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Recent Trends in Private International Law: A Québec Perspective[1]

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ABSTRACT

New social and legal aspirations have emerged, such as those claimed by same sex couples or consumers involved in class actions. Due to the globalization of human relations, those aspirations transcend borders. Nowadays, any fruitful participation to international relations presupposes modern rules fully able to strike a balance between three fundamental principles: avoiding schizophrenic situations, providing for certainty and respecting the States' interests and policies.

Whenever issues relating to which court should take jurisdiction, which law should apply and whether a foreign decision should be given effects by local courts, judges need to take into consideration the expectations of all parties involved. A fast answer has often been to forge rules on a short-term basis without giving much consideration to the general coherence of the legal system. Such a tension between legal conservatism and post modernism must be addressed everywhere.

From a comparative law perspective, this paper suggests some answers through carefully selected highlights on Quebec' 1994 rules on Private International Law and on the case law and problems that emerged thereafter.

Avoiding schizophrenic situations meant the adoption of the «proximity principle» and a new feature of the methodology: the general escape clause. In addition, a new «recognition method», having the potential to swallow the whole topic of conflict of law, has been integrated into a specific rule.

Reaching material justice through predictability favoured a strong tendency to allow parties to choose a law, even in some family matters, such as registered partnerships. However, such a postmodern solution ignores the proximity principle and does not avoid schizophrenic situations. The resolution of conflicts relating to same sex marriages celebrated in Canada carries the same characteristics.

In terms of international jurisdiction, Quebec rules are shaped by two fundamental principles: providing for a proper administration of justice and procedural fairness between the parties. This led to the codification of the forum non conveniens doctrine in order to decline jurisdiction. However, courts have had to find some limits to such a power in order to avoid too much uncertainty.

Finally, new developments relating to multi-jurisdictional class actions show, negatively, a strategy that might be described as a race to the bottom, and, positively, an encouraging trend of cooperation that could evolve towards a very bright future. In both cases, the experience of Quebec and Canadian courts provide some insights into the next frontier of the law relating to the recognition of foreign judgments.

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INTRODUCTION

Following a general trend in civil law countries, Quebec' rules on Private International Law have been codified in 1994 in order to modernize them[3]. Quebec's codification strives to conciliate the general needs of the international commerce which express themselves through some basic and fundamental principles: namely, from a private law perspective, avoiding schizophrenic situations (I) and providing for certainty (II), and from a public law perspective, respecting the States' interests and policies (III).

In doing so, the Quebec legislator was inspired by the 1987 Federal Swiss law[4], by the Rome Convention of 1980[5] and by various Hague conventions. It led to the adoption of a plurality of conflict of laws methods.

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[3] Civil Code of Quebec, Book X, CQLR, C-1991; SQ 1991, c 64 : <http://www.canlii.org/en/qc/laws/stat/cqlr-c-c-1991/latest/cqlr-c-c-1991.html>; See: Henry Patrick Glenn, 'Droit international privé ' in *La réforme du Code civil*, t 3 (Ste-Foy : Presses de l'Université Laval, 1993) 669, n° 12, 684 ; Jeffrey A Talpis and Jean-Gabriel Castel, 'Le Code civil du Québec : Interprétation des règles du droit international privé', in *La réforme du Code civil*, t 3 (Ste-Foy : Presses de l'Université Laval, 1993) 801; Gerald Goldstein and Ethel Groffier, *Traité de droit civil. Droit international privé*, t 1, 'Théorie générale' (Cowansville: Yvon Blais, 1998); t 2, 'Règles spécifiques' (Cowansville: Yvon Blais, 2003); Gerald Goldstein, *Commentaires sur le Code civil du Québec. Droit international privé*, vol 1, 'Conflits de lois: dispositions générales et spécifiques (art 3076 à 3133 CcQ)' (Cowansville: Yvon Blais, 2011); vol 2, 'Compétence internationale des autorités québécoises et effets des décisions étrangères' (Cowansville: Éditions Yvon Blais, 2011); Claude Emanuelli, *Droit international privé québécois* (3rd ed, Montréal: Wilson & Lafleur, 2011); 'Droit international privé' in *JurisClasseur Québec*, col *Droit civil* (Montréal: LexisNexis Canada). The previous law, essentially inspired by a few articles (art. 6, 7 and 8) in the old Civil Code of Lower Canada and by civil and common law foreign cases, was a collection of mostly ambiguous and poorly motivated case law which was insufficient to deal with the modern needs of international relationships. On this topic, see, among others: E. Lafleur, *The Conflict of Laws in the Province of Quebec* (1898); John D. Falconbridge, *Essays on the Conflict of Laws* (2nd ed., Canada Law books, 1954); Walter S. Johnson, *The Conflict of Laws* (2nd ed., Montréal: Wilson & Lafleur, 1962); Jean-Gabriel Castel, *Droit international privé québécois* (Toronto: Butterworths, 1980); Ethel Groffier, *Précis de droit international privé*, 4th éd. (Montréal: Yvon Blais, 1990); Gerald Goldstein et Jeffrey Talpis, *L'effet au Québec des jugements étrangers en matière de droits patrimoniaux,* (Montréal: Thémis, 1991). The Office de révision du Code Civil (O.R.C.C.), under the direction of Prof. Paul-André Crépeau and Jean-Gabriel Castel, proposed a first version of the new private international law in 1975 (O.R.C.C., *Rapport sur le droit international privé*, Montréal, XXXII, 1975; published in *Projet de Code civil*, 1977, O.R.C.C., vol. 1, éd. officiel, 1978), inspired by the classical conflict of law methodology. Then, in 1985, this first project was completed by a second one, inspired by the Swiss law and prepared by prof. Jeffrey Talpis and Gerald Goldstein and it lead to the *Avant-projet de loi portant réforme au Code civil du Québec, du droit de la preuve et de la prescription et du droit international privé*, Assemblée Nationale, 33 éme lég., 2 ème session, Québec, 1988). For an analysis of this previously proposed legislation, see Jeffrey Talpis et Gerald Goldstein, 'Analyse critique de l'Avant-Projet de loi du Québec en droit international privé' (1989) 91 *Revue du Notariat* 293-353, 456-521, 606-646. After a final revision, this project was included into the new Civil Code of Québec which was adopted in 1991 (SQ 1991, c 64) and came into force in 1994.

