts can do a better job than traditional contracts, but Werbach and Cornell say that is not why contract law exists. They say it exists to compensate the promisee for the loss resulting from the breach of an agreement and it is fundamentally a remedial institution, aimed at resolving disputes.

So, when contract law is looked at from this perspective it becomes clear that smart contracts and contract law do not do the same thing at all. Thus, one does not pose a threat to the other. As Werback and Cornell put it, "[s]mart contracts are designed to ensure action. Contract law, on the other hand, is a dispute resolution mechanism."[58]

Bottom line: The burgeoning use of online contracts has caused academics and courts to question the appropriateness of applying existing contract law principles and doctrine to this modality. As we have seen in some of the cases discussed in this paper, the courts can choose to modify existing principles to fit the new modes of contracting, as the SCC did in *Douez*.

If smart contracts are more than a passing fad, then regulation of this marketplace is likely inevitable, as is litigation. Over time, we will see how contract law adapts or a new body of law develops to deal with this innovation.

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[53] Alexander Savelyev, "Contract Law 2.0 Smart Contracts as the Beginning of the End of Classic Contract Law" (2017) 26 Info. & Comm. Tech. L. 116 (2017).
[54] Werbach & Cornell at 4.
[55] *Ibid*.
[56] *Ibid*.
[57] *Ibid* at 32.
[58] *Ibid* at 41.

CONTRACT LAW – DEVELOPMENTS OF NOTE
SUMMARY OF TOPICS

HEADINGS	2016	2015	2014	2013	2012	2011	2010	2009
Links to Contract Law Paper by Year	http://www.lawsonlundell.com/media/news/550_Lisa%20Peters_%20Contract%20Law%20Update%20November%2015%202016%20Final.pdf	http://www.lawsonlundell.com/media/news/502_Contract%20Law%20Update%202015%20_final_.pdf	/http://www.lawsonlundell.com/media/news/461_Contract%20Law%20Update%202014%20_LP_.pdf	http://www.lawsonlundell.com/media/news/396_2013%20developments%20in%20contract%20law%20paper%20_in%20house%20and%20website%20version%20as%20at%20October%2031_.pdf	http://www.lawsonlundell.com/media/news/323_ContractLawUpdate2012.pdf	http://www.lawsonlundell.com/media/news/76_ContractLawUpdateDevelopmentsofNote2011LisaPeters.pdf	http://www.lawsonlundell.com/media/news/101_Contract%20Law%20Update.pdf	http://www.lawsonlundell.com/media/news/147_ContractLawUpdate.pdf
Acceptance by Conduct					X			
Anti-oral Amendment Clauses	X							
Arbitration Clauses			X	X		X	X	
Automatic Renewal Clauses		X						
Best Effort Clauses						X		
Binding Effect and Enurement Clauses				X				
Buy/Sell Clauses						X		
Choice of Court (Forum Selection) Clauses			X				X	
Conditions Precedent				X				
Continuing Breach of Contract	X	X						
Contract Interpretation	X							
Contract Termination								X
Confidentiality Clauses		X						
Contracting with First Nations under the *Indian Act*				X				
Discretionary Powers	X							
Duty of Good Faith	X	X	X	X				X
Duty of Honesty in Contractual Performance		X	X					

HEADINGS	2016	2015	2014	2013	2012	2011	2010	2009
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Efficient breach			X					
Economic Duress							X	
Electronic Transactions and Computer Contracts					X			
Equitable Mistake						X		
Exculpatory Clauses and Limitation of Liability Clauses		X	X	X	X	X		X
Frustration and *Force Majeure*								X
Fundamental Breach (*Tercon)*							X	
Illegal Contracts							X	
Implied Terms		X			X			
Legislative Developments of Note					X	X		X
Liquidated Damages Clauses					X			
Options	X							
Pre-Incorporation Contracts							X	
Privity of Contract					X	X		X
Rights of First Refusal	X							
Restrictive covenants			X					
Severability								X
Standard of Review on Contract Issues			X					
Statutory Illegality					X			
Specific Performance				X				
Time of the Essence Clauses							X	

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Unconscionability in Commercial Transactions						X		

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