LICENSE AGREEMENTS AND FRANCHISE AGREEMENTS UNDER THE NEW CIVIL CODE OF QUEBEC

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SYNOPSIS

The purpose of this article is to summarize the effect of the coming into force of the new Civil Code of Quebec on the application and interpretation of licensing and franchising contracts inasmuch as these contracts can be considered as "contracts of adhesion". Article 1379 defines what is to be understood as a "contract of adhesion". Articles 1435, 1436 and 1437 respectively state that in a contract of adhesion: - an external clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the adhering party - a clause which is illegible or incomprehensible to a reasonable person is null if the adhering party suffers injury therefrom - an abusive clause is null, or the obligation arising from it may be reduced.

The author deals with the conditions under which a license or franchise agreement can be considered as a "contract of adhesion" and if so, what are the consequences for the parties to the agreement.

INTRODUCTION

The Civil Code of Quebec proceeds from a legislative intent to reduce into one instrument the private law of Quebec. The Civil Code of Quebec (as well as its predecessor, the Civil Code of Lower Canada) is a practical and accessible code and does not contain any statement of philosophical principle: it only codifies the positive private law. The new Civil Code of the province of Quebec came into force on January 1st, 1994. It is the result of a long process of revision which started many decades ago. The revision

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purports to rejuvenate the code and among other things, adapt it to the evolution of case law.

Contracts are among the many subject matters dealt with by the Civil Code. There are many classes of contracts. Article 1378 says that contracts may be divided into contracts of adhesion and contracts by mutual agreement, synallagmatic and unilateral contracts, onerous and gratuitous contracts, commutative and aleatory contracts, and contracts of instantaneous performance or of successive performance; they may also be consumer contracts.

Our focus will be on contracts of adhesion which are defined at article 1379 as a contract in which the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable.

It will be immediately understood that many license agreements and franchise agreements are of that nature since in most cases, the essential stipulations in these agreements were imposed or drawn up by the licensor or the franchisor, on his behalf or upon his instructions. Furthermore, most of these stipulations were not negotiable,

It follows from this situation that the interpretation and application of such license agreements or franchise agreements will be governed by rules which differ from rules applicable to normal contracts which the code defines as "contract by mutual agreement".

Obviously not all license agreements or all franchise agreements will fall under the category of contracts of adhesion but for the purpose of this article, we will only be dealing with license agreements and franchise agreements which do fall in the category of contracts of adhesion.

EXTERNAL CLAUSE

As a general principle of law, article 1435 states that an external clause referred to in a contract is binding on the parties. An external clause is a clause which is referred to in a contract as forming part of the contract but which is not as such spelled out in the contract. It is a clause included in the contract by reference.

In a license agreement or a franchise agreement, such an external clause will be considered null if, at the time of the execution of the agreement, it was not expressly brought to the attention of the licensee or the franchisee, unless

the licensor or the franchisor proves that the licensee or franchisee otherwise knew of it.

It would seem to be insufficient for the licensor or franchisor to prove that the provisions contained in the external clause are a current practice in the trade.

It would however seem sufficient for the licensor or franchisor to prove that in other similar circumstances, the licensee or franchisee was made aware of the provisions contained in the external clause.

Therefore, article 1435 creates a presumption of nullity of an external clause which is rebuttable by the licensor or the franchisor. It is therefore important that proper steps be taken at the time of the execution of the contract to bring the attention of the prospective licensee or franchisee to the provisions of the external clause and to obtain a specific acknowledgement from the licensee or the franchisee that his or her attention was expressly brought to the existence of this external clause. The code does not provide for any special means for rebutting this nullity presumption but we can suspect that the specific execution of the external clause with appropriate wording to the effect that the licensee or franchisee has taken cognizance of the content of this external clause should suffice.

ILLEGIBLE OR INCOMPREHENSIBLE CLAUSES

Article 1436 states that a clause in a contract which is illegible or incomprehensible to a reasonable person is null if the person suffers injury therefrom. To benefit from this nullity presumption, the licensee or franchisee has first to establish that it has suffered injury. The code does not indicate the level of injury which has to be established. Once this injury has been established, the presumption of nullity arises. The presumption of nullity can however be rebutted by the licensor or the franchisor if it proves that an adequate explanation of the nature and scope of the clause was given to the prospective licensee or franchisee.

Again, the code does not give any indication as to the kind of proof which is required from the licensor or franchisor. It is to be noted that nothing in the code says that the explanation of the nature and scope of the clause has to come from the licensor or the franchisor. These explanations could come from the legal advisor of the licensee or franchisee. It would therefore seem to be a good practice to insist on the licensee or the franchisee being represented by legal counsel when executing the agreement. One way of proving that an adequate explanation of the nature and scope of the clause was given, would be to provide to the prospective licensee or franchisee

before the execution of the agreement, adequate documentation explaining the working of the license or the franchise.

An illegible clause is one for instance which is written in such small characters that it is permitted to wonder if the author did not wish it to remain unread. An incomprehensible clause could be one which is written in such abstruse language that it seems likely that the author did not want the clause to be understood by people of normal intelligence.

This provision of the code should be an encouragement for lawyers to draft contracts which are more to the point and less convoluted.

ABUSIVE CLAUSE

Article 1437 provides that an abusive clause in a contract of adhesion is null, or the obligation arising from it, may be reduced. A clause would be abusive in a license or franchise agreement if it was excessively and unreasonably detrimental to the licensee or franchisee and would therefore not be in good faith; in particular, will be considered abusive, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract. In the context of a license or franchise agreement, a clause will be considered abusive if for instance, the court can come to the conclusion that the licensee or the franchisee is being exploited by the licensor or the franchisor. The code imposes on the licensor or the franchisor the obligation to act in good faith and not to exploit with excess an unbalanced economic relationship. When abuse is shown to exist, the court can either declare the clause to be null or reduce the obligations arising from it.

CONCLUSION

The topic dealt herein is just but one of the numerous aspects of the revision of the Civil Code touching upon areas of concern for the intellectual property practitioners.