[4] *Loi fédérale du 18 décembre 1987 sur le droit international privé (LDIP)*, RO 1988.1776, RS 291 : <http://www.admin.ch/ch/f/rs/c291.html>. For an English (non official) translation: *Switzerland's Federal Code on Private International Law* (CPIL), Umbricht Attorneys, Zurich (Switzerland) 2007 : <http:// www.umbricht.com>.

[5] 80/934/EEC: *Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980*, OJEC No L266 /1: <http://eur-lex.europa.eu/resource.html?uri=cellar:22cc5c49-2b36-4962-aa60-e928a52efa66.0008.02/DOC_1&format=PDF>.

I. Avoiding schizophrenic situations

Whenever people cross a border, they will come under the jurisdiction of a foreign authority that could apply a foreign law. This might lead to a disruption of their expectations and of their status (being married, divorced, creditor and so on). So avoiding a schizophrenic (or «limping») situation means trying to coordinate the hometown and foreign laws or trying at least to coordinate the result of their application.

This is the origin of the adoption of the so called «proximity principle»[6], or of the quest of the designation of the law having *objectively the closest connection* to the situation, a method originally proposed by the great German author Von Savigny as the research of the *objective center of gravity* of a situation according to its nature (contractual, extra contractual and so on). The reasoning behind Savigny's methodology being that hopefully judges everywhere would objectively agree on the designation of the same law which will avoid a disruption of a person's status whenever such a person crosses a border.

Quebec law fully integrated such a principle by adopting a large number of «Savignian» conflict of laws rules. For instance art. 3083 C.c.Q. states that the law of the domicile of a physical person governs his or her status and capacity. The aim of such a rule is to localize objectively the center of gravity of this type of situations, or of questions raised by those situations. It is neutral and called «bilateral» since it does not favour the *lex fori* and might equally lead to the law of any foreign country (hence the «bilateral» characterization of the rule).

In addition, following the Swiss example, Quebec law adopted a general escape clause. Art. 3082 C.c.Q. states the following:

> Exceptionally, the law designated by this Book is not applicable if, in the light of all attendant circumstances, it is clear that the situation is only remotely connected with that law and is much more closely connected with the law of another country. This provision does not apply where the law is designated in a juridical act.

As a result, whenever the law designated by the conflict rule is only remotely linked with the situation and therefore does not correspond to its genuine center of gravity, then the Quebec judge is allowed to start the reasoning again in order to apply the law of the place which according to the circumstances will be the objective center of gravity.

Furthermore, avoiding limping situations has lead Quebec legislator to open widely the doors to the recognition of foreign judgments by adopting recognition rules widely accepted by modern laws. Art. 3155 states:

> A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases: (1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title; (2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered; (3) the decision was rendered in contravention of the fundamental principles of procedure; (4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Québec, whether it has acquired the authority of a final judgment (res judicata) or not, or is pending before a Québec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec; (5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations; (6) the decision enforces obligations arising from the taxation laws of a foreign country.

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[6] Paul Lagarde, 'Le principe de proximité dans le droit international privé contemporain' (1986) I *RCADI* t 196, 9.

In terms of international jurisdiction, the same policy expresses itself through the adoption of flexible rules aiming to avoid parallel litigations leading to multiples decisions contradicting each other in relation to the same situation. In this perspective, it is worth mentioning the adoption by Quebec law of art. 3135 C.c.Q., which codifies the *forum non conveniens* theory.

Such a rule gives a Quebec judge a discretionary power to decline jurisdiction whenever a foreign judge is in a better position to decide and as a result there will not be two contradictory decisions in Quebec and abroad. One could also mention art. 3137 C.c.Q., which codifies the *lis pendens* exception on approximately the same basis[7] or art. 3139 C.c.Q. which gives jurisdiction to a Quebec court over an incidental action when such a court has jurisdiction over a main or principal action[8].

II. Providing for certainty and material justice through Private International Law rules

Providing for foreseeability and striving to keep stable the personal status has been at the core of the new rules in Quebec private international law. Its main expression has been a strong tendency to promote parties' will to choose a law. Not only when contractual matters are involved, but «party autonomy» covers as well matters relating to conventional matrimonial property regime (art. 3122 C.c.Q.), trusts (art. 3107 C.c.Q.), succession (art. 3098 C.c.Q.) and even rights relating to securities held by intermediaries, under the most recent rules (art. 3108.1 to 3108.8 C.c.Q.) which follow the North American trend in that direction.

