SUPREME COURT OF NOVA SCOTIA
Citation: *Cyclesmith v. Salesforce.com*, 2024 NSSC 306

Date: 20241024
Docket: 529511
Registry: Halifax

Between:

Cyclesmith Incorporated

Plaintiff

v.

Salesforce.com Canada Corporation and
Salesforce Canada Corporation

Defendants

DECISION

Judge: The Honourable Justice Darlene A. Jamieson

Heard: September 25, 2024, in Halifax, Nova Scotia

Written Decision: October 24, 2024

Counsel: Gavin C. Giles, K.C., for the Plaintiff
Nasha Nijhawan, for the Defendants

By the Court:

Background

[1] The Defendant, Salesforce.com Canada Corporation ("Salesforce") moves for a stay of proceedings on the basis that the forum selection clauses contained in its Master Subscription Agreement ("MSA") are enforceable against the Plaintiff, Cyclesmith Incorporated ("Cyclesmith"). It says that the contract between the parties is governed by Ontario law and is subject to the exclusive jurisdiction of the Ontario courts.

[2] On December 29, 2023, Cyclesmith filed a Notice of Action and Statement of Claim alleging the "enhanced online retail sales platform using the defendant's proprietary CRM, "Commerce Cloud", and "Marketing Cloud," "cloud-based" computer solutions which the defendants were to custom design, install and provide training for" was never designed or implemented for them, never worked and there was a total failure in Salesforce's efforts on behalf of Cyclesmith. The relief sought by Cyclesmith includes all remuneration paid to Salesforce, loss of on-line sales etc. Cyclesmith has acknowledged that its claim is a breach of contract claim.

[3] The parties agree this court has territorial competence or jurisdiction as both Salesforce and Cyclesmith are Nova Scotia incorporated companies. As corporations registered under the Nova Scotia *Companies Act*, R.S., c. 81 the parties are considered to be persons ordinarily resident in the province over which the Nova Scotia Supreme Court has territorial competence. (*Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003, c. 2 at section 4(d)).

[4] Declining jurisdiction is a separate question from whether the court has jurisdiction. With territorial jurisdiction or competence established, I must decide whether to decline jurisdiction, given Salesforce's argument that the forum selection clauses apply. Cyclesmith opposes the motion, asking that this court preserve its jurisdiction.

Evidence

[5] In support of its motion, Salesforce filed two affidavits of Stephen M. Blank sworn on March 8, 2024 and on September 17, 2024. Mr. Blank is the Senior Corporate Counsel, Litigation at Salesforce Inc. Salesforce is a wholly owned subsidiary of Salesforce Inc. Mr. Blank gave evidence that the other named

Defendant, Salesforce Canada Corporation, is not a Salesforce related entity and he is not aware of the existence of such a corporation. Mr. Blank was cross examined.

[6] In response to the motion, Cyclesmith filed the affidavit of Andrew Feenstra sworn on September 9, 2024. Mr. Feenstra is the sole Director, Officer and Shareholder of Cyclesmith.

Overview of the Evidence

[7] Salesforce Inc. is a cloud-based software company that provides customer relationship management ("CRM") services. Salesforce Inc. is a publicly-traded company incorporated in Delaware. It is not a party to this action. The relevant contracts were entered into by its subsidiary Salesforce. Mr. Blank had no personal involvement with respect to the contracts entered into between the parties.

[8] Salesforce has no office or physical presence in Halifax, Nova Scotia. All of its Nova Scotia employees work remotely. Salesforce's only physical office locations in Canada are in Toronto, Ontario; Montreal, Quebec and Vancouver, British Columbia. The Toronto office is by far the largest, with more than 1,200 employees.

[9] Cyclesmith is a small and closely held Nova Scotia business. It carries on business from two retail locations (Halifax and Dartmouth). It also has a small on-line retail presence. Cyclesmith's business is in the retail sale, repair and servicing of bicycles, and in the sale of cycling accessories, including cycling specific clothing, protective equipment, such as helmets, lighting and nutrition and hydration. Cyclesmith's staff complement is usually in the range of 28 full-time and part-time employees, with approximately sixty percent of that number being full-time employees.

[10] By early 2022, Cyclesmith had been considering, for a few years, if it should, and how best to expand its small on-line retail presence. As the business started to expand, especially with the on-set of COVID-19, Cyclesmith started to consider the establishment of an enhanced on-line retail sales platform. As a result, Cyclesmith sent out solicitations, or informal requests for proposals, to service providers for the establishment of such a platform.

[11] Mr. Feenstra delegated the tasks related to the solicitations to one of his senior employees, Mr. George Inglis. As a result of inquires made by Mr. lnglis, Cyclesmith

became aware of Salesforce and what they could offer to assist in the expansion of Cyclesmith's on-line retail presence.

[12] There is no dispute that the parties entered into two contracts: a Salesforce Marketing Cloud Services Order Form ("MC contract") and a Salesforce Commerce Cloud Services Order Form ("CC contract"). Each were executed and dated January 28, 2022. The contract documents were prepared by Salesforce and sent to Cyclesmith in an electronic format for electronic signature. Mr. Feenstra signed the above documents electronically and returned them to Salesforce. There is no dispute the two contracts were properly executed. They were signed electronically, which the provisions of the *Electronic Commerce Act*, S.N.S. 2000, c. 26 allow.

[13] Mr. Feenstra said that prior to signing the contracts there was no mention made by anyone at Salesforce of a Master Services Agreement ("MSA"). He said that neither he nor Mr. Inglis were aware that disputes with Salesforce could only be resolved, as they allege, in Ontario.

