

## CONTRACTING OUT OF ACCESS TO JUSTICE: ENFORCEMENT OF FORUM-SELECTION CLAUSES IN CONSUMER CONTRACTS

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Forum-selection agreements in consumer contracts nominate by default the business's home jurisdiction to resolve disputes and thus directly impact a consumer's ability not only to access courts, but also to obtain access to substantive justice. It has been argued that courts should consider enforcing jurisdiction clauses in consumer contracts with "greater scrutiny" because of their inherent power imbalance. To examine how the courts approach forum-selection clauses in consumer contracts, this article analyzed all reported consumer cases involving forum-selection agreements in Canadian common law jurisdictions between 1995 and 2016. The analysis of these cases shows that the courts have failed to exercise the greater scrutiny that was called for. In light of the analysis of the surveyed cases, this article argues that the rules for enforcing forum-selection clauses in consumer contracts ought to be recalibrated to reflect the power dynamics of consumer relationships, the ubiquity of standard-form contracts, and their effect on consumers' ability to obtain redress. This article proposes two suggestions for reform: legislative intervention to invalidate forum-selection clauses in consumer agreements, and reframing and recalibrating the common law strong-cause test for the enforcement of forum-selection clauses in consumer transactions.

Les accords d'élection de for désignent la province de rattachement d'une entreprise comme lieu de résolution des différends par défaut et ont donc une incidence directe sur la capacité du consommateur d'accéder non seulement aux tribunaux, mais aussi à la justice substantielle. On a déjà soulevé que les tribunaux devraient évaluer l'application des clauses d'élection de for dans les contrats de consommation de manière plus minutieuse en raison du déséquilibre de pouvoir inhérent à celles-ci. Afin de déterminer comment les tribunaux abordent les clauses d'élection de for dans les contrats de consommation, cet article analyse toutes les décisions publiées en droit de la consommation impliquant des accords d'élection de for devant les tribunaux canadiens de common law entre 1995 et 2016. L'analyse des décisions étudiées montre que les tribunaux ont omis d'exercer la minutie requise. À la lumière de l'analyse des décisions étudiées, cet article soutient que les règles d'application des clauses d'élection de for dans les contrats de consommation devraient être recalibrées afin de refléter la dynamique de pouvoir dans les relations de consommation, l'omniprésence des contrats types, et leurs effets sur la possibilité pour les consommateurs d'obtenir réparation. Cet article propose deux suggestions pour instaurer une réforme : une intervention législative qui invaliderait les clauses d'élection de for dans les contrats de consommation, ou la restructuration du critère de la cause en common law pour l'application des clauses d'élection de for aux opérations commerciales de consommation.

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## Introduction

Consumers purchase goods and services from businesses located in Canada and worldwide on a daily basis. They get loans, buy telecommunications services, book travel, sign up for social networking websites, and purchase everything from clothing to computers. Inevitably, some of these relationships will break down and the consumers will seek some form of redress. The Canadian Forum on Civil Justice conducted a national survey exploring the nature and extent of legal problems experienced by Canadians. This survey found that consumer problems are the most frequently experienced legal problem, representing 22.6 per cent of all everyday problems.<sup>1</sup> They are both the most frequently abandoned and the most frequently resolved problems. Consumers largely resolve their legal problems through self-help<sup>2</sup> and rarely resort to the courts.<sup>3</sup> While self-help and effective alternative dispute resolution systems may resolve a substantial number of consumer complaints, a small number of consumer cases will still end up in court, either as individual actions or as class proceedings. The courts are central for securing consumers' access to procedural and substantive justice and upholding consumer protection policies, despite their low engagement in resolving these problems.<sup>4</sup>

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<sup>1</sup> See Trevor CW Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto: Canadian Forum on Civil Justice, 2016) at 8, online: <[www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf](http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf)>. This is consistent with a 2006 survey (see Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007) at 12, online: <[www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07\\_la1-rr07\\_aj1/rr07\\_la1.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf)>).

<sup>2</sup> See Currie, *supra* note 1 at 58.

<sup>3</sup> See *ibid* at 66 (7.6 per cent of consumer justiciable problems in Canada were resolved by the courts). See also Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (Oxford: Hart, 1999) at 156 (in England and Wales, court actions were commenced in three per cent of consumer cases, and less than one per cent of consumer cases were resolved by a court). Subsequent English surveys reported similarly low, or even lower, use of courts (see e.g. Pascoe Pleasence et al, *Civil Justice in England and Wales: Report of Wave 1 of the English and Welsh Civil and Social Justice Panel Survey* (London: Legal Services Commission, 2011) at 52). Only two per cent of consumers in the European Union who took action with a legal problem engaged the courts (see EC, *Special Eurobarometer 342: Consumer Empowerment* (Brussels: TNS Opinion & Social, 2011) at 184).

<sup>4</sup> See e.g. Ontario Law Reform Commission, *Report on Consumer Warranties and Guarantees in the Sale of Goods* (Ottawa: Department of Justice, 1972) at 22. See also Genn, *supra* note 3 at 261; Neil Postman, *Technopoly: The Surrender of Culture to Technology* (New York: Alfred A Knopf, 1993) at 72–76 (considering courts as a societal “immune system” at 76).

Business-to-consumer transactions in a globalized digital economy are governed almost exclusively by non-negotiable standard-form contracts, which are presented to consumers on a take-it-or-leave-it basis by all market players. Put differently, “[i]n the mass market, consumers are contract takers”<sup>5</sup> and their access to and use of goods and services is conditional upon them accepting the terms of the standard-form contracts. The seemingly unlimited choices available to consumers are, in fact, constrained by the often onerous terms of standard-form contracts. These contracts have become “the rule[,] and [the businesses] the rulers.”<sup>6</sup> Standard-form contracts contain clauses dealing with substantive rights (such as price, warranties, and the like) and dispute resolution clauses setting out how disputes between the parties will be resolved. Dispute resolution clauses include either an arbitration clause that requires the consumer to engage in binding arbitration<sup>7</sup> or a forum-selection clause that confers jurisdiction on a specific court chosen by the business.<sup>8</sup>

In Canada, arbitration clauses have attracted a significant amount of litigation<sup>9</sup> and academic criticism.<sup>10</sup> In response, Alberta, Ontario, Quebec, and Saskatchewan have enacted consumer protection legislation regulat-

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<sup>5</sup> Julie E Cohen, “Copyright and the Jurisprudence of Self-Help” (1988) 13:3 BTLJ 1089 at 1125.

<sup>6</sup> Ian R Kerr, “If Left to Their Own Devices... How DRM and Anti-circumvention Laws Can Be Used to Hack Privacy” in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 167 at 191 (discussing end-user license agreements).

<sup>7</sup> See e.g. “Conditions of Use” (16 May 2016), *Amazon.ca*, online: <[www.amazon.ca/gp/help/customer/display.html?nodeId=918816](http://www.amazon.ca/gp/help/customer/display.html?nodeId=918816)> (providing for binding arbitration in Seattle, Washington).

<sup>8</sup> See e.g. “Terms of Service” (30 January 2015), *Facebook* at para 15.1, online: <[www.facebook.com/terms.php](http://www.facebook.com/terms.php)> (an exclusive forum-selection clause nominating Northern District of California District courts or San Mateo County courts in California).

<sup>9</sup> See e.g. *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34, [2007] 2 SCR 801 [*Dell*]; *Seidel v TELUS Communications Inc*, 2011 SCC 15, [2011] 1 SCR 531.

<sup>10</sup> See e.g. Shelley McGill, “This is the Law That National Money Mart Built: One Company’s Role in Constructing Canadian Consumer Arbitration Law” (2014) 56:1 Can Bus LJ 1; Shelley McGill & Ann Marie Tracey, “The Next Chapter: Revisiting the Policy in Favor of Arbitration in the Context of Effective Vindication of Statutory Claims” (2014) 31:3 Ariz J Intl & Comp L 547; Shelley McGill, “Consumer Arbitration After *Seidel v. Telus*” (2011) 51:2 Can Bus LJ 187; Shelley McGill, “Consumer Arbitration Clause Enforcement: A Balanced Legislative Response” (2010) 47:3 Am Bus LJ 361; Marina Pavlović & Anthony Daimsis, “Arbitration” in John C Kleefeld, ed, *Dispute Resolution: Readings and Case Studies*, 4th ed (Toronto: Emond, 2016) 483 at 590–629; Geneviève Saumier, “Consumer Arbitration in the Evolving Canadian Landscape” (2009) 113:4 Penn St L Rev 1203; Jonnette Watson Hamilton, “Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?” (2006) 51:4 McGill LJ 693; Geneviève Saumier, “Consumer Dispute Resolution: The Evolving Canadian Landscape” (2007) 1:4 Class Action Defence Q 52.

ing pre-dispute mandatory arbitration clauses.<sup>11</sup> In contrast, little attention has been given to forum-selection clauses, although they are far more prevalent than arbitration clauses<sup>12</sup> and have an equally or even greater negative impact on a consumer's access to courts. In fact, the public outrage over consumer arbitration (in both Canada and the United States) may have turned the forum-selection clauses into a silent consumer fiend. For example, after considerable public clamour over Facebook's use of a mandatory arbitration clause in its revised terms of use, Facebook changed these terms and substituted its arbitration clause for a forum-selection clause.<sup>13</sup>

The principal policy goal behind the criticism of consumer arbitration and subsequent regulation through the *Consumer Protection Act* in Ontario was to increase consumers' access to justice by increasing their access to the courts.<sup>14</sup> On the surface, forum-selection clauses appear to meet this objective by ensuring that *a court* will hear the matter. However, the practical effect is that forum-selection clauses restrict consumers' access to justice, since the business dictates the choice of court (forum). The forum chosen by the business is its own home forum or a forum most favourable to its interests.<sup>15</sup> In a cross-border business-consumer relationship, the chosen forum is a foreign forum for consumers and it may often, although not always, offer lesser substantive protection than a consumer's

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<sup>11</sup> See *Fair Trading Act*, RSA 2000, c F-2, s 16 (Alberta); *Consumer Protection Act*, SO 2002, c 30, Schedule A, s 7 [Ontario CPA] (Ontario); *Consumer Protection Act*, CQLR c P-40.1, s 11.1 [Quebec CPA] (Quebec); *The Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, s 101 (Saskatchewan). Similar provisions have been recommended for adoption in Manitoba (see Manitoba Law Reform Commission, *Mandatory Arbitration Clauses and Consumer Class Proceedings* (Winnipeg: MLRC, 2008) at 44). While *The Consumer Protection Act* of Manitoba, in effect since 1 September 2016, does not explicitly include any provisions dealing with arbitration clauses, section 209 includes a general prohibition that a contractual term restricting "jurisdiction or venue to a forum outside Manitoba is void and of no effect" (RSM 1987, c C200, CCSM c C200).

<sup>12</sup> For example, out of 830 sampled software licence agreements, 235 (28 per cent) contained a forum-selection agreement, and 41 (4.9 per cent) contained an arbitration clause. I am very grateful to Professor Florencia Marotta-Wurgler for graciously sharing her raw data. For a more comprehensive analysis of the dataset, see Florencia Marotta-Wurgler, "Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements" (2008) 5:3 J Empirical Leg Stud 447; Florencia Marotta-Wurgler, "Unfair' Dispute Resolution Clauses: Much Ado about Nothing?" in Omri Ben-Shahar, ed, *Boilerplate: The Foundation of Market Contract* (Cambridge: Cambridge University Press, 2007) 45 [Marotta-Wurgler, "Unfair' Dispute Resolution Clauses"].

<sup>13</sup> See Greg Beck, "Facebook Dumps Binding Mandatory Arbitration" (26 February 2009), *Public Citizen: Consumer Law & Policy Blog* (blog), online: <pubcit.typepad.com/clpblog/2009/02/facebook-dumps-binding-mandatory-arbitration.html>.

<sup>14</sup> See *Ontario CPA*, *supra* note 11, s 7(1).

<sup>15</sup> See Marotta-Wurgler, "Unfair' Dispute Resolution Clauses" *supra* note 12 at 63.

home forum. On the surface, forum-selection clauses provide predictability, as consumers know ahead of time which forum will resolve the dispute. Yet, they significantly restrict consumers' access to meaningful remedies, since the cost and complexities of pursuing a claim in a foreign forum often outweigh the financial benefits of the claim.

Since the enactment of the *Civil Code of Québec* in 1994, Quebec has treated contractual restrictions on consumers' access to justice in cross-border transactions differently than the rest of Canada. Article 3149 provides for the jurisdiction of Quebec courts in consumer transactions where the consumer is a resident of Quebec, and effectively prohibits contractual restrictions on accessing Quebec courts through arbitration or forum-selection clauses. Additionally, section 11.1 of Quebec's *Consumer Protection Act* prohibits contractual restrictions on consumers' "right to go before a court" and has an impact on the enforcement of arbitration clauses and class action waivers in domestic transactions.<sup>16</sup>

It has been argued that courts should consider enforcing jurisdiction clauses in consumer contracts with "greater scrutiny" because of their inherent power imbalance. To examine how the courts approach forum-selection clauses in consumer contracts, this article analyzes all reported consumer cases involving forum-selection agreements in Canadian common law jurisdictions between 1995 and 2016. The analysis of these cases shows that the courts have failed to exercise the greater scrutiny that had been called for. In light of the analysis of the surveyed cases, this article argues that the rules for enforcing forum-selection clauses in consumer contracts ought to be recalibrated to reflect the power dynamic of consumer-business relationships, the ubiquity of standard-form contracts, and their effect on consumers' ability to obtain redress. This article proposes two suggestions for reform: legislative intervention that would invalidate forum-selection clauses in consumer agreements, and redesigning the common law strong-cause test specifically for consumer transactions. The article proceeds in three parts. Part I provides an overview of the applicable rules for the enforcement of forum-selection clauses, both generally and in consumer contracts. Part II provides an in-depth survey and analysis of cases dealing with the enforcement of consumer jurisdiction agreements in common-law Canada. Part III outlines the two suggestions for reform.

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<sup>16</sup> Quebec CPA, *supra* note 11, s 11.1.

## I. Rules for the Enforcement of Forum-Selection Clauses

A forum-selection clause—also referred to as a jurisdiction clause or choice of court clause—is a contract between the parties where they agree that their future disputes will be resolved by the court of a specified jurisdiction.<sup>17</sup> The preponderant contractual obligation of a jurisdiction clause, found in every jurisdiction agreement, is positive. In positive clauses, the parties agree to “confer[] the power to adjudicate upon a court which, but for that clause, might not have jurisdiction.”<sup>18</sup> Jurisdiction clauses may also contain a negative obligation whereby the parties may agree to remove (waive) the jurisdiction of an otherwise competent court or “all other courts”.<sup>19</sup>

An *exclusive* forum-selection clause contains both the positive and negative elements. The clause provides that only the nominated court will decide a dispute and “preclude[s] the parties from seeking relief in [an]other for[um].”<sup>20</sup> A *non-exclusive* (permissive) forum-selection clause contains only the positive obligation. It provides that a nominated court may decide a dispute, but the clause on its own does not exclude the jurisdiction of other courts. The enforcement of non-exclusive clauses is not subject to a distinct jurisdictional test; rather, these clauses are considered as one of the factors in the *forum non conveniens* analysis by either the nominated or non-nominated court. The method of enforcing an exclusive forum-selection clause depends on which court is asked to enforce it. If an action has been commenced before a nominated court, this court will enforce the forum-selection agreement by seizing jurisdiction. If an action has been commenced before a non-nominated court, the nominated court will enforce the clause by issuing “an anti-suit injunction to prevent a party from suing abroad in breach of [a forum-selection] agreement.”<sup>21</sup>

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<sup>17</sup> For a consumer plaintiff, the court specified in the contract (the nominated court) is a foreign forum.

<sup>18</sup> Friedrich K Juenger, “Supreme Court Validation of Forum-Selection Clauses” (1972) 19:1 Wayne L Rev 49 at 51. See also Trevor C Hartley, “The Validity of Forum-Selection Agreements: A Preliminary Sketch” in Robin White & Bernard Smythe, eds, *Current Issues in European and International Law: Essays in Memory of Frank Dourick* (London: Sweet & Maxwell, 1990) 156 at 156.

<sup>19</sup> Juenger, *supra* note 18 at 51. See also Hartley, *supra* note 18 at 156.

<sup>20</sup> Janet Walker, ed, *Castel & Walker: Canadian Conflict of Laws*, 6th ed (Toronto: LexisNexis, 2005) vol 1 (loose-leaf updated 2016, release 58) at 11-7.

<sup>21</sup> Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law, 2016) at 158.

