

This article explores the nature of public policy limits to the enforcement of forum selection clauses, recently considered by the Supreme Court of Canada in *Douez v Facebook*. The public policy factors relied on by the plurality of the Court, inequality of bargaining power and the quasi-constitutional nature of the right at issue, possess neither the doctrinal clarity nor the transnational focus necessary to guide the deployment of public policy in this context. Here, I argue for a public policy exception to the enforcement of forum selection clauses based on the doctrine of mandatory overriding rules. This approach would focus on whether such clauses have the effect of avoiding the application of local norms intended to enjoy mandatory application in the transnational context.

Facebook is an American corporation headquartered in California. Douez is a resident of British Columbia. In 2011, Facebook created a new advertising product, which used the name and picture of Facebook members. Douez brought an action in British Columbia against Facebook alleging that it used her name and likeness without consent for the purposes of advertising, in contravention to s. 3(2) of British Columbia's *Privacy Act*. Douez also sought certification of her action as a class proceeding under the *Class Proceedings Act*.

Under the *Privacy Act*, actions under the Act must be heard in the British Columbia Supreme Court. However, as part of the registration process, all potential users of Facebook must agree to its terms of use which include a forum selection and choice of law clause requiring that disputes be resolved in California according to California law.

Facebook brought a preliminary motion to stay the action on the basis of this clause. The chambers judge declined to enforce the clause and certified the class action. The British Columbia Court of Appeal reversed the stay decision of the chambers judge on the basis that Facebook's forum selection clause was enforceable and that Douez failed to show strong cause not to enforce it. This rendered the certification issue moot and the court declined to address it.

The Supreme Court has held (with three justices dissenting) that the appeal should be allowed. The forum selection clause is unenforceable. The chambers judge's order dismissing Facebook's application to have the Supreme Court of British Columbia decline jurisdiction must be restored.

According to the dissenting judges when parties agree to a jurisdiction for the resolution of disputes, courts will give effect to that agreement, unless the claimant establishes strong cause for not doing so. In this case, Douez has not shown such cause. Therefore, the action must be tried in California, as the contract requires, and a stay of the underlying claim should be entered. Applying the strong cause test in a nuanced manner or modifying the test to place the burden on the defendant in the context of consumer contracts of adhesion would amount to inappropriately overturning other decisions of the Court and substituting new and different principles.