[14] The MC contract contains a number of headings: Address Information, Terms and Conditions, Services, Usage Details, Pricing Schedule, Quote Special Terms, Product Special Terms and Purchase Order Information. The MSA is referred to four times in this contract, once under the heading Quote Special Terms, twice under Product Special Terms (NOTICE-Daorama Reports Infrastructure and SSL Certificate) and above the signature space where it states:

> Upon signature by Customer and submission to salesforce.com, this Order Form shall become legally binding unless this Order Form is rejected by salesforce.com for any of the following reasons: (1) the signatory below does not have the authority to bind customer to this order form, (2) changes have been made to this order form (other than completion of the purchase order information in the signature block), or (3) the requested purchase order information or signature is incomplete or does not match our records or the rest of this Order Form. Subscriptions are non-cancelable before their Order End Date. This Order Form is governed by the terms of the salesforce.com Masters Subscription Agreement found at https://www.salesforce.com/company/msa.jsp unless (i) Customer has a written master subscription agreement executed by salesforce.com for such Services as referenced in the Documentation, in which case such written salesforce.com master subscription agreement will govern or (ii) otherwise set for herein. Additional information related to the Services may be found in the Documentation at https://sfdc.co/ptd. For the avoidance of doubt, the applicable master services agreement takes precedence over the Documentation.
>
> [Emphasis added]

[15] The CC contract contains the same headings with the exception of there being no Pricing Schedule or Quote Special Terms headings. The MSA is referred to twice in this contract, once under the heading B2C Commerce-Growth-GMV and once above the signature section. An identical paragraph to that set out above appears immediately before the signature block.

[16] Mr. Blank gave evidence that the website address (URL) for the MSA contained in the Order Forms, above the signature block, was a functioning hyperlink. He also said that if someone needed to find the Salesforce MSA but did not have the link, they could still access it from the Salesforce website, where the current and all previous versions of the Master Subscription Agreement (since 1999) are posted. It can also be found in a Google search.

[17] The MSA contains an entire agreement clause:

> **12.3 Entire Agreement and Order of Precedence.** This Agreement is the entire agreement between SFDC and Customer regarding Customer's use of Services and Content and supersedes all prior and contemporaneous agreements, proposals or representations, written or oral, concerning its subject matter. The parties agree that any term or condition stated in a Customer purchase order or in any other Customer order documentation (excluding Order Forms) is void. In the event of any conflict or inconsistency among the following documents, the order of precedence shall be: (1) the applicable Order Form, (2) this Agreement, and (3) the Documentation. Titles and headings of sections of this Agreement are for convenience only and shall not affect the construction of any provision of this Agreement.

[18] The MSA contains the following clauses relating to choice of forum and choice of law.

> **12.09 SFDC Contracting Entity, Notices, Governing Law, and Venue.** The SFDC entity entering into this Agreement, the address to which Customer should direct notices under this Agreement, the law that will apply in any dispute or lawsuit arising out of or in connection with this Agreement, and the courts that have jurisdiction over any such dispute or lawsuit, depend on where the Customer is domiciled.
>
> …

If Customer is domiciled in:	**The SFDC entity entering into this Agreement is:**	**Notice should be addressed to:**	**Governing law is:**	**Courts with exclusive jurisdiction are:**

Canada	salesforce.com Canada Corporation, a Nova Scotia corporation	Salesforce Tower, 415 Missions Street, 3rd Floor, San Francisco, California, 94105, U.S.A., attn: VP Worldwide Sales Operations, with a copy to attn: General Counsel	Ontario and controlling Canadian federal law	Toronto, Ontario, Canada

…

> **12.11 Agreement to Governing Law and Jurisdiction.** Each party agrees to the applicable governing law above without regard to choice or conflicts of law rules, and to the exclusive jurisdiction of the applicable courts above.
>
> [Emphasis added]

[19] Electronic correspondence between the parties was exhibited to Mr. Feenstra's affidavit. The correspondence includes: a list of information being provided by Cyclesmith to Salesforce with respect to its operations, correspondence referring to virtual meetings, exchanges concerning cost and correspondence enclosing documents/order forms etc. On January 21, 2022 at 1:30 pm, Mr. Sean DeCaire of Salesforce sent to George Inglis of Cyclesmith an electronic message indicating:

> I wanted to send along the Commerce Cloud draft agreement so that you had all the paperwork from Salesforce you would need to review. Geoffrey also sent along the draft agreement for Marketing Cloud. We're open to any feedback and will be available to talk today if needed. As discussed, the annual cost for commerce cloud is $43,333 CAD and the agreement is 36 months with annual billing. If all looks good I can send a DocuSign, and if there are any questions I'll be here to help.
>
> I was very happy to see the ETG quote get down significantly to help us meet the budget for implementation. If that looks good to you I can have them create a contract including statement of work that can be signed…

[20] On January 28, 2022 at 3:52 pm Mr. DeCaire sent to Mr. Inglis four quotes. The electronic message states:

> Good to talk to you today! Here are the four quotes together in one email so you can easily access them to send to the bank as you mentioned. We're here to help with anything else you need.

[21] Shortly after this message there are further exchanges, including with Mr. Feenstra, concerning the quoted price and confirmation that it was being presented as a 36-month term. Mr. DeCaire indicated to Mr. Feenstra that if his explanation concerning pricing did not help, to please repeat the question as he would like to better understand the concern and that they could "jump on a call to clarify". Mr. Feenstra responded "Perfect. That's good. I just didn't see that broken down in the proposal." Following this Mr. Feenstra sent a further email indicating: "I'm (sic) just signed two DocuSign documents."

Parties' Positions

[22] Salesforce asks the court to enforce s. 12.09 and s. 12.11 of the MSA between the parties (together, the "forum selection clauses") which it says provide that the Ontario Superior Court in Toronto has exclusive jurisdiction over any claim arising out of or in connection with the contract between the parties and that Ontario law governs. It says that, because it is an exclusive (rather than a non-exclusive) jurisdiction clause, there is a presumption that the forum selection clause in the contract will be respected by the court. Salesforce submits that courts will usually enforce forum selection clauses in the commercial context.

[23] Salesforce says the exclusive jurisdiction clause is valid and enforceable. It argues there is no evidence that the forum selection clause in the MSA is unenforceable under any applicable contractual doctrine. Salesforce further argues there are no reasons to consider this case to be so exceptional as to allow the plaintiff to escape from the forum selection clause in the MSA.