In addition, promoting party autonomy has been heavily favoured in some family matters, such a civil unions or registered partnerships, whose connection factor has been chosen in order to meet parties' expectations. In effect, art. 3090.1 C.c.Q. applies the law of the place of registration to those situations instead of traditional connecting factors proper to personal status (such as domicile, habitual residence and nationality).

III. Respecting the State's interests and policies

State intervention in the realm of socio economic activities must be maintained in order to keep the coherence of any legal system.

So Quebec law openly accepted the theory of mandatory rules or «laws of immediate application», not only when Quebec rules are concerned but also when foreign rules are involved. Art. 3076 C.c.Q. states in somewhat broad terms the following:

> The rules contained in this Book [Private international law] apply subject to those rules of law in force in Québec which are applicable by reason of their particular object.

Moreover, art. 3079 C.c.Q. states:

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[7] Art 3137 CcQ states: 'On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority'.

[8] Art 3139 CcQ states: 'Where a Québec authority has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross demand'.

> Where legitimate and manifestly preponderant interests so require, effect may be given to a mandatory provision of the law of another country with which the situation is closely connected. In deciding whether to do so, consideration is given to the purpose of the provision and the consequences of its application.

In addition, nowadays, the traditional Savignian search for conflict of law justice, leading to the designation of a neutral center of gravity, has given way to a new approach based on the search for material justice in the particular case. New conflict rules including several alternative connecting factors have been developed in order to designate the better law. Quebec has eagerly followed this new trend. Those new rules notably include art. 3090 and 3128 C.c.Q.

Art. 3090 C.c.Q. addresses the issues relating to the establishment of natural (or blood) filiation and states the following:

> Filiation is established in accordance with the law of the domicile or nationality of the child or of one of his parents, at the time of the child's birth, whichever is more beneficial to the child.

Under such rule, *several* alternative connecting factors are selected in order to lead to a law having a close connection to the issue of filiation (namely the law of domicile of nationality of the child or of the parents at the time of birth) and the court will choose among them which one is the more favourable to the better result (usually the law establishing a filiation instead of a law denying it).

The same type of rule has been adopted to deal with manufacturer's liability under art. 3128 C.c.Q. that states:

> The liability of the manufacturer of a movable, whatever the source thereof, is governed, at the choice of the victim, (1) by the law of the country where the manufacturer has his establishment or, failing that, his residence, or (2) by the law of the country where the movable was acquired.

Under art. 3128 C.c.Q. the victim may choose between two laws having a close connection whichever is more favourable to his claim.

Consequently, in order to attain material justice in specific situations or to make sure the State's policies will be respected even when international relationships are involved, Quebec private international law has adopted several alternative methods to solve conflict of laws problems, aside from the classical Savignian method.

After having introduced the main underlying principles of the Quebec system, we shall now turn our attention to specific points highlighting some interesting issues from a comparative law perspective, relating to conflict of laws (1), international jurisdiction (2) and the recognition of foreign judgments (3).

1. Conflict of Laws

From a conflict of law perspective, we shall deal first with issues relating to the *general methodology* (1.1.). We shall then deal with some *specific issues* (1.2.).

1.1. General Methodology: A Plurality of Methods

Highlights of Quebec private international law illustrating some interesting new trends include a new feature of the classical methodology, the escape clause (1.1.1), and some comments other methods like mandatory rules (1.1.2), and a new method expressing itself in Quebec law through a specific rule relating to transactions (or settlements) (1.1.3.).

1.1.1. Classical Conflict of Law Rules and the General Escape Clause

As stated previously, Quebec private international law includes a general escape clause in art. 3082 C.c.Q., which states the following:

> Exceptionally, the law designated by this Book is not applicable if, in the light of all attendant circumstances, it is clear that the situation is only remotely connected with that law and is much more closely connected with the law of another country. This provision does not apply where the law is designated in a juridical act..

The aim of this general rule is to avoid any automatic application of the law designated by the conflict rule and to apply instead the law having the closest connection with the dispute in the particular circumstances. Adopting this rule was a sophisticated answer to the American critics of the classical Savignian method and its rigid character. However, having to look at all the circumstances for a determination of the applicable law brings unpredictability since only a judge could do it and there is no way to know in advance which law will apply. As a consequence, such escape clause must only be exceptionally used, as mentioned by art. 3082 C.c.Q. In addition, it should never be applied when predictability, as opposed to proximity, is the underlying principle of the conflict rule. That is the reason why art. 3082 C.c.Q. states that it will not be used «where the law is designated in a juridical act» by parties.

In order to fulfill its conditions, art. 3082 C.c.Q. requires that *negatively*, the law designated by the conflict rule (a foreign law or even the *lex fori*) must be only remotely connected with the situation. So it will not be applied where the law designated has a reasonable link with the situation. In addition, *positively*, another law (the *lex fori* or a foreign law) must have a much better connection with the situation.

