**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *International Pre-Owned Barcode Ltd. v. Agiliron Inc.*, 2022 NSSC 375

**Date:** 20221221
**Docket:** Hfx No. 514063
**Registry:** Halifax

**Between:**

International Pre-Owned Barcode Ltd.

Plaintiff/Respondent

v.

Agiliron Inc.

Defendant/Applicant

**DECISION**

| | |
|---|---|
| **Judge:** | The Honourable Justice James L. Chipman |
| **Heard:** | December 20, 2022, in Halifax, Nova Scotia |
| **Written Decision:** | December 21, 2022 |
| **Counsel:** | Derek B. Brett, for the Plaintiff/Respondent<br>John T. Shanks and Calvin DeWolfe, for the Defendant/Applicant |

**By the Court (orally):**

## INTRODUCTION

[1] The defendant, Agiliron Inc. (Agiliron). moves for an order against the plaintiff, International Pre-Owned Barcode Ltd. (IPOB) dismissing the lawsuit for want of jurisdiction. Alternatively, Agiliron asks for a stay. IPOB resists the motion, asking the Court to preserve jurisdiction in Nova Scotia.

[2] The parties rely on their filed briefs and authorities along with their oral submissions of this afternoon. In terms of evidence, Agiliron relies on the affidavit of its chief executive officer, Satish Menon, sworn December 8, 2022. IPOB relies on the affidavit of its director of operations, Paul Strople, sworn December 12, 2022. The deponents were not cross-examined.

## FACTS GLEANED FROM THE AFFIDAVITS

[3] Agiliron is incorporated pursuant to the laws of Delaware, United States of America, with its registered address in Oregon. Agiliron is a software company and one of many competitors in the business solutions space. Agiliron contracts with various businesses throughout North America, Europe, Latin America, and Asia to provide software to assist with management of orders, inventory and customer management relationship records.

[4] The management of Agiliron is exercised from Oregon. Agiliron has employees globally – in the United States, Canada, India, and Europe – but has never had an employee in Nova Scotia.

[5] On September 13, 2020 Mr. Strople emailed Agiliron with an initial inquiry, as follows:

> We buy, sell, and refurbish/remanufacture barcode industry products; this is all managed with a handful of employees. So, we require a system that is robust, flexible, and (most importantly) is easy to maintain.
>
> To limit the number of systems to further investigate, please review and reply to the points below. Also, provide a general idea of a monthly cost and setup fee. I will start with one of the most critical points.
>
> **Time Frame**

> We are looking to make the decision within the next 2 weeks. The system would have to be installed before the end of the year. So, if this is not doable, please let us know.

[6] After setting forth further detail, Mr. Strople concluded his email:

> **Repair**
> …A portion of our business is in repair and service contacts. If you provide any functionality in this regard, please detail.
>
> When replying to the above, a general idea of cost per month would be great.

[7] Agiliron account executive Graham Thomas (based in Vancouver, British Columbia) dealt with IPOB and a number of emails between IPOB and Mr. Thomas are included in Mr. Strople's affidavit. The emails are evidence of negotiations between the parties. For example, in an October 26, 2020 email, Mr. Thomas writes:

> For the special pricing we have offered you, Global pricing at Enterprise pricing plus the further 25% discount for the 2 year prepay we do require payment in full.
>
> In addition, I have added to our terms and conditions our bank wire details plus the early cancellation conditions which you requested which was also detailed in the quotation.
>
> Let me know if you have any questions with the attached invoice.

[8] The next day the parties entered into a "Subscription Agreement & Terms of Service" contract. This software subscription agreement (the Agreement) is standard form. Mr. Strople deposes in his affidavit, the Agreement "is presented to which you must agree should you wish to proceed with your purchase."

