

Available online at [www.sciencedirect.com](http://www.sciencedirect.com)

ScienceDirect

[www.compseconline.com/publications/prodclaw.htm](http://www.compseconline.com/publications/prodclaw.htm)Computer Law  
&  
Security Review

## Comment

# Global social media vs local values: Private international law should protect local consumer rights by using the public policy exception?

Julia Hornle \*

Centre for Commercial Law Studies, Queen Mary University of London, UK

## A B S T R A C T

## Keywords:

Social media  
Privacy claims  
Private international law  
Jurisdiction clauses  
Choice of law clauses  
Contract  
Public policy  
Internet

This article focuses on the relationship between forum selection clauses, choice of law clauses and data protection and privacy protection. In particular, it discusses the question whether and why jurisdiction and choice of law clauses used in the terms of social media providers should not be enforced against social media users located in a different jurisdiction. The article distinguishes between the contractual, private law analysis and the application of public policy as part of the private international law analysis. The contract law analysis is centred on doctrines such as unconscionability, which in turn examines issue such as fairness and overwhelming bargaining power of one party. By contrast, the public policy analysis in private international law focuses on fundamental rights, legality of contractual clauses according to the local law of the forum and the interests of justice. It is argued here that both aspects (contractual and public policy doctrines) are paramount for achieving not only justice between the parties of a dispute but also ensuring good administration of justice in the public interest.

© 2017 Julia Hornle. Published by Elsevier Ltd. All rights reserved.

## 1. Introduction

In *Douez v Facebook*<sup>1</sup>, the Canadian Supreme Court has recently held that the choice of jurisdiction clause contained in Facebook's terms with its Canadian users should be displaced as unenforceable in a tort class action alleging an infringement of the Privacy Act of British Columbia, thus recognizing

the jurisdiction of the local courts in British Columbia to protect local consumers under their local privacy standards.

In a similar case, *Max Schrems* began a collective redress action alleging a long list of infringements of EU data protection law before the Austrian courts in 2014, likewise arguing that the jurisdiction clause in his contract with Facebook selecting the Irish Courts should not apply, basing his argument on Articles 17 and 18 (1) of the Brussels Regulation Recast.<sup>2</sup> *Max*

\* Centre for Commercial Law Studies, Queen Mary University of London, 67-69 Lincoln's Inn Fields, London WC2A 3JB, UK.  
E-mail address: [j.hornle@qmul.ac.uk](mailto:j.hornle@qmul.ac.uk).

<sup>1</sup> [2017] SCC 33, Judgment of 23. June 2017, available from CanLII <https://www.canlii.org/en/ca/scc/doc/2017/2017scc33/2017scc33.html>.

<sup>2</sup> Regulation EU/1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 12 December 2012, OJ L351/1.

<http://dx.doi.org/10.1016/j.clsr.2017.08.008>

0267-3649/© 2017 Julia Hornle. Published by Elsevier Ltd. All rights reserved.

*Schrems* is suing on his own behalf and in a collective action, on behalf of 25,000 other Facebook users who have ceded their claims to him online. While this case raises procedural issues under Austrian law (which does not recognize class actions as such), it additionally raises questions about the extent of the special consumer protection rules in the Brussels Regulation Recast, including the question whether Mr *Schrems* is acting as a consumer in the meaning of the Regulation if he acts as a representative for the class, albeit unpaid.<sup>3</sup> The Supreme Court of Austria has referred questions to the Court of Justice of the EU in an action, which is currently pending.<sup>4</sup>

Both these cases concern the question whether a jurisdiction or forum selection clause used in the terms of social media providers should be enforced against social media users located in a different jurisdiction. This question is inextricably linked to differing privacy and consumer protection standards in the country of origin of the social media provider and the country of destination of the user, and the business model of such providers based on the exploitation of users' private information in exchange for "free" services. This article does not examine any of the substantive privacy and consumer protection issues but instead focuses on the relationship between forum selection clauses, choice of law clauses and data protection and privacy protection.