[24] In advancing Ontario as the choice of law and forum in the MSA, Salesforce says it was legitimately pursuing its own interest in (a) uniform consideration of their contract within Canada by a single jurisdiction and (b) litigating disputes in the same location as its principal place of business in Canada, including the location of the majority of its employees and records.

[25] Cyclesmith says that Salesforce has not met its initial hurdle in demonstrating that the clause on which they purport to rely is valid, clear, enforceable and in the interests of justice. It says the MC contract was divided into multiple sections, heavily jargoned and employing multiple acronyms which were not defined. It says the font was small. It further says that buried in the last page of the fine print was the reference to the MSA and a website that was not hyperlinked. It makes similar comments with respect to the CC contract.

[26] With respect to the wording of the clauses in question, Cyclesmith says there is no such thing as "Ontario and controlling federal law", just as there is no such thing as "Toronto, Ontario, Canada" courts. It says that Clause 12.9 of the MSA, when read in its natural, plain and ordinary meaning, provides that the courts of Toronto, Ontario, Canada are Salesforce's exclusive jurisdiction courts. It argues ambiguity, in that, according to the Ontario Justice Education Network Handout: The Courts of Ontario Flowchart available on-line, there are three principal courts with registries, and in some instances, multiple registries, in Toronto: the Ontario Court of Appeal, the (Ontario) Superior Court of Justice and the Ontario Court of Justice. The Ontario Court of Justice currently operates through multiple divisions: Criminal, Family, Youth, Bail, Mental Health, *Gladue* and Drug Treatment. The Superior Court of Justice also currently operates through multiple divisions: Criminal, Family, Civil, Small Claims, and the Divisional Court itself. In addition, the Superior Court of Justice also functions as an appellate court for certain matters decided within the criminal and family jurisdictions of the Ontario Court of Justice. It says all of the drafting was undertaken by Salesforce and *contra proferentem* should apply. Therefore, to the significant extent that the alleged MSA is ambiguous on the question of exclusive dispute resolution forum, the impugned provisions cannot stand.

[27] It says that there was significant inequality of bargaining power between the parties and the caselaw says that inequality of bargaining power may be sufficient in-and-of-itself to oust the effectiveness of a dispute resolution or a forum selection clause.

[28] Cyclesmith further says that it is akin to an individual consumer in the current circumstances. Salesforce is part of a major multi-national corporation and in its commercial relationships imposes its will, whereas Cyclesmith is, for all intents and purposes, one person. It says there was no equality of bargaining power between the parties. Instead, it says, Salesforce had their standard terms which were only ever of the "take-it-or-leave-it" variety and also engaged in a subterfuge to disguise what it was really doing contractually. It says this was unfair and the contextual antithesis of good faith bargaining.

[29] Cyclesmith argues these were contracts of adhesion and its bargaining power was non-existent. It says it was subjected to a contract of adhesion proposed by a large and powerful party which held not only a significant, but a gross inequality of bargaining power. And now Salesforce seeks to have it address the contractual dispute on terms and conditions which are economically oppressive. It says the

principles set out in the Supreme Court of Canada decision in *Uber Technologies Inc. v. Heller*, 2020 SCC 16, regarding unconscionability, are applicable here. Cyclesmith also says there is much about the case that is similar to the so-called "ticket cases" where exclusionary or other important clauses are buried within standard form contracts and are not specifically drawn to the attention of the parties intended to be bound by them.

[30] With respect to a strong cause why the forum selection clauses should not be enforced, Cyclesmith says that Salesforce "went to unbridled lengths to hide from the respondent not only the alleged Master Services Agreement, but the alleged provisions *vis-à-vis* governing law and the court with the exclusive jurisdiction to hear and determine legal proceedings such as the ones herein" from it.

[31] Cyclesmith further argues unfairness, saying it would be unfair to deprive it of its longstanding counsel in Nova Scotia and force it to retain far more expensive legal representation in Ontario, most likely leading to it dropping its claim due to the significantly higher expense of litigating in Toronto.

[32] I note that Cyclesmith takes issue with the only evidence led by Salesforce being from Mr. Blank, a lawyer, who had no personal involvement in this matter. It questions why the evidence of those involved is not before the court nor an explanation as to why this evidence is not before the court. Salesforce is entitled to marshal its evidence as it sees fit. The signed contracts and related documents are before the court. Cyclesmith put before the court what it wished to be considered with respect to the electronic messages exchanged between the parties leading up to the execution of the contracts. Cyclesmith did not ask the court to draw any inference from this and I see none to be drawn.

The Law and Analysis

[33] The authority of this court to stay a proceeding is set out in s. 41(e) of the *Judicature Act*, R.S., c. 240:

> **Rules of law**
>
> **41** In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> …

> (e) no proceeding at any time pending in the Court shall be restrained by prohibition or injunction but every matter of equity on which an injunction against the prosecution of any such proceeding might have been obtained prior to the first day of October, 1884, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto provided always that nothing in this Act contained shall disable the Court from directing a stay of proceedings in any proceeding pending before the Court if it or he thinks fit, and any person, whether a party or not to any such proceeding who could have been entitled, prior to the first day of October, 1884, to apply to the Court to restrain the prosecution thereof, or who is entitled to enforce by attachment or otherwise any judgment, contrary to which all or any part of the proceedings have been taken, may apply to the Court thereof by motion in a summary way for a stay of proceedings in such proceeding either generally, or so far as is necessary for the purposes of justice and the Court shall thereupon make such order as shall be just;
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> …

[34] The law is clear that forum selection clauses in commercial contracts should be enforced, with a few exceptions (*Expedition Helicopters Inc. v. Honeywell Inc.*, [2010] O.J. No. 1998 at para. 24 (leave to appeal to SCC refused)). The starting point is always that parties should be held to their bargains. The Supreme Court explained in *Douez v. Facebook, Inc*., 2017 SCC 33 that forum selection clauses serve a valuable purpose:

> [24] Forum selection clauses serve a valuable purpose. This Court has recognized that they "are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law" (*Pompey*, at para. 20). Forum selection clauses are commonly used and regularly enforced.