A non-nominated court will enforce the forum-selection clause by staying its proceedings in favour of the nominated court.<sup>22</sup> This is probably the most common method of enforcing forum-selection clauses and is the subject of this article. The non-nominated court engages in a two-step analysis to determine whether to stay the proceedings in the face of a valid forum-selection clause. First, the court establishes that the forum-selection agreement is a valid and enforceable contract and that it applies to the dispute at hand (that is, that the dispute is captured by the wording of the clause). Once the existence and applicability of the clause have been established, the court, using the strong-cause test, considers whether it will enforce the forum-selection clause by staying its proceedings.

This two-step approach to enforcing forum-selection clauses has deep historical roots and is based on the special nature of forum-selection contracts.<sup>23</sup> The parties' promise to submit future disputes before the contractually-agreed forum carries a concomitant duty to refrain from submitting future disputes before an otherwise competent court.<sup>24</sup> This principal obligation is an essential component of the forum-selection contract that reaches beyond the boundaries of the private contractual bargain and into the public (judicial) sphere. Jurisdiction clauses affect "the exercise of a state's adjudicatory authority"<sup>25</sup>—one of the core public functions of a government<sup>26</sup>—as parties forgo adjudication in other competent courts. This encroachment of a private contract into the public sphere makes forum-selection clauses a unique category of contracts<sup>27</sup> and is the reason why

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<sup>22</sup> See Walker, *supra* note 20 at 11-7. A more recent, and still emerging view, is that in addition to a stay, the courts should award damages for the breach of forum-selection clauses (see CJS Knight, "The Damage of Damages: Agreements on Jurisdiction and Choice of Law", Book Review of *Agreements on Jurisdiction and Choice of Law* by Adrian Briggs, (2008) 4:3 J Priv Intl L 501; Jonas Steinle & Evan Vasiliades, "The Enforcement of Jurisdiction Agreements Under The Brussels I Regulation: Reconsidering the Principle Of Party Autonomy" (2015) 6:3 J Priv Intl L 565 at 575-580; Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford: Oxford University Press, 2008) at para 6.71; EC, Commission, *Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Brussels: EC, 2009) at 5).

<sup>23</sup> See Arthur T von Mehren with the assistance of Eckart Gottschalk, *Adjudicatory Authority in Private International Law: A Comparative Study* (Leiden: Martinus Nijhoff, 2007) at 261-62.

<sup>24</sup> See Hartley, *supra* note 18 at 157.

<sup>25</sup> von Mehren & Gottschalk, *supra* note 23 at 176.

<sup>26</sup> See William M Landes & Richard A Posner, "Adjudication as a Private Good" (1979) 8:2 J of Leg Stud 235 at 235.

<sup>27</sup> See von Mehren & Gottschalk, *supra* note 23 at 176 (referring to forum-selection clauses as "contracts ... of a special type").



enforcing forum-selection clauses by a non-nominated court is subject to a two-step process.

General contract rules apply to the first step: assessing the validity and scope of the forum-selection contract. The second step—giving effect to the forum-selection clause—deals with the encroachment of a private contract into the public sphere and is thus subject to additional limitations (or special rules) that are absent in enforcing other contractual arrangements. The private contractual nature of the forum-selection clauses warrants that the courts will place “a great deal of weight”<sup>28</sup> on them and will enforce them. Absent legislative direction, however, these contracts are “not absolutely binding”,<sup>29</sup> since a private agreement could not completely remove the inherent jurisdiction of the otherwise competent court.<sup>30</sup> Hence, the courts retain the discretionary power to enforce forum-selection clauses through the strong-cause test.

The defendant bears the burden of proving that a forum-selection agreement is valid and applicable to the dispute at hand.<sup>31</sup> Once the agreement is found applicable, the burden shifts to the plaintiff.<sup>32</sup> Indeed, by commencing the proceedings in a non-nominated forum, the plaintiff has breached the forum-selection contract. As a challenger of the forum-selection agreement, the onus is on her to “persuade the court that effect should not be given to the clause.”<sup>33</sup> She must persuade the court that there are reasons which warrant that the court override an otherwise val-

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<sup>28</sup> Hartley, *supra* note 18 at 158.

<sup>29</sup> *Ibid.*

<sup>30</sup> See e.g. *Cargo Lately Laden on Board The Fehmarn (Owners) v Fehmarn (Owners)*, [1958] 1 WLR 159 at 162, [1958] 1 All ER 333 (CA (Eng)):

[A] stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. It is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them.

See also Sir Lawrence Collins, ed, *Dicey, Morris and Collins on the Conflict of Laws*, 14th ed (London: Sweet & Maxwell, 2006) vol 1 at para 12-128; Hartley, *supra* note 18 at 158.

<sup>31</sup> See *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27 at para 31, [2003] 1 SCR 450 [*ZI Pompey*] (using the simpler wording “validly formed contract”); *Hudye Farms Inc v Canadian Wheat Board*, 2011 SKCA 137 at para 12, 342 DLR (4th) 659 (stating that the clause must be “valid, clear and enforceable”). Both expressions lead to the same results.

<sup>32</sup> See *ZI Pompey*, *supra* note 31 at paras 20–21.

<sup>33</sup> *Frey v Microcell Communications Inc*, 2011 SKCA 136 at para 109, 342 DLR (4th) 513 [*Frey CA*]. See also *ZI Pompey*, *supra* note 31 at para 25.

id jurisdiction clause between the parties. The court will then use the discretionary strong-cause test to decide whether to seize jurisdiction in the face of the valid forum-selection clause, effectively endorsing a breach of the contract.

The discretionary nature and factors of the strong-cause test were articulated in *Owners of Cargo Lately Laden on Board the Ship or Vessel Eleftheria v. The Eleftheria (Owners)*<sup>34</sup> (*The Eleftheria*) as follows:

(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.<sup>35</sup>

*The Eleftheria's* strong-cause factors are similar to the *forum non conveniens* factors, subject to one major distinction. In the *forum non conveniens* analysis, the default preference is for the plaintiff's choice of forum, and the defendant bears the onus of proving that the plaintiff's jurisdictional choice should be replaced. In the strong-cause analysis, the default preference is for the contractual choice of forum, and the plaintiff bears the onus of proving that this contractual jurisdictional choice should be replaced.

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<sup>34</sup> [1970] P 94 at 99–100, [1969] 2 All ER 641 (Eng) [*The Eleftheria*]. The test from *The Eleftheria* was subsequently confirmed in several cases (see *The Aratra Potato Co Ltd v Egyptian Navigation Co (The El Amria)*, [1981] 2 Lloyd's Rep 119 at 127, [1981] Com LR 136 (CA (Eng)); *DSV Silo-und Verwaltungsgesellschaft mbH v Owners of the Senar*, [1985] 1 WLR 490 at 500, [1985] 2 All ER 104). See also JG Collier, *Conflict of Laws*, 3rd ed (Cambridge: Cambridge University Press, 2001) at 97–98.

<sup>35</sup> *The Eleftheria*, *supra* note 34 at 99–100.

Canadian courts generally relied on *The Eleftheria*'s version of the strong-cause test until 2003, when the Supreme Court of Canada addressed the enforceability of forum-selection agreements in *ZI Pompey Industrie v. ECU-Line NV*<sup>36</sup> (*ZI Pompey*). In *ZI Pompey*, the Court confirmed that the strong-cause test was the appropriate test for assessing the enforcement of a forum-selection clause, since "there [was] no legal or policy justification for setting aside the 'strong cause' test."<sup>37</sup> The Court's basic proposition was consistent with the historical two-step analysis that relies on both contract rules and special rules: "parties should be held to their bargain" unless there is a strong cause for not doing so.<sup>38</sup>

The rules for enforcing forum-selection clauses were developed largely in commercial settings. The courts' strong deference to party autonomy in commercial settings has led to a favourable attitude toward enforcing forum-selection clauses. Within the two-part analysis for enforcing forum-selection clauses, the discretionary strong-cause test, as articulated in *The Eleftheria* was designed to protect the public interest in public adjudication. In commercial settings, where there is a presumed equality of bargaining powers, state intervention is quite narrow and parties therefore have almost unfettered autonomy to regulate their affairs. This leads to a narrow interpretation of the strong-cause test in commercial contracts, effectively resulting in the enforcement of most forum-selection clauses. Consumer contracts, however, embody an inherent power imbalance, which necessitates greater intervention by the state.<sup>39</sup>

In *ZI Pompey*, the Supreme Court indicated that high deference to forum-selection clauses is shown in "normal circumstances," which involve "sophisticated [business] parties,"<sup>40</sup> or conversely, that the deference to the agreement of the parties "is given effect in all but exceptional circumstances."<sup>41</sup> In its reasons, the Court twice indicated that the enforceability of forum-selection clauses may be different in cases involving parties with

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<sup>36</sup> *Supra* note 31. See also *GreCon Dimter Inc v JR Normand Inc*, 2005 SCC 46, [2005] 2 SCR 401 [*GreCon Dimter*] (addressing forum-selection clauses in Quebec); *Momentous.ca Corp v Canadian American Association of Professional Baseball Ltd*, 2012 SCC 9, [2012] 1 SCR 359 (addressing forum-selection clauses in Ontario).

<sup>37</sup> *ZI Pompey*, *supra* note 31 at para 1.

<sup>38</sup> *Ibid* at para 21.

<sup>39</sup> See Erin A O'Hara & Larry E Ribstein, *The Law Market* (Oxford: Oxford University Press, 2009) at 143.

<sup>40</sup> *ZI Pompey*, *supra* note 31 at para 29. See also Pitel & Rafferty, *supra* note 21 at 128 (emphasizing that the rules set out in *ZI Pompey* were applicable to bills of lading and inferring that the effect of forum-selection clauses in other types of commercial contracts may be different).

<sup>41</sup> *ZI Pompey*, *supra* note 31 at para 21.

unequal bargaining power.<sup>42</sup> Because of this unique power dynamic and on the basis of the Court's inferences in *ZI Pompey*, it has been argued that the courts should approach enforcing forum-selection clauses in consumer contacts with "greater scrutiny."<sup>43</sup> While the Supreme Court recognized that enforcing forum-selection clauses in consumer contracts requires a more cautious approach, the Court and commentators have not articulated what that greater scrutiny ought to look like.

In order to protect the public nature of adjudication, the interests of justice,<sup>44</sup> and the authority (jurisdiction) of the forum, enforcing forum-selection clauses ought to be subject to additional limits, embodied in the strong-cause test. Adjudication by the consumer's home court is vital, since it is often, if not exclusively, the only meaningful way for consumers to obtain redress in a cross-border dispute. The protectionist nature of the strong-cause test therefore becomes more important in consumer contracts. The core factors listed in the fifth step of the test set out in *The Eleftheria* (the location of the evidence and its importance to the trial; applicable law and its importance to the trial; the connections between the parties and the forum or other relevant jurisdictions; the impact of the trial in the nominated forum on the defendant; and the impact or prejudice of the trial in the nominated forum on the plaintiff), while originating in commercial settings, could equally be applied in consumer settings. The "greater scrutiny" that has been called for would be exercised through the application of all five factors, and, in particular, through proper balancing of the competing jurisdictional interests of consumers and businesses (factors 5(d) and (e)).

Commentators have argued that despite its apparent simplicity, the Court's proposition in *ZI Pompey* that parties should abide by the clause unless a strong cause justifies that they do otherwise marked a significant shift in the Canadian approach to the enforcement of foreign jurisdiction agreements.<sup>45</sup> This shift was so fundamental that it effectively resulted in a distinct test for the enforcement of forum-selection agreements, where "the starting point is that parties should be held to their bargain."<sup>46</sup> The existence of a valid jurisdiction agreement would therefore be a "sufficient

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<sup>42</sup> See *ibid* at paras 29, 31.

<sup>43</sup> Walker, *supra* note 20 at 11-11.

<sup>44</sup> See Briggs, *supra* note 22 at 6.71.

<sup>45</sup> See *ZI Pompey*, *supra* note 31 at 21; Pitel & Rafferty, *supra* note 21 at 128-29. See also Geneviève Saumier & Jeffrey Bagg, "Forum Selection Clauses Before Canadian Courts: A Tale of Two (or Three?) Solitudes" (2013) 46:2 UBC L Rev 439.

<sup>46</sup> *ZI Pompey*, *supra* note 31 at para 21. See also *GreCon Dimter*, *supra* note 36 at paras 20-28, 35, 50.

reason for a court to decline jurisdiction,”<sup>47</sup> broadening the reach of the contractual nature of the forum-selection clauses and, in turn, necessarily narrowing the reach of the special limitations through the use of the strong-cause test. While this shift may be acceptable in the commercial context, it may pose additional challenges for enforcing forum-selection clauses in consumer contracts.

In the last several years, the enforcement of forum-selection clauses has become somewhat “nebulous”<sup>48</sup> and more complex due to several distinct yet interrelated developments. These changes have led to some uncertainty in enforcing forum-selection clauses in commercial contracts and are even more challenging for consumer contracts.

First, several recent cases, including the Supreme Court’s 2012 decision in *Momentous.ca Corp. v. Canadian-American Association of Professional Baseball Ltd.*,<sup>49</sup> have supported a shift toward a stronger emphasis on the contractual nature of the jurisdiction agreement.<sup>50</sup> As a result, Canadian courts show an even “greater deference” to forum-selection clauses and routinely enforce them.<sup>51</sup>

Second, there has been some disagreement among both the commentators and the courts about the scope of the strong-cause test; that is, which factors should be considered (only factors going to the contractual nature of the forum agreement, or also other external factors which protect the public nature of adjudication, such as those traditionally considered under the test set out in *The Eleftheria*) and whether the list of factors is closed. In *Expedition Helicopters Inc. v. Honeywell Inc. (Expedition Helicopters)*, the Ontario Court of Appeal articulated a revised, narrower, version of the strong-cause test:

A forum selection clause in a commercial contract should be given effect. The factors that may justify departure from that general principle are few. The few factors that might be considered include[:] the plaintiff was induced to agree to the clause by fraud or improper inducement or the contract is otherwise unenforceable, the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim, the claim or the circumstances that have arisen are outside of what was reasonably contemplated by the par-

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<sup>47</sup> *Viroforce Systems Inc v R & D Capital Inc*, 2011 BCCA 260 at para 14, 336 DLR (4th) 570 [*Viroforce*]; Walker, *supra* note 20 at 11-10.

<sup>48</sup> Saumier & Bagg, *supra* note 45 at 462.

<sup>49</sup> *Supra* note 36.

<sup>50</sup> See *Expedition Helicopters Inc v Honeywell Inc*, 2010 ONCA 351 at paras 7, 24, 319 DLR (4th) 316 [*Expedition Helicopters*]; *BTR Global Opportunity Trading Limited v RBC Dexia Investor Services Trust*, 2011 ONCA 518 at paras 7–8, 204 ACWS (3d) 468.

<sup>51</sup> See Walker, *supra* note 20 at 11-10.

ties when they agreed to the clause, the plaintiff can no longer expect a fair trial in the selected forum due to subsequent events that could not have been reasonably anticipated, or enforcing the clause in the particular case would frustrate some clear public policy.<sup>52</sup>

While this revised approach has been confirmed by several decisions across Canada, there is some uncertainty whether the Expedition Helicopters factors are illustrative or exhaustive. The tendency, so far, seems to support an open list.<sup>53</sup>

Third, the *Courts Jurisdiction and Transfer Proceedings Act*<sup>54</sup> (*CJPTA*), which is in force in British Columbia,<sup>55</sup> Nova Scotia,<sup>56</sup> and Saskatchewan,<sup>57</sup> does not contain any rules for enforcing forum-selection clauses by non-nominated courts. The courts have grappled with reconciling the *CJPTA* with the strong-cause test.<sup>58</sup>

This recent shift toward a stronger emphasis on the contractual nature of the forum-selection clauses, while perhaps appropriate in the commercial context, is not appropriate in the consumer context. The contractual nature of the forum-selection clause and the strong-cause test are, to borrow terminology from linguistics, in a syntagmatic relationship: they are interdependent, and taken together sequentially they define which jurisdiction agreements will be enforceable. They are not in a paradigmatic relationship: they are not mutually replaceable, since each serves a distinct function.<sup>59</sup> Contract rules provide a core legal basis for the enforcement of jurisdiction agreements, while the strong-cause test limits contractual autonomy in order to protect the authority (jurisdiction) of otherwise competent courts. The strong-cause test, while it may be diminishing in importance, should not be recast through contractual principles. Any reservations regarding the appropriateness of private ordering in cases involving “individuals who may not be of equal bargaining pow-

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<sup>52</sup> *Expedition Helicopters*, *supra* note 50 at para 24.

<sup>53</sup> See *Viroforce*, *supra* note 47 at para 17; *Momentous.ca Corporation v Canadian American Association of Professional Baseball Ltd*, 2010 ONCA 722 at paras 41–42, 325 DLR (4th) 685; *Frey CA*, *supra* note 33 at para 115. See also Saumier & Bagg, *supra* note 45 at 460–61.

