

Federal Court



Cour fédérale

Date: 20250305

Docket: T-2269-24

Citation: 2025 FC 410

Ottawa, Ontario, March 5, 2025

PRESENT: Madam Justice Azmudeh

BETWEEN:

TATIANA GORENSTEIN

Plaintiff

and

META PLATFORMS, INC.

Defendant

JUDGMENT AND REASONS

I. Overview and Relevant Facts

[1] The Defendant, Meta Platforms, Inc. [Meta] brings a motion for an order permanently staying this action against it on jurisdictional grounds. The Plaintiff, Tatiana Gorenstein, filed a Statement of Claim [Claim] in Federal Court. Meta claims this Court does not have jurisdiction to hear the action and that the Claim is filed in the wrong court.

[2] The Plaintiff lives in Vancouver, British Columbia and owns and operates a luxury goods resale and consignment business, which uses an Instagram account to engage in business and promote sales. Instagram is an online platform owned by Meta. When Meta suspended the Plaintiff's Instagram Account, the Plaintiff filed her Claim in this Court and sought damages for the loss of business income.

[3] Specifically, this action relates to the Plaintiff's business or commercial use of the Instagram service, and Meta argues that the parties' agreements state that such claims are subject to the exclusive jurisdiction of either the United States District Court for the Northern District of California or a court located in San Mateo County in the United States. The determinative issue is, therefore, whether the forum selection clause in the standard user agreement should apply in this case.

[4] The parties do not dispute that the Plaintiff's use of the Instagram account in question was commercial in nature. She sought damages for economic losses related to the suspension of an Instagram account she created [Instagram Account] to run a for-profit business to sell and consign luxury goods. The Plaintiff agrees that she paid Meta to advertise her business on Instagram and that she used the Instagram Account to arrange her business' sales.

[5] The parties do not dispute that for the Plaintiff to open and use the Instagram Account, she had to agree to the Instagram's "Terms of Use" by clicking and accepting all its non-negotiable terms. The following is the relevant dispute clauses in the Terms of Use:

7.4 How We Will Handle Disputes.

If you are a consumer, the laws of the country in which you reside will apply to any claim, cause of action, or dispute you have against us that arises out of or relates to these Terms ("claim"), and **you may resolve your claim in any competent court in that country that has jurisdiction over the claim. In all other cases, you agree that the claim must be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, that you submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim**, and that the laws of the State of California will govern these Terms and any claim, without regard to conflict of law provisions. Without prejudice to the foregoing, you agree that, in its sole discretion, Meta Platforms Inc. may also bring any claim we have against you related to efforts to abuse, interfere, or engage with our products in unauthorized ways in the country in which you reside that has jurisdiction over the claim (emphasis added by the Defendant).

[6] The Defendant states that since the Plaintiff paid Meta to advertise her business on Instagram, she also had to agree to the "Ad Terms", by clicking on them. The relevant clause of the Ad Terms reads as follows:

17. Any claim, cause of action or dispute that arises out of or relates to these Ad Terms is subject to the disputes resolution clause in the Commercial Terms.

[7] The evidence in the record shows that to advertise on Instagram you must agree to the Ad Terms. The Ad Terms incorporate by reference a hyperlinked document titled the "Commercial Terms", the relevant clauses of which are the following:

Commercial Claims outside the United States: If you reside outside the United States or your business is located outside the United States, you agree that:

Any Commercial Claim between you and Meta Platforms, Inc. must be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, that you submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim, and that the laws of the State of California will govern these Commercial Terms and any such claim, without regard to conflict of law provisions.

Any Commercial Claim between you and Meta Platforms Ireland Limited must be resolved exclusively in the courts of the Republic of Ireland, that you submit to the personal jurisdiction of the Republic of Ireland for the purpose of litigating any such claim, and the laws of the Republic of Ireland will govern these Commercial Terms and any such claim, without regard to conflict of law provisions.

Notwithstanding (i) and (ii) above, any Commercial Claim between you and both Meta Platforms, Inc. and Meta Platforms Ireland Limited must be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, that you submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim, and that the laws of the State of California will govern these Commercial Terms and any such claim, without regard to conflict of law provisions.

Without prejudice to the foregoing, you agree that, in our sole discretion, we may also bring any claim we have against you related to efforts to abuse, interfere, or engage with our Products in unauthorized ways in the country in which you reside that has jurisdiction over the claim.

