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Contracts of adhesion in the Province of Quebec

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Freedom to contract is a well-established principle in the civil law of Quebec. A key feature of such freedom is that parties may freely negotiate the provisions of the contract prior to entering into the final agreement.

Conversely, the *Civil Code of Quebec* assumes that, in contracts of adhesion, one of the contracting parties does not have the ability to negotiate the terms of the agreement because the essential stipulations of the contract are imposed by the other party. In order for a contract to be considered a contract of adhesion in Quebec: (i) the *essential stipulations* of the contract must not be negotiable, and (ii) they must be imposed or drawn up by one of the parties or on its behalf.

1. The "essential" nature of the stipulation

In order to determine whether a contract is a contract of adhesion, the term "essential stipulation" must be construed broadly and is not limited to the essential elements required to *form* the contract. This means that while certain provisions may not be indispensable in order to form a contract, they could be considered *essential* in certain circumstances, depending on the parties to a given contract and the nature of the arrangement established pursuant to the contract.

Franchise agreements usually consist of a standard template. It is generally accepted that some of the essential elements of a franchise agreement include the establishment of a contractual relationship or collaboration between two legally independent and separate enterprises, the granting of a right to do business in accordance with the franchisor's concept in a defined territory for a limited period of time, in exchange for financial consideration from the franchisee.

However, it is not the existence of a standard template *per se*, but the *possibility of subsequent negotiation of essential provisions* of that contract, that must be considered in order to determine whether an agreement is a contract of adhesion.

Since each contractual relationship must be evaluated on a case by case basis, there is no clear precedent, and the nature of a contract will be determined by considering the overall scheme of the contract, as well as the facts surrounding its negotiation and execution. For example, without proof that a franchisee was *unable* to freely negotiate the essential terms of a franchise agreement, it will not be automatically considered a contract of adhesion. For example, in *Gestion Jerodem inc.* v. *Choice Hotels Canada inc.*,[1] the Court was of the view that a franchise agreement was not a contract of adhesion because the termination clause, the deposit and the terms of its repayment were essential conditions that *were* negotiated by the parties.

From a franchisor's perspective, strategic planning in the course of the negotiation of each franchise agreement can be useful. We examine below the interpretative principles applicable to contracts of adhesion, which

provide additional insight into the reasons for paying special attention to the negotiation process which leads to entering into a franchise agreement in Quebec.

2. Interpretation principles applicable to contracts of adhesion

In order to reduce the inequity in bargaining power between parties to a contract of adhesion, the *Civil Code of Quebec* includes specific provisions that favour the adhering party (i.e., the party upon which the essential terms of the contract are imposed) and are designed to protect that party, because adhesion contracts are generally drafted by or on behalf of the party that has greater bargaining power. As such, the latter generally bears the risk of any ambiguous or unclear provisions.

2.1 External clauses

An “external clause” is a provision set out in a document that is physically separate from the main agreement or instrument but that, according to a clause of the main agreement, is deemed to form an integral part thereof. External clauses may be used to supplement contractual provisions and to simplify the content of a contract. In the franchising context, these clauses are typically found in manuals, regulations, policies and other documents which are prepared by or on behalf of a franchisor and imposed upon a franchisee, and their content is generally meant to be mandatory.

In principle, a clause contained in an external document is not enforceable against a party to a contract unless it is incorporated by reference into the main contract. This basic requirement applies to both contracts of adhesion and all other contracts.

However, in contracts of adhesion, an external clause must be brought to the attention of the adhering party (i.e., the adhering party must receive a copy of the external clause prior to the execution of the main agreement that refers to an external clause), failing which the external clause can be declared unenforceable by a court if the adhering party undertakes the appropriate recourse. In addition, amendments to an external clause must be brought to the attention of the adhering party where the changes occur after the contract is signed. In circumstances where an extranet is used to circulate updated materials, a notification should be provided to franchisees when content is updated or replaced.

In all other contracts, an external clause does not need to be brought specifically to the attention of the other party; there must simply be actual *knowledge* of the clause at the time the contract is entered into. This knowledge is presumed where the contract explicitly and precisely refers to the external clause (but it can also be established by other means).

2.2 Illegible or incomprehensible clauses

According to the Civil Code of Quebec, a clause that is illegible or incomprehensible to a reasonable person may be declared unenforceable if the adhering party undertakes the appropriate recourse, unless the other party proves that an adequate explanation of the nature and scope of the clause was given to the adhering party.

An "illegible" clause is one that is *physically* impossible or very difficult to read due to the quality of the ink, the type or font size or the position of the text.

An "incomprehensible" clause refers to that which is *intellectually* impossible to understand, overly technical, unnecessarily complex or simply incoherent.

2.3 Abusive clauses

The *Civil Code of Quebec* also provides adhering parties with a certain level of protection with respect to abusive clauses by giving courts broad discretionary powers to interpret clauses that would distort the fundamental nature of a contractual arrangement. The courts have adopted a very stringent test in order for a clause to rise to the level of being considered abusive, and clauses must be examined in context in order to determine whether they satisfy the test. A court must assess the validity of a clause by examining the context in which the agreement was entered into, as well as the other provisions of the contract itself. In order for a contractual provision to be considered abusive, it must be inconsistent with well-established principles of good faith.

It has been recognized that while a clause may not be abusive simply by reason of its *presence* in a contract, the *application* of that same clause or the *exercise* of the rights which arise under that clause may, in turn, be abusive. These are also matters which are determined on a case by case basis in light of the facts of each particular case.

2.4 Interpretation in favour of the adhering party

Finally, the *Civil Code of Quebec* requires that, where there is a doubt, a contract of adhesion be interpreted in favour of the adhering party. However, a contractual provision must be ambiguous or unclear before this

principle can be applied. A court cannot, under the pretext of equity, distort a clear contractual provision in order to favour the adhering party, even if the provision is generally unfavorable to that party.

1. J.E. 2000-2175 (C.S.).

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