<sup>54</sup> See Uniform Law Conference of Canada, *Courts Jurisdiction and Proceedings Transfer Act*, online: <[www.ulcc.ca/en/home/183-josetta-1-en-gb/uniform-actsa/court-jurisdiction-and-proceedings-transfer-act/1092](http://www.ulcc.ca/en/home/183-josetta-1-en-gb/uniform-actsa/court-jurisdiction-and-proceedings-transfer-act/1092)> [ULCC *CJPTA*].

<sup>55</sup> See *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28.

<sup>56</sup> See *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003, c 2.

<sup>57</sup> See *Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1.

<sup>58</sup> For a detailed overview of the courts' approaches, see Saumier & Bagg, *supra* note 45 at 462–69.

<sup>59</sup> See e.g. Walker, *supra* note 20 at 11-10.

er,”<sup>60</sup> such as consumer or employment contracts, should be dealt with at the contractual level. The strong-cause test should be preserved as a distinct and important safeguard of access to domestic courts for other, non-contractual reasons, such as access to justice, “convenience of the parties, fairness between the parties and the interests of justice.”<sup>61</sup>

## II. Survey of Cases

To examine how the courts approach forum-selection clauses in consumer contracts, and whether they indeed exercise “greater scrutiny” as called for by the Supreme Court in *ZI Pompey*, this article surveyed all reported consumer cases involving forum-selection agreements in Canadian common law jurisdictions between 1995 and 2016. The review and analysis of the case law has largely focused on the version of the strong-cause test set out in *The Eleftheria*, primarily because it has been the dominant test during the reviewed period. The analysis, however, also includes distinct factors and issues raised by the more recent interpretations of the test in *Expedition Helicopters*.

For the purpose of this article, a consumer transaction is defined as any transaction between a merchant (business) and an individual (consumer) in which the consumer obtained goods or services for personal use. In the period between 1 January 1995 and 1 July 2016, there were nineteen cases<sup>62</sup> involving an exclusive forum-selection agreement in a consumer contract.<sup>63</sup>

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<sup>60</sup> *Ibid* at 11-11.

<sup>61</sup> *ZI Pompey*, *supra* note 31 at para 31.

<sup>62</sup> See *Trepanier v Kloster Cruise Ltd* (1995), 23 OR (3d) 398, 52 ACWS (3d) 1296 (Ont Sup Ct) [*Trepanier*]; *Lehner v Keller* (1997), 74 ACWS (3d) 950 (available on CanLII) (BC SC) [*Lehner*]; *Rudder v Microsoft Corp* (1999), 2 CPR (4th) 474, 40 CPC (4th) 394 (Ont Sup Ct) [*Rudder*]; *Rosenthal v Kingsway General Insurance Co* (2002), 113 ACWS (3d) 810, 20 CPC (5th) 394 (Ont Sup Ct) [*Rosenthal*]; *Kates v Wyant* (2002), 27 BLR (3d) 273, 112 ACWS (3d) 49 (Ont Sup Ct) [*Kates*]; *Friesen v Norwegian Cruise Lines Inc*, 2003 BCSC 256, 12 BCLR (4th) 394 [*Friesen*]; *Ezer v Yorkton Securities and Danzig*, 2004 BCSC 487, 130 ACWS (3d) 74 [*Ezer*], *aff'd* 2005 BCCA 22, 207 BCAC 65; *Frey et al v BCE Inc et al*, 2006 SKQB 330, 282 Sask R 29 [*Frey QB*], *aff'd* 2008 SKQB 79, 329 Sask R 42, *aff'd* *Frey CA*, *supra* note 33; *Straus v Decaire* (2007), 156 ACWS (3d) 1058 (available on CanLII) (Ont Sup Ct) [*Straus*]; *Zhan v Pfizer Inc* (2007), 37 BLR (4th) 132, 158 ACWS (3d) 744 (Ont Sup Ct) [*Zhan*]; *McLean v Can American Van Lines/Yellow Self Storage et al*, 2007 SKPC 105, 303 Sask R 269 [*McLean*]; *Allen v Carnival Corporation* (2007), 162 ACWS (3d) 374 (available on CanLII) (Ont Sup Ct) [*Allen Sup Ct*], *aff'd* 2008 ONCA 57 (available on CanLII) [*Allen CA*]; *Bérubé v Rational Entertainment Ltd*, [2009] OJ No 5619 (QL), 2009 CarswellOnt 8674 (WL Can) (Ont Sup Ct) [*Bérubé*]; *Liebrecht v Lieder*, 2010 BCSC 549, 188 ACWS (3d) 671, *aff'd* 2010 BCSC 1548, 194 ACWS (3d) 793 [*Liebrecht*]; *Magill v Expedia Canada Corporation*, 2010 ONSC 5247, 1 CPC (7th) 129 [*Magill*]; *Preymann v Ayus Technology Corp*, 2011 BCSC 1819, 32 BCLR (5th)

The subject matter of the cases and the personal characteristics of the consumers involved are illustrative of the ubiquity and pervasiveness of consumer contracts in the daily lives of present-day consumers. Examples involved cruise travel (three cases), individual investments and brokerage agreements (four cases), personal loans (two cases), internet services, cell phone service, social media and privacy, internet gambling, cybersquatting, legal services of a licensed practitioner of foreign law, immigration consulting services, online travel booking services, inter-provincial moving, and intercontinental cargo transport. Consumers affected by these contracts were of diverse ages (ranging from students and recent university graduates to an eighty-one-year-old retiree),<sup>64</sup> gender,<sup>65</sup> marital status,<sup>66</sup> socio-economic status,<sup>67</sup> and language.<sup>68</sup> In all but two cases,<sup>69</sup> the

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387 [*Preymann* SC], aff'd 2012 BCCA 30, 346 DLR (4th) 541 [*Preymann* CA]; *Stephen v George*, 2012 ABPC 343, 555 AR 172 [*Stephen*]; *Douez v Facebook, Inc.*, 2014 BCSC 953, 313 CRR (2d) 254 [*Douez* SC], rev'd 2015 BCCA 279, 387 DLR (4th) 360 [*Douez* CA], leave of appeal to SCC granted, 2016 CarswellBC 647 (WL Can) (available on CanLII); *Manjos v Fridgant*, 2016 ONCA 176, 264 ACWS (3d) 89 [*Manjos*].

<sup>63</sup> A search was conducted in Quicklaw's "All Canadian court cases" database, WestlawNext Canada's "cases and decisions", and on CanLII's "all Canadian court decisions" from 1 January 1995 until 1 July 2016, using the following keywords: "forum-selection clause," "forum-selection agreement," "choice of forum clause," "choice of forum agreement," "choice of court agreement," "choice of court clause," "jurisdiction agreement," "jurisdiction clause," "exclusive jurisdiction clause," and "jurisdiction contract." From the results, only cases involving at least one individual name have been selected for further assessment. Each case was examined on its facts, to eliminate non-consumer contracts. Note, however, that the number of cases may be larger, since a considerable number of the consumer claims may fall under the jurisdiction of the provincial small claims courts whose decisions are generally not reported.

<sup>64</sup> See *Ezer*, *supra* note 62 (student); *Rudder*, *supra* note 62 (graduates); *Kates*, *supra* note 62 (retiree).

<sup>65</sup> Six cases included female consumers, individually or as class representatives: *Allen* Sup Ct, *supra* note 62; *Bérubé*, *supra* note 62; *Friesen*, *supra* note 62; *McLean*, *supra* note 62; *Liebrecht*, *supra* note 62; *Trepanier*, *supra* note 62; and *Douez* SC, *supra* note 62. Eight cases included male consumers acting individually or as class representatives: *Ezer*, *supra* note 62; *Frey* QB, *supra* note 62; *Kates*, *supra* note 62; *Lehner*, *supra* note 62; *Magill*, *supra* note 62; *Rosenthal*, *supra* note 62; *Rudder*, *supra* note 62; *Zhan*, *supra* note 62. Two cases included spouses as joint plaintiffs: *Straus*, *supra* note 62; *Manjos*, *supra* note 62.

<sup>66</sup> Some cases involved spouses (see *Straus*, *supra* note 62; *Manjos*, *supra* note 62 and *Stephen*, *supra* note 62). Other cases did not reference marital status of the consumers; on the facts, some involved single persons.

<sup>67</sup> See *Zhan*, *supra* note 62 at para 5 (discussing consumer's impecuniosity); *Straus*, *supra* note 62 at para 36 (stating that the consumers were of modest means); *Bérubé*, *supra* note 62 at paras 2–3 (involving a consumer who lost all her assets due to gambling). Other cases have not explicitly discussed the socio-economic status of the plaintiffs, but based on the available facts, the cases involved consumers of significantly varied means.



consumers were the plaintiffs, either individually, or as class representatives.<sup>70</sup> Six cases included intra- or inter-provincial relationships<sup>71</sup> and thirteen cases included international relationships.<sup>72</sup> Five cases included electronic standard-form contracts,<sup>73</sup> while the remaining thirteen included paper contracts.

The courts found that the forum-selection agreements were validly formed in all but two cases.<sup>74</sup> Out of the seventeen cases in which the clause was found to be valid, the courts applied the strong-cause test in all but two cases.<sup>75</sup> Forum-selection clauses were enforced in twelve cases resulting in the stay of proceedings.<sup>76</sup> The clauses were not enforced in five cases;<sup>77</sup> of those, in three cases the courts found that the plaintiffs demonstrated strong cause for not enforcing the clause.<sup>78</sup> The remaining two cases were class actions. The proceedings were not stayed because they would cause multiple proceedings, which would be unfair or unfavourable to the class members who were not bound by the forum-selection clause.<sup>79</sup>

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<sup>68</sup> See *Zhan*, *supra* note 62 (involving a consumer who required translation services). There was no indication on the language capabilities of the other consumers.

<sup>69</sup> See *Lehner*, *supra* note 62; *Stephen*, *supra* note 62.

<sup>70</sup> Five cases were commenced as class proceedings: *Rudder*, *supra* note 62; *Ezer*, *supra* note 62; *Magill*, *supra* note 62; *Frey QB*, *supra* note 62; *Douez SC*, *supra* note 62.

<sup>71</sup> See *Kates*, *supra* note 62; *Frey QB*, *supra* note 62; *Straus*, *supra* note 62; *McLean*, *supra* note 62; *Preyman*, *supra* note 62; *Manjos*, *supra* note 62.

<sup>72</sup> These cases included the following jurisdictions: the United States (*Trepanier*, *supra* note 62; *Rudder*, *supra* note 62; *Friesen*, *supra* note 62; *Ezer*, *supra* note 62; *Zhan*, *supra* note 62; *Allen Sup Ct*, *supra* note 62; *Magill*, *supra* note 62; *Douez SC*, *supra* note 62), Switzerland (*Lehner*, *supra* note 62), Germany (*Liebrecht*, *supra* note 62), England (*Rosenthal*, *supra* note 62), the Isle of Man (*Bérubé*, *supra* note 62), and India (*Stephen*, *supra* note 62).

<sup>73</sup> See *Rudder*, *supra* note 62; *Bérubé*, *supra* note 62; *Zhan*, *supra* note 62; *Magill*, *supra* note 62; *Douez SC*, *supra* note 62.

<sup>74</sup> See *Trepanier*, *supra* note 62; *McLean*, *supra* note 62.

<sup>75</sup> See *Bérubé*, *supra* note 62 (no particular test applied); *Frey QB*, *supra* note 62 at para 17; *Frey CA*, *supra* note 33 at para 107 (arguing that enforcing the clause would not be fair toward other class members who are not bound by the forum-selection clause).

<sup>76</sup> See *Rudder*, *supra* note 62; *Lehner*, *supra* note 62; *Kates*, *supra* note 62; *Ezer*, *supra* note 62; *Zhan*, *supra* note 62; *Allen Sup Ct*, *supra* note 62; *Bérubé*, *supra* note 62; *Liebrecht*, *supra* note 62; *Stephen*, *supra* note 62; *Manjos*, *supra* note 62; *Douez SC*, *supra* note 62; *Preymann SC*, *supra* note 62.

<sup>77</sup> See *Rosenthal*, *supra* note 62; *Friesen*, *supra* note 62; *Frey QB*, *supra* note 62; *Straus*, *supra* note 62; *Magill*, *supra* note 62.

<sup>78</sup> See *Rosenthal*, *supra* note 62; *Friesen*, *supra* note 62; *Straus*, *supra* note 62.

<sup>79</sup> See *Magill*, *supra* note 62 at para 55; *Frey CA*, *supra* note 33 at para 118.

The discretionary nature of the strong-cause test leads to highly fact-specific results and, therefore, carries a necessary caveat against overgeneralization. The analysis has a narrow focus and only takes into consideration the issues that allow the courts to appropriately adapt the general (commercial) rules to the consumer setting. Its focus is on the way courts apply the strong-cause test and, in particular, how they balance the jurisdiction interests of businesses and consumers identified in Part I, above. These factors are possible avenues for exercising greater scrutiny of forum-selection clauses.

The survey of cases shows that courts have not truly exercised the greater scrutiny that was called for. With the exception of four cases,<sup>80</sup> the courts have applied the existing (commercial) rules as they are, with little regard, if any, to the specific nature of the consumer transactions or the crucial implications that staying local proceedings has on consumers' ability to seek and obtain redress.

#### A. *Validity of Forum-Selection Clauses*

In most cases, courts started from the premise that the forum-selection clauses were valid contracts, mainly because their validity was not challenged by consumer-plaintiffs. The validity of the forum-selection agreements was considered in six cases, and the jurisdiction clauses were treated as exclusionary clauses in five of those cases.<sup>81</sup> To be valid, forum-selection clauses should be clear and have been brought to the user's attention.<sup>82</sup> If the clause was drawn to the consumer's attention<sup>83</sup> and the business reasonably believed that the consumer's signature indicated acceptance of the terms of the contract,<sup>84</sup> that term was deemed valid—provided it was not unconscionable.<sup>85</sup> All five cases predate the Supreme

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<sup>80</sup> See *Rosenthal*, *supra* note 62; *Friesen*, *supra* note 62; *Straus*, *supra* note 62; *Manjos*, *supra* note 62.

<sup>81</sup> See *Trepanier*, *supra* note 62; *McLean*, *supra* note 62; *Friesen*, *supra* note 62; *Rosenthal*, *supra* note 62; *Rudder*, *supra* note 62. See also *Manjos*, *supra* note 62 (where the forum-selection clause was upheld).

<sup>82</sup> See *Trigg v MI Movers International Transport Services Ltd* (1991), 4 OR (3d) 562 at 565–67, 84 DLR (4th) 504 (Ont CA).

<sup>83</sup> See *Karroll v Silver Star Mountain Resorts Ltd* (1988), 33 BCLR (2d) 160 at 164, 40 BLR 212 (SC) (on the rule that the relying party draw consumer's attention to the exclusionary clause).

<sup>84</sup> See *Tilden Rent-A-Car Co v Clendenning* (1978), 18 OR (2d) 601 at 605, 83 DLR (3d) 400 (Ont CA), citing SM Waddams, *The Law of Contracts* (Toronto: Canada Law Book, 1977) at 191 (on the conditions in which reliance will be considered reasonable).

<sup>85</sup> The term is also valid if a consumer could have expected such a term given the circumstances (in which case it does not have to be brought to the consumer's attention). This

Court decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, which provides a framework for determining the applicability of exclusionary clauses.<sup>86</sup>

In two cases, the courts found that the forum-selection clause was invalid. *Trepanier v. Kloster Cruise Limited* involved an Ontario plaintiff who ingested a piece of glass from a drink while on the defendant's ship, which was located in the Bahamas at that time of the injury. The forum-selection clause nominating Florida courts was included in a ten-page ticket contract containing twenty-eight terms.<sup>87</sup> The evidence indicated that the plaintiff did not read the terms and that the terms were not explicitly brought to her attention either by her travel agent or the cruise line.<sup>88</sup> As a result, the court found that the forum-selection agreement was not valid and seized jurisdiction in the matter. *McLean v. Can American Van Lines/Yellow Self Storage et al.* involved a Saskatchewan plaintiff who hired an Ontario moving company to transport her property from Ontario to Saskatchewan.<sup>89</sup> Some of the property was damaged, destroyed, or lost during the move. The forum-selection clause nominating Quebec courts was included on the second page of the standard form contract. The court stated that the validity of the terms on the second page was predicated on the existence of the consumer signature on that page. The plaintiff signed the first page of the contract, but there was no signature, initial, or any other indication on the reverse page of the contract.<sup>90</sup> As a result, the court found that the forum-selection clause was not valid and seized jurisdiction in the matter.