[9] The Agreement provided IPOB with non-exclusive, non-transferable rights to Agiliron's online business software and included the following condition, which I will refer to as the Forum Selection Clause:

> 20 General
>
> …any disputes, actions, claims or causes of action arising out of or in connection with this Agreement …shall be subject to the exclusive jurisdiction of the state and federal courts located in San Francisco, California.

[10] IPOB began the within proceeding in Nova Scotia on April 11, 2022, claiming against Agiliron in breach of contract, negligent misrepresentation, and unjust enrichment. The underlying facts of each cause of action relate to the alleged failure of the software to function as intended.

## ISSUES

[11] Pursuant to Civil Procedure Rule 4.07(1), Agiliron moves that the within lawsuit should be dismissed or stayed for the following reasons:

1. This Court has no territorial competence over Agiliron;
2. If this Court does have territorial competence, it ought to decline to exercise it;
3. The Forum Selection Clause in the Agreement ought to be enforced.

## IPOB RESPONSE TO THE MOTION

[12] IPOB submits that it was presented with the Agreement without any opportunity to discuss or negotiate its terms. IPOB further submits that the Agreement was drafted without any contribution or consultation with IPOB. It argues that the Agreement contains a "unique, nonsensical forum selection clause". IPOB argues that if they are compelled to pursue this action in San Francisco, that it will incur prohibitively high expenses such as travel expenses, court costs and fees, including retaining a qualified San Francisco lawyer.

[13] IPOB submits that the disruption to IPOB's business operations caused by a trial in San Francisco would result in further financial losses. As such, IPOB says that it is fiscally unable to pursue this matter in San Francisco. Further, IPOB says that if compelled to pursue this action in San Francisco, their primary witness, Mr. Strople, would not be able to attend. Since Mr. Strople has suffered from recent health issues, they argue that he would not be cleared to travel to San Francisco.

## GOVERNING LAW

[14] In Nova Scotia, the territorial competence analysis on motions pursuant to Rule 4.07 is governed by the *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2nd session), c.2 (the *Act*).

[15] The *Act* requires that a Nova Scotia court have territorial competence over Agiliron as defined by s. 2(h):

> (h) "territorial competence" means the aspects of a court's jurisdiction that depend on a connection between
>
> > (i) the territory or legal system of the state in which the court is established, and

> (ii) a party to a proceeding in the court or the facts on which the proceeding is based.

[16] Pursuant to s. 4 of the *Act*, this Court can only have territorial competence over Agiliron if one of the following is satisfied:

> (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counter-claim;
>
> (b) during the course of the proceeding that person submits to the court's jurisdiction;
>
> (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding;
>
> (d) that person is ordinarily residence in the Province at the time of the commencement of the proceeding; or
>
> (e) there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based.

[17] Agiliron is not a plaintiff in any related claims in this Court. Further, Agiliron has not yet defended this claim on the merits, and has therefore not submitted (or "attorned") to this Court's jurisdiction (Rule 4.07(2)).

[18] Agiliron is not a party, and has never been a party, to any agreement by which it has agreed to submit to the jurisdiction of the Nova Scotia courts. The Agreement is to the effect that the federal courts of the United States of America located in San Francisco, California have jurisdiction.

[19] Section 8 of the *Act* establishes a closed list of conditions by which Agiliron can be considered "ordinarily resident" in Nova Scotia:

> 8 A corporation is ordinarily residence in the Province, for the purposes of this Part, only if
>
> (a) the corporation has, or is required by law to have, a registered office in the Province;
>
> (b) pursuant to law, it
>
> (i) has registered an address in the Province at which process may be served generally, or
>
> (ii) has nominated an agent in the Province upon whom process may be served generally;
>
> (c) it has a place of business in the Province; or

(d) its central management is exercised in the Province

[20] Agiliron is a Delaware corporation with offices in Oregon. It does not have a registered address or place of business in Nova Scotia. It has no address by which process may be served upon it, nor has it nominated an agent in Nova Scotia upon whom process may be served. The management of Agiliron is exercised outside of Nova Scotia and Agiliron has never employed anyone who is resident of Nova Scotia.