In particular, it examines whether and *why* such clauses may be invalid and unenforceable in relation to privacy tort claims analysing US and Canadian laws. In doing so, the article distinguishes between the contractual, private law analysis and the application of *public policy* as part of the private international law analysis. The contract law analysis is centred on doctrines such as unconscionability, which in turn examines issue such as fairness and overwhelming bargaining power of one party. By contrast, the *public policy* analysis in private international law focuses on fundamental rights, legality of contractual clauses according to the local law and the interests of justice.

It is argued here that considerations relating to transactional efficiency focusing on consent and the "free will" of the parties may favour the purely contractual analysis. By contrast, a rights' based approach focuses on the public interest function of the courts ("interests of justice"), taking into account interests beyond the contractual relationship between the parties to the dispute. The article finds that *public policy* as a tool for restricting the enforceability of forum selection and choice of law clauses had receded into the background in recent years, but may now resurface in the context of privacy protection in view of cases such as *Douez*, *Schrems* and *Re Facebook Biometric Information Privacy Litigation*. The article concludes that both, the contractual analysis and the *public policy* analysis should be part of the test for examining the enforceability of forum selection and choice of law clauses.

<sup>3</sup> <https://www.ft.com/content/77da4ebc-791e-11e6-97ae-647294649b28>.

<sup>4</sup> Case C-498/16 *Schrems* filed on 11 November 2016 and the Decision of the Austrian Supreme Court: <http://www.europe-v-facebook.org/EN/en.html>.

## 2. Jurisdiction clauses: freedom to contract and risk management – the diminishing role of public policy

In a globalised world with an increase of transnational commercial relationships, the benefits of express jurisdiction clauses<sup>5</sup> are risk management<sup>6</sup> (from the viewpoint of the person using the clause), legal certainty<sup>7</sup> and economic efficiency, thus encouraging transnational commerce and trade. The US Supreme Court held in *M/S Bremen* in 1972: "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts"<sup>8</sup> and that "the choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honoured by the parties and enforced by the courts".<sup>9</sup> Legal certainty and transactional efficiency is achieved by lowering transactional cost through the reduction of litigation processes necessary to establish the relevant court and the associated costs and delay.

The downside of express jurisdiction clauses are that the parties' interests as to the preferred forum are likely to diverge and in many situations one party may be in a much stronger, if not overwhelming, bargaining position compared to the other. Furthermore, the party with the stronger bargaining position is likely to contract using its own standard terms, so frequently the stronger party dictates the choice of forum and the choice of law, which means that the weaker party will find it harder, if not impossible, to access justice. Cross-border litigation is more costly, requires the appointment of foreign lawyers, may necessitate translation, the travelling of witnesses and transfer of evidence, but most importantly may subject the weaker party to a foreign law, potentially avoiding the protection of consumer and privacy rights arising in the weaker party's local jurisdiction.

This situation includes business-to-consumer (B2C) contracts, but may encompass many business-to-business (B2B) contracts, where increasingly there may be a similar imbalance of power where a small-to-medium sized business contracts with a large multinational corporation. For example, a franchisee will not be able to negotiate jurisdiction or choice of law with *Burger King* and an Adword advertiser on Google search,<sup>10</sup> likewise, will not be able to change these provisions put forward by Google. However, the law in many jurisdictions mainly makes a distinction between B2C and commercial B2B contracts assuming that for B2C contracts there is a natural imbalance of negotiation power, which may lead to the as-

<sup>5</sup> See further NJ Davis "Presumed Assent the Judicial Acceptance of Clickwrap" (2007) 22 *Berkeley Technology Law Journal* 577-598, 578.

<sup>6</sup> See *Carnival Cruise Lines v Shute* 499 U.S. 585, 593-4; 111 S.Ct. 1522 (1991).

<sup>7</sup> *Ibid.*

<sup>8</sup> 407 U.S. 1, 9; 92 S.Ct. 1907 (1972).

<sup>9</sup> At 12.

<sup>10</sup> *TradeComet.com LLC v. Google Inc.* 647 F.3d 472 (2<sup>nd</sup> Cir 2011).

Download English Version:

<https://daneshyari.com/en/article/6890546>

Download Persian Version:

<https://daneshyari.com/article/6890546>

[Daneshyari.com](https://daneshyari.com)