[35] There is no dispute that the two-part test with respect to the enforceability of forum selection clauses as set out in *Douez, supra*, applies. The Supreme Court said that the applicable common law test of "strong cause" first requires the defendant to demonstrate that a valid and enforceable exclusive jurisdiction clause exists and applies to the claim brought contrary to it, at which point the burden shifts to the plaintiff to show "strong cause" why the clause should not be enforced to stay the action:

> [28] Instead, where no legislation overrides the clause, courts apply a two-step approach to determine whether to enforce a forum selection clause and stay an action brought contrary to it (*Pompey*, at para. 39). At the first step, the party

> seeking a stay based on the forum selection clause must establish that the clause is "valid, clear and enforceable and that it applies to the cause of action before the court" (*Preymann v. Ayus Technology Corp.*, 2012 BCCA 30, 32 B.C.L.R. (5th) 391, at para. 43; see also *Hudye Farms*, at para. 12, and *Pompey*, at para. 39). At this step of the analysis, the court applies the principles of contract law to determine the validity of the forum selection clause. As with any contract claim, the plaintiff may resist the enforceability of the contract by raising defences such as, for example, unconscionability, undue influence, and fraud.
>
> [29] Once the party seeking the stay establishes the validity of the forum selection clause, the onus shifts to the plaintiff. At this second step of the test, the plaintiff must show strong reasons why the court should not enforce the forum selection clause and stay the action. In *Pompey*, this Court adopted the "strong cause" test from the English court's decision in *The* "*Eleftheria"*, [1969] 1 Lloyd's Rep. 237 (Adm. Div.). In exercising its discretion at this step of the analysis, a court must consider "all the circumstances", including the "convenience of the parties, fairness between the parties and the interests of justice" (*Pompey*, at paras. 19 and 30-31). Public policy may also be a relevant factor at this step (*Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, at para. 91, referred to in *Pompey*, at para. 39; *Frey*, at para. 115).
>
> [Emphasis added]

Further, in exercising my discretion under the test, I am to take into account all of the circumstances of the case (*Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 SCR 450 at p. 473, para. 39).

[36] The parties agree that if the forum selection clauses are clear, valid and enforceable, then they should be upheld by this court unless Cyclesmith has successfully demonstrated "strong cause" not to give effect to the contract. At the first step of the analysis, I am to apply the general principles of contract law (*Douez*, *supra*, at para. 28).

[37] Cyclesmith argues Salesforce cannot meet the first part of the test. It says the forum selection clauses are ambiguous as there is no such thing as "Ontario and controlling federal law", just as there is no such thing as "Toronto, Ontario, Canada" courts. I note during argument that Cyclesmith acknowledged it did not "toll a lot on this" argument. It also says the forum selection clauses are unconscionable and, therefore, invalid. It also relies on the principles set out in the "so called" ticket cases.

[38] In the interpretation exercise, the words of an agreement are always the starting point. The Supreme Court of Canada said in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 that the overriding concern is to determine the objective

intent of the parties, through the application of legal principles of interpretation and consistent with the surrounding circumstances:

> [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744 (S.C.C.), at para. 27 per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 64-65 per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, per Lord Wilberforce)
>
> [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300 (Man. C.A.), at para. 15, per Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society (1997)*, [1998] 1 All E.R. 98 (U.K. H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]
> >
> > …
>
> [49] … Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation…
>
> [Emphasis added]

[39] Surrounding circumstances or the factual matrix is broad and may include many things, but the case law is clear that it does not include evidence of negotiations leading up to the final agreement or the subjective intentions of the parties.

[40] I agree with Salesforce that the forum selection clauses are sufficiently clear. There is no ambiguity about choice of law or jurisdiction. The wording "Ontario or controlling federal law" reflects the fact that depending on the subject-matter of the claim, applicable law could be provincial or federal. The wording "Courts with exclusive jurisdiction are: Toronto, Ontario, Canada" is also not ambiguous nor unclear. Cyclesmith's claim would be filed in the Ontario Superior Court of Justice in Toronto. As Salesforce points out, depending on the value of a claim, a litigant may file in the Small Claims Court. Salesforce contracted that any claim was to be filed in Toronto, as opposed to another court registry in Ontario. This is in keeping with Salesforce's Toronto office being its the largest in Canada.

[41] I note that similar broad wording has been interpreted in other cases without issue. For example, the forum selection clause in *Pompey*, *supra*, stated: "the contract evidenced by or contained in this bill of Lading is governed by the law of Belgium, and any claim or dispute arising hereunder or in connection herewith shall be determined by the courts in Antwerp and no other courts." The Supreme Court had no issue in finding this clause met step one of the test, as being a valid and enforceable exclusive jurisdiction clause. I further note, the Ontario Court of Appeal decision in *Manjos v. Fridgant*, 2016 ONCA 176 where the wording of the clause in question said, "the Agent and the client will submit exclusively to courts in British Columbia" and the decision in *Pentacap LLC v. ACI Capital Partners Inc*., 2024 NSSC 5 where the clause said "… governed by Illinois laws, with Illinois jurisdiction"). In those cases a state or province was specified. They did not specify a level of court.

[42] While Salesforce Inc. is a huge multinational corporation, with billions in revenue per year, I am unable to find any grossly uneven bargaining power nor are the clauses invalid due to unconscionability. My reasons are set out below.

[43] Cyclesmith says there is little distinction between the circumstances of the respondent in *Uber*, *supra*, and Cyclesmith in the current context. That case did not involve a forum selection clause and was not considering the "strong cause" test; rather, the issue was whether an arbitration clause was unconscionable and, therefore, invalid. To become a driver for Uber in Toronto, Mr. Heller had to accept the terms of a standard form services agreement which stated that any disputes were

to be resolved through mediation and arbitration in the Netherlands. Cyclesmith says both the current case and *Uber*, *supra*, had:

> … issues arising out of contract. Both were subject to contracts of adhesion proposed by large and powerful parties which held not only a significant, but a gross, inequality of bargaining power. Both sought – or are seeking – the determination of their contractual issues in the domestic courts. And both were told that to address those contractual issues, both would have to do so on terms and conditions which were economically oppressive.