[21] Since Agiliron does not have residence or presence in Nova Scotia and has neither submitted nor agreed to any assumed jurisdiction in the Province of Nova Scotia, this Court has jurisdiction to try this action only if the real and substantial connection test is met.

[22] Section 11 of the *Act* establishes an open list of illustrative conditions by which a "real and substantial connection" will be presumed to exist between Nova Scotia and IPOB's claim against Agiliron. Paragraphs specific to this matter are 11(e) to (h):

> **Presumption of real and substantial connection**
>
> 11 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Province and the facts on which a proceeding is based, a real and substantial connection between the Province and those facts is presumed to exist if the proceeding
>
> …
>
> (e) concerns contractual obligations, and
>
> (i) the contractual obligations, to a substantial extent, were to be performed in the Province,
>
> (ii) by its express terms, the contract is governed by the law of the Province, or
>
> (iii) the contract
>
> (A) Is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and
>
> (B) Resulted from a solicitation of business in the Province by or on behalf of the seller;
>
> (f) concerns restitutionary obligations that, to a substantial extent, arose in the Province;
>
> (g) concerns a tort committed in the Province;

> (h) concerns a business carried on in the Province;

[23] Section 12 of the *Act* lists specific factors to be considered by the Court in its decision to exercise or decline to exercise territorial competence:

> 12 (1) After considering the interest of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside the Province is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
>
> (b) the law to be applied to issues in the proceeding;
>
> (c) the desirability of avoiding multiplicity of legal proceedings;
>
> (d) the desirability of avoiding conflicting decisions in different courts;
>
> (e) the enforcement of an eventual judgment; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[24] In addition to the statutory criteria for territorial competence in the *Act*, the common law factors for assessing jurisdictional questions continue to apply as summarized by Justice Saunders in *Bouch v. Penny*, 2009 NSCA 80, at para. 52:

> 52 From the cases he reviewed, Justice Sharpe identified a list of emerging factors which would be relevant in assessing these jurisdictional questions. Sharpe, J.A. offered a list of eight factors:
>
> (1) The connection between the forum and the plaintiff's claim
>
> (2) The connection between the forum and the defendant
>
> (3) Unfairness to the defendant in assuming jurisdiction
>
> (4) Unfairness to the plaintiff in not assuming jurisdiction
>
> (5) The involvement of other parties to the suit
>
> (6) The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis
>
> (7) Whether the case is interprovincial or international in nature

[25] Accordingly, the focus of the Court is on assessing the substance and nature of connection (if any), all with an eye to the governing principles of “order” and “fairness”: (see *Bouch*, at paras. 45 and 53).

[26] In *Douex v. Facebook Inc.*, 2017 SCC 33, the Supreme Court of Canada reviewed the law respecting the enforceability of forum selection clauses, particularly with respect to commercial versus consumer contracts. In discussing the applicable two-step test, the majority decision of the Court stated as follows at paras. 28 and 29:

> 28 Instead, where no legislation overrides the clause, courts apply a two-step approach to determine whether to enforce a forum selection clause and stay an action brought contrary to it (Pompey, at para. 39). At the first step, the party seeking a stay based on the forum selection clause must establish that the clause is "valid, clear and enforceable and that it applies to the cause of action before the court" (*Preymann v. Ayus Technology Corp*., 2012 BCCA 30, 32 B.C.L.R. (5th) 391, at para. 43; see also *Hudye Farms*, at para. 12, and *Pompey*, at para. 39). At this step of the analysis, the court applies the principles of contract law to determine the validity of the forum selection clause. As with any contract claim, the plaintiff may resist the enforceability of the contract by raising defences such as, for example, unconscionability, undue influence, and fraud.
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> 29 Once the party seeking the stay establishes the validity of the forum selection clause, the onus shifts to the plaintiff. At this second step of the test, the plaintiff must show strong reasons why the court should not enforce the forum selection clause and stay the action. In *Pompey*, this Court adopted the "strong cause" test from the English court's decision in *The "Eleftheria"*, [1969] 1 Lloyd's Rep. 237 (Adm. Div.). In exercising its discretion at this step 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" (*Pompey*, at paras. 19 and 30-31). Public policy may also be a relevant factor at this step (*Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90, [2001] 3 S.C.R. 907, at para. 91, referred to in *Pompey*, at para. 39; *Frey*, at para. 115).