From a practical perspective, it is difficult to mention one single case where such a rule has been correctly applied[9] since its implementation in 1994, although it could have been rightly invoked in a few cases. One of such cases was an adoption situation where a mother domiciled in the Philippines left her newborn child in a Quebec hospital where she was born[10]. The mother was later sent back to the Philippines for criminal motives. The child's aunt wanted to adopt her but the conflict rule relating to the issue of consent led to the law of the domicile of the child, which was supposed to be situated at the place of residence of her tutor. Since her mother was still her tutor,

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[9] See: *Giesbrecht* c. *Succession de Nadeau***,** 2017 QCCA 386 (C. A.). The Court of Appeal of Quebec held that the law of Ontario (governing the situation under Quebec law as the law of the place where a plane crash happened) had no connection with actions relating to the extracontractual liability of the pilot, since most of the victims where resident in Quebec, and the court applied the law of Quebec instead. However, the reasoning of the court under art. 3082 C.c.Q. did not address the requirement to prove that the law applicable under the conflict rule had no connection with the situation.

[10] *Droit de la Famille - 3510* [2000] RJQ 559 (CQ).

the domicile of the child was in the Philippines and the law of this country was supposed to govern the issue. Obviously, the law of the Philippines had absolutely no connection with the child's situation. So the Quebec court applied the law of Quebec where the child was born and where she had lived and resided up to the time of the dispute. Even though it would have been an ideal illustration of a situation where the escape clause should have been invoked as a basis for decision, the court did not clearly embarked on such reasoning. However, this case aptly shows that a general escape clause could be very useful in a modern system of private international law.

Furthermore, Quebec case law illustrates the fact that there has not been any *tsunami* of escape clause uses, so as to devoid the system of any predictability. As long as conflict rules are cautiously constructed and interpreted, there should not be any great fear of it. From a comparative law perspective, it is worth mentioning that the 2001 Korean law[11] (art. 8) adopted such a general escape clause, although neither the 2006 Japanese law[12] nor the 2011 Chinese law[13] followed this example. However, both laws adopted several specific escape clauses in order to provide for partial flexibility without embarking on a general approach that seemed too unpredictable.

1.1.2. Mandatory Rules

By mandatory rules, or «laws of immediate application», or even *lois de police*, we mean the type of super imperative norms of one system whose function will force a court to apply it to an international situation, even though it is not part of the applicable law under the conflict rule. It is also called overriding mandatory provisions as defined by art. 9 of the Rome I Regulation relating to the law applicable to contracts as follows:

> Overriding mandatory provisions are provisions the respect of which is regarded as crucial by a country for safeguarding its public interests, such as its political social or economic organisation, to such an extend that they are applicable to any situation falling within their scope irrespective of the law otherwise applicable to the contract [under the conflict rule…].

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[11] *Law amending the Conflict of Laws Act of the Republic of Korea*, (Law No 6465, promulgated on 7th April 2001, efective as of 1st july 2001, Unofficial English translation by: Kwang Hyun Suk, (2003) 5 *YrBk Priv Intl L* 315-336. See Kwang Hyun Suk, 'The New Conflict of Laws Act of the Republic of Korea' (2003) 5 *YrBk Priv Intl L* 99-141.

[12] *Act on the General Rules of Application of Law*s (Hô No Tekyiyô Ni Kansuru Tsûsokuhô), Law No 10 of 1898, as newly Titled and Amended 21st june 2006, original Japanese version : <http://law.e-gov.go.jp/announce/H18HO078.html> ; Unofficial English translation by : Kent Anderson and Yasuhiro Okuda, (2006) 8 *YrBk Priv Intl L* 427-441.

[13] *Statute on the Application of Laws to Civil Relationships Involving Foreign Elements of the People's Republic of China*, Oct 20th 2010 : <www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm> (chinese version); Unofficial English translation by: Weizuo Chen and Kevin M. Moore, (2010) 12 *YrBk Priv Intl L* 669. See: Weizuo Chen, Chinese Civil Procedure and the Conflict of Laws, Beijing, Tsinghua University Press, 2011; Zhengxin Huo, 'Highlights of China's New Private International Law Act: From the Perspective of Comparative Law', (2011) 45 *RJT* 637; 'An Imperfect Improvement: The New Conflict of Laws Act of the People's Republic of China' (2011) *International and Comparative Law Quarterly* 60, 1065-1093 doi: 10.1017/S0020589311000534. For further comparative law researches on this topic, see also Taiwan's new legislation of 2010 called "Act Governing the Choice of Law in Civil Matters Involving Foreign Elements": http://law.moj.gov.tw/ENG/LawClass/LawContent.aspx?pcode=B0000007, see Jürgen Basedow & Knut B. Pissler (eds.), *Private International Law in Mainland China, Taiwan and Europe* (Tübingen, Germany: Mohr Siebeck, 2014). The law of Taiwan does not include a general escape clause.

As mentioned earlier, when we introduced art. 3076 C.c.Q. and art. 3079 C.c.Q., Quebec law as well as other modern private international systems had to make room for those imperative rules by which a State will intervene aggressively into any international situation of a private character whenever it deems necessary in order to reach one of its vital interests, like the protection of some type of weak parties. As a result, for instance, a Quebec court might impose the application of one of his imperative domestic rules relating to residential leases allowing for punitive damages if a landlord harass her tenant by intruding too often in the rented premises, even though the governing law under the appropriate conflict rule would be a foreign law expressly chosen in the lease.