[44] In *Uber*, the Supreme Court found the arbitration clause to be unconscionable and invalid. As indicated above, I do not find support for an inequality of bargaining power that resulted in an improvident or an unconscionable bargain.

[45] There is no evidence before me that Cyclesmith could not protect its own interests. There was no necessity nor any dependence on Salesforce. In fact, the evidence indicates Cyclesmith solicited proposals, weighed them, had options to contract with providers other than Salesforce, had various discussions with Salesforce before entering the contracts, raised questions concerning price and had the opportunity to query the contractual terms and chose not to do so. These facts bear little resemblance to those in *Uber*, *supra*.

[46] Salesforce acknowledges that the contracts (other than the information specific to the project and pricing, etc.) are standard form contracts. Simply by using a standard form contract does not automatically result in an inequality of bargaining power (see para 88 of *Uber*, *supra*). Further, this was not a take it or leave it situation. The forum selection clauses were not adhesive terms resulting from grossly unequal bargaining power.

[47] It is useful to note the Supreme Courts comments in *Uber*, *supra*, concerning unconscionability:

> [60] This Court has often described the purpose of unconscionability as the protection of vulnerable persons in transactions with others (*Hodgkinson v. Simms*, [1994] 3 S.C.R. 377(S.C.C.), at pp. 405 and 412; *Syncrude Canada Ltd. v. Hunter Engineering Co.*, [1989] 1 S.C.R. 426(S.C.C.), at p. 462, per Dickson C.J., and p. 516, per Wilson J.; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226(S.C.C.), at p. 247; see also *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494(S.C.C.), at para. 43). We agree. Unconscionability, in our view, is meant to protect those who are vulnerable *in the contracting process* from loss or improvidence to that party in the bargain that was made (see Mindy Chen-Wishart, *Unconscionable Bargains* (1989), at p. 109; see also James Gordley, "Equality in Exchange" (1981), 69 *Cal. L. Rev.* 1587, at pp.

1629-34; *Birch*, at para. 44). Although other doctrines can provide relief from specific types of oppressive contractual terms, unconscionability allows courts to fill in gaps between the existing "islands of intervention" so that the "clause that is not quite a penalty clause or not quite an exemption clause or just outside the provisions of a statutory power to relieve will fall under the general power, and anomalous distinctions ... will disappear" (S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at p. 378).

[61] Openly recognizing a doctrine of unconscionability also promotes fairness and transparency in contract law (Swan, Adamski and Na, at p. 925; McCamus, at p. 438; Stephen Waddams, *Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment* (2019), at p. 225). There is value in recognizing that "judges are and always will be concerned with unfairness, with arrangements that work harshly and with conduct that is oppressive" (Swan, Adamski and Na, at p. 925). The unconscionability doctrine allows courts to "focus expressly on the real grounds for refusing to give force to a contractual term said to have been agreed to by the parties" (*Hunter Engineering Co.*, at p. 462). As Dickson C.J. observed in *Hunter Engineering Co.*:

> In my view, there is much to be gained by addressing directly the protection of the weak from over-reaching by the strong.... There is little value in cloaking the inquiry behind a construct that takes on its own idiosyncratic traits, sometimes at odds with concerns of fairness. [p. 462]

[62] Most scholars appear to agree that the Canadian doctrine of unconscionability has two elements: "... an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant and ... an improvident transaction" (McInnes, at p. 524 (emphasis deleted); see also Swan, Adamski and Na, at p. 986; McCamus, at pp. 424 and 426-27; Benson, at p. 167; Waddams (2017), at p. 379; Stephanie Ben-Ishai and David R. Percy, eds., *Contracts: Cases and Commentaries* (10th ed. 2018), at p. 719).

…

[69] One common example of inequality of bargaining power comes in the "necessity" cases, where the weaker party is so dependent on the stronger that serious consequences would flow from not agreeing to a contract. This imbalance can impair the weaker party's ability to contract freely and autonomously. When the weaker party would accept almost any terms, because the consequences of failing to agree are so dire, equity intervenes to prevent a contracting party from gaining too great an advantage from the weaker party's unfortunate situation. As the Privy Council has said, "as a matter of common fairness, 'it [is] not right that the strong should be allowed to push the weak to the wall'" (*Janet Boustany v. George Pigott Co (Antigua and Barbuda)*, [1993] UKPC 17, at p. 6 (BAILII), quoting *Alec Lobb (Garages) Ltd. v. Total Oil Great Britain Ltd.*, [1985] 1 W.L.R. 173, at p. 183; see also *Lloyd's Bank v. Bundy*, [1975] Q.B. 326 (C.A.), at pp. 336-37).

[70] The classic example of a "necessity" case is a rescue at sea scenario (see *The Medina* (1876), 1 P.D. 272). The circumstances under which such agreements are made indicate the weaker party did not freely enter into the contract, as it was the product of his "extreme need ... to relieve the straits in which he finds himself" (*Bundy*, at p. 339). Other situations of dependence also fit this mould, including those where a party is vulnerable due to financial desperation, or where there is "a special relationship in which trust and confidence has been reposed in the other party" (*Norberg*, at p. 250, quoting Christine Boyle and David R. Percy, *Contracts: Cases and Commentaries* (4th ed. 1989), at pp. 637-38). Unequal bargaining power can be established in these scenarios even if duress and undue influence have not been demonstrated (see *Norberg*, at pp. 247-48; see also McInnes, at p. 543).

[71] The second common example of an inequality of bargaining power is where, as a practical matter, only one party could understand and appreciate the full import of the contractual terms, creating a type of "cognitive asymmetry" (see Smith, at pp. 343-44). This may occur because of personal vulnerability or because of disadvantages specific to the contracting process, such as the presence of dense or difficult to understand terms in the parties' agreement. In these cases, the law's assumption about self-interested bargaining loses much of its force. Unequal bargaining power can be established in these scenarios even if the legal requirements of contract formation have otherwise been met (see Sébastien Grammond, "The Regulation of Abusive or Unconscionable Clauses from a Comparative Law Perspective" (2010), 49 *Can. Bus. L.J.* 345, at pp. 353-54).