## ANALYSIS AND DISPOSITION

[27] With respect to the above-referenced two-step test, I find from the uncontradicted affidavit evidence that Agiliron has established the validity of the Forum Selection Clause. In this regard, I have reviewed the Forum Selection Clause and find it to be valid, clear and enforceable as well as applicable to the matters plead in the lawsuit. While unquestionably a standard form contract of adhesion, the Agreement is in plain English and easy to read and understand. From the affidavit

evidence I am unable to infer any grossly uneven bargaining power. Indeed, Mr. Menon's affidavit tells me that Agiliron has several competitors in the business software market. Whereas IPOB was concerned about price and timing, Mr. Strople accepted the Agreement terms without any attempt to alter any of the clauses.

[28] In my view the language of the Forum Selection Clause is sufficiently broad so as to capture the facts as alleged in the Statement of Claim. For example, the Forum Selection Clause (reproduced at para. nine of this decision) speaks to "any disputes, actions, claims or causes of action arising out of or in connection" with the Agreement.

[29] Given the above, IPOB must show strong reasons why the Court should not enforce the Forum Selection Clause. In argument IPOB emphasized paras. 33 and 34 of *Douez*, which read:

> 33 But commercial and consumer relationships are very different. Irrespective of the formal validity of the contract, the consumer context may provide strong reasons not to enforce forum selection clauses. For example, the unequal bargaining power of the parties and the rights that a consumer relinquishes under the contract, without any opportunity to negotiate, may provide compelling reasons for a court to exercise its discretion to deny a stay of proceedings, depending on the other circumstances of the case (see e.g. *Straus v. Decaire*, 2007 ONCA 854, at para. 5 (CanLII)). And as one of the interveners argues, instead of supporting certainty and security, forum selection clauses in consumer contracts may do "the opposite for the millions of ordinary people who would not foresee or expect its implications and cannot be deemed to have undertaken sophisticated analysis of foreign legal systems prior to opening an online account" (*Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic* Factum, at para. 7).
>
> 34 Canadian courts have recognized that the test may apply differently, depending on the contractual context (see *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351, 100 O.R. (3d) 241, at para. 24; *Stubbs v. ATS Applied Tech Systems Inc.*, 2010 ONCA 879, 272 O.A.C. 386, at para. 58). The English courts have also recognized that not all forum selection clauses are created equally. The underpinning of the transaction is relevant to the exercise of discretion under the strong cause test: "... a defendant who cynically flouts a jurisdiction clause which he has freely negotiated is more likely to be enjoined than one who has had the clause imposed upon him ... ." (*Welex A.G. v. Rosa Maritime Limited (The "Epsilon Rosa")*, [2003] EWCA Civ 938, [2003] 2 Lloyd's Rep. 509, at para. 48; see also *The "Bergen"* (No. 2), [1997] 2 Lloyd's Rep. 710 (Q.B. (Adm. Ct.)), at p. 715; *D. Joseph, Jurisdiction and Arbitration Agreements and their Enforcement* (2nd ed. 2010), at para. 10.13). Similarly, Australian courts have found "that in a consumer situation [courts] should not place as much weight on an exclusive jurisdiction clause in determining a stay application as would be placed on such a clause where

> there was negotiation between business people" (*Quinlan v. Safe International Forsakrings AB*, [2005] FCA 1362, at para. 46 (AustLII); see also *Incitec Ltd. v. Alkimos Shipping Corp.*, [2004] FCA 698, 206 A.L.R. 558, at para. 50).