[8] The Plaintiff pleaded that although she advertised on Instagram, and she must have clicked on the Ad Terms, she does not recall specifically agreeing to the Commercial Terms through the Ad Terms due the confusion of navigating multiple hyperlinks.

[9] Meta relies on Rule 208 of the *Federal Court Rules*, SOR/98-106 [Rules] to argue that this Court should decline to exercise its jurisdiction over the Claim in favour of the binding and

enforceable Disputes Clause to which the Plaintiff agreed, and permanently stay the Claim against Meta.

II. Decision

[10] I grant Meta's motion and permanently stay the Claim based on the dispute clauses present in the binding agreements between the Defendant and the Plaintiff.

III. Analysis

A. *Is the Plaintiff bound by Instagram's Terms of Use and are they enforceable?*

[11] The parties do not dispute that the Plaintiff agreed to Instagram's Terms of Use. The full Terms of Use were accessible by hyperlink when the Plaintiff created her Instagram account. As stated by Justice Denis Gascon in *Zanin v Ooma, Inc*, 2025 FC 51 at para 75, even if a consumer does not click or read the hyperlinked materials, the presence of the link to terms and conditions in an electronic consumer contract suffices to bind the consumer to the terms (see also *Uber Technologies Inc v Heller*, 2020 SCC 16 at para 181 [*Uber*], citing *Hazell v Doordash Technologies Canada Inc*, 2022 BCSC 2497 at para 74; see also *Tahmasebpour v Freedom Mobile Inc*, 2024 BCSC 726 at para 26). By creating the Instagram account, the Plaintiff was bound to Instagram's Terms of Use.

[12] Meta relies on *Loan Away Inc v Facebook Canada Ltd*, 2021 ONCA 43 [*Loan Away*] to argue that in commercial contexts, outside of exceptional circumstances, forum selection

clauses are generally valid and enforceable subject to the following two-step approach articulated in para 21:

(a) the party seeking to enforce the clause must show that the clause is clear, valid and enforceable, and applies to the claim before the Court; and

(b) once the clause is found to be enforceable, the onus shifts to the plaintiff to establish that there is a strong cause not to enforce the forum selection clause (see *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27 at paragraphs 20, 39, 47, for the history on the development of the test).

[13] Therefore, in commercial contexts such as this, as highlighted in *Momentous.ca Corp v Canadian American Assn. of Professional Baseball Ltd*, 2010 ONCA 722 [*Momentous*] and *Loan Away*, courts tend to enforce forum selection clauses to ensure certainty and predictability in business relationships. The courts generally hold sophisticated parties to the agreements they have made.

[14] However, the "strong cause" exception could allow a party to avoid a forum selection clause, as seen in a case relied by the Plaintiff, *Douez v Facebook, Inc*, 2017 SCC 33 [*Douez*]. The onus is on the party seeking to avoid the clause to demonstrate such a strong cause. This could be on the basis of inequality of bargaining power, public policy concerns, or the inconvenience and expense of litigating in the chosen forum.

[15] In considering what factors affect the enforceability of the forum selection clause in question in this business context, I am guided by the jurisprudence presented by both parties in discussing the following:

- **Nature of the Relationship:** The Plaintiff is a business owner and her Instagram account in question is considered a commercial entity. In such cases, courts are inclined to enforce the forum selection clause, such as in *Momentous* where the Court emphasized that forum selection clauses are important for creating certainty and security in commercial transactions.
- **Inequality of Bargaining Power:** The Instagram Terms of Use agreement is contract of adhesion, meaning it is a "take it or leave it" agreement with no room for negotiation. The Instagram users must agree to it in its entirety in order to be able to open their account. While inequality of bargaining power can be a factor, as noted in *Douez* and *Uber*, it is not typically sufficient, on its own, to invalidate a forum selection clause, unless it rises to the level of unconscionability. The *Uber* case is particularly instructive in the discussion of unconscionability, when the court found that the terms of the arbitration clause had the effect of preventing access to justice. However, *Uber* is an employment case and *Amazon.com* distinguished it from cases governing commercial relationships and disputes. Further, as the Plaintiff's evidence demonstrate, the commercial use of her Instagram account had allowed her to run a for-profit business with little investment or overhead. The Plaintiff's visa statement in August 2023, showed that she had spent under \$15 in advertising her business on Instagram.. Therefore, while she could not negotiate the terms of the agreement with Meta, she did not suffer unconscionability. In fact, she enjoyed a commercial operation with little costs.