[72] These examples of inequality of bargaining power are intended to assist in organizing and understanding prior cases of unconscionability. They provide two examples of how weaker parties may be vulnerable to exploitation in the contracting process. Regardless of the type of impairment involved, what matters is the presence of a bargaining context "where the law's normal assumptions about free bargaining either no longer hold substantially true or are incapable of being fairly applied" (Bigwood, at p. 185 (emphasis deleted); see also Benson, at pp. 189-90). In these circumstances, courts can provide relief from a bargain that is improvident for the weaker party in the contracting relationship.

[73] This leads us to the second element of unconscionability: an improvident bargain.

[74] A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable (see McCamus, at pp. 426-27; Chen-Wishart (1989), at p. 51; Benson, at p. 187; see also Waddams (2017), at p. 303; Stephen Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (2011), at pp. 87 and 121-22). Improvidence is measured at the time the contract is formed; unconscionability does not assist parties trying to "escape from a contract when their circumstances are such that the agreement *now* works a hardship upon them" (John-Paul F. Bogden, "On the 'Agreement Most Foul': A Reconsideration of the Doctrine of Unconscionability" (1997), 25 *Man. L.J.* 187, at p. 202 (emphasis in original)).

[75] Improvidence must be assessed contextually (McInnes, at p. 528). In essence, the question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. An undue advantage may only be evident when the terms are read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties (see Chen-Wishart (1989), at pp. 51-56; McInnes, at pp. 528-29; Reiter, at pp. 417-18).

…

[93] There was clearly inequality of bargaining power between Uber and Mr. Heller. The arbitration agreement was part of a standard form contract. Mr. Heller was powerless to negotiate any of its terms. His only contractual option was to accept or reject it. There was a significant gulf in sophistication between Mr. Heller, a food deliveryman in Toronto, and Uber, a large multinational corporation. The arbitration agreement, moreover, contains no information about the costs of mediation and arbitration in the Netherlands. A person in Mr. Heller's position could not be expected to appreciate the financial and legal implications of agreeing to arbitrate under ICC Rules or under Dutch law. Even assuming that Mr. Heller was the rare fellow who would have read through the contract in its entirety before signing it, he would have had no reason to suspect that behind an innocuous reference to mandatory mediation "under the International Chamber of Commerce Mediation Rules" that could be followed by "arbitration under the Rules of Arbitration of the International Chamber of Commerce", there lay a US$14,500 hurdle to relief. Exacerbating this situation is that these Rules were not attached to the contract, and so Mr. Heller would have had to search them out himself.

[94] The improvidence of the arbitration clause is also clear. The mediation and arbitration processes require US$14,500 in up-front administrative fees. This amount is close to Mr. Heller's annual income and does not include the potential costs of travel, accommodation, legal representation or lost wages. The costs are disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into. The arbitration agreement also designates the law of the Netherlands as the governing law and Amsterdam as the "place" of the arbitration. This gives Mr. Heller and other Uber drivers in Ontario the clear impression that they have little choice but to travel at their own expense to the Netherlands to individually pursue claims against Uber through mandatory mediation and arbitration in Uber's home jurisdiction. Any representations to the arbitrator, including about the location of the hearing, can only be made after the fees have been paid.

[95] The arbitration clause, in effect, modifies every other substantive right in the contract such that all rights that Mr. Heller enjoys are subject to the apparent precondition that he travel to Amsterdam,[7] initiate an arbitration by paying the required fees and receive an arbitral award that establishes a violation of this right. It is only once these preconditions are met that Mr. Heller can get a court order to enforce his substantive rights under the contract. Effectively, the arbitration clause

> makes the substantive rights given by the contract unenforceable by a driver against Uber. No reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it.
>
> [Emphasis added]

Clearly the current circumstances are not similar to those found in *Uber*, *supra*.

[48] I do not agree that Cyclesmith, in the current context of its dealings with Salesforce, is analogous to an individual consumer. It is a for profit business, and operates two retail outlets, employing 28 people, with annual revenue of 6.8 million. Mr. Feenstra described in his affidavit a 25-year relationship with his legal counsel, indicating counsel had guided Cyclesmith:

> … and its various shareholders through a number of contentious or potentially contentious matters, including acquisitions and shareholder take-outs, the potential addition of new shareholders, human resources issues, real property and leasing transactions, construction disputes, corporate borrowings and related guarantees, dealer agreements, customers discontentment, on-line harassment, and general legal advice and direction, to name some of them.

In this context, it is also difficult for Cyclesmith to argue it was an unsophisticated party.

[49] Unlike the consumer cases where the contract was essentially forced on the consumer, that is not the case here. Although it was presented with a standard form contract, Cyclesmith had an opportunity to negotiate. Price was certainly discussed. The electronic messages from Salesforce invited discussion saying, for example, when the draft CC contract was sent "We're open to any feedback and will be available to talk today if needed." When the four quotes were sent on January 28, 2022 they said, "We're here to help with anything else you need." When Mr. Feenstra indicated he had a question about pricing he did not hesitate to direct it to Mr. DeCaire at Salesforce who replied within minutes with his explanation and again indicated an availability for discussion saying, "If this doesn't help, can you repeat the question as I'd like to better understand the concern."

[50] In addition, Mr. Blank said in his reply evidence that some customers do have an opportunity to negotiate with respect to feedback or concerns about the standard form terms of the MSA. Internally, Salesforce has a threshold contract value amount above which it is willing to enter into individual modifications to the terms of their standard form agreement. At the time the MC and CC contracts were entered into, their value would have qualified for possible amendments, if Cyclesmith had

requested them. In addition, it is clear from the contract itself that some customers do have individualized MSAs. The Order Form clause above the signature block says it is governed by the terms of the standard form MSA, unless "Customer has a written master subscription agreement executed by salesforce.com for such Services as referenced in the Documentation, in which case such written salesforce.com master subscription agreement will govern".

[51] Mr. Feenstra and Mr. Inglis on receipt of the responses to their solicitations, considered them and chose Salesforce from the various provider options available to them. After receipt of the proposed Order Form contracts from Salesforce they could have chosen not to proceed. They were free to decide to choose another provider, if the terms of the contract were not to their liking.

