

Franchising - Canada

Franchisors must be vigilant in monitoring contractual compliance

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Introduction

Canada's common law provinces have historically recognised that different standards apply to contractual performance where 'best efforts' must be used pursuant to the terms of a contract, rather than 'reasonable efforts'. In *Cemar Electro Inc v Grob Textile AG*, rendered in December 2014, the Quebec Superior Court recognised that there is also a distinction between these concepts in Quebec civil law.⁽¹⁾ The judgment also provides insight with respect to the manner in which parties to commercial contracts should conduct themselves when contractual performance is not optimal, even in the absence of express contractual stipulations to that effect.

Decision

In *Cemar Electro* the plaintiff filed an action in damages claiming that the defendant had not used its best efforts to promote the plaintiff's product in keeping with the express provisions of an exclusive distribution contract. The clause at issue stated: "the Distributor shall use its best efforts to advertise and promote the sale of Products in the Territory".

The court concluded that the sales of the plaintiff's product could have been improved if the defendant had applied more significant efforts to make sales. The court recognised that a contractual requirement for a party to use its best efforts was indeed a more onerous obligation than using reasonable efforts to achieve the result desired. The judge found that the evidence demonstrated "at best, tepid efforts" by the defendant to promote sales of the plaintiff's product, and that the defendant had unilaterally limited the efforts it dedicated to selling the plaintiff's product and striving for sales growth in the market; this was inconsistent with the plaintiff's expectations on entering into the contract.⁽²⁾ However, the court also emphasised that the plaintiff was partly responsible for the poor sales levels achieved while the exclusive distribution contract was in force, since the plaintiff chose to "[stand] by and not [complain] or [react] in any measurable fashion" for almost two years.⁽³⁾ As a result, the court allocated to the plaintiff a share of the responsibility representing 25% of the total damages it suffered as a result of the defendant's breach of its best-efforts covenant.

Comment

Practitioners should proceed with caution when drafting franchising agreements in order to ensure that they properly reflect the parties' respective obligations and the efforts that a party is expected to use in fulfilling its contractual obligations – bearing in mind that the 'best efforts' standard is considered to require more significant efforts than the 'reasonable efforts' standard both under Quebec civil law and in Canadian common law jurisdictions.

The court's analysis in this case also suggests that, under Quebec civil law, if a party to a contract fails to take steps to mitigate its damages or stand on its contractual rights when faced with a breach by the other party, a court may have little sympathy when the aggrieved party eventually seeks compensation for such breach.

This is particularly important to consider in franchise relationships, where the franchisor may be inclined to allow a franchisee ample and repeated opportunities to cure defaults either to protect its brand and image or retain market share and brand presence in a certain region. Franchisors that tolerate defaults in respect of material covenants by franchisees – whether with the realistic hope that the situation will be corrected or otherwise – may face obstacles if they later seek to enforce their contractual rights on the basis of such defaults. Franchisors may therefore wish to adopt a more vigilant approach in enforcing contractual compliance by franchisees in order to avoid unfortunate surprises.

Despite this decision, it remains likely that – as a result of the particular nature of franchise relationships – a franchisor's damage claim may be more readily considered by a court in cases

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where the franchisor has failed to exercise its rights or has delayed doing so by reason of adopting a lenient approach in its dealings with a franchisee, subject to the franchisor's obligation to generally protect the franchised network for the benefit of all franchisees.

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Endnotes

(1) 2014 QCCS 5814.

(2) *Ibid*, at paragraph 62.

(3) *Ibid*, at paragraph 84.

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