

Ontario Court of Appeal Weighs In On Contracts of Adhesion, Jurisdiction, and Forum Selection Clauses

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A recent Court of Appeal of Ontario decision, *Next Pathway Inc. v. Informatica Inc.*, 2026 ONCA 657 ("**Informatica**") reminds commercial parties not to overlook a species of generally "boilerplate" contract language: the jurisdiction and forum selection clause.

Between 2021 and 2023, the defendant, a California-based company, entered into two separate agreements with the plaintiff, a Canadian software service provider, for related data migration and storage services supplied between the two companies. The first agreement was negotiated between the parties, and included a jurisdiction and forum selection clause that referred all disputes exclusively to Ontario courts, where they would be decided under Ontario law (the **Ontario Contract**). The second agreement was a contract of adhesion (i.e. – a "take it or leave it" contract) drafted by the defendant and signed by the plaintiff, and contained the following forum selection clause:

Governing Law. This Agreement will be governed by the laws of the State of California, without regard to conflict of law provisions, and any dispute must be brought in the Superior Court for San Mateo County, California. If either party brings an action or proceeding to enforce the provisions of this Agreement, the prevailing party shall be entitled to collect all reasonable attorneys' fees and expenses incurred in connection therewith. The Uniform Commercial Code is not applicable to this Agreement. [emphasis added]

(the "**California Contract**")

In early 2024, the defendant allegedly terminated both Contracts without paying a stipulated contractual termination fee to the plaintiff. The plaintiff brought actions in Ontario arising from *both* terminations. When it was served with the Ontario proceeding, the defendant brought a motion to have the claims regarding the California Contract stayed in Ontario so they could be properly commenced in California. When its stay request was denied, the defendant appealed.

The Court of Appeal started its analysis by restating the "strong cause" test^[1] that courts must follow when considering a forum selection clause:

1. First, the moving party must first establish that its forum selection clause is "valid, clear and enforceable" and that it applies to the cause of action before the court" [emphasis added];
2. If the moving party is successful, a stay must be granted, "unless the plaintiff can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause."

In applying this test, the Court upheld the following key findings by the motion judge and dismissed the defendant's stay request:

1. The California Contract was a contract of adhesion;
2. The California Contract was not sufficiently "valid, clear and enforceable"; and
3. Since the plaintiff had no opportunity to negotiate the California Contract, the ambiguity in the governing law clause must be interpreted against the defendant under the doctrine of *contra proferentem*.

Regarding question 2 above – why did the Court agree that the California Contract's governing law clause was ambiguous? The motion judge had found, and the Court of Appeal agreed, that the clause did not confer “exclusive” jurisdiction to California courts, whereas the Ontario Contract did in respect of Ontario courts. Though the California Contract provided that all disputes *could* be resolved in California, the motion judge was not satisfied that these disputes *must* be resolved there. In arriving at this conclusion, the motion judge relied on the fact that the clause omitted the word “exclusive” from its language. The Court of Appeal held that this finding was not reversible.

The result (pending further appeal) is that the defendant, who put language in their own Contract that seemingly referred all disputes to its home jurisdiction, will now have to respond to litigation commenced in another country.

The dispute in *Informatica* arose from software services, but governing jurisdiction and forum selection clauses are perpetually in dispute in supply chain litigation. *Informatica* offers several valuable considerations for shippers, carriers, and intermediaries who are relying on jurisdiction and forum selection clauses in their “take it or leave it” contracts;

1. Contracts of adhesion must be unambiguous and precise. Any error or ambiguity in a contract will be decided against the drafter if its counterparty did not have an opportunity to negotiate terms.
2. Governing law and forum selection clauses must be valid, clear and enforceable. If a party wants an agreement to be governed and adjudicated exclusively within a specific jurisdiction, the agreement's terms should explicitly confer that jurisdiction *and* oust all others.
3. To the extent possible, the wording in jurisdiction and forum selection clauses should be consistent and unambiguous across *all* agreements with a certain counterparty. Any differences in language between agreements might result in unintended consequences.

Forum selection and jurisdiction clauses can be a useful tool in managing legal risk, but only to the extent that they can be predictably enforced. *Informatica* is a good demonstration that the devil is in the details with these clauses. As always – it is best to consult with a legal professional about the efficacy of a jurisdiction and/or forum selection clause before an opinion is needed, and not after.

[1] As set out by the Supreme Court of Canada in *ZI Pompey Industrie v. ECU-Line NV*, 2003 SCC 27 (CanLII).

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