[52] Cyclesmith says that the evidence that there was an option to negotiate due to the value of the contract does not fit with Salesforce's position that it wished matters addressed in Toronto, where its largest Canadian office is located. However, while Salesforce said the MSA was open for negotiation at certain contract value thresholds, it did not say definitively that it would agree to change the forum selection clauses. Cyclesmith, if it had read the contracts and raised the forum selection clauses, may well have been advised those were non-negotiable. It then would have had the option of walking away and doing business with another provider.

[53] I do not agree with Cyclesmith's argument that the circumstances here are similar to those of the so called "ticket cases". As noted above, the evidence illustrates that Cyclesmith sought out Salesforce with a solicitation; Cyclesmith was considering other providers; it had time to consider the contracts presented that incorporated the MSA and forum selection causes; it was offered opportunities to ask questions of Salesforce and it could have sought legal advice before it entered into contracts valued at approximately $250,000 CAD.

[54] Based on evidence before me, I am of the view that these were commercial parties entering into a commercial contract for commercial purposes. Cyclesmith sought out Salesforce; it sent out solicitations or informal requests for proposals to various providers. It then considered the responses it received to those solicitations; it had discussions with Salesforce and then chose to proceed with the Salesforce Marketing Cloud and Commerce Cloud solutions for its online retail presence. It questioned the pricing and then chose to enter into the contracts, without any attempt

to vary any of the terms in the contracts. I am of the view that Cyclesmith was capable of protecting its own interests in the transaction.

[55] In summary, I find that the forum selection clauses are valid and enforceable. I further find they are applicable to the matters plead in the action brought by Cyclesmith. The wording of the forum selection clauses is sufficiently broad to encompass the contract claims set out in the Statement of Claim. Clause 12.09 (reproduced at para. 18 above) includes the following wording "any dispute or lawsuit arising out of or in connection with this Agreement."

[56] I now turn to the second part of the test. Cyclesmith must show strong cause why the court should not enforce the forum selection clause. It is only in exceptional circumstances that there will be a departure from enforcing a valid commercial contract (para. 21 of *Pompey*, *supra*). *Expedition Helicopters*, *supra*, set out a "few" exceptional factors that could represent strong cause to retain jurisdiction:

> [24] A forum selection clause in a commercial contract should be given effect. The factors that may justify departure from that general principle are few. The few factors that might be considered include the plaintiff was induced to agree to the clause by fraud or improper inducement or the contract is otherwise unenforceable, the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim, the claim or the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause, the plaintiff can no longer expect a fair trial in the selected forum due to subsequent events that could not have been reasonably anticipated, or enforcing the clause in the particular case would frustrate some clear public policy. Apart from circumstances such as these, a forum selection clause in a commercial contract should be enforced.

[57] This was reiterated in *Douez*, *supra,* where the Supreme Court said the strong cause factors, while not a closed list (para. 30), have been interpreted and applied restrictively in the commercial context.:

> [31] That said, the strong cause factors have been interpreted and applied restrictively in the commercial context. In commercial interactions, it will usually be desirable for parties to determine at the outset of a business relationship where disputes will be settled. Sophisticated parties are justifiably "deemed to have informed themselves about the risks of foreign legal systems in agreeing to a forum selection clause" (*Aldo Group Inc. v. Moneris Solutions Corp.*, 2013 ONCA 725, 118 O.R. (3d) 81 (Ont. C.A.), at para. 47). In this setting, our Court recognized that forum selection clauses are generally enforced and to be encouraged "because they provide international commercial relations with the stability and foreseeability required for purposes of the critical components of private international law,

> namely order and fairness" (*GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 22).
>
> [Emphasis added]

[58] The court further noted that commercial and consumer relationships are different (*Douez, supra*, para. 33) and said it modified the strong cause factors in the consumer context:

> [35] As these cases recognize, different concerns animate the consumer context than those that this Court considered in *Pompey*, where a sophisticated commercial transaction was at issue. Because of these concerns, we agree with Ms. Douez and several interveners that the strong cause test must account for the different considerations relevant to this context.
>
> [36] In our view, recognizing the importance of factors beyond those specifically listed in "*Eleftheria"* is an appropriate incremental response of the common law to a different context (*Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.), at paras. 33-34 and 40). Such a development is especially important since online consumer contracts are ubiquitous, and the global reach of the Internet allows for instantaneous cross-border consumer transactions. It is necessary to keep private international law "in step with the dynamic and evolving fabric of our society" (*R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.), at p. 670).
>
> …
>
> [38] Therefore, we would modify the *Pompey* strong cause factors in the consumer context. When considering whether it is reasonable and just to enforce an otherwise binding forum selection clause in a consumer contract, courts should take account of all the circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake. The burden remains on the party wishing to avoid the clause to establish strong cause.

[59] I reiterate that *Douez, supra*, did not change the law in the commercial context. Only where there are exceptional circumstances will there be a departure from enforcing a valid commercial contract. Cyclesmith argues that the strong cause requirement is met as a result of two exceptional circumstances. First, it says that Salesforce hid the MSA and, therefore, the forum selection clauses and second, that if Cyclesmith is forced to bring its claim in Toronto, it may be deprived of its claim due to the prohibitive cost involved in litigating there.

[60] Cyclesmith maintains that it did not enter into an agreement that contained the MSA. However, as noted above, the terms of the signed contracts and the surrounding circumstances do not support this position. It further says that

Salesforce “went to unbridled lengths to hide not only the alleged Master Services Agreement, but the alleged forum selection clauses”.

[61] I do not agree that Salesforce hid the MSA from Cyclesmith. It is referenced six times between the two contracts Mr. Feenstra signed. It appears in clear language above each signature block where Mr. Feenstra signed. It clearly says, “This Order Form is governed by the terms of the salesforce.com Masters Subscription Agreement found at https://www.salesforce.com/company/msa.jsp”.