- **Fairness and Convenience:** The courts in *Douez* and *Loan Away* considered the fairness and convenience of requiring a party to litigate in the selected forum, particularly the expense and inconvenience to the plaintiff. A business owner would have to demonstrate significant hardship or unfairness to overcome the forum selection clause. This is more likely in the consumer context, as considered in *Douez*, where the Court recognized that the test may be applied differently depending on the context. The context in *Douez* was protecting the privacy rights of the individual involved, which is distinguishable from the Plaintiff's pure commercial interest in this case.
- **Access to Justice:** *Uber* established the principle that contractual terms which act as a bar to justice will not be enforced. In a related way, *Douez* also held that forum selection clauses should not be enforced if they prevent access to justice, and that the courts should consider whether the local court is better placed to hear the case on its merits. However, I find that the Plaintiff's reliance on *Douez* to be misplaced as the case dealt with a fundamental right of individuals, namely their privacy. Suing for damages in the context of the commercial relationship before me does not invoke the same access to justice issues.

[16] While I sympathize with the additional expense and inconvenience the Plaintiff will likely face by pursuing her claim in California, I find that there is no strong cause to avoid enforcing the forum selection clauses.

B. *Is the Plaintiff considered a consumer under the Instagram Terms of Use?*

[17] Provided that the Plaintiff was bound by the Terms of use, and it was enforceable, I now turn to contractual interpretation to understand if the clause applies to the Plaintiff.

[18] Meta argues that the dispute clauses to which the Plaintiff has agreed stipulate that the Plaintiff cannot launch a legal action against Meta outside of California. The Instagram User Agreement only allows Canadian “consumers” to seek legal remedies from Canadian courts and that “in all other cases”, the person agrees that the claim “must be resolved exclusively” in one of the options provided in California.

[19] Meta argues that the owner of an account exclusively used for a for-profit business is not a consumer for the purposes of interpreting the Instagram Terms. Meta agreed that the Instagram User Agreement does not define the term “consumer” but submitted that the ordinary interpretation of the term does not contemplate a business. For this, Meta submitted that the term should be interpreted in the jurisdiction where the Plaintiff lives and understands this word, namely British Columbia. As such, to interpret the definition of consumer, Meta relied on the definition provided by the British Columbia *Business Practices and Consumer Protection Act*, SBC 2004, c2 to argue that a consumer is often an individual who has purchased goods in a nonbusiness transaction and may need legislative protection:

Definitions

1(1) In this Act

"consumer" means an individual, whether in British Columbia or not, who participates in a consumer transaction, but does not include a guarantor;

"consumer transaction" means

(a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or

(b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a),

and, except in Parts 4 and 5, includes a solicitation of a consumer by a supplier for a contribution of money or other property by the consumer;

[20] Meta argues that even without the other two documents generated when the Plaintiff purchased advertisement, by the operation of the Instagram Terms of Use, the Claim cannot be litigated in Canadian courts. However, even if this Court finds that there is ambiguity in the term consumer, or that the definition provided by a Canadian act cannot be read into to a contract that does not even recognize the jurisdiction of Canadian courts, then the existence of the Ad Terms and the Commercial Terms, both of which are binding on the Plaintiff who placed ads, are also binding on her. As discussed, the presence of a hyperlink is sufficient to bind the consumer to those terms, even if they do not click or read the linked material (*Ooma* at para 75). The Ad Terms and Commercial Terms prohibit a purchaser of an ad outside of the United States to litigate a case outside of the specific courts in California.

[21] The Plaintiff argued that Meta's agreements are unfair in the sense that she could not engage in negotiating them, and that the Ad Terms that incorporate the Commercial Terms, create confusion and the hyperlinks are difficult to navigate. She also pointed to the more favourable terms applicable to the American users of Meta platforms and argued that it was discriminatory and unfair to treat Canadians differently.

[22] I find that the Plaintiff's Instagram account's exclusive commercial use is inconsistent with her claim that she was a consumer. She agreed that Instagram offers the opportunity to its users to also use it for personal purposes, such as sharing their personal pictures with their friends or family. The Claim seeks damages for the Plaintiff's loss of profit, loss of revenue and business opportunities and her inability to sell her inventory due to Meta's closure of her account.

