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**TERMINATION CLAUSES IN SERVICE AGREEMENTS MUST BE CRYSTAL CLEAR**

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In 2012, the Superior Court of Québec rendered a decision in *MDV Representations v. Corporation Xprima.com*[1] that serves as a reminder to all Québec service providers and their clients that they must use clear and simple language when drafting termination clauses. Moreover, if parties wish to renounce to any rights in the *Civil Code of Québec* ("*CCQ*"), they must make specific reference thereto. This decision is of importance to those wishing to conduct business in Québec's booming mining industry, and is particularly interesting to engineering firms and other professionals, and to their respective clients.

***Overview of the Decision***

In *MDV Representations*, the Superior Court dismissed the claims of two plaintiff service providers, M.D.V. Representations and MC 3 Média Inc., which argued that the defendant Xprima had wrongly terminated their service contracts.

The Court examined two articles of the *CCQ* that are relevant to the service provider industry. Firstly, the Court considered art. 2125 *CCQ,* which allows a client to *unilaterally* resiliate a service contract "even though the work or provision of service is already in progress". Secondly, an analysis of art. 2129 *CCQ* was undertaken.

Article 2125 *CCQ* allows a client to cut ties with its service provider without any prior warning, despite the fact that the service being provided is ongoing. Québec courts have determined that this article is not of public order. Therefore, parties can renounce to or contract out of its application in their service contracts by outlining specific conditions which would give rise to a resiliation. For example, the Plaintiffs in *MDV Representations* entered into a 2-year service contract with Xprima whose termination clause explicitly stated that the latter could only rescind the contract on August 7, 2007, and, if it did not reach a financial target of at least $1,000,000 in sales.

While such specific language may appear to reflect the parties' intent to renounce to their rights in art. 2125 *CCQ* by outlining the circumstances under which Xprima may terminate its service contract, the Court nevertheless refused to give it effect. In doing so, it held that although art. 2125 *CCQ* is not of public order, a renunciation to the rights therein is only valid when expressed unequivocally. In this regard, the language employed in the termination clause had to clearly express the parties' intent, without leaving any room for interpretation. The Court also highlighted that a contract for services that has a fixed term does not necessarily demonstrate the parties' intent to renounce to their rights in art.2125 *CCQ*. For these reasons, the Court refused to give the termination clause effect and upheld Xprima's right to terminate its service contracts prematurely.

Since the Court refused to enforce the termination clause, the Plaintiffs sought compensation from the Defendant under art. 2129 *CCQ,* which states:

[1] 2012 QCCS 2451.

> **2129.** Upon resiliation of the contract, the client is bound to pay to the contractor or the provider of services, in proportion to the agreed price, the actual costs and expenses, the value of the work performed before the end of the contract or before the notice of resiliation and, as the case may be, the value of the property furnished, where it can be returned to him and used by him.
>
> For his part, the contractor or the provider of services is bound to repay any advances he has received in excess of what he has earned.
>
> In either case, each party is liable for any other injury that the other party may have suffered.

Clearly, the first paragraph of this article requires that the client pay any costs or expenses owed for the services rendered up until the termination date. However, the third paragraph allows the service provider to claim for "*any other injury* that the other party may have suffered". In hopes taking advantage on those general terms, the Plaintiffs claimed compensation for their future loss of profits resulting from Xprima's early termination.

After surveying the jurisprudence, the Court held that, under art.2129 *CCQ*, future loss of profits will only be awarded when the client has terminated the service contract in bad faith or in an abusive manner. Although Xprima's reasons for terminating the contract were minor, for example, it expressed annoyance with the plaintiffs' tardiness in producing bimonthly reports, the Court did not consider these complaints to constitute bad faith. In fact, the Court held that the onus is not on the client to justify the unilateral resiliation. Rather, it is the service provider that must prove bad faith on the client's part, despite the fact that nearly any reason, including minor gripes, serves as sufficient grounds for rescission.

***How does this decision impact the Plan Nord?***

The decision in *MDV Representations* sends a clear reminder to Québec's booming mining industry to use clear and simple language when renouncing to rights in the *CCQ*. Indeed, with anticipation that the development projects in northern Quebec will be at an all-time high and with significant capital at stake, leading corporations, equipment suppliers, expert environmentalists, geologists and engineers, to name a few, are concluding contracts in order to get a piece of the action. It is important that these actors heed the Superior Court's warning to avoid being left out in the cold!

Most importantly, eager participants need to be aware of the reality that "industry standard" service provider contracts may result in undesirable outcomes, as was the case in *MDV Representations*. This warning is particularly important in the mining context. While service providers seek to diminish their clients' ability to cut ties without any motive or warning by imposing stiff penalties for doing so, mining companies try to limit their potential exposure by minimizing their obligation to pay a service provider whose services may not be needed in the future. Evidently, both actors come into the bargaining process with very different objectives. While service providers want to renounce to the rights in the *CCQ* so as to make any divorce as costly as possible, their clients are quite comfortable doing things by the book. As in any negotiation, it is imperative that both parties find a middle ground and draft reasonable and fair termination clauses that protect their mutual interests.

In this regard, the Superior Court's ruling in *MDV Representations* does shed light on several critical lessons.

***Lesson 1: Termination clauses should make specific reference to the article of the CCQ to which parties wish to renounce***

It is important that service providers and their clients pay particular attention when drafting "Termination" or "Rescission" clauses. While the Plaintiffs' contracts in *MDV Representations* seemed to renounce to the right conferred by article 2125 *CCQ* by defining narrow parameters in which Xprima could unilaterally terminate the agreement, the Court found the clause to be ambiguous. An effective way to avoid this pitfall is to draft termination clauses containing the *explicit* renunciation of the right in article 2125 *CCQ* or any other right that is not of public order. This method of drafting will make things easier for the court.

***Lesson 2: Consider including a liquidated damages clause to compensate for the future loss of profits***

When a client prematurely terminates a service contract, the financial impact extends far beyond the present since the service provider will lose any profits it expected to earn throughout the life of the contract. Given that courts exercise great restraint in awarding damages for future losses, more and more service providers are including "Liquidated Damages" clauses in their service agreements to compensate for these losses.

It is suggested that the **parties agree to a dollar amount** representing liquidated damages that must be paid by the client upon early termination. A liquidated damages clause can favour both parties since they can negotiate terms of applicability that reflect their mutual interests. For example, one method of quantifying damages may be to establish a scale whereby the earlier the contract is terminated, the higher the amount of damages. This method would give the service provider more financial security in the event of an early termination, while also offering the client the ability to pay less if the provider's services are no longer needed farther along into the project. Such compromises not only provide a more fair and equitable solution for both parties, but also allow for greater flexibility and security.