However, Quebec and Canadian courts have had problems understanding the true function of this exceptional method as the following case, which went up to the Supreme Court of Canada, unfortunately shows.

In *Kuwait Airways* v. *Iraq*[14], a Kuwaiti company sued the Iraqi airline and the government of Iraq for compensation. During the war that followed the invasion of Kuwait by Sadam Hussein, Iraq seized aircrafts belonging to the Kuwaiti airline and lent them to the Iraqi airline. After the war, the Kuwaiti airline did not recuperate each one of its aircrafts and sued therefore the two defendants in England since there was some Iraqi property there that they could seize in compensation for their loss. However the Republic of Iraq raised the issue of its immunity. The English court applied English law to the issue and held that the behaviour of the Republic of Iraq during the trial went beyond the sovereignty limits. Therefore, no State immunity could hamper the proceedings in England and the Republic of Iraq was to compensate the Kuwaiti airline company. Later on, the Kuwaiti company tried to have the English judgement recognised and executed in Quebec against the property of Iraq situated there. Once again, the Republic of Iraq raised the immunity issue and the question that Quebec courts, and later the Supreme Court of Canada, had to address was whether or not the English judgement was determinative of the immunity question, under the English law, or should such a question be dealt with under the law of Canada (which might have had a different view on the matter according to its own standards). The Supreme Court of Canada, rightly so, held that Canadian law was determinative of the issue of state immunity.

However the motive given was that the Canadian State Immunity Act[15] was an overriding mandatory rule that should be applied under art. 3076 C.c.Q.

Such reasoning is totally contrary to the basic tenets of the theory, despite what the highest Court of Canada affirmed. Such a theory assumes that *the super imperative rule* that could apply through this exceptional method *does not belong to the law governing the issue under the applicable conflict rule*. So, in order to apply it, one has to characterize the issue beforehand in order to understand which conflict of law rule will possibly be used and which law will be designated by such a rule. Issues of immunity belong to two different kinds: immunity as to *jurisdiction* or as to *execution*. When immunity relates to jurisdiction, the issue belongs to procedural matters, since the question is whether or not the local courts have jurisdiction over a foreign State. Similarly, when immunity relates to the execution of a judgement, it should also be characterized as procedural matter. Everywhere in the world, procedural matters are governed by the *lex fori*, the law of the court seized of the dispute, and Quebec law codified the same rule in art. 3132 C.c.Q. Therefore only Quebec or Canadian law could possibly apply to the immunity issues

[14] *Kuwait Airways Corp v Irak* 2010 CSC 40.

[15] State Immunity Act, RSC 1985, c S-18.

raised in Quebec or in Canadian courts. There was absolutely no justification to invoke art. 3076 C.c.Q. in order to avoid the designation of English law.

Some other Quebec courts have sometimes invoked the same erroneous reasoning[16]. It is possible that such a mistake was induced by the vague formulation of art. 3076 C.c.Q. This article does not mention the exact relation between such an exceptional method and the classical Savignian method, or the conditions under which the former takes precedence over the latter. Unfortunately, such a problem, which destroys the logic of a legal system, presumably relates to a very specific characteristic often encountered with private international law: a wide gap of theoretical knowledge between the doctrine and the other legal operators.

1.1.3. International Transactions and the Recognition Method

The adoption of a multiplicity of methods by Quebec law is also well illustrated by art 3163 C.c.Q. (inspired by art. 19 of the 1971 Hague Convention[17]), which reads as follows:

> A transaction enforceable in the place of origin is recognized and, as the case may be, declared to be enforceable in Québec on the same conditions as a judicial decision, to the extent that those conditions apply to the transaction.

A transaction, or settlement, could be defined as a contract by which the parties avoid a future dispute, put an end to a lawsuit or settle difficulties arising out of the execution of a judgment, by way of mutual concessions. Under many legal systems, such a contract may have the authority of a final judgment between the parties (*res judicata*) as soon as concluded, even without any homologation or registration by a public authority. So it may be viewed as a contract having some effects of a judgment between the parties. As a consequence, art 3163 C.c.Q. states that *such a transaction* will be recognised in Quebec or will be enforced there *as a judgement*, under the same conditions as a foreign decision (indirect jurisdiction of the foreign authority; no contradiction with public policy and so on), as long as it is enforceable at the place of its origin.

It is worth mentioning that Quebec courts will not enforce a foreign judgment of a country A having homologated the contract of transaction in order to render it enforceable there (in A). According to art. 3163 C.c.Q., the *contract itself* will be *directly* declared enforceable in Québec as if it was a foreign judgement, which it is not. Those effects will be given to a contract *without using a conflict of law rule in order to evaluate its validity or its effects* under the law applicable according to Quebec conflict rules, since art. 3157 C.c.Q. states that foreign judgements are not subject to a condition that the court of origin has applied the law that would have been applicable under Quebec conflict rules.

We are witnessing here a strange phenomenon that looks like a short circuit between conflict of laws issues and the recognition of a foreign judgement. It has aptly been called the «recognition method» by some authors since it is an alternative to the classical savignian method and it seems to import into conflict of law issue the old vested rights theory. There will be *no control of the law*

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[16] *McKinnon v Polisuk* 2009 QCCS 5778.