[62] There is some dispute as to whether the above referenced website was hyperlinked in the two contracts. Mr. Blank says the contracts did include a hyperlink. Mr. Feenstra does not address this in his affidavit. The respondent’s brief says with respect to at least the first contract the website was not hyperlinked and required a manual insertion of the link into an internet search engine. Mr. Feenstra appears to attempt to incorporate all factual assertions contained in the brief into his affidavit via general comment at paragraph 14 of his affidavit, stating that he agrees with and adopts the factual contentions set out in the plaintiff’s claim and the plaintiff’s pre-hearing brief. This is unusual and was objected to by the applicant. Regardless, I am of the view that it does not matter whether the website for the MSA was a live link when the MC and CC Order Form contracts were received by Mr. Feenstra for signature.

[63] The contracts are clear that they are governed by the terms of the MSA which can be found at https://www.salesforce.com/company/msa.jsp. If the referenced link in each Order Form contract were not live, then the website address could have easily been inserted in a web browser with the MSA then being available. The MSA was also available on the Salesforce website. Mr. Feenstra or Mr. Inglis could have asked for a copy. Mr. Feenstra’s evidence indicates they were aware of Salesforce’s public internet postings concerning its offerings, so presumably had visited the website when they ultimately selected Salesforce as the preferred provider after the various solicitations. The fact that Salesforce did not specifically draw Cyclesmith’s attention to the MSA references does not negate the multiple clear references included in the MC and CC Order Form contracts. I find that the MSA was sufficiently accessible to incorporate its terms into the contracts.

[64] The context of the contracts is also not to be forgotten - these were contracts for online retail or e-retailing. The discussions were conducted online and it appears from the documentation, the meetings were virtual. No paper was exchanged between the parties. For Salesforce to include the MSA in a link within the contract

is in keeping with the nature of the business relationship. If the link in either of the contracts was not functioning, the MSA could easily be obtained, as I have said, by insertion of the referenced website into a search engine.

[65] Cyclesmith emphasizes that in the message of January 21, 2022 Salesforce said, "I wanted to send along the Commerce Cloud draft agreement so that you had all the paperwork from salesforce you would need to review." Yet the MSA was not attached. For this to somehow mean that the MSA was not applicable, is not supportable. While the attachment to the electronic message, referred to as the Salesforce Commerce Cloud Cyclesmith Draft Agreement, is not in evidence, it is clear that in the CC contract the MSA, containing the forum selection clauses, was referred to two times and one might say emphasized, by placement immediately above the signature block. That same January message also says that "Geoffrey also sent along the draft agreement for Marketing Cloud." Again, this draft is not in evidence but the signed MC contract contained four references to the MSA.

[66] Cyclesmith argued that if it had known about the forum selection clauses it would not have "agreed to any form of binding relationship" with Salesforce. While this is inappropriate speculation, I note the MSA was not hidden and the clauses would have been obvious if the MSA was read.

[67] Mr. Feenstra's evidence of being unaware of the MSA agreement leads to only one conclusion being that he did not read the contracts that he signed and that he did not seek legal advice concerning them, despite having a longstanding relationship with his legal counsel. As the Ontario Court of Appeal said in *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co*., (1997), 34 OR (3d) 1 (ONCA), in the course of a normal commercial relationship, "failure to read a contract before signing it is not a legally acceptable basis for refusing to abide by it".

> As a general proposition, in the absence of fraud or misrepresentation, a person is bound by an agreement to which he has put his signature whether he has read its contents or has chosen to leave them unread. Failure to read a contract before signing it is not a legally acceptable basis for refusing to abide by it. A businessman executing an agreement on behalf of a company must be presumed to be aware of its terms and to have intended that the company would be bound by them. The fact that the plaintiff's owner chose not to read the contract can place him in no better position than a person who had read it. Nor was that fact that the clause was in a standard pre-printed form and was not a subject of negotiations sufficient in itself to vitiate the clause. … *Estrange v. F. Graucob Ltd.*, [1934] 2 K.B. 394 (Eng. K.B.),

> at 403; *Craven v. Strand Holidays (Canada) Ltd.* (1982), 40 O.R. (2d) 186 at 194 (Ont. C.A.).
>
> [Emphasis added]

[68] Cyclesmith also raised fairness as an exceptional circumstance. It argued that if it is forced to litigate in Toronto, this will effectively deny it access to justice. Mr. Feenstra said that Cyclesmith will experience considerable inconvenience if it has to assert its claim in Toronto and the significant expense will likely mean the claims will be dropped. It referred to the preferable rate it receives from its legal counsel in Halifax as compared to what it can expect to pay in Toronto. However, such described inconvenience, in the current circumstances, does not allow Cyclesmith to resile from its contract with Salesforce. The inconvenience of having to bring the claim in Toronto is not, in and of itself, sufficient to meet the "strong cause" test. Such inconvenience to one party to a commercial contract does not rise to the level of exceptional circumstance contemplated in the factors set out in *Expedition Helicopters, supra.* In addition, such evidence is more properly for consideration in *forum conveniens* determinations rather than under a "strong cause" analysis. Regardless, Cyclesmith does have a legal remedy available in another domestic jurisdiction: Toronto, Ontario.

[69] As Salesforce said "despite Cyclesmith's characterization of Toronto as a 'far flung jurisdiction' where its claim must be 'prosecuted by unfamiliar counsel according to unfamiliar Rules of Procedure, and at a greater expense,' a forum selection clause favouring the courts of Ontario does not deprive the plaintiff of a legal remedy." Further, with the proliferation of virtual meetings and virtual court appearances post pandemic, there can be cost efficiencies achieved.

[70] Cyclesmith has not met its burden to illustrate strong cause why this court should disregard the forum selection clauses and retain jurisdiction over the claim.

Conclusion

[71] Salesforce has illustrated that the forum selection clauses are valid and enforceable and applicable to the claim advanced by Cyclesmith. Conversely Cyclesmith has not met its burden to illustrate there is a strong cause why the parties should not be bound by their bargain.

[72] I allow the motion and stay the within proceeding with costs to Salesforce. If the parties cannot agree on the amount of costs, I will entertain brief written submissions within 30 days of the date of this decision.