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THE PROS AND CONS OF ARBITRATION CLAUSES IN COMMERCIAL CONTRACTS
Catherine Méthot and André Paquette

Arbitration clauses are increasingly finding their way into commercial contracts. However, the fact that arbitration is a frequently chosen path nowadays does not necessarily mean that it is always the best solution. One must know its advantages and disadvantages and be wary of standard clauses which may be ill-adapted to one's situation.

Generally, the main advantages and disadvantages of arbitration clauses which are most often mentioned are the following:

Advantages: (i) simplified procedure; (ii) less documentation to file; (iii) obtaining a decision is quicker than in the context of the judicial process; (iv) generally reduced costs compared to the judicial process; (v) absence of a right to appeal; and (vi) the confidentiality of the process and the decision, subject to an application for homologation of the arbitral award or a recourse to cancel the decision.

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Disadvantages : (i) the absence of a right to appeal, with some exceptions; (ii) the risk of the arbitration clause being ill-adapted to your particular situation; (iii) costs beyond the expectations of the parties, particularly when three arbitrators are appointed, some authors even maintaining that in such a case, arbitrators' fees are sometimes almost multiplied by four because of the delays caused by time management and communications between three arbitrators;

(iv) the impossibility to access items of evidence in the hands of opposing party outside of the judicial process; and (v) the exclusion of this decision from case law while the issue in dispute may constitute an important law issue.

Before inserting an arbitration clause in a contract, one must assess these advantages and disadvantages and, if arbitration is chosen, the terms of the clause must be adapted, particularly with respect to following items : (i) things and situations covered under the clause; (ii) applicable law, making sure to verify whether such law limits or prohibits arbitration (for example, section 11.1 of the *Consumer Protection Act*,[1] which prohibits stipulations whereby the consumer is obliged to refer a dispute to arbitration or restrict his right to go before a court, particularly by prohibiting him from bringing a class action or being a member of a group exercising such a remedy); (iii) the opportunity to provide for a right to appeal; (iv) the confidentiality of the arbitration process (subject to an application for homologation or a recourse for cancelling the decision); (v) the arbitration process (number of arbitrators, rules for submitting evidence, etc.); and (vi) the opportunity to provide for mediation meetings prior to arbitration.

In all cases, the objective sought should be to ensure that in the event a dispute occurs, your interest will be better served by arbitration rather than the judicial process. If such is not the case, avoid inserting an arbitration clause in your contract.

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[1] C. P-40.1.

PIRATING AND USING SOFTWARE WITHOUT A LICENCE: THE BSA | THE SOFTWARE ALLIANCE CASE
Bruno Verdon

The claims of the BSA | the Software Alliance (the "**BSA**") against Quebec and Canadian businesses seem to be increasingly frequent.

The BSA is a U.S.-based non-profit organization operating in more than 80 countries. Its members include companies such as Adobe, Apple, IBM and Microsoft.

According to the information it publishes on its website, the BSA particularly fights copyright infringement when software has been installed by users without acquiring the necessary licence. It would appear that most investigations of the BSA target businesses and are conducted further to calls on its anti-piracy line or anonymous reporting via its website. Most reports come from current or former employees. In principle, after receiving information alleging software infringement, the BSA contacts the business to investigate the matter further and invites it to negotiate a settlement where it concludes that there is actual infringement. If a settlement cannot be reached, the BSA assigns the file to its attorneys and ultimately, if they cannot negotiate a settlement, the case goes to court.

In Quebec and elsewhere in Canada, the BSA bases its claims for use of software without a licence on the provisions of the *Copyright Act*.[1] this Act particularly provides that "When a person infringes copyright, the person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement and, in addition to those damages, such part of the profits that the

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infringer has made from the infringement and that were not taken into account in calculating the damages as the court considers just."[2]

In addition, since the *Act to amend the Copyright Act*,[3] assented to on June 29, 2012, came into force, the holder of the infringed copyright may elect to claim, instead of damages and profits made by the person who infringed the copyright in question, an award of statutory damages which are not less than $500 and not more than $20,000 per violation if the infringements are for commercial purposes and not less than $100 and not more than $5,000 in the case of violations for non-commercial purposes.[4]

Therefore, since 2012, a business which uses software without having acquired the required licences is liable to a claim of not less than $500 and not more than $20,000 per licence which it failed to acquire.