The notice requirement—whether the clause was properly brought to the consumer's attention—was considered in three cases, all of which found them to be valid. *Friesen v. Norwegian Cruise Lines Inc. (Friesen)* involved a consumer from British Columbia who slipped and fell from a hot tub while on the defendant's cruise ship, which was located in Alaska at the time of the injury. The forum-selection clause nominating Florida courts was included in the ticket contract, containing “28 paragraphs of

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principle is generally derived from a line of cases involving dangerous sports and waivers of businesses' liability in case of an injury or accidental death (see e.g. *Dyck v Manitoba Snowmobile Association* (1982), 136 DLR (3d) 11 at 20, [1982] 4 WWR 318 (Man CA)).

<sup>86</sup> See *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4 at paras 121–23, [2010] 1 SCR 69.

<sup>87</sup> See *Trepanier*, *supra* note 62 at 400.

<sup>88</sup> See *ibid* at 401.

<sup>89</sup> See *McLean*, *supra* note 62.

<sup>90</sup> See *ibid* at para 13.

fine print.”<sup>91</sup> The consumer-plaintiff checked the date of travel, but there was no evidence that she read any other term of the contract. The court stated that the threshold for the notice of onerous terms was “a very low standard of reasonableness,”<sup>92</sup> which was met in this case. Despite being valid, the forum-selection clause in this case was not enforced, based on the existence of strong cause. In *Rosenthal v. Kingsway General Insurance Co.*,<sup>93</sup> an Ontario consumer engaged an English freight forwarder to transport cargo from England to Ontario. The plaintiff jointly sued the English freight forwarder and the Ontario insurer for damages arising from the loss of the portion of the cargo. The forum-selection clause nominating English courts was included in an “almost illegibl[y]”<sup>94</sup> small type size on the reverse side of a bill of lading that was only presented to the consumer-plaintiff after the commencement of legal proceedings. While the court found the clause to be valid, it held that the circumstances of the presentation of the contract, along with the other facts of the case (the evidence was located mainly in Ontario), sufficiently established strong cause for not enforcing the forum-selection clause.<sup>95</sup> In contrast, in *Rudder v. Microsoft Corp. (Rudder)*, a case involving an internet service contract between MSN (an internet provider from the United States) and individual Ontario consumers, the court did not categorize the forum-selection clause as an onerous fine-print term.<sup>96</sup> The forum-selection clause was included in an electronic contract that was presented to consumers before payment for the service. Since this was the first Canadian case to deal with electronic contracts, the court was faced with defining what constitutes appropriate notice in such contracts. The plaintiffs argued that the forum-selection clause contained in the electronic contract was not valid, since, being equivalent to fine print in a paper contract, it was not brought to their attention at the time of contracting. Judge Winkler stated that the entire contract was presented in a uniform-sized typeface and, therefore, “there [was] no fine print as that term would be defined in a written document.”<sup>97</sup> Judge Winkler further argued that the form and manner of presentation of the agreement did not require any special considerations,<sup>98</sup> and that not enforcing the agreement would “move this type of electronic transaction into the realm of commercial absurdity. It would

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<sup>91</sup> *Friesen*, *supra* note 62 at para 8.

<sup>92</sup> *Ibid* at para 16.

<sup>93</sup> *Rosenthal*, *supra* note 62.

<sup>94</sup> *Ibid* at para 2.

<sup>95</sup> See *ibid* at paras 4–6.

<sup>96</sup> See *Rudder*, *supra* note 62 at para 14.

<sup>97</sup> *Ibid* at para 14.

<sup>98</sup> See *ibid* at para 16.

lead to chaos in the marketplace, render ineffectual electronic commerce and undermine the integrity of any agreement entered into through this medium.”<sup>99</sup>

*Manjos v. Fridgant*<sup>100</sup> (*Manjos*) involved an Ontario couple that sued for mismanagement of investment funds. While the contract in dispute was a consumer contract, the couple also had a prior business relationship with the investment advisor on behalf of their corporation. This is perhaps why the court found that the forum-selection agreement was valid. In assessing the validity of the contract, the court found the consumers were educated and sophisticated, that they were offered and declined an opportunity to review the contract and its terms, and that they were not induced into signing the contract because they truly had an opportunity to not transfer the accounts to the investment advisor’s new employment.<sup>101</sup>

Similarly to the rules on enforcing forum-selection clauses, contract rules (including rules on standard-form contracts) originated in a commercial environment strongly built on party autonomy. Party autonomy has been detrimental for consumer interests, as vividly depicted by Geoffrey Woodroff and Robert Lowe, who argued that consumers have not been able to “break out of the straitjacket of freedom of contract.”<sup>102</sup> Or, as Iain Ramsay has argued, the “traditional contract ideas are the core and consumer law the periphery,”<sup>103</sup> acting only as a necessary and often insufficient limit on party autonomy. The Canadian courts continue to routinely enforce consumer standard-form contracts,<sup>104</sup> despite a normative view expressed in the academic literature that their enforcement is particularly problematic in the consumer context.<sup>105</sup> Because of this view, the stronger emphasis on the contractual nature of forum-selection clauses in the *Expedition Helicopters* version of the strong-cause test—by effectively eliminating another avenue for consumers to challenge these agreements—further strengthens the enforceability of these clauses.

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<sup>99</sup> *Ibid.*

<sup>100</sup> *Supra* note 62.

<sup>101</sup> See *ibid* at paras 7–9. For a view of what the individual party’s level of sophistication and literacy should be when assessing standard form contracts, see Paul Michell, “Illiteracy, Sophistication and Contract Law” (2005) 31:1 *Queen’s LJ* 311.

<sup>102</sup> Geoffrey Woodroffe & Robert Lowe, *Woodroffe & Lowe’s Consumer Law and Practice*, 9th ed (London: Sweet & Maxwell, 2013) at para 9.01.

<sup>103</sup> Iain Ramsay, “Consumer Law and Structures of Thought: A Comment” (1993) 16:1 *J Consumer Policy* 79 at 81.

<sup>104</sup> See e.g. *Rudder*, *supra* note 62; *Kanitz v Rogers Cable Inc* (2002), 58 OR (3d) 299, 21 BLR (3d) 104 (Ont Sup Ct); *Dell*, *supra* note 9.

<sup>105</sup> See e.g. Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton: Princeton University Press, 2013); Ben-Shahar, *supra* note 12.

***B. Enforceability of Forum-Selection Clauses: The Applicability of the Strong-Cause Test in Consumer Cases***

In fifteen out of seventeen cases where the forum-selection clause was found to be valid, the courts applied the strong-cause test to determine whether the forum-selection clause should be given effect. In ten cases, the courts found that the consumer-plaintiff failed to establish strong cause for not enforcing the clause and the proceedings in consumer's home forum were therefore stayed.<sup>106</sup> In two cases, the courts found that the business-plaintiffs also did not establish strong cause.<sup>107</sup> In five cases, the consumer-plaintiffs established strong cause and the forum court seized jurisdiction in the matter.<sup>108</sup> By and large, the courts applied *The Eleftheria's* strong-cause test, either directly or through the Canadian cases that have incorporated it.<sup>109</sup> Only two cases considered the more recent version of the strong cause, articulated in *Expedition Helicopters* and its subsequent cases.<sup>110</sup>

In the surveyed cases, the courts examined the facts against the strong-cause test with vastly varying degrees of analysis. The level of the courts' analysis can be grouped into three categories: conflated jurisdictional tests; application and under-analysis of the strong-cause test; and traditional application of the strong-cause test.

The first group nominally applied the strong-cause test but conflated it with the other jurisdictional tests, such as the real and substantial connection or the *forum non conveniens* tests. For example, in *Kates v. Wyant* (*Kates*), an elderly Ontario resident bought shares in the defendant's Saskatchewan corporation through a subscription agreement containing a jurisdiction clause nominating Saskatchewan courts. The court found that there was "a real and substantial connection to both Ontario and Saskatchewan"<sup>111</sup> and stayed the action because the forum-selection clause "should be respected."<sup>112</sup> *Zhan v. Pfizer Inc. (Zhan)* involved cybersquat-

<sup>106</sup> See *Rudder*, *supra* note 62; *Kates*, *supra* note 62; *Ezer*, *supra* note 62; *Zhan*, *supra* note 62; *Allen Sup Ct*, *supra* note 62; *Bérubé*, *supra* note 62; *Liebrecht*, *supra* note 62; *Preymann CA*, *supra* note 62 at para 46; *Douez CA*, *supra* note 62 at para 80; *Manjos*, *supra* note 62.

<sup>107</sup> See *Lehner*, *supra* note 62; *Stephen*, *supra* note 62.

<sup>108</sup> See *Rosenthal*, *supra* note 62; *Friesen*, *supra* note 62; *Frey CA*, *supra* note 33 at para 119; *Straus*, *supra* note 62; *Magill*, *supra* note 62.

<sup>109</sup> Most cases after 2003 referred to *ZI Pompey*, while the earlier cases often cited *Sarabia v "Oceanic Mindoro" (The)* (1996), [1997] 2 WWR 116, 4 CPC (4th) 11 (BCCA).

<sup>110</sup> See *Douez SC*, *supra* note 62; *Douez CA*, *supra* note 62; *Manjos*, *supra* note 62.

<sup>111</sup> *Kates*, *supra* note 62 at para 38.

<sup>112</sup> *Ibid* at para 41 (this approach, albeit in a rather rudimentary form, is in line with the changing nature of the strong-cause test, as explained in Part I, above).

ting, or the registration of a domain name including the “Pfizer” trademark in Chinese characters, and provided for the jurisdiction of Colorado courts. The court incorporated the strong-cause test into the *forum non conveniens* analysis.<sup>113</sup>

The second group comprises the cases that have applied the strong-cause test, but have not discussed it in detail. *Lehner v. Keller*<sup>114</sup> involved an unpaid personal loan of 50,000 Swiss Franks between Swiss individuals and a Canadian consumer. Although the parties nominated a Swiss court, they did not address the jurisdictional issues. Thus, the plaintiff failed to establish strong cause for not enforcing the clause, and the proceeding was stayed.<sup>115</sup> *Allen v. Carnival Corporation*<sup>116</sup> (*Allen*) involved an Ontario resident who fell and injured her ankle while on the defendant’s cruise ship; the agreement nominated Florida courts. *Preymann v. Ayus Technology Corporation*<sup>117</sup> (*Preymann*) involved an Austrian consumer to whom a British Columbia corporation did not pay back a loan (investment) of one million Euro; the agreement nominated Austrian courts. In these two cases, the trial courts did not refer explicitly to the strong-cause test, but enforced the clauses based on the principles of fairness and reasonableness<sup>118</sup> or deference to forum-selection clauses.<sup>119</sup> On appeal, the Ontario Court of Appeal and the British Columbia Court of Appeal confirmed that the trial courts’ analyses conformed to the strong-cause test.<sup>120</sup> The Ontario Superior Court of Justice’s order staying proceedings in *Manjos* was appallingly short.<sup>121</sup> While the Ontario Court of Appeal confirmed the result, its analysis of the *Expedition Helicopters* strong cause was not remarkably thorough.<sup>122</sup>

The majority of cases, which comprise the third group,<sup>123</sup> applied the strong-cause test and analyzed the applicable strong-cause factors in light

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<sup>113</sup> See *Zhan*, *supra* note 62 at paras 27–30 (strong cause), 18–31 (*forum non conveniens*).

<sup>114</sup> *Supra* note 62.

<sup>115</sup> See *ibid* at para 20.

<sup>116</sup> See *Allen* Sup Ct, *supra* note 62; *Allen* CA, *supra* note 62.

<sup>117</sup> See *Preymann* SC, *supra* note 62; *Preymann* CA, *supra* note 62.

<sup>118</sup> See *Allen* Sup Ct, *supra* note 62 at paras 10–14.

<sup>119</sup> See *Preymann* SC, *supra* note 62 at para 5.

<sup>120</sup> See *Allen* CA, *supra* note 62 at para 3; *Preymann* CA, *supra* note 62 at 49.

<sup>121</sup> The orders reads: “None of the factors set out in *Expedition Helicopters* are satisfied. No other factor has been established here that amounts to ‘strong cause’” (see *Manjos v Fridgant* (10 July 2015) (Ont Sup Ct), Quinn J).

<sup>122</sup> See *Manjos*, *supra* note 62.

<sup>123</sup> See *Rudder*, *supra* note 62; *Ezer*, *supra* note 62; *Liebrecht*, *supra* note 62; *Friesen*, *supra* note 62; *Straus*, *supra* note 62; *Magill*, *supra* note 62; *Rosental*, *supra* note 62.

of the “factual matrix”<sup>124</sup> of the cases. All five of the factors listed in *The Eleftheria*—the location of evidence; the applicable law; the connection between the parties and the forum or the other relevant jurisdiction; the impact on the defendant and the impact on the plaintiff to sue in the nominated jurisdiction—have been considered in these cases. More recent cases, which used the *Expedition Helicopters* version of the test, considered juridical advantage, public policy, as well as other relevant factors.

1. Businesses’ Jurisdictional Interest: Impact on the Defendant of Holding the Trial in the Nominated Jurisdiction

*Friesen* and *Allen*, two cases with very similar facts, considered the impact on the business-defendant of holding the trial in the nominated forum. *Friesen* considered this impact in light of the cost and convenience of presenting evidence and witnesses in the nominated forum. The defendant’s witnesses were located across several jurisdictions and the court found that “the practical requirements for the defendant of staging a trial are more or less the same no matter where in the world the trial might take place.”<sup>125</sup>

In *Allen*, despite the similarity with *Friesen*,<sup>126</sup> the Ontario court employed a very different approach in assessing the business’s jurisdictional interest and did not reach the same result. The forum-selection clause was included in a multi-page ticket contract, which the plaintiff signed, but claimed not to have read. In the court’s view, the forum-selection agreement nominating Florida (the business-defendant’s home jurisdiction) was “not ... unreasonable”, and necessary for the business to ensure certainty and predictability in its multi-national operations.<sup>127</sup> By formulating its reasons this way, the court legitimized the business’s choice of home jurisdiction as appropriate, or, using the terminology of *The Eleftheria*, the business’s choice of its home forum automatically demonstrated

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<sup>124</sup> *Rudder*, *supra* note 62 at para 21.

<sup>125</sup> *Friesen*, *supra* note 62 at para 23.

<sup>126</sup> There are indeed some differences between the two cases: the consumer-plaintiff in *Allen* initially attempted to negotiate a settlement with the defendant through her Ontario lawyer, after which she also attempted to engage a Florida lawyer. The ticket contract provided for a one-year limitation period and the Ontario action was commenced only after that limitation period expired. While Judge Glass noted that the plaintiff may have had time to commence an action in Florida had the Ontario action been commenced earlier, it is not clear whether these circumstances (including the fact that the plaintiff was arguably able to afford a foreign lawyer) were taken into consideration for enforcing the forum-selection clause (see *Allen* Sup Ct, *supra* note 62 at para 12).

<sup>127</sup> See *ibid.*



its “genuine[] desire” to hold the trial in its home jurisdiction.<sup>128</sup> When the court quantified the jurisdictional interests of the big business and the small individual consumer, it made an important qualitative judgment that the business’s jurisdictional interests are more significant, thus invalidating the “greater scrutiny” of forum-selection clauses. Ultimately, this approach pushes the threshold for establishing the strong cause even further away from the reach of an ordinary consumer.

2. Consumers’ Jurisdictional Interest: Impact on or Prejudice to the Plaintiff by Holding the Trial in the Nominated Jurisdiction

The impact on the plaintiff of holding the trial in the nominated forum was considered in a majority of cases.<sup>129</sup> *The Eleftheria*’s strong-cause test provides a rather narrow list of circumstances to be considered under this factor: the loss of the security for the claim; the inability to enforce the judgment; whether there is a time-bar which does not exist in the consumer’s jurisdiction; and the inability to obtain a fair trial. This list should not be interpreted as exhaustive, however, since both *The Eleftheria* and *ZI Pompey* instruct the courts to “take into account all the circumstances of the particular case.”<sup>130</sup> In the surveyed cases, the courts considered both the explicitly listed factors (fair trial and enforcement of judgment) and those that are highly relevant for consumer cases and could be broadly subsumed in this category (such as the impact of the cost of trial in the foreign jurisdiction and the impact of the multiplicity of proceedings).

a. Fair Trial and Enforcement of Judgments

*Rudder* considered the fair trial and the enforcement of the foreign judgment in the context of class proceedings. The court concluded that the more favourable certification criteria in the *Ontario Class Proceedings Act*,<sup>131</sup> which affected the plaintiffs’ ability to obtain a fair trial in the United States, were not sufficient to override the forum-selection agreement.<sup>132</sup> In fact, in the court’s view, the loss of that advantage was offset by the potential advantage of enforcing the judgment of the nominated

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<sup>128</sup> *The Eleftheria*, *supra* note 34 at 100.

<sup>129</sup> See *Friesen*, *supra* note 62; *Straus*, *supra* note 62; *Zhan*, *supra* note 62; *Rudder*, *supra* note 62 at 23; *Allen* Sup Ct, *supra* note 62; *Ezer*, *supra* note 62; *Douez* SC, *supra* note 62; *Kates*, *supra* note 62.