[17] Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters, February 1st 1971, Hague Conference on Private International Law: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=78>. Art 19 states the following : 'Settlements made in court in the course of a pending proceeding which may be enforced in the State of origin shall be enforceable in the State addressed under the same conditions as decisions falling within this Convention, so far as those conditions apply to settlements'.

applicable to the situation under his conflict rule by the judge seized of the dispute, but the result or the effects of such a situation will be «recognised» by him as if it was a foreign decision.

Some scholars have recently promoted this method[18]. It also finds some expressions in legal rules as art. 3163 C.c.Q. seems to show. As a further example, one could cite art. 45 of the 1987 Federal Swiss law on Private international law, which states the following:

> *A marriage validly celebrated abroad shall be recognized in Switzerland.*

According to art. 45, as long as a marriage has been validly celebrated abroad, by a foreign public officer according to the law that was then deemed applicable by such authority, Swiss courts will automatically «recognize» the validity of such a marriage *without controlling themselves the law governing its validity*, without any application of their own conflict rule.

The arguments raised to promote such a revolution in conflict of law methodology are simple. Life will be simplified for the parties involved in international relations. Since a situation has been dealt with by a foreign authority, it is effective abroad because of a legal cover over it and not recognising this effectiveness by requiring that it should be governed by a different law would lead to a schizophrenic situation. Moreover, giving this effect to a state of facts already covered by a legal cover abroad will respect the parties' expectations.

However, it is also easy to present opposite arguments. One could wonder whether it is justified to extend the respect of the parties' expectations in family matters, such as marriage, which conditions are not freely governed by the parties' will since they also concern their acceptance by the society in which they live.

Obviously such a concern has much less value when contractual situations are involved, specially when those contracts, like transactions or settlements, aim at avoiding costly trials.

However there could be frauds involved if the foreign authority has no substantial connection with the situation. Moreover, adopting such a method would imply giving less weight or even no weight at all to the proximity principle, which is one of the fundamental tenets of classical conflict of law methodology.

Scholars in favour of such a recognition method will argue that, since a foreign officer has dealt with the situation, applying the law that he thought relevant under his own conflict of law rule or not, there is no need to further inquire into the center of gravity of such a situation which is plainly and objectively centered at the place where the authority acted.

Nonetheless, a contradictory argumentation could be raised again. All is well as long as the foreign officer had some substantial connection with the situation, which might be enough to respect the bona fide parties' expectations. But sometimes, under some legal systems, no

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[18] On this topic, see: Paul Lagarde, 'Développements futurs du droit international privé dans une Europe en voie d'unification : quelques conjectures' (2004) *RabelsZ* 225 ; Pierre Mayer, 'Les méthodes de la reconnaissance en droit international privé' in *Mélanges P. Lagarde* (Dalloz, 2005) 547; Gian P Romano, 'La bilatéralité éclipsée par l'autorité. Développements récents en matière d'état des personnes' (2006) *Rev crit DIP* 457, bibliographie note 2, 458; Gerald Goldstein, 'La cohabitation hors mariage en droit international privé', (2006) *RCADI* vol 320, 55-88; Sylvain Bollée, 'L'extension du domaine de la méthode de reconnaissance unilatérale' (2007) *Rev crit DIP* 307; Dominique Bureau and Horatia Muir Watt, *Droit international privé*, t. 1 (Thémis, 2007) n° 575; Pierre Mayer, 'Le phénomène de la coordination des ordres juridiques étatiques en droit privé' (2007) *RCADI* vol 327, n° 337 à 345; Horatia Muir Watt, 'European Federalism and the New Unilateralism' (2008) *Tul L Rev* vol 82, 1983; Paul Lagarde, 'La reconnaissance, mode d'emploi' in *Liber Amicorum Gaudemet-Tallon* (Dalloz, 2008) 479; Charalambos Pamboukis, 'La renaissance-métamorphose de la méthode de reconnaissance' (2008) *Rev crit DIP* 513; Gerald Goldstein and Horatia Muir Watt, 'La méthode de la reconnaissance à la lueur de la Convention de Munich du 5 septembre 2007 sur la reconnaissance des partenariats enregistrés' (2010) *Journal du Droit International* 1085-1125.

connection is required between the officer and the situation and some parties might want to take advantage of such a legal void in order to grab a status which would not be available at home and try to have it recognize there. In those cases, no respect should be given to the parties' fraudulent expectations. In addition, such a scheme would hardly convince anyone that the action of the public officer should be considered as the objective center of gravity of the situation since the parties would only spend a minimal amount of time there.

Basically, the fundamental opposition lies here between the proximity and the foreseeability principles: where should a system draw a line between the situations where the private parties' will or autonomy should govern the applicable law and those where some other, more imperative, or more public law oriented, principle should prevail?

Such a methodological debate could swallow the whole topic of conflict of law. It must therefore be discussed in depth in each system. In any case, since the new recognition is a very powerful means to avoid the creation of schizophrenic situations, it should be given the utmost consideration.

1.2. Specific Issues

We shall deal here with such *specific issues* as the law applicable to Registered Partnerships (1.2.1.) and to Same Sex Marriages (1.2.2.).