[30] Although the Supreme Court of Canada recognized in *Douez* that the public policy rationale may not apply to contracts of adhesion formed between two parties with grossly unequal bargaining power, I am of the view that this case is in no way analogous to the facts of *Douez*, which dealt with a consumer contract between Facebook and one of its many individual users. Here, the Court is considering two incorporated companies and while the Nova Scotia business is relatively small, we know from the evidence that IPOB has a director of operations, president and certified professional account. IPOB chose to do business with a USA-based software suppler and accepted the Agreement.

[31] The Nova Scotia Court of Appeal distinguished *Douez* in *328944 Nova Scotia Limited v. R.W. Armstrong & Associates Inc.*, 2018 NSCA 26. Justice Fichaud noted:

> 72 In *Douez*, para. 38, Justices Karakatsanis, Wagner and Gascon modified *Z.I. Pompey's* "strong cause" analysis to account for "the gross inequality of bargaining power" in consumer transactions. *Douez* does not assist the Numbered Company. This Subconsultant Agreement was a freely negotiated business transaction between experienced commercial undertakings. Article 18.3 was not an adhesive term derived from grossly uneven bargaining power.

[32] In my view, Fichaud JA's comments underscore that *Douez* was intended to protect weaker parties from adhesive terms derived from grossly uneven bargaining power, not to undo agreements entered into between experienced commercial parties in business to make profits.

[33] IPOB also referred to paras. 65 – 67 of the Supreme Court of Canada majority's decision in *Uber Technologies Inc. v. Heller*, 2020 SCC 16 in support of their argument:

> 65 We see no reason to depart from the approach to unconscionability endorsed in *Hunter*, *Norberg* and in *Douez*. That approach requires both an inequality of bargaining power and a resulting improvident bargain.
>
> 66 An inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process (see *McCamus*, at pp. 426-27 and 429; *Crawford*, at p. 143; *Chen-Wishart* (1989), at p. 31; *Morrison*, at p. 713; *Gustafson*, at para. 45; *Hess v. Thomas Estate*, 2019 SKCA 26, 433 D.L.R. (4th) 60, at para. 77; *Blomley v. Ryan* (1956), 99 C.L.R. 362 (H.C.A.), at p. 392;

> *Commercial Bank of Australia*, at pp. 462-63, and 477-78; *Bartle v. GE Custodians*, [2010] NZCA 174, [2010] 3 N.Z.L.R. 601, at para. 166).
>
> 67 There are no "rigid limitations" on the types of inequality that fit this description (*McCamus*, at p. 429). Differences in wealth, knowledge, or experience may be relevant, but inequality encompasses more than just those attributes (*McInnes*, at p. 524-25). Professor McInnes describes the diversity of possible disadvantages as follows:
>
> > Equity is prepared to act on a wide variety of transactional weaknesses. Those weaknesses may be personal (i.e., characteristics of the claimant generally) or *circumstantial* (i.e., vulnerabilities peculiar to certain situations). The relevant disability may stem from the claimant's "purely cognitive, deliberative or informational capabilities and opportunities", so as to preclude "a worthwhile judgment as to what is in his best interest". Alternatively, the disability may consist of the fact that, in the circumstances, the claimant was "a seriously volitionally impaired or desperately needy person", and therefore was specially disadvantaged because of "the contingencies of the moment". [Emphasis in original; footnotes omitted; p. 525.]
>
> (See also *Chen-Wishart* (2018), at p. 363.)
>
> These disadvantages need not be so serious as to negate the capacity to enter a technically valid contract (*Chen-Wishart* (2018), at p. 340; see also *McInnes*, at pp. 525-26).