<sup>130</sup> *The Eleftheria*, *supra* note 34 at 99. See also *ZI Pompey*, *supra* note 31 at para 39.

<sup>131</sup> RSO 1992, c 6.

<sup>132</sup> See *Rudder*, *supra* note 62 at para 23.

court against the defendant's local assets, especially given the value of the proposed class action of \$75,000,000.<sup>133</sup>

The weakest link in resolving cross-border disputes is the enforcement of foreign judgments. If the business-defendant does not have any assets in the consumer's home jurisdiction, consumers awarded compensation by their home court need to enforce that judgment in the business's home jurisdiction. The inherent risk of every court proceeding with a foreign element is that the resulting judgment will not be enforced in a foreign jurisdiction. A judgment's enforceability is an important factor in both the strong-cause and the *forum non conveniens* analyses. Within the strong-cause test, however, a judgment's enforceability is part of a bundle used to assess the consumer's jurisdictional interest. Difficulty or inability to enforce the judgment should not be used to further legitimize a business's choice of its home jurisdiction as appropriate, nor should it be used as a counterweight to the other factors from the same bundle, such as the fair-trial factor.

Compensation for a wrongful act is often the motivating factor for commencing legal proceedings<sup>134</sup> and the enforcement of the judgment is a crucial step in meeting this objective. The inability to enforce the judgment, however, will not render the trial useless. The reason for commencing a court action may be driven by other, non-monetary motivations, such as a desire to change business practices,<sup>135</sup> to prevent "the same thing from happening to someone else,"<sup>136</sup> or to protect the consumer's other interests (such as their reputation and validation). This is particularly true for class proceedings. The compensation provided to consumer plaintiffs in class actions carries a deterrent effect, affecting the business'

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<sup>133</sup> See *ibid* at paras 23, 4.

<sup>134</sup> See Genn, *supra* note 3 at 183.

<sup>135</sup> Behaviour modification is particularly relevant in class proceedings and it is one of the three core objectives of class actions (see *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 29, [2001] 2 SCR 534; *Hollick v Toronto (City)*, 2001 SCC 68 at para 27, [2001] 3 SCR 158). See also Mathew Good, "Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions" (2009) 47:1 *Alta L Rev* 185; Jeff Berryman, "Nudge, Nudge, Wink, Wink: Behavioural Modification, Cy-Près Distributions and Class Actions" (2011) 53 *SCLR* (2d) 133; John C Kleefeld, "*Homo legislativus*: Missing Link in the Evolution of 'Behaviour Modification'?" (2011) 53 *SCLR* (2d) 169. On plaintiffs' desire to change the defendants' behaviour, see Laura Nader, "Disputing Without the Force of Law" (1979) 88:5 *Yale LJ* 998 at 1002.

<sup>136</sup> Genn, *supra* note 3 at 183–84. See also David Morris, "Cost of Complaining and the Efficiency of Consumer Complaints Agencies" (1980) 4:2 *J Consumer Studies & Home Economics* 125 at 126.

future behaviour and the behaviour of other similarly situated parties.<sup>137</sup> Enforcing a judgment in the business's home jurisdiction gives teeth to the original judgment—it carries out the punitive aspect of the trial, including its deterrent effect. By its very nature as a public institution<sup>138</sup> and, in particular, by publicizing the information about the case, a trial produces broader social results, such as the creation of new rules, deterrence, and behaviour modification.<sup>139</sup> These are almost exclusively achieved through domestic court proceedings. Enforcement proceedings may further amplify the intangible effects of the original trial; failure to enforce a judgment, however, will not eliminate these effects. As “reactive”<sup>140</sup> institutions, the courts’ “agendas are largely set by the actions and choices of individuals and groups having no formal ties to the judicial system.”<sup>141</sup> Commencing domestic proceedings and enforcing the judgment are the consumer's prerogative—a prerogative that is used neither lightly nor frequently.<sup>142</sup> Compensation is an important consideration in a consumer's decision to engage the courts. Yet, the potential unenforceability of a judgment from the consumer's home court should not automatically override a consumer's jurisdictional (or other) interests in holding a trial before this court.<sup>143</sup> The court's prioritization of a single factor (such as enforceability of the judgment, as seen in *Allen*<sup>144</sup> and *Rudder*<sup>145</sup>) leads to an even higher onus for establishing the strong cause.

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<sup>137</sup> See generally A Mitchell Polinsky & Daniel L Rubinfeld, “The Deterrent Effects of Settlements and Trials” (1988) 8:1 Intl Rev L & Econ 109.

<sup>138</sup> See *supra* note 4 and accompanying text.

<sup>139</sup> For a discussion on the multidimensional effects of a trial, see Marc Galanter, “The Radiating Effects of Courts” in Keith O Boyum & Lynn Mather, eds, *Empirical Theories About Courts* (New York: Longman, 1983) 117.

<sup>140</sup> Austin Sarat, “Alternatives in Dispute Processing: Litigation in a Small Claims Court,” (1976) 10 Law & Soc'y Rev 339 at 341 citing Donald J Black, “The Mobilization of Law” (1973) 2:1 J Leg Stud 125 at 128.

<sup>141</sup> Sarat, *supra* note 140 at 341.

<sup>142</sup> See *supra* note 3 and the accompanying text.

<sup>143</sup> See e.g. *Breeden v Black*, 2012 SCC 19 at paras 35, 38, [2012] 1 SCR 666 [*Breeden*]. In this case, the judgment's enforceability was considered as part of the *forum non conveniens* analysis in the context of internet defamation. The Canadian judgment would be unenforceable in the United States against nine out of ten defendants, thus depriving the plaintiff from the financial compensation for the harm to his reputation. The Supreme Court of Canada found that the plaintiff's intangible interest in protecting his reputation in Ontario outweighed both the plaintiff's financial interest in receiving compensation and the defendants' strong jurisdictional interest in having the trial in their home jurisdiction.

<sup>144</sup> See *Allen* Sup Ct, *supra* note 62 at para 12.

<sup>145</sup> See *Rudder*, *supra* note 62 at paras 21, 23.

*b. Cost and Inaccessibility of the Foreign Trial*

The cost and impact of the foreign trial were considered in four cases.<sup>146</sup> In *Friesen*, the consumer-plaintiff was not able to return to work due to her injuries, which were treated by numerous British Columbia medical professionals.<sup>147</sup> The plaintiff's case substantially relied on evidence and witnesses located in British Columbia. The court found that "the cost of and inconvenience" of presenting her case in the nominated forum (Florida), irrespective of the defendant's offer to cover the plaintiff's airfare to Florida or availability of videoconferencing, was potentially prejudicial to the plaintiff's case,<sup>148</sup> and was sufficient to establish strong cause for not enforcing the clause. In the court's view, a stay of proceedings in favour of the nominated forum "would come close to denying the plaintiff access to a court at all."<sup>149</sup>

*Straus v. Decaire*<sup>150</sup> (*Straus*) involved an Ontario couple who purchased shares in a British Columbia company based on advice from and through several financial and investment advisors. The company became insolvent; the couple lost their investment and sued the advisors in Ontario. The relationship with certain advisors was based on a contract containing a forum-selection clause nominating the British Columbia courts.<sup>151</sup> The court considered the cost of trial in British Columbia for an Ontario couple in light of possible multiple proceedings which would occur if the forum-selection clause was enforced. The court found that the cost and inconvenience of a separate trial against the British Columbia defendants would be prohibitive for the plaintiffs, who were of modest means and had young children in Ontario. In the court's view, staying the action would bar the plaintiffs merits of their Ontario claim.<sup>152</sup> By contrast, in *Zhan and Ezer v. Yorkton Securities and Danzig (Ezer)*, the courts found that the cost of a foreign trial alone was not sufficient to establish strong cause to override the contractual forum.<sup>153</sup>

Inaccessibility and inconvenience of the nominated forum was briefly considered in two cases. *Kates* involved an eighty-one-year-old retiree and

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<sup>146</sup> See *Friesen*, *supra* note 62; *Straus*, *supra* note 62; *Ezer*, *supra* note 62; *Zhan*, *supra* note 62.

<sup>147</sup> See *Friesen*, *supra* note 62 at paras 2–3.

<sup>148</sup> *Ibid* at para 21.

<sup>149</sup> *Ibid* at para 27.

<sup>150</sup> *Supra* note 62.

<sup>151</sup> See *ibid* at paras 1–4, 29–31.

<sup>152</sup> See *ibid* at para 36.

<sup>153</sup> See *Zhan*, *supra* note 62 at paras 25, 29 (Ontario plaintiff, nominated forum in Colorado); *Ezer*, *supra* note 62 at para 29 (BC consumer, nominated forum in Ontario).

*Ezer* involved a plaintiff with a temporary medical condition. The plaintiff's inability to travel to the nominated forum was raised in support of the strong cause for not enforcing the forum-selection clauses. However, this inability was not considered a significant factor compared to the other facts in these cases.<sup>154</sup>

The cost of any trial is prohibitive.<sup>155</sup> This is particularly so in consumer cases, where the cost of a trial may often be significantly higher than the value of the claim.<sup>156</sup> Despite their low engagement in resolving consumer problems,<sup>157</sup> the courts are central for securing substantive justice for consumers and upholding consumer protection policies.<sup>158</sup> For those few cases that reach the courts, access to courts equals access to substantive justice. Keeping an unobstructed path to the courts is an important means of protecting substantive justice for consumers. The infrequent use of courts in either domestic or foreign proceedings is irrelevant for assessing the strong cause. In fact, the very act of commencing proceedings before the consumer's home court, in breach of a forum-selection agreement, is a testament to the courts' importance in protecting consumers' procedural and substantive interests.

"If ... litigation in [the consumer's] home forum is a complex and expensive prospect, cross-border litigation is worse."<sup>159</sup> In the types of cases presented in this review, the cost of a foreign trial and associated expenses—retaining a foreign lawyer, a translator, additional expenses for bringing in witnesses, and so on<sup>160</sup>—are certainly higher than the cost of a trial in consumer's home jurisdiction. For the purpose of assessing the strong cause, however, the cost analysis is not a comparative one. The cost of a foreign trial should not be assessed solely against the cost of the home trial; rather, it is the impact of the cost and the inconvenience of a foreign

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<sup>154</sup> See *Kates*, *supra* note 62 at paras 16, 35; *Ezer*, *supra* note 62 at paras 26, 28.

<sup>155</sup> See Tracey Tyler, "A 3-Day Trial Likely to Cost You \$60,000", *The Toronto Star* (3 March 2007), online: <www.thestar.com>; Kate Lunau, "When Lawyers Are Only for the Rich", *Maclean's* (14 January 2009), online: <www.macleans.ca>.

<sup>156</sup> See generally Currie, *supra* note 1 at 39. The low monetary value of a consumer claim, however, is neither indicative of its importance to the individual consumer, or of the importance of consumer cases for the development of the law (see *ibid* at 41–42; Nader, *supra* note 135 at 1000–02).

<sup>157</sup> See *supra* note 142 and the accompanying text.

<sup>158</sup> For a general view on the importance of courts for ensuring substantive justice, see Solum, *supra* note 4 at 187.

<sup>159</sup> Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford: Oxford University Press, 2008) at para 3.135.

<sup>160</sup> See *ibid* at para 7.13. See also EC, Commission, *Green Paper: Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market* (Brussels: EC, 1993) at 59.

trial on consumers' procedural and substantive rights that should be considered. The cost of a foreign trial acts as a significant barrier to substantive justice for consumers. Once the local proceedings are stayed, commencing a foreign action is the only remaining legal recourse for consumers.<sup>161</sup> If the foreign action is not pursued due to its costs, consumers are left without any form of legal remedy. At the same time, even if a consumer pursues a foreign action following the stay of proceedings in her home jurisdiction, the cost may still influence a consumer's ability to receive a fair trial in the nominated jurisdiction. The high cost will often produce a selective, rather than comprehensive, presentation of witnesses and evidence, which puts consumers at an additional disadvantage. The courts' analysis of the cost of the trial on the consumer's ability to obtain redress in *Friesen* and *Straus* is a good start.<sup>162</sup> Since a consumer's choice to pursue her claims is influenced by the cost of trial (a key factor), a more comprehensive analysis of the overall impact of the cost of trial on a consumer's ability to obtain any redress is warranted.

*c. Inability of the Nominated Court to Deal with the Claim*

*Douez v. Facebook, Inc.*<sup>163</sup> (*Douez*) involved a statutory tort of invasion of privacy: Facebook's unauthorized use of its users' images for advertising. Both the trial and appellate courts considered whether the nominated forum, California, would be able to decide the matter, given that unauthorized use of images is a tort under the British Columbia *Privacy Act*,<sup>164</sup> and that the *Act* provides for the jurisdiction of British Columbia courts. The trial and appellate courts came to a different interpretation of the statutory jurisdiction and, therefore, different conclusions on the (in)ability of the nominated court to deal with the claim.<sup>165</sup> The facts in *Douez* are more complex than most of the surveyed cases, both because of its subject matter (a tort related to a contract) and of the statutory jurisdiction in the *Privacy Act*. The case is currently under appeal before the Supreme Court of Canada, which is expected to provide further guidance on both the scope of the strong-cause test and the relationships between forum-selection clauses and statutory jurisdiction.

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<sup>161</sup> For the purpose of this article, pursuing the claim through alternative dispute resolution is not considered.

<sup>162</sup> See *Friesen*, *supra* note 62 at paras 21–23; *Straus*, *supra* note 62 at para 36.

<sup>163</sup> See *Douez SC*, *supra* note 62; *Douez CA*, *supra* note 62.

<sup>164</sup> RSBC 1996, c 373.

<sup>165</sup> See *Douez SC*, *supra* note 62 at paras 56–78; *Douez CA*, *supra* note 62 at paras 45–73.

### C. *Balancing Competing Jurisdictional Interests*

Proper balancing of businesses' and consumers' jurisdictional interests, as expressed in factors 5(d) and 5(e) of *The Eleftheria's* test or through the application of *Expedition Helicopters*, is crucial for ensuring fairness in enforcing forum-selection clauses in consumer contracts. *Friesen* is the only surveyed case that truly engaged in balancing the competing business and consumer jurisdictional interests. The court balanced the parties' jurisdictional interests in light of the presentation of witnesses and evidence, which weighed heavily in that case. The consumer-plaintiff's evidence and witnesses (various medical professionals that treated her) were located in British Columbia. The defendant's witnesses were located in Norway, the United Kingdom, South Africa, and Alaska. The court found that the "the practical requirements for the defendant of staging a trial are more or less the same no matter where in the world the trial might take place."<sup>166</sup> In assessing the impact on both parties of holding the trial in Florida, the court engaged in an impressively thorough analysis of all of the circumstances of the case, including the assessment of available alternatives. For example, the court examined video conferencing as a cost-effective way of presenting witnesses and evidence; in their analysis, the court balanced the cost and convenience of this method against the difficulties of compelling non-resident witnesses to testify in Florida by video conference. Also, when examining the cost of a foreign trial and its impact on the plaintiff, the court subtracted the cost of the plaintiff's airfare to Florida, as the defendant offered to cover it for the plaintiff. After a truly comprehensive analysis, the court concluded that the plaintiff established a strong cause for not staying the British Columbia proceedings, since the trial in the nominated forum "would come close to denying the plaintiff access to a court at all."<sup>167</sup>

*Manjos* and *Douez* applied the *Expedition Helicopters* version of the test to assess the impact of a stay on the consumer-plaintiffs, achieving a similar objective to the balancing analysis under *The Eleftheria's* version of the test.<sup>168</sup> Under the Ontario courts' interpretation of the *Expedition Helicopters* version of the strong-cause test, the list of factors is open and the courts may consider other appropriate factors. For instance, in *Manjos*, the consumers followed their investment advisor to his new employment and transferred their assets to his new financial institution. Even though the particular contract at issue was a consumer contract, the investment advice also dealt with the consumers' corporate investments.

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<sup>166</sup> *Friesen*, *supra* note 62 at para 23.

<sup>167</sup> *Ibid* at para 27.

<sup>168</sup> See *Manjos*, *supra* note 62 at para 5; *Douez SC*, *supra* note 62 at paras 92–93.

The court looked at the specific circumstances of this case and the overall impact the stay of proceedings would have on the consumers. It found that the consumers were highly educated and sophisticated and had an opportunity to review the terms of the contract, which they declined to do. The court also found that the consumers were not induced into the contract, since they had an option to remain at their financial institution at the time.<sup>169</sup> In the court's view, granting the stay and requiring the consumers to litigate in the nominated forum (British Columbia), would not deprive them of the protections available under the forum law, namely, the Ontario *Securities Act*<sup>170</sup> and the rules and policies of the Investment Industry Regulatory Organization, since Ontario law can be invoked before British Columbia courts.<sup>171</sup> *Manjos* shows that the proper analysis of the strong-cause test will not always lead to a trial in a consumer's home forum. Indeed, it ought not to be that every consumer case is more appropriately tried in the home forum—it is the process of determining the outcome of the case that matters most.