1.2.1. Registered Partnerships

Since new family institutions were recently adopted in various countries in order to avoid opening marriage to same sex couples, it was necessary to be able to solve conflict of law issues relating to those institutions. Under such names as «registered partnership», «civil union» or «civil partnership», often reserved for same sex couples, they would offer a personal status. While some laws brought a very limited status (as French, Belgian law and the law of Luxemburg did), others (like Norwegian, Danish, English, Swiss, German and Quebec laws) implied a very broad one, quite similar to marriage. As a consequence, the very wide divergences between those laws reflected themselves into the conflicts resolution methods that have been proposed to solve them[19]. If those institutions would be characterized as a type of unions similar to marriages, they would be submitted to the same type of connecting factors as those relating to marriages, namely; domicile, habitual residence of nationality of each person when essential validity or effects of marriage issues would be involved, place of celebration, being here the place of registration, when issues relating to the formal validity would be raised.

[19] See : Peter Sarcevic, 'Private International Law Aspects of Legally Regulated Forms of Non-Marital Cohabitation and Registered Partnerships' (1999) *Yearbook of Private International Law* 37 ; Hugues Fulchiron, 'Réflexions sur les unions hors mariage en droit international privé' (2000) *JDI* 889 ; Georges Kairallah, 'Les 'partenariats organisés' en droit international privé (propos autour de la loi du 15 novembre 1999 sur le pacte civil de solidarité)' (2000) *Rev crit DIP* 317 ; Laurent Barnich, 'Union libre et cohabitation légale. Questions de droit international privé' in *Mélanges R. De Walkeneer* (Bruylant, 2000) 1 ; Marc Mignot, 'Le partenariat enregistré en droit international privé' (2001) *RIDC* 601; Alain Devers, 'Private International Law Aspects of Non-marital Unions' (2003) *Yearbook of Private International Law* 191 ; Georges Kessler, *Les partenariats enregistrés en droit international privé* (LGDJ, 2004); Alain Devers, *Le concubinage en droit international privé* (LGDJ, 2004); Ian Curry-Sumner, *All's well that ends registered?* (Intersentia, 2005); Gerald Goldstein, 'La cohabitation hors mariage en droit international privé' (2006) 320 *RCADI* vol 320, 9.

However this is not the solution most legislators chose. Catching an emerging trend, Quebec legislator adopted art. 3090.1 C.c.Q., stating the following:

> A civil union is governed with respect to its essential and formal validity by the law of the place of its solemnization. That law also applies to the effects of a civil union, except those binding all spouses regardless of the civil union regime, which are subject to the law of the country of domicile of the spouses.

So not only formal validity of civil unions are governed by the law of the place of registration, which is fine, but the domain of this law also extends to the essential validity and to some effects of those new institutions, instead of the law of the domicile or of the nationality of each person. As a result, from a conflict of laws perspective, it becomes *essential to deal separately with marriage and such civil unions at the characterization step of conflict resolution since the connecting factors of those two categories are different*. Why such a difference between situations – marriage and civil unions – which seemed to be very similar?

It was argued that those institutions are so diverse that they cannot be deemed to be equivalent: there is no commonality between them, which constitutes an implied condition to adopt a classical bilateral and neutral conflict rule. As a result, each one of these institutions had to be created by the law of the place of registration under the formal and essential validity of that law, and had to be governed as to its unique effects by the same law of the place of registration. Such a reasoning seems very close to the old and outmoded vested rights theory: one has to recognize as a fact a right created abroad, which theory begs the question to know under which law this right has been validly created.

However «technical» motives could better explain the origin of such a rule based on the place of registration. When Denmark first created such an institution, called registered partnership[20], it was the only country in the world to know it. So, it was useless to provide for any bilateral rule that could lead to the application of any other law. Therefore a unilateral conflict of law rule, based on the domicile or the habitual residence in Denmark, or on the Danish nationality of one person, was sufficient to provide for an international domain to this new Danish institution. But other Scandinavian countries (Norway[21], Sweden[22], Finland[23]) followed the Danish example and adopted the same type of registered partnership. Soon enough, other countries (Germany[24], the Netherlands[25], Belgium[26]) followed this trend. Each one of them enacted unilateral rules in order to know when their own law would apply to an international situation. It thus became necessary to provide also for the application of foreign laws that, by now, existed. The logical solution was to adopt a set of unilateral rules for one's own law (*lex fori*) and to double it by a general and bilateral conflict of law rule based on the foreign place of registration. Such a connecting factor represents

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[20] See: The Registered Partnership Act, D/341-H-ML, Law n° 372 du 7 juin 1989, unofficial English translation: <http://www.france.qrd.org/texts/partnership/dk/denmark-act.html>.

[21] Registered Partnership, 1993, Lov om registrert partnerskap, 1993-04-30 no.40, unofficial English translation : <http :www.dep.no/bfd/engelsk/publ/handbooks/004071-120027/index-dok000-b-n-a.html>

[22] Registered Partnership, (Act 1994: 117, Decree 1994: 1431), unofficial English translation: <http://www.france.qrd.org/texts/partnership/se/sweden-act.html>.

[23] Act on Registered Partnership, Loi n° 950/2001, unofficial English translation: <http://www.finlex.fi/pdf/saadkaan/E0010950.PDF>.

[24] Rohentwurf der Bundesjustizministeriums zur Eingetragenen Lebenspartnerschaft 2000, <http://www.france.qrd.org/texts/partnership/de/bmj.html>.