In the case of *Adobe Systems Incorporated et al.* c. *Thompson (Appletree Solutions)*,[5] the Federal Court was called upon to apply this new provision of the *Copyright Act*. the Court noted that in awarding statutory damages, the following must be taken into account: (1) the good or bad faith of defendant, (2) the conduct of the parties before and during the proceedings; and (3) the need to deter other infringements of the copyright in question.

Having concluded that proof had been made of the intention of the defendant to infringe and that severe deterrent measures were warranted, the Federal Court issued an injunctive order to prevent defendant from continuing to violate copyrights. On the issue of damages, the Court declared:

" I find no reason not to award maximum statutory damages in the amount of $340,000, being $20,000 per work infringed for each of the three Plaintiffs."

Proof the (1) the good or bad faith of defendant, (2) the conduct of the parties before and during the proceedings; and (3) the need to deter other infringements of the copyright in question being easier to make than that of the damages, it is anticipated that the BSA and its members will not hesitate in invoking the statutory damages provided for in this new provision of the Act in support of their claims.

As these statutory damages can be well beyond the value of each non-acquired licence, it goes without saying that a negotiated settlement of the claim will constitute a preferred approach.

The BSA usually publishes on its website the settlement agreements entered into with businesses.

However, nothing prevents the parties from agreeing that the settlement of the claim and the settlement terms will be kept confidential, which will avoid he business concerned having its name associated with the settlement of a BSA claim.

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[1] R.S.C. (1895) c. C-42.

[2] Ibid., sec. 35.

[3] S.C. 2012, ch. 20.

[4] Ibid., sec. 38.1.

[5] 2012 CF 1219 (CanLII).

INTERPROVINCIAL TAXATION: THE IMPORTANCE OF SEVERING RESIDENTIAL TIES ON DEPARTURE
Jean-Philippe Latreille

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The place of residence of an individual is a fundamental tax concept which determines, among other things, his liability for provincial income tax. under the *Taxation Act*,[1] an individual is subject to tax for a given year if he resides in Quebec on December 31 of that year. the tax base then consists of the individual's income from all sources, except for business income from a Canadian establishment situated outside Quebec.

The fact that an individual moves from a province to another usually results in a change of his place of residence for provincial tax purposes. However, it may happen that some residential ties with the province of origin remain, with unanticipated and unwanted results, as shown by a recent decision of the Court of Quebec in the case of *Perron* c. *L'Agence du revenu du Québec*.[2]

In that case, the taxpayer was challenging assessments made by revenu Québec for taxation years 2005 to 2007, arguing that he was a resident of Alberta during the relevant period. the taxpayer, an engineer, had held various positions in Quebec prior to moving in Alberta in May 2005 after finding permanent employment there. From that time on, the taxpayer had rented a dwelling unit in Alberta and had purchased furniture for it. He also had opened a bank account and became a member of the Association of Professional engineers and Geoscientists of Alberta.

However, the taxpayer had retained several residential ties with Quebec during years 2005 to 2007, particularly the following:

a) His spouse, to whom he was married since 1985, and his son had continued residing in Quebec despite the departure of the taxpayer for Alberta. the taxpayer was neither divorced or separated under a judgment or a written agreement.

b) the taxpayer had remained co-owner with his spouse of the family residence located in Beauport.

c) the taxpayer had continued to provide for the financial needs of his son and to assume certain maintenance expenses of the residence located in Quebec.

d) the taxpayer had stayed in Quebec every three months for periods of four or five days. When doing so, he was staying at his residence in Beauport.

e) the taxpayer had retained his Quebec driver's licence and maintained is eligibility to the Quebec health insurance regime.

f) the taxpayer had remained a member of the Ordre des ingénieurs du Québec.

g) the taxpayer had continued to use the postal address of his Beauport residence, particularly with respect to his credit cards.

h) the taxpayer was the owner of a vehicle registered in Quebec, which he had given to his son in 2009.