Under the British Columbia courts' interpretation of the *Expedition Helicopters* version of the strong-cause test, the courts should only apply factors from the exhaustive list. In the trial level decision in *Douez*, for instance, the court engaged in a thorough analysis of the impact that holding the trial in California would have on both the procedural and substantive rights of the consumer class. The court found that staying the proceeding in favour of the nominated forum would truly deprive the consumer class from the substantive rights available under the British Columbia *Privacy Act*, since the *Act* provides for a statutory jurisdiction of British Columbia courts.<sup>172</sup> The British Columbia court of Appeal reversed the decision, finding that the statutory jurisdiction under the *Act* was not exclusive and that the California courts could apply the substantive law of British Columbia.<sup>173</sup> *Douez* is currently under appeal before the Supreme Court of Canada.

#### *D. Why a "Commercial" Strong Cause Does Not Work for Consumers*

In *ZI Pompey*, the Supreme Court of Canada gave strong preference to the enforcement of forum-selection clauses based on their contractual nature. Commercial parties have an almost unfettered choice in choosing an appropriate business partner. As equals—arguably—, it is expected that

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<sup>169</sup> See *Manjos*, *supra* note 62 at paras 7, 9.

<sup>170</sup> RSO 1990, c S.5.

<sup>171</sup> See *Manjos*, *supra* note 62 at para 10.

<sup>172</sup> See *Douez SC*, *supra* note 62 at paras 56–78.

<sup>173</sup> See *Douez CA*, *supra* note 62 at paras 45–73, in particular paras 63–64.



commercial parties can meaningfully negotiate the terms of their relationship. The principles of party autonomy and freedom of contract allow commercial parties to order their affairs without too much intervention by regulators or courts. In exchange for that autonomy, commercial parties are expected to follow the terms of their arrangements. As a result, the courts show high deference to forum-selection clauses in cases involving “sophisticated [business] parties”.<sup>174</sup> The courts will hold commercial parties “to their bargain”<sup>175</sup> and stay the proceedings in favour of the nominated courts, “unless strong cause for not doing so is shown.”<sup>176</sup>

In *Friesen*, the court’s thorough and comprehensive analysis of the facts against the strong-cause factors showed that the strong-cause test could be adapted to the consumer context, thus instilling elements of consumer-protection policy into the legal framework for the enforcement of forum-selection clauses.<sup>177</sup> *Friesen*, along with *Manjos* and the trial decision in *Douez*, are, however, exceptions. *Rudder*, *Zhan*, and *Allen*, either individually or taken together, are illustrative of the courts’ dominant approach in enforcing consumer jurisdiction agreements by transferring expectations of commercial parties into the consumer environment.

The availability of standard-form contracts as a low-cost and efficient mechanism to conduct business has brought standard-form contracts into virtually every aspect of consumers’ lives—everything from leisure, to convenience, to basic needs—is now governed by standard-form contracts. How does choice, a fundamental tenet of party autonomy, operate in an environment where virtually all consumer transactions are governed by standard-form contracts? In consumer contracts, forum-selection clauses offer unilateral certainty and predictability to the business. The same certainty and predictability is not offered to consumers, since they are contracted out from accessing their home court. The terms of consumer contracts are non-negotiable,<sup>178</sup> and are presented to consumers on a take-it-or-leave-it basis. Using the standard of a powerful consumer, the courts start from a premise that consumers have a choice to “turn down” a standard-form contract by not getting the goods and services. While the

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<sup>174</sup> *ZI Pompey*, *supra* note 31 at para 29. See also Pitel & Rafferty, *supra* note 21 at 128.

<sup>175</sup> *ZI Pompey*, *supra* note 31 at para 29.

<sup>176</sup> *Ibid* at para 19, citing *The Eleftheria*, *supra* note 34.

<sup>177</sup> See *Friesen*, *supra* note 62 at paras 21–27.

<sup>178</sup> Even if the opportunity to negotiate individual clauses were to present itself, those representing the business in the transaction often lack authority to modify the contract; see e.g. Apple iTunes Store, “Apple Media Services Terms and Conditions” (13 September 2016), online: <[www.apple.com/legal/internet-services/itunes/us/terms.html#APPS](http://www.apple.com/legal/internet-services/itunes/us/terms.html#APPS)> (“[n]o Apple employee or agent has the authority to vary this Agreement”).

consumers may have an option to choose an alternative provider, the alternative will, by-and-large, be conditional upon another standard-form contract. The essential terms (such as price or duration) of the new contract may be different from the contract which the consumers refused, but its general terms (such as warranties, limitations of liability, or jurisdictional issues) are likely to be identical. Standard-form contracts are extremely long, some are longer than classic literary works—the Terms of Service of PayPal and Apple iTunes are longer than *Hamlet* and *Macbeth*, respectively,<sup>179</sup> and consumers generally do not read them.<sup>180</sup> If they do, consumers look only for the essential terms and skip pages and pages of general terms.<sup>181</sup> Essential terms have an immediate and often financially measurable impact on the consumers and are the decisive factor for consumers in choosing goods or services. Forum-selection clauses are ab-

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<sup>179</sup> See Rich Parris, “Online T&Cs Longer than Shakespeare Plays: Who Reads Them?”, *Which? Conversation* (23 March 2012), online: <conversation.which.co.uk/technology/length-of-website-terms-and-conditions/?cmp=W0412\_p7\_tandcsconvo>.

<sup>180</sup> One study found that the majority of users spend less than twelve seconds on the page containing the electronic standard-form contract (see Jeff Sauro, “Do Users Read License Agreements?” (11 January 2011), *MeasuringU* (blog), online: <www.measuringusability.com/blog/eula.php>). According to another study, reading privacy policies, which are but a fraction of standard-form contracts entered into by an average consumer, would take an average of 201 hours per year (see Aleecia M McDonald & Lorrie Faith Cranor, “The Cost of Reading Privacy Policies” (2008) 4:3 *I/S: JL & Policy for Information Society* 543 at 565). Consumers’ attitudes toward standard-form contracts has been examined in a number of recent empirical studies: see e.g. Robert A Hillman, “Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?” (2006) 104:5 *Mich L Rev* 837; Shmuel I Becher & Esther Unger-Aviram, “The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction” (2010) 8:3 *DePaul Bus & Comm LJ* 199; Yannis Bakos, Florencia Marotta-Wurgler & David R Trossen, “Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts” (2014) New York University School of Law Working Paper No 195, online: <lsr.nellco.org/nyu\_lewp/195>; Debra Pogrund Stark & Jessica M Choplin, “A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities” (2009) 5:2 *New York U JL & Business* 617; Victoria C Plaut & Robert P Bartlett III, “Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements” (2012) 36:4 *L & Human Behavior* 293; Amy J Schmitz, “Pizza-Box Contracts: True Tales of Consumer Contracting Culture” (2010) 45:3 *Wake Forest L Rev* 863; Rainer Böhme & Stefan Köpsell, “Trained to Accept? A Field Experiment on Consent Dialogs”, *Proceedings of the SIGCHI Conference on Human Factors in Computing Systems* (New York: ACM, 2010) 2403, DOI: <10.1145/1753326.1753689>.

<sup>181</sup> See e.g. Florencia Marotta-Wurgler, “Does Contract Disclosure Matter?” (2012) 168:1 *J Institutional & Theoretical Economics* 94 at 98. See also Chris M Wilson & Catherine Waddams Price, “Do Consumers Switch to the Best Supplier?” (2010) 62:4 *Oxford Economic Papers* 647 at 654; Robert A Hillman & Jeffrey J Rachlinski, “Standard-Form Contracting in the Electronic Age” (2002) 77:2 *NYUL Rev* 429 at 446. Consumers’ primary focus on the essential terms came up in the surveyed cases as well (see e.g. *Rudder*, *supra* note 62 at paras 13, 15; *Friesen*, *supra* note 62 at para 17).

tract, they deal with unpredictable future events, and their future financial impact on the consumers cannot be measured until a dispute arises. If consumers read the contract and analyzed the implications of the forum-selection clause, it is highly unlikely that their discontent with the forum clause would trump otherwise favourable essential terms of the contract. The court's statement in *Allen*, that the consumer "was not in an unreasonable position having to sue in Florida because she signed the contract with the opportunity to turn it down and not go on the cruise,"<sup>182</sup> does not reflect the reality of the marketplace in which these contracts operate. For example, all major cruise travel providers, which could have been used by the consumer as alternative service providers, include a forum-selection agreement into their contracts and most nominate courts in Florida.<sup>183</sup>

Using transplanted commercial rules to assess the validity of forum-selection clauses in the consumer environment creates virtually watertight forum-selection agreements.<sup>184</sup> Or, as the courts in *Allen* and *Zhan* have put it, by accepting the contract terms the consumers should be "aware of the consequences"<sup>185</sup> of the forum-selection clauses, they "must take on responsibility for signing the document,"<sup>186</sup> and they should not be permitted "to avoid the effect of the contractual provision."<sup>187</sup> The only way for consumers to avoid the jurisdiction agreement is to establish a strong cause, an already heavy onus, which became even heavier when applying unaltered commercial rules.

If properly applied, the strong-cause test has the potential to introduce consumer protection policy into this area of law. As the surveyed cases have

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<sup>182</sup> *Allen* Sup Ct, *supra* note 62 at para 11.

<sup>183</sup> With the exception of Disney Cruises, all major cruise lines' ticket contracts include exclusive forum-selection clauses nominating the business's home jurisdiction (see e.g. Carnival Cruise Lines, "Ticket Contract", online: <[www.carnival.com/about-carnival/legal-notice/ticket-contract](http://www.carnival.com/about-carnival/legal-notice/ticket-contract)> at s 13(c); Princess Cruises, "Passage Contract", online: <[www.princess.com/legal/passage\\_contract/plc.html](http://www.princess.com/legal/passage_contract/plc.html)> at s 15(b); Royal Caribbean Cruises, "Cruise/Cruisetour Ticket Contract", online: <[https://secure.royalcaribbean.com/content/en\\_US/pdf/CTC\\_Not\\_For\\_BR.pdf](https://secure.royalcaribbean.com/content/en_US/pdf/CTC_Not_For_BR.pdf)> at s 9(a); Costa Cruises, "Cruise Ticket Contract", online: <[www.costacruise.com/B2C/USA/Support/contract/contract.htm](http://www.costacruise.com/B2C/USA/Support/contract/contract.htm)> at s 2; Regent Seven Seas, "Ticket Contract", <[www.rssc.com/media/hostedfiles/legal/USTicketContractRegent.pdf](http://www.rssc.com/media/hostedfiles/legal/USTicketContractRegent.pdf)> at s 27(c); Celebrity Cruises, "Cruise/CruiseTour Ticket Contract", <[www.celebritycruises.com/media/en\\_US/pdf/cruise\\_ticket\\_contract/Xpedition-Cruise-Ticket-Contract.pdf](http://www.celebritycruises.com/media/en_US/pdf/cruise_ticket_contract/Xpedition-Cruise-Ticket-Contract.pdf)> at s 9(a)). Carnival, Royal Caribbean, Costa Cruises, Regent of the Seven Seas, and Celebrity Cruises also include arbitration clauses for disputes that are not covered by the forum-selection clauses.

<sup>184</sup> See Part II-A, above.

<sup>185</sup> *Zhan*, *supra* note 62 at para 29.

<sup>186</sup> *Allen* Sup Ct, *supra* note 62 at para 11.

<sup>187</sup> *Rudder*, *supra* note 62 at para 7.

shown, however, other than *Friesen*, the courts have not seized this opportunity. As a result, the courts are frequently leaving consumers without any access to remedies by enforcing forum-selection clauses without giving proper regard to the distinct nature of consumer relationships. While the jurisdictional outcome of some of the surveyed cases may have been the same regardless of the existence of the forum-selection clause, discrepancy in individual results does not diminish the need for a systemic reform that would restore “litigational equality”<sup>188</sup> and place consumers on a jurisdictional “level playing field.”<sup>189</sup> In the current scheme, the starting point of the analysis gives a strong preference to businesses’ choice of jurisdiction. In choosing their home forum, businesses effectively choose substantive rules, furthering their procedural advantage into a substantive one.<sup>190</sup>

### III. Suggestions for Reform

Private international law rules should achieve both corrective<sup>191</sup> and substantive<sup>192</sup> justice. In the context of forum-selection clauses in consumer contracts, this means recalibrating the rules for enforcing forum-selection clauses to favour consumers’ jurisdictional preference. The preferred and more effective way to achieve these objectives is through a legislative approach that would invalidate forum-selection clauses in consumer agreements.<sup>193</sup> Legislative prohibition of forum-selection clauses in consumer contracts would completely reverse the current approach and would give unfettered preference to a consumer’s choice of jurisdiction. The second, less preferred but more realistic approach is to adapt the common law strong-cause test for consumer transactions and include additional safeguards that would offset the power imbalance the current strong-cause test is fraught with.

#### A. Legislative Approach

Several Canadian and foreign jurisdictions have regulated forum-selection clauses in consumer contracts and their approaches may serve as guidance for legislative reform in the rest of common law Canada.

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<sup>188</sup> von Mehren & Gottschalk, *supra* note 23 at 166.

<sup>189</sup> *Ibid* at 262 (this idea is further discussed at 262–69).

<sup>190</sup> See *ibid* at 166; Solum, *supra* note 4 at 203; O’Hara & Ribstein, *supra* note 39 at 5.

<sup>191</sup> See von Mehren & Gottschalk, *supra* note 23 at 167–71.

<sup>192</sup> See Zheng Sophia Tang, *Electronic Consumer Contracts in the Conflict of Laws* (Oxford: Hart, 2009) at 266.

<sup>193</sup> See O’Hara & Ribstein, *supra* note 39 at 135–59 (arguing strongly in favour of legislative regulation of cross-border consumer contracts).

### 1. Existing Legislative Approaches

Ontario and Quebec are the only Canadian jurisdictions that have regulated forum-selection clauses in consumer contracts. Ontario has legislated the enforcement of forum-selection clauses through its *Consumer Protection Act*. While a positive step forward, regulation through Ontario's *Consumer Protection Act* is narrow, since the *Act* does not apply to numerous transactions in which consumers participate in their daily lives. The Quebec approach is broader, since it regulates forum-selection clauses through its private international law framework,<sup>194</sup> which applies to both jurisdiction and enforcement of judgments.

#### a. Ontario

Ontario's *Consumer Protection Act* applies to transactions between suppliers (businesses) and consumers (individuals acting "for personal, family or household purposes"<sup>195</sup>), in which either the consumer or the business was located in Ontario at the time of the transaction.<sup>196</sup> Subsection 7(1) of the *Act* provides that "[t]he substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary." Procedural rights under the *Act* deal with access to the class proceedings<sup>197</sup> and specific statutory rights under the *Act* to commence an action before the Superior Court of Justice.<sup>198</sup> Based on subsection 7(1), a pre-dispute exclusive foreign forum-selection clause included in a consumer transaction that falls under the scope of the *Consumer Protection Act* should not be enforced against an Ontario consumer.<sup>199</sup> Post-dispute forum-selection agreements are permitted and enforceable.<sup>200</sup>

There were no cases interpreting subsection 7(1) of Ontario's *Consumer Protection Act* with respect to forum-selection clauses. Since the *Consumer Protection Act* came into force in 2005, there have been six cases dealing with forum-selection clauses in consumer contracts, and all of

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<sup>194</sup> See arts 3134–68 CCQ.

<sup>195</sup> Ontario *CPA*, *supra* note 11, s 1, *sub verbo* "consumer".

<sup>196</sup> See *ibid*, s 2(1).

<sup>197</sup> See *ibid*, s 8.

<sup>198</sup> See *ibid*, ss 18(9), 100.

<sup>199</sup> Similar provisions are included in Manitoba's *Consumer Protection Act*, *supra* note 11, s 209 and British Columbia's *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 3.

<sup>200</sup> Post-dispute forum-selection clauses (as well as post-dispute arbitration clauses) are generally not considered problematic, as it is presumed that after the dispute has arisen consumers are able to make a fully informed choice about the forum.

them were outside of the *Act*'s scope.<sup>201</sup> While the *Act* is a step in the right direction—in securing better access to domestic courts to consumers—its application is considerably limited, since the *Act* excludes a number of transactions in which consumers routinely participate.

*b. Quebec*

Quebec generally has a distinct approach to consumer protection and, in particular, consumer protection in cross-border transactions. Quebec consumers' access to courts in their home jurisdiction is protected through the private international framework in the *Civil Code of Québec* (CCQ).

