

LITIGATION & DISPUTE RESOLUTION

The Enforcement of Arbitration Clauses in Quebec, Canada

By Francis P. Donovan

The ever-mounting costs and delays associated with formal civil and commercial litigation are well known. More than ever, the parties involved in commercial disputes choose to resolve their differences by having recourse to dispute resolution mechanisms outside the judicial system, and most notably mediation and arbitration. Again, in many jurisdictions, the legislature has taken steps to facilitate and to encourage alternative dispute resolution.

Canada is a federal state, in which contractual matters, and generally the area of property and civil rights, fall under provincial jurisdiction. The province of Quebec, a largely French-speaking civil law jurisdiction representing somewhat more than 22% of the Canadian population, adopted a new Code of Civil Procedure in 2016, which effected a major shift in the pre-existing legal culture. The 2016 Code of Civil Procedure, often referred to as the “new” Code of Civil Procedure (“NCCP”), although far from doing away with traditional civil and commercial litigation, has at its core a legislative mission to encourage alternative dispute resolution mechanisms. Indeed, Article 1 of the NCCP provides that to prevent a potential dispute or resolve an existing one, the parties concerned, by mutual agreement, may opt for a private dispute prevention and resolution process. This Article goes on to create a positive obligation on the part of the parties to consider private prevention and resolution processes be-



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fore referring their disputes to the court.

Furthermore, once the parties have chosen to settle their dispute by an alternative dispute resolution mechanism, their choice is normally respected by the courts of the province. Article 622 of the NCCP provides that, unless otherwise provided by law, the issues on which the parties have an arbitration agreement cannot be brought before a court even though it would have jurisdiction to decide the subject matter of the dispute. Further, a court seized of a dispute on such an issue is required, on a party’s application, to refer the parties back to arbitration, unless the court finds the arbitration agreement to be null.

This is not just a matter of procedure in Quebec, but also a matter of substantive law inasmuch as the Civil Code of Quebec provides that Quebec authorities have no jurisdiction where the parties have chosen by agreement to sub-

mit their dispute to an arbitrator, unless the defendant submits to the jurisdiction of the Quebec authorities.

These principles found application in the recent decision of the Superior Court of Quebec in the matter of *Team Productions v. Bieber*¹. In this case, Team Productions, a Montreal-based event promoter, entered into an agreement with the popular singer and social media personality Justin Bieber, to secure his presence at an event to take place in Montreal. Following a disagreement between the parties, Mr Bieber decided not to attend the event and issued a “tweet” to his estimated 80 million plus followers consisting of a terse statement of his reasons for not attending.

Considering the contents of the tweet to be defamatory, Team Productions sued Mr Bieber in the Superior Court of Quebec for CAD 650,000 (approximately USD 450,000). Counsel for Justin Bieber countered with a motion to refer the parties to arbitration under the terms of an arbitration clause in the agreement between the parties. The court granted Mr Bieber’s motion and referred the parties to binding arbitration, thus putting an end to the proceedings before the Superior Court of Quebec.

The court, following in this regard the jurisprudence of the Supreme Court of Canada, stated that they have no discretion and must refer the dis-

1) *Team Productions v. Bieber*, 2017 QCCS 1110. NB: At the time of writing, the deadline for appeal had not yet expired.

pute to arbitration if the validity of the agreement and the applicability of the clause are not contested. If, as in this case, there is such contestation, and it requires review of evidence, then again the matter should be sent to arbitration. The arbitrator or arbitration panel itself is competent to rule on its own jurisdiction. An exception to this rule is only made where the contestation of the arbitrator's competence is exclusively a question of law or if any factual questions can be answered by a superficial examination of the documentary evidence.

The court further emphasised the broad and liberal interpretation that is to be given to an arbitration clause contained in a commercial agreement. Indeed, the plaintiff argued that the action was not based on breach of contract, but rather on extra-contractual liability stemming from Mr Bieber's allegedly

defamatory tweet.

The court noted firstly that the arbitration clause in question was itself drafted in very broad terms, covering "all disputes arising under, concerning, relating to or touching on this agreement". Secondly, the court noted that, although the essence of the claim rested on defamation, the circumstances and the source of the attacked statement originated from the contract, and that this was sufficient to bring the dispute within the purview of the arbitration clause.

On a final note, this case serves as an example of the careful consideration that is to be given to the inclusion of arbitration clauses in commercial agreements. Although the legislative encouragement of recourse to arbitration is intended to simplify dispute resolution and reduce costs and delays, the enforcement of arbitration clauses can

have the perverse effect of placing one party at a strategic disadvantage. In this case, the plaintiff sued in its home forum, namely the Superior Court of Quebec. The enforcement of the arbitration clause, resulted in the parties being referred to arbitration in California, arguably increasing the costs and complexity associated with the dispute for the Montreal-based plaintiff.

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