The Court determined that the taxpayer had provided *prima facie* evidence that his tax residence was located in Alberta during years 2005 to 2007, particularly by establishing the permanent nature of his position in Alberta and the low frequency of his visits in Quebec. the tax authorities thus had the burden to prove that the residence of the taxpayer had remained in Quebec.

After reviewing the case law, the Court concluded that revenu Québec had established, by preponderance of evidence, that the taxpayer had retained his tax residence in Quebec during the disputed period by reason of the absence of severance of residential ties with Quebec.

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The judge particularly noted the absence of evidence corroborating the separation between the taxpayer and his spouse. According to the Court, several factors rather indicated that the spousal link was maintained between them. In addition, the taxpayer failed to establish sufficient connection to Alberta, except for his employment.

This decision of the Court of Quebec, which was not appealed, underlines the importance of severing all residential ties with Quebec when moving to another province, particularly if the tax regime of the other province is less onerous. the place of residence is a complex issue which has to be decided according to the legislation in force and applicable case law. Any individual who maintains a more or less important presence in more than one province would be well-advised to consult a professional in this respect.

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[1] RLRQ RSQ?, c. I-3.

[2] 2013 QCCQ 3271.

SECURITY UNDER SECTION 427 OF *THE BANK ACT*: DO THE RIGHTS OF A BANK RANK AHEAD OF THOSE OF THE HOLDER OF A RETENTION RIGHT?

Mathieu Thibault, Étienne Guertin and Jean Legault

For financing its activities, a Quebec-based business may grant to a Canadian chartered bank a security under 427 of the *Bank Act*. This security interest allows the bank to exercise its rights on the borrower's inventories as well as on the debts resulting from their sale while avoiding the formalities and notices which would otherwise be required under the *Civil Code of Québec* upon the exercise of a hypothecary remedy.[1]

For its part, article 2293 of the *Civil Code of Québec* allows the holder of a retention right to retain the stored property until the depositor has, among other things, paid him the agreed upon compensation.

In the *Levinoff-Colbex, s.e.c. (Séquestre de)* et *RSM Richter inc.*,[2] the Superior Court had to decide whether the rights of National Bank of Canada ("**NBC**") resulting from a security granted to it under the *Bank Act*, a federal statute, ranked ahead of the retention right relied upon by another creditor under the *Civil Code of Québec* following the failure of the debtor to meet its contractual commitments respecting the payment of the storage and refrigeration costs of its inventories.

According to the Superior Court, the rights of a creditor under section 427 of the *Bank Act* may be described as a *sui generis* ownership right, according to the wording used by the Court of Appeal in the case of *Banque Canadienne Nationale* v. *Lefaivre*.[3]

However, this *sui generis* ownership right does not constitute a true ownership right within the meaning of the Quebec civil law on property covered by such security interest. Section 427 and following of the *Bank Act* rather establish a security interest regime focused on ownership and confer on the bank which holds such security interest rights as a secured creditor and not as an owner of the property covered by such security interest.

In this context, NBC could not be bound by the retention right created in favour of another creditor. In fact, the determination of the priority of these rights did not derive from holding an ownership right within the meaning of civil law: the NBC was rather a secured creditor of the debtor.

The priority of creditors' rights must be determined by applying and interpreting the *Bank Act* in accordance with the doctrine of paramountcy and the judgment issued by the Supreme Court of Canada in the case of *Bank of Montreal* v. *Innovation Credit Union*.[4]

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Since section 428 of the *Bank Act* contains an express provision resolving this priority conflict, one has simply to apply the rule provided in this section whereby the rights of the BNC had “priority over all rights subsequently acquired in, on or in respect of that property” covered by the security interest.

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[1] *Banque de Montréal* v. *Hall*, [1990] 1 S.C.R.

[2] 2013 QCCS 1489. It must be noted that an appeal of this judgment has been filed with the Court of Appeal under number 500-09-023539-133.

[3] [1951] B.R. 83, at page 88, referring to *Landry Pulpwood Co.* v. *Banque Canadienne Nationale*, [1937] S.C.R. 605, page 615.

[4] [2010] 3 S.C.R.3

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