Article 3148 of the CCQ sets the jurisdictional bases of the Quebec courts in “personal actions of a patrimonial nature”: presence, consent, and a real and substantial connection. Article 3149 establishes an additional jurisdictional basis for Quebec courts in consumer<sup>202</sup> and employment transactions, providing that

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<sup>201</sup> Two cases involved financial services, explicitly excluded in ss 2(2)(b) and 2(2)(c) of the Ontario *CPA*, *supra* note 11 (see *Straus*, *supra* note 62; *Manjos*, *supra* note 62). One case involved cybersquatting and a related trademark claim covered by the *Trademarks Act*, RSC 1985, c T-13 (see *Zhan*, *supra* note 62). In another case, the claims could have been interpreted either as a financial service or as a claim regarding the operation of an online gambling site, both of which are excluded from Ontario's *Consumer Protection Act* (see *Bérubé*, *supra* note 62). One case involved a slip and fall accident on a cruise ship; while the principal ticket contract fell under the scope of Ontario's *Consumer Protection Act*, section 8 of the *Act* applies only to the rights protected by the *Act* and was thus inapplicable to the tort claim (see *Allen* Sup Ct, *supra* note 62). One case included joint defendants from the United States and Ontario; only the defendants from the United States invoked the forum-selection agreement. The court noted, in passing, that “s. 8 of the *Consumer Protection Act*, 2002 [regulating access to class proceedings] may prevent Expedia Canada [the Ontario defendant] from relying on the exclusive jurisdiction clause,” but the applicability of the *Act* was not further discussed (*Magill*, *supra* note 62 at para 53). Section 2 of the *Act* sets its “geographical” application to transactions in which either the business or the consumer are located in Ontario. Based on the facts of the case, the *Act* should have applied to the defendant from the United States, since the consumers were located in Ontario at the time of the relevant transaction. The court's interpretation of the *Act*, whereby it applies solely to domestic (in-province) businesses, does not seem correct. This interpretation severely limits its application and undermines the protections offered to consumers.

<sup>202</sup> Article 1384 CCQ defines consumer contracts as follows:

A consumer contract is a contract whose field of application is delimited by legislation respecting consumer protection whereby one of the parties, being a natural person, the consumer, acquires, leases, borrows or obtains in any other manner, for personal, family or domestic purposes, property or services from the other party, who offers such property and services as part of an enterprise which he carries on.

Québec authorities also have jurisdiction to hear an action based on a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.<sup>203</sup>

As Geneviève Saumier and Pierre-Gabriel Jobin have noted, article 3149 ensures “greater access to local courts for Quebec consumers, even if the transaction itself has no connection to the province.”<sup>204</sup> Article 3149 considerably restricts the reach of the forum-selection agreements in consumer contracts. It does not invalidate a forum-selection clause, but it produces an equivalent result, since Quebec courts will seize jurisdiction in a consumer case despite a valid forum-selection clause.

The rules governing the enforcement of foreign judgments strengthen this protection. As noted by the Supreme Court in *Morguard Investment v. De Savoye*, the rules for establishing jurisdiction and enforcing foreign judgments are “correlatives”.<sup>205</sup> Article 3168 lists the jurisdictional grounds for recognition and enforcement of foreign judgments in Quebec. Article 3168(5) contains a “mirror”<sup>206</sup> provision to article 3149 and provides that a foreign judgment in which the jurisdiction of the rendering court was based on a forum-selection clause will not be enforced against the consumer.<sup>207</sup> This protection is somewhat narrower since it is restricted to consumers who are domiciled in Quebec, whereas article 3149 applies to consumers who are either domiciled in or residents of Quebec.

Quebec’s approach facilitates consumers’ access to their home courts, but it does not exclude the possibility for consumers to commence an action in the nominated forum. By commencing or participating in an action in the nominated forum, consumers would attorn to the jurisdiction of the nominated court, in which case the jurisdictional basis of the action (strictly speaking) would not be the jurisdictional agreement, but would produce the same result. This new jurisdictional basis would also become part of the court’s analysis in the enforcement proceedings, producing the

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Article 2 of Quebec’s *Consumer Protection Act* defines its applicability to “every contract for goods or services entered into between a consumer and a merchant in the course of his business” (Quebec *CPA*, *supra* note 11, s 2).

<sup>203</sup> Article 3150 CCQ establishes an additional jurisdictional basis for Quebec courts in insurance claims (which may capture some additional consumer contracts).

<sup>204</sup> Geneviève Saumier & Pierre-Gabriel Jobin, “Québec” in Diego P Fernández Arroyo, ed, *Consumer Protection in International Private Relationships* (Asunción: Center for the Studies of Law, Economy and Politics, 2010) 121 at 124 [translated by original authors].

<sup>205</sup> *Morguard Investment v De Savoye*, [1990] 3 SCR 1077 at 1103, [1991] 2 WWR 217.

<sup>206</sup> Saumier & Jobin, *supra* note 204 at 127 [translated by original authors].

<sup>207</sup> See *ibid* at 127–28.

common law equivalent of article 3168 of the CCQ. A default foreign judgment based on the forum-selection agreement would not be enforced against a consumer in their home jurisdiction. However, this protection would not be extended to the consumers who opted to sue in the nominated forum. When consumers attorn to the jurisdiction of the nominated court, they would not be able to later oppose the enforcement of a foreign judgment in their home forum.<sup>208</sup>

*c. European Union*

Recognizing that cross-border transactions heighten the inherent vulnerability of consumers,<sup>209</sup> the European private international law framework—embodied in the *Brussels Convention*<sup>210</sup> (dealing with jurisdiction) and the *Rome Convention*<sup>211</sup> (dealing with the applicable law)—, introduced special protective rules for consumer transactions which apply in the European Union. The *Brussels Convention* has been replaced first with the new regime in the *Brussels I Regulation*<sup>212</sup> and, more recently, with the *Brussels Regulation (Recast)*,<sup>213</sup> which came into effect in December 2015. The default jurisdictional rule for consumer transactions in the *Brussels I Regulation* and *Brussels Regulation (Recast)* mirror the *Brussels Convention* and provide that consumer-plaintiffs have a choice to sue in either their home jurisdiction or business’s home jurisdiction. As defendants, however, consumers can only be sued in their home jurisdiction.<sup>214</sup> Pre-dispute forum-selection clauses are *a priori* invalid, unless they broaden the consumer’s jurisdictional options or nominate the joint jurisdiction of the consumer’s domicile and the business at the time the contract was concluded (in cases where a consumer and a business were residents in the same jurisdiction when they entered into a domestic contract, but the consumer subsequently moved to a different jurisdiction).<sup>215</sup>

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<sup>208</sup> See *ibid* at 124.

<sup>209</sup> See Tang, *supra* note 192 at 4–8.

<sup>210</sup> EC, *Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, [1972] OJ, L 299/32.

<sup>211</sup> EC, *Convention on the law applicable to contractual obligations*, [1998] OJ, L 27/36.

<sup>212</sup> EC, *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2001] OJ, L 12/1.

<sup>213</sup> EC, *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2012] OJ, L 351/1.

<sup>214</sup> See Peter Arnt Neilsen, “Jurisdiction over Consumer Contracts” in Ulrich Magnus & Peter Mankowski, eds, *Brussels I Regulation* (Munich: Sellier, 2007) 301 at 320.

<sup>215</sup> See Hill, *supra* note 159 at para 7.14.



The *Brussels I Regulation* and *Brussels Regulation (Recast)* also introduced additional rules to extend the jurisdictional protection to most consumer contracts concluded on the internet.<sup>216</sup>

The *Brussels Regulation* regime contains a relevant provision regarding recognition and enforcement of foreign judgments, ensuring that the “protective regimes themselves therefore get accompanying protection with a second-tier of recognition and enforcement.”<sup>217</sup> A foreign judgment that is contrary to the Regulation’s jurisdictional rules for consumer transactions will not be recognized.

The *Directive on Unfair Terms*<sup>218</sup> further strengthened consumers’ access to their home court by establishing general consumer protection rules in the European Union. According to the *Directive on Unfair Terms*, a non-negotiated term in standard-form contracts is considered unfair “if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”<sup>219</sup> The Annex to the *Directive on Unfair Terms* provides a list of prima facie unfair terms, with forum-selection clauses included under article 1(q).<sup>220</sup>

## 2. Canadian and International Uniform Rules

### a. *Uniform Law Conference of Canada Uniform Consumer Contracts Rules*

In 2003, the Uniform Law Conference of Canada (ULCC) adopted the *Uniform Jurisdiction and Choice of Law Rules for Consumer Contracts*<sup>221</sup>

<sup>216</sup> The *Brussels I Regulation*, for instance, applies to those consumer contracts concluded on the internet in which the business “directs” its activities toward EU Member states (*supra* note 213, art 15(1)(c)).

<sup>217</sup> Peter Mankowski, “Article 35” in Magnus & Mankowski, *supra* note 214, 601 at 607.

<sup>218</sup> EC, *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, [1993] OJ, L 95/29.

<sup>219</sup> *Ibid*, art 3(1).

<sup>220</sup> The coverage of article 1(q) is broader since it covers clauses “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract (*ibid*, Annex, art 1(q)).

<sup>221</sup> Uniform Law Conference of Canada, *Uniform Jurisdiction and Choice of Law Rules for Consumer Contracts*, online: <[www.ulcc.ca/images/stories/Uniform\\_Acts\\_EN/Unif\\_Jur\\_Choice\\_Law\\_Consumer\\_Contracts\\_En.pdf](http://www.ulcc.ca/images/stories/Uniform_Acts_EN/Unif_Jur_Choice_Law_Consumer_Contracts_En.pdf)> [*Uniform Consumer Contracts Rules*]. The purpose of the *Uniform Consumer Contracts Rules* was to address complex jurisdiction-

(*Uniform Consumer Contracts Rules*). These rules contain detailed jurisdictional and choice of law rules for consumer contracts and are complementary to the *CJPTA*. The *Uniform Consumer Contracts Rules* have not been adopted in any of the common law provinces, while the relevant Quebec rules are found to be consistent with them. The ULCC could serve as a starting point for legislative reform in the *CJPTA* and common law jurisdictions.

Under the ULCC rules, pre-dispute forum-selection clauses nominating a foreign court are void if the transaction resulted from a solicitation of business in the jurisdiction in which the consumer ordinarily resides, the consumer's order was received by the vendor in the jurisdiction in which the consumer ordinarily resides, or the consumer was induced by the vendor to travel to another province or territory for the purpose of forming the contract and the vendor assisted the consumer's travel.<sup>222</sup> Pre-dispute forum-selection clauses nominating a consumer's home jurisdiction, pre-dispute forum-selection clauses in transactions in which the consumer sought the business (rather than the business targeting the consumer's jurisdiction), and post-dispute forum-selection clauses are, however, valid.

#### *b. International or Regional Conventions*

Regulating consumer forum-selection clauses through a binding international law instrument would establish a uniform standard worldwide. Yet, this is unlikely to occur. There are stark differences between civil law and common law systems, both in regulating consumer protection (the civil law's approach is protective, whereas the common law's is neutral and varied) and in private international law (the civil law is rule-based, whereas the common law is more discretionary). Due to these different approaches, as well as distinct political preferences, two recent international projects found it impossible to reach a meaningful compromise on the matter. Since an international or even regional consensus on the issue

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al issues raised by electronic commerce, as specifically noted in the introductory comments to the rules (see *ibid* at 1; Consumer Measures Committee and Uniform Law Conference of Canada Joint Working Group, "The Determination of Jurisdiction in Cross-Border Business-To-Consumer Transactions: A Consultation Paper" (2002), online: <[cmcweb.ca/eic/site/cmc-cmc.nsf/vwapj/ca01862e.pdf/\\$FILE/ca01862e.pdf](http://cmcweb.ca/eic/site/cmc-cmc.nsf/vwapj/ca01862e.pdf/$FILE/ca01862e.pdf)>). The ULCC also meant to ensure that the consumers participating in online transactions enjoy equal levels of protection to those afforded to consumers participating offline (see *Uniform Consumer Contracts Rules*, *supra* note 221 at 2). This objective is in line with those of the Organisation for Economic Co-operation and Development (see OECD, *Guidelines for Consumer Protection in the Context of Electronic Commerce* (Paris: OECD, 2000) at 18, online: <[oecd.org/sti/consumer/34023811.pdf](http://oecd.org/sti/consumer/34023811.pdf)>).

<sup>222</sup> See *Uniform Consumer Contracts Rules*, *supra* note 221 at 5–6.

appears to be untenable, forum-selection clauses should be legislated domestically.

The Interim text of the *Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, negotiated under the auspices of the Hague Conference on Private International Law, contained detailed jurisdictional provisions for consumer contracts, including rules on forum-selection clauses.<sup>223</sup> Inclusion of consumer contracts in the *Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* was one of the stumbling blocks in the negotiation process.<sup>224</sup> The project was subsequently scaled back to a narrow issue of exclusive choice of court agreements in commercial (non-consumer) settings that resulted in the *Convention on 30 June 2005 Choice of Court Agreements*,<sup>225</sup> where consumer transactions are explicitly excluded from its scope.

A further example of irreconcilable differences is a more recent project on consumer protection in private international law by the Organisation of American States' Inter-American Specialized Conference on Private International Law (CIDIP).<sup>226</sup> The negotiations reached an impasse because the three proposals on the matter were fundamentally different<sup>227</sup> were different in their scope (jurisdiction, choice of law, alternative dispute resolution mechanisms) and the choice of regulatory mechanisms (international convention, model law, or legislative guideline).

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<sup>223</sup> See "Hague Conference on Private International Law, Commission II, Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Nineteenth Session: Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001, Interim Text" (2002) 77:3 *Chicago-Kent L Rev* 1015 .

<sup>224</sup> A number of comments to this effect have been archived on the Hague-jur-commercial-law archives, online: Internet Archive <[web.archive.org/web/20130729011312/http://lists.essential.org/pipermail/hague-jur-commercial-law/](http://web.archive.org/web/20130729011312/http://lists.essential.org/pipermail/hague-jur-commercial-law/)>.

<sup>225</sup> 30 June 2005, 44 ILM 1294, art 2(1)(a) (entered into force 1 October 2015).

<sup>226</sup> For a detailed summary of the CIDIP's activities on consumer protection, see Diego P Fernandez Arroyo, "Current Approaches Towards Harmonization of Consumer Private International Law in the Americas" (2009) 58:2 *ICLQ* 411.

<sup>227</sup> See OAS, Committee on Juridical and Political Affairs, *Proposals by the Member States for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII), May 2008*, OR OEA/Ser.G/CP/CAJP-2652/08 (2008) (revised proposal by the Canadian delegation); OAS, Committee on Juridical and Political Affairs, *Proposals by the Member States for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)*, OR OEA/Ser.G/CP/CAJP-2652/08 add. 1, rev. 1(2010) (a proposal by the United States); OAS, Committee on Juridical and Political Affairs, *Proposals by the Member States for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)*, OR OAE/Ser.G/CP/CAJP-2652/08 add. 4 (2008) (a joint proposal by Brazil, Argentina, and Paraguay).

### 3. Proposal for Common Law Canada

Businesses and consumers have competing jurisdictional interests.<sup>228</sup> There is no compromise in the form of a neutral jurisdiction and, regardless of the chosen solution, one side will be at a disadvantage. Yet, “[i]n contests between localized plaintiffs and multistate defendants it is difficult to justify breaking a jurisdictional tie in the latter’s favor.”<sup>229</sup> The starting point of the legislated jurisdictional analysis should be changed to favour consumers’ choice of their home forum, shifting the default jurisdictional burden of proof to the defendant-business. Examples are found in other jurisdictional bases (presence, attornment, and the real and substantial connection) where the courts show deference to the plaintiff’s choice of jurisdiction. The onus is on the defendant to demonstrate that another forum is clearly more convenient through the application of the *forum non conveniens* test.<sup>230</sup> Shifting the onus from consumer to business would significantly protect consumers’ jurisdictional interest while leaving sufficient room for addressing the specific facts of the particular case when applying the doctrine of *forum non conveniens*. The choice of the consumer’s home forum as the default jurisdiction contributes to equalizing their private international law “litigational capacity.”<sup>231</sup> Businesses’ litigational capacity is considerably superior to consumers’ and they are often more than capable of offsetting the cost of litigating in the consumers’ home jurisdiction. Businesses would not be nearly as negatively impacted by this jurisdictional rule as consumers are by the current rules.

Under the current rules, consumers, as plaintiffs, bear the “heavy onus” of establishing the strong cause for not giving effect to a valid forum-selection clause.<sup>232</sup> This role reversal, which would give precedence to consumers’ home forum, can only be achieved through a legislative change that would invalidate forum-selection agreements in consumer contracts. Courts lack the power to make such a reversal. In British Co-

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<sup>228</sup> See von Mehren & Gottschalk, *supra* note 23 at 166–71; Tang, *supra* note 192 at 265–66.