[23] To conclude that the Plaintiff's commercial activities would reasonably take her out of the "consumer" category of the Instagram User Agreement, I am guided by *Difederico v Amazon.Com, Inc*, 2022 FC 1256 [*Amazon.com*] where the Court had to determine if the relationship between Amazon and a customer who purchased products online was "commercial" in nature. The Court determined that even though the plaintiff was a consumer, her claims had a commercial character. The plaintiff in *Amazon.com* had alleged that Amazon engaged in criminal price fixing by conspiring with third-party sellers. Although the plaintiff was an ordinary consumer who overpaid for goods, the conduct that led to the harm was commercial because it involved "anti-competitive conduct related to the plaintiff's purchases of products online" (*Amazon.com* at para 63).

[24] In *Amazon.com*, the Court noted that the plaintiff's claims centered on allegations that Amazon entered into commercial agreements with third-party sellers on its sites regarding the pricing of goods. These agreements were deemed to be commercial transactions between business entities. The Court stated that the agreements were "akin to a 'trade transaction for the supply or exchange of goods or services' or 'distribution agreement'" (*Amazon.com* at para 65). The Court emphasized that the focus should be on the nature of the dispute rather than the

nature of the relationship between the parties. The Court referenced *Uber*, and distinguished commercial disputes from employment disputes which were central to *Uber*, noting that employment disputes are not covered by the word “commercial” (*Amazon.com* at para 60).

[25] Ultimately, the Court in *Amazon.com* concluded that the term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. The court noted that relationships of a commercial nature include any trade transaction for the supply or exchange of goods or services, distribution agreements, and other forms of industrial or business cooperation.

[26] The Plaintiff argued that being a consumer to Instagram and have a commercial relationship with them are not necessarily mutually exclusive. She can be both a consumer and a commercial entity, and as such, she should have access to Canadian courts. However, section 7.4 of the Instagram Terms of Use creates only two categories of potential litigants: consumers and “all other(s)”. when the agreement distinguishes only between consumers and all other parties, any engagement in activities that go beyond purely consumer relationship necessarily places one in the latter category.

[27] Moreover, *Amazon.com* case illustrates that a commercial relationship is not solely defined by the direct nature of a transaction but also by the underlying conduct and agreements, even when a consumer is involved. The case highlights that the nature of the dispute and the presence of commercial agreements between businesses are key factors in determining whether a relationship is considered commercial. These elements also existed in the case at bar when the

Plaintiff placed ads and agreed to the Ad Terms and the Commercial Terms that also require her to litigate in California.

[28] The Plaintiff also relied on *St-Arnaud c Facebook inc*, 2011 QCCS 1506 [*St-Arnaud*] to argue that Meta's position is contradictory to an earlier position. While Mr. St-Arnaud tried to argue that he was a consumer in a consumer relationship with Facebook to avoid the jurisdiction clause in the Terms of Service, Facebook argued that because its service was free to use, it was not a commercial relationship with consumers, and therefore not subject to the legal protections for consumer contracts. The Court sided with Facebook's position, finding that the relationship was not a consumer one. The Plaintiff argues that since the use of an Instagram account is free, Meta cannot now argue that it was in a commercial relationship with the Plaintiff, a contradictory position Facebook took in *St-Arnaud*.

[29] I find that there are two flaws with the Plaintiff's argument. First, the question of the relationship between Facebook and its users in *St-Arnaud* was being assessed under the Quebec Civil Code's definition of a consumer relationship (article 3149 CCQ). How Meta argued the case- in the legal context of that case, when the legal context was different, is irrelevant to this case. Second, on what is relevant to this case, the court acknowledged that the agreement between Facebook and its users was a contract of adhesion with no room for negotiation, and that the users, including Mr. St-Arnaud, had agreed to the jurisdiction clause by clicking on the "sign up" icon, and that the Terms of Use were readily available on the website.

[30] For all these reasons, I conclude that the Plaintiff is not a consumer for the purposes of the Instagram User Agreement. Therefore, I find that the Plaintiff's action against Meta is permanently stayed because the forum selection clause of the Instagram User Agreement is enforceable.

C. *Costs*

[31] Meta is seeking the costs of this motion.

[32] Rule 400 of the *Rules* gives the Court “full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.”

[33] Even though Meta has succeeded in obtaining the relief that it sought, in considering the factors in Rule 400(3), I also note that this issue was important to the Plaintiff who represented herself in this matter and dealt with issues that were of high importance and complex. I also find that it is not in public interest to further discourage the advancement of potentially evolving legal issues.

[34] Therefore, given the discretionary nature of costs and in considering the factors in Rule 400(3), I decline to award costs.

JUDGMENT in T-2269-24**THIS COURT'S JUDGMENT is that**

1. The Plaintiff's action against Meta is permanently stayed without costs.

“Negar Azmudeh”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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