[34] Once again, when I scrutinize the affidavit evidence, I find scant support for both an inequality of bargaining power and a resulting improvident bargain. There is simply no evidence that IPOB could not adequately protect their interests in the contracting process. To the contrary, Mr. Strople initiated the contact with Agiliron and the emails are abundant evidence of a negotiation in the important areas of price and timing. Based on all of the evidence I have no hesitancy in concluding that the Agreement (inclusive of the Forum Selection Clause) is valid and enforceable.

[35] The Supreme Court of Canada directs that here the burden is on IPOB to satisfy the Court that there is a “strong cause” for the Court not to be bound by the Forum Selection Clause.

[36] The “strong cause” test is premised, in part, on the Supreme Court of Canada’s view that as a matter of public policy, courts should respect the parties’ agreement as to the jurisdiction in which a dispute will be litigated. This is reflected in the following excerpt from Justice Bastarache’s decision on behalf of the unanimous Supreme Court in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 at para. 20:

> 20 …The "strong cause" test remains relevant and effective and no social, moral or economic changes justify the departure advanced by the Court of Appeal. In the context of international commerce, order and fairness have been achieved at least in part by application of the "strong cause" test. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. There is no reason to consider forum selection clauses to be non-responsibility clauses in disguise. In any event, the "strong cause" test provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.
>
> [my emphasis added]

[37] The matter before the Court concerns international commerce. IPOB must satisfy the Court that there is good reason why it should not be bound by the Forum Selection Clause. In my view, they have not. I would add that from the affidavits I can infer no improper motives. In all of the circumstances I have determined that it is desirable to hold IPOB and Agiliron to the Agreement.

[38] Having regard to the affidavit evidence, I find the within case to be more similar to the situation in *Z.I. Pompey* than to *Douez*. The Agreement is a commercial contract that IPOB formed with Agiliron, a company with several competitors. IPOB chose to enter into a commercial arrangement with Agiliron (rather than one of Agiliron's competitors) and ultimately chose to accept the terms of the Agreement.

[39] On the uncontroverted affidavit evidence I specifically reject the notion advanced by IPOB that they could not discuss or negotiate the terms of the Agreement. In this regard, Mr. Strople's own affidavit appends email exhibits confirming that the parties engaged in negotiations prior to the Agreement being presented in the key area of price.

[40] While IPOB now refers to the Forum Selection Clause in the Agreement as "nonsensical", they did not address this clause in the negotiations leading up to the Agreement or once the Agreement was emailed to them. While they now cite potentially costly expenses associated with the matter being litigated in San Francisco, this was never mentioned until they realized alleged problems with the Agiliron software.

[41] Having regard to all of the evidence in context, I am not convinced that Mr. Strople will unquestionably need to physically attend in San Francisco. For example,

if he remains unwell and is not cleared to travel (or in any event), one may surmise that in this post pandemic era of routine virtual appearances in North America courts that he may well be permitted to participate via an online streaming platform.

[42] IPOB has raised the spectre of inequality of bargaining power as part of its pitch that the Forum Selection Clause should be disregarded. While it is true that Agiliron is an international company and IPOB is a Nova Scotia company, that is essentially the extent of the evidence before the Court concerning the companies' relative positions. I would add that IPOB obviously chose to do business with an American software supplier. There is no evidence to support IPOB's argument that there are "drastic disparities" between the parties' bargaining power. Nor is there affidavit support for IPOB's alleged lack of sophistication.

[43] In the result, Agiliron has satisfied me on the motion evidence and governing law that the Forum Selection Clause and the Agreement is in force and effect. IPOB has not satisfied me that there is a strong cause for the parties not to be bound by what they agreed to. Unlike the situation in *Douez*, this matter does not concern a consumer contract between a massive multi-national conglomerate company (i.e., Facebook) and one of its millions of individual users. Rather, the affidavits (and exhibits) support Agiliron's submission that the Agreement is a commercial contract between two companies in the competitive software marketplace. In the result, I allow the motion and stay the within proceeding with $1,500 costs to Agiliron.

Chipman, J.