[25] Art 80a to 80g of the Civil Code of the Netherlands.

[26] Art 1475 to 1479 of the Civil Code of Belgium.

a functional equivalent of a general unilateral conflict of law system that, according to the unilateral thinking, will apply the law that wants to govern the situation without any control by the judge seized of the dispute.

Technically, choosing such a connecting factor is the only way to realize a kind if bilateralisation of the unilateral rules of the forum since it is usually very difficult or impossible to bilateralise a conflict rule with alternative connecting factors (domicile or nationality of one person, for instance).

It has also been argued that the fact that the public officer acted abroad and applied its own law, or, less often, the law governing the matter under its conflict rule, will easily and objectively localize it which solution will therefore respect the proximity principle.

Moreover, this solution does not force a legislator to choose between nationality and domicile. Such a difficult choice is simply handed to the law of the place of registration since it allows the application of a foreign rule according to its own connecting factors,

In addition, it will also favour the designation of a law validating a foreign partnership, without consideration of its connecting factors. It is worth mentioning that in fact, some legislators have voluntarily tried to reach this aim. Indeed, *militancy* has had a strong influence on the solution. Often positively (and hypocritically) presented as a way to avoid discrimination towards foreigners, its true meaning must be clarified.

Whenever two persons are domiciled at the place of registration or have the nationality of such a place, they can freely enter such same sex union without any critic being raised as long as it has been the free legislative choice of the local people. However, if *one* of them is domiciled abroad in a country that does not allow it, or has a foreign nationality of such a country, then the *local person cannot celebrate such a union* since it would be invalid under the *foreign* law of his partner (you cannot marry alone). In order to avoid such a *discrimination between two persons domiciled at the place of registration* (one having a local boyfriend or girlfriend, and the other having a *foreign* one) or *having the nationality of such a place*, the solution to avoid the application of this disturbing foreign law is to apply in a seemingly neutral way the law of the place of registration!

However, the door is therefore open to *two* foreigner or two persons domiciled abroad to come and register their union here. In such a situation, the only justification remaining to upheld the union is militancy. As a result, the schizophrenic effects of such a reckless behaviour will be shovelled abroad, at the foreign place where the couple really lives. Whenever the public officer has no substantial connection with the couple, as in Quebec or in Germany, then those two foreigners might realize after a while that their new status acquired abroad has no effect whatsoever at home, unless they strive to change their local law, which is sometimes the precise aim of such a scheme.

It is intimated here that when conflict relating to civil union or registered partnership are involved, any cautious legislator should select the same connecting factors as the ones used for marriage, domicile, habitual residence or nationality of each person involved in order to avoid such a schizophrenic situation.

On the opposite, ignoring the proximity principle is the hallmark of the intrusion of post modernism in private international law[27]. Ignoring the coherence of the whole system in order to reach pragmatically a specific and often politically motivated aim, which suits the immediate needs of the parties without caring too much about the whole society in which they live, is an attitude that

[27] On this topic, see: Georgette Salamé, *Le devenir de la famille en droit international privé. Une perspective postmoderne* (Presses Universitaires d'Aix-Marseille, 2006).

has unfortunately rapidly spread in Quebec after the codification (while the codification was striving for a comprehensive legal coherence). The resolution of conflicts relating to same sex marriages carries the same characteristics.

1.2.2. Same Sex Marriages Celebrated in Canada or Abroad

Canada wholly participated in a worldwide family evolution by modifying the definition of marriage, which is now a union between two *persons*. This new freedom attracted quite a high number of foreigners who wished to benefit from this new legislation, either by ignorance of the rules of private international law or by conscious choice in order to import this new status to their own country through the means of recognition of foreign judgements. This legal tourism was at the origin of a peculiar schizophrenic situation.

In Quebec and in Canada in general, since marriage falls in principle under the federal jurisdiction, according to the Canadian constitution (except for the formalities of celebration of marriages in the provinces), public officers will ask where the future spouses are domiciled, then will write it down in the marriage certificate which will be registered in the proper registry and they will proceed with the celebration. After the big feast, coming back from their honeymoon, some of those happy couples could wonder about the validity of their union.

Since the issue of the gender of the spouses relates to its essential validity, not to its mere formality, the usual conflict rules will require that either the law of each spouse's domicile (in Canada or in the common law countries) or the law of their nationality (in many other civil law countries) will consider valid such a union.

Being foreigners and domiciled outside of Canada, both the law of their nationality and the law of their domicile will annul it and one might think that we are faced with a schizophrenic situation: valid in Canada but invalid abroad. However such a conclusion would be mistaken. In reality, the same sex union was *also* invalid in Canada since Canadian conflict rules in Canadian courts apply the law of the *domicile* of the spouses which, by hypothesis, will consider it invalid even though it was performed by a Canadian public officer which did not verify if, under the applicable law governing this international situation, same sex couples could validly get married. Moreover, there is no jurisdictional requirement under Canadian law that the public officer must have the same nationality as one of the future spouses or that one of them must to be domiciled or have a habitual resident in Canada.

Faced with such incoherent situation, the Canadian legislator had to do something to restore the logic of the scheme. It would have been reasonable, for instance, to add a requirement that the public officer would be provided with a certificate or