<sup>229</sup> von Mehren & Gottschalk, *supra* note 23 at 173.

<sup>230</sup> See *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at paras 103, 108, [2012] 1 SCR 572; *Breeden*, *supra* note 143 at para 23.

<sup>231</sup> von Mehren & Gottschalk, *supra* note 23 at 170 (this idea is discussed in detail at 165–73). On litigational capacity, see also O’Hara & Ribstein, *supra* note 39 at 68–70 (on the plaintiff’s ability to choose the governing law by choosing where to sue); Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9:1 *Law & Soc’y Rev* 95 (comparing the litigational capacity of large, professional, and repetitive litigants with that of ordinary consumers who engage in one-off lawsuits).

<sup>232</sup> Stephen GA Pitel, “The Canadian Codification of Forum Non Conveniens” (2011) 7:2 *J Priv Intl L* 251 at 267.

lumbia, Saskatchewan, and Nova Scotia, this legislative reform could be carried out by amending the *CJPTA* through revised *Uniform Consumer Contracts Rules*, and additionally by amending the consumer protection legislation, similarly to Ontario and Quebec statutes. In the remaining common law jurisdictions, which do not have jurisdictional statutes, the reform can only be carried out through amendments to consumer protection legislation.

Quebec, the European Union, and the ULCC solutions cover jurisdiction in the context of a contractual relationship. Most consumer relationships are based on contracts, but there is a growing number of cases in which the subject matter of a proceeding will be a non-contractual basis, such as a tort<sup>233</sup> or unjust enrichment<sup>234</sup> related to the contractual relationship. The legislative language proposed below broadens the scope of the rule to allow for non-contractual claims to be covered by these jurisdictional provisions by using the term “relationship” rather than contract or agreement. The proposed legislative amendment, however, does not go so far as to provide a new jurisdictional basis for consumer transactions (such as the protection provided under Quebec law) or to provide a blanket prohibition on all forum-selection clauses. The prohibition applies only to instances in which a consumer acts as a plaintiff, retaining her ability to sue in a business’s home jurisdiction if she wishes, as provided under Quebec and European Union law. Additionally, there has to be a territorial connection between the transaction and the consumer, fostering certainty and predictability for both parties to the transaction.<sup>235</sup>

The following is the suggested provision to be added to the *CJPTA*, after section 3 in the of the Uniform Law Conference of Canada *CJPTA*:

Despite any agreement or waiver to the contrary, a consumer can only be sued in the [enacting province] if a consumer is ordinarily resident in the [enacting province] and the transaction resulted from a solicitation of business in [the enacting province] by or on behalf of the seller.

The corresponding, broad definition of a consumer, which is consistent with the definitions in numerous provincial consumer protection acts, would be added to the definitional section (section 1) of the *CJPTA*:

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<sup>233</sup> See e.g. *Friesen*, *supra* note 62; *Allen* Sup Ct, *supra* note 62; *Douez* SC, *supra* note 62.

<sup>234</sup> See e.g. *Frey* CA, *supra* note 33.

<sup>235</sup> See *Club Resorts*, *supra* note 230 at paras 66, 73. See also Pitel & Rafferty, *supra* note 21 at 84, 87 (arguing that the solicitation of business in the consumer’s forum provides protections for consumers in internet transactions, particularly, and mirrors the traditional rule in negligence cases such as *Moran v Pyle National (Canada) Ltd.*, [1975] 1 SCR 393, [1974] 2 WWR 586).

Consumer is an individual acting for personal, family or household purpose.

The following is the suggested provision to be added to respective provincial consumer protection acts:

Despite any agreement or waiver to the contrary, a consumer may commence an action in the [trial court] if a consumer is [resident or ordinarily resident] in the [enacting province] at the time of the commencement of the proceedings and the transaction resulted from a solicitation of business in [enacting province] by or on behalf of the seller.

The legislative changes proposed above would not go as far as to completely invalidate forum-selection clauses in consumer agreements, but they would permit consumers to sue businesses in the consumer's home jurisdiction. A complete legislative ban on forum-selection clauses in consumer contracts would, in effect, be equivalent to establishing the consumer's home court as a jurisdictional basis over any consumer transaction. While this solution may be desirable and more predictable, it is beyond the scope of this article.

### ***B. Re-imagining the Common Law Strong-Cause Test***

Re-imagining the strong-cause test specifically for consumer transactions is both an alternative and a complementary solution to legislative reform. Since neither jurisdiction nor consumer protection issues are on the provincial or territorial priority list for legislative reform, a redesigned strong-cause test would produce immediate results. More importantly, even if legislative intervention amends consumer protection legislation in jurisdictions which do not have jurisdictional statutes, the courts would still rely on the strong-cause test in consumer cases that fall outside of the consumer protection legislation.

In the analysis for the enforcement of forum-selection agreements by a non-nominated court, general principles of contract law are used to assess the validity of the forum-selection contract. If a forum-selection contract is found to be valid, the emphasis then shifts to assessing whether there is a strong cause for not enforcing the forum-selection clause. The traditional strong-cause test, as articulated in *The Eleftheria*, uses a number of factors that are similar to the *forum non conveniens* analysis, which centers on two main areas: the parties' connection to the forum and the consequent injustice to the parties in granting a stay of proceedings.

The current approach to enforcing forum-selection clauses, as articulated in *Expedition Helicopters*, places a much stronger emphasis on the

contractual part of the equation. Moreover, the strong-cause factors emphasize “the parties’ original bargain”<sup>236</sup> and the parties’ expectations “that the chosen jurisdiction will allow for a fair adjudication of the dispute,”<sup>237</sup> with a narrow fallback option that enforcing the clause “would frustrate some clear public policy.”<sup>238</sup> Indeed, *The Eleftheria*’s strong-cause test was developed in a commercial setting where there is equality of bargaining power and strong deference to party autonomy. As explained above, however, if the jurisdictional interests of the business and the consumer were properly analyzed and balanced, the version of the strong-cause test from *The Eleftheria* could achieve the “greater scrutiny”<sup>239</sup> required in cases of unequal bargaining power. The survey of consumer cases discussed in Part II, above, showed that this scrutiny was present to some extent in three cases,<sup>240</sup> but only to the extent necessary in one case (*Friesen*). In the remaining cases, the courts did not give due regard to the special nature of the consumer relationship, the nature of the standard-form contracts, or the impact the stay of proceedings would have on the consumer’s access to both procedural and substantive justice. Moreover, *Expedition Helicopters*’ shift away from the balancing of parties’ jurisdictional interests toward the stronger emphasis on the contractual nature of the forum-selection clause and the parties’ expectations is problematic and inappropriate for consumer relationships.

The strong cause test proposed below is designed specifically for consumer relationships.<sup>241</sup> First, this test preserves the principal two-part structure of the enforcement equation: contractual basis and the strong-cause test. However, it *recalibrates* them, in light of their original purpose, of the power dynamic of consumer relationships, and of the ubiquity of standard-form contracts. Second, this test revises the strong-cause factors to better reflect the nature of consumer relationships.

Contract rules provide a core legal basis for the enforcement of jurisdiction agreements. The strong-cause test limits the reach of a private contract into the public adjudicative sphere, ensuring access to a home court. The broader civil justice system includes both public adjudication by courts and private adjudication by, for example, arbitration tribunals

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<sup>236</sup> Saumier & Bagg, *supra* note 45 at 459.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Expedition Helicopters*, *supra* note 50 at para 24.

<sup>239</sup> Walker, *supra* note 20 at 11-11.

<sup>240</sup> See *Friesen*, *supra* note 62; *Manjos*, *supra* note 62; *Douez SC*, *supra* note 62.

<sup>241</sup> The proposed test can be analogously applied to other contracts that include parties of unequal bargaining power, such as employment agreements, insurance agreements, franchise contracts, or agreements between small and medium size businesses on the one hand and large corporations on the other.

or industry ombudsman schemes. However, the reach of private ordering into the public adjudicative sphere is still bounded, in particular in cases involving “individuals who may not be of equal bargaining power.”<sup>242</sup> While the importance of the strong cause has diminished following *Expedition Helicopters*, the test ought not to be recast through contractual principles. In the first part of the equation, the appropriateness of private ordering should be considered at the purely contractual level, as covered by general contract rules that developed outside of the forum-selection framework. The strong-cause test should be preserved as a distinct and important safeguard for access to domestic courts for other, non-contractual reasons, such as access to justice, “fairness between the parties[,] and the interests of justice.”<sup>243</sup>

Other than resetting the weight of the contractual part of the equation, the proposed test does not deal with contractual rules. As concluded from the survey of cases in Part II-A, the Canadian courts continue to routinely enforce standard-form contracts, despite a robust academic debate about their enforcement, in particular in the consumer context.

The focus of the proposed test is on adapting the strong-cause analysis and its factors to better reflect the nature of consumer relationships. The strong-cause test is re-calibrated in three ways. First, the proper balancing of a consumer’s and business’s jurisdictional interests is included as a guiding principle in assessing the strong cause. Second, the factors have been assigned specific weight and are arranged in a hierarchical order from most to least important. Third, the factor dealing with the consumers’ jurisdictional interests is considerably broadened to reflect the unique nature of consumer transactions and particular issues that have proven problematic in applying the version of the strong-cause test set out in *The Eleftheria*. These include the effect of the stay of proceedings on the consumer’s ability to access justice; the protection afforded to consumers by law applicable in their home jurisdiction; the availability of and the criteria for collective redress in the consumer’s home jurisdiction; and the “the desirability of avoiding multiplicity of legal proceedings” and “avoiding conflicting decisions.”<sup>244</sup> As a result, the test still retains its flexibility and is able to accommodate other relevant factors that may arise over time.

What the redesigned test cannot do, however, is change the starting point of the analysis: the contractual choice of forum. Yet, because the proposed test considers factors that are particularly relevant to consum-

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<sup>242</sup> Walker, *supra* note 20 at 11-11.

<sup>243</sup> *ZI Pompey*, *supra* note 31 at para 31.

<sup>244</sup> ULCC *CJPTA*, *supra* note 54, s 11(2)(c)–(d).



ers, the burden for displacing the contractual choice effectively becomes less onerous.

The proposed strong-cause test applies only to consumer transactions, which are defined as transactions between a merchant business and an individual consumer acting for a personal, family or household purpose, regardless of whether the relationship is of a contractual or non-contractual nature. The test incorporates much of the wording in *The Eleftheria* and also gives due regard to the spirit of the Supreme Court's approach in *ZI Pompey*. The recalibrated test reads as follows:

- 1) Where consumers sue in their home jurisdiction in breach of an agreement to refer disputes to a foreign court, and the business-defendants apply for a stay, the court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has the discretion to do so.
- 2) Overall, the parties should be held to their bargain and the court's discretion should be exercised by granting a stay unless strong cause for not doing so is shown. When determining whether strong cause has been shown, in balancing consumers' and businesses' jurisdictional interests, as presented in step four, the court will be guided by the interest of justice.
- 3) The burden of proving such strong cause is on the consumer-plaintiffs.<sup>245</sup>
- 4) In exercising its discretion, the court should take into account all the circumstances of the particular case. In particular, but without prejudice to step two, the following factors, where they arise, may be properly considered:
  - a. Which country each party is connected with, and how closely;
  - b. Whether the consumer-plaintiffs would be prejudiced by having to sue in the foreign forum because they would:
    - i. Be effectively deprived of access to foreign courts given the cost and inconvenience of litigating in that forum;
    - ii. Be deprived of the protection afforded by the law applicable in their home jurisdiction;
    - iii. Be deprived of access to collective redress;
    - iv. Be unlikely to get a fair trial in the designated jurisdiction;
    - v. Be unable to enforce any judgment obtained;
    - vi. Be faced with a time bar not applicable in the domestic forum;<sup>246</sup>

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<sup>245</sup> Shifting the burden of proof to the business-defendant would require a legislative change.

- vii. Be deprived of security for their claim.<sup>247</sup>
  - a. Whether the defendants genuinely desire a trial in the foreign country, or are only seeking procedural advantage;
  - b. In which country the witnesses and evidence are located in, or more readily available, and the effect of their location on the relative convenience and expense of trial as between the consumers' home jurisdiction and the foreign forum;
  - c. The law to be applied to issues and its relevance to the case;
  - d. The desirability of avoiding a multiplicity of proceedings and conflicting decisions.

The proposed test still maintains the form and the function of the original *The Eleftheria* strong-cause test. With the addition of new consumer-specific factors, the test should be less arduous for consumers and, where the relevant circumstances exist, should more readily allow consumers to prove strong cause for displacing the contractual forum. This does not mean that each and every consumer case will be allowed to proceed in the domestic forum despite a valid forum-selection clause, in the same way that not every case without a forum-selection clause will automatically proceed before a consumer's domestic court. The strong cause, in the former case, and *forum non conveniens*, in the latter, allow for the jurisdictional result to be appropriately tailored to the factual matrix at hand. Consumers still bear the burden of persuading the court that there is strong cause for overriding the contractual forum, which is an opportunity to be seized and not ignored, but the onus is not so high that it would be impossible to meet.

## Conclusion

Consumer cases are not only unique because of the inherent power imbalance between the contracting parties, but also because of the unique way in which consumers' legal issues are resolved.<sup>248</sup> Only a minuscule number of consumer cases ever reach the courts, since most consumer

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<sup>246</sup> This factor is subject to the forum's rules on whether a limitation period is a procedural or substantive issue. Although *Tolofson v Jensen*, provides that limitation periods are substantive ([1994] 3 SCR 1022, [1995] 1 WWR 609), several jurisdictions have legislated limitation periods as procedural issues to which the law of the forum applies (see e.g. *Limitations Act*, RSA 2000, c L-12, s 12; *Limitations Act*, SNL 1995, c L-16.1, s 23; *The Limitations Act*, SS 2004, c L-16.1, s 27). We found, however, that with the increase of contractual limitation periods, it was important to retain this factor from the original *The Eleftheria* test.

<sup>247</sup> This is a factor from the original *The Eleftheria* test, which was retained as is, even though it may have a very limited application in consumer cases.

<sup>248</sup> See Part II-B-2, above.

claims are either not pursued due to their small value or are resolved directly between the business and the consumer. Consumer cases that reach the courts are important for several reasons: while commencing a legal action before a court is rare in consumer cases, it is an important avenue for consumers who are unable to receive redress through other means. In addition to providing individual consumers with redress, these cases act as “signalling mechanism[s]” that “relay information about particular markets or products horizontally to other consumers (potential and actual), backwards to producers and also to governments and policy-making bodies,”<sup>249</sup> and often deal with novel legal issues that require authoritative judicial determination.<sup>250</sup> The courts are the last redress mechanism available to resolve consumers’ claims, and therefore a clear access to home courts ought to be preserved.

Forum-selection agreements, by default, nominate the business’s home jurisdiction to resolve disputes and thus directly impact a consumer’s ability not only to access courts but to obtain access to substantive justice. It has been suggested that courts should approach forum-selection clauses in consumer contracts “with greater scrutiny” because of the inherent imbalance of power in consumer transactions. To assess whether the courts have indeed approached the enforcement of forum-selection clauses in consumer transactions in this way, this article has surveyed all reported consumer cases involving forum-selection clauses since 1995. The analysis of the cases demonstrates that the courts by and large routinely enforce forum-selection clauses in consumer agreements by staying proceedings in favour of the contractual forum, often leaving consumers without any access to remedies. While the strong-cause test could be applied to the consumer environment, the courts have not used this test as a vehicle for exercising greater scrutiny over consumer jurisdiction agreements.

In light of the surveyed cases, this article has argued that the rules for enforcement of forum-selection clauses in consumer contracts should be changed and has proposed two options. The first suggestion includes a call for legislative reform that would invalidate forum-selection clauses in consumer agreements and would permit consumers to sue businesses in the consumer’s home jurisdiction. The second suggestion includes reframing and re-calibrating the common law strong-cause test for the enforcement of forum-selection clauses in order to address the unique needs of consumer transactions. The proposed changes in the strong cause test would produce immediate results and would effectively establish a uni-

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<sup>249</sup> Morris, *supra* note 136 at 125.

<sup>250</sup> See Genn, *supra* note 3 at 263.

form standard across common law Canada. The status quo, whereby the courts haphazardly enforce forum-selection clauses without recognizing the complexities of the consumer relationships governed by the standard-form contracts, will continue to negatively impact consumers' access to justice. It seems that the time to re-calibrate the strong cause test has come. The Supreme Court of Canada heard the appeal from *Douez v. Facebook* in November 2016, with the decision expected later in 2017. It is an opportunity for the Court to continue the "quiet revolution"<sup>251</sup> of the Canadian private international law and set clearer rules for the enforcement of forum-selection clauses in consumer contracts.

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<sup>251</sup> See Joost Blom, "Private International Law in a Globalizing Age: The Quiet Canadian Revolution" (2002) 4 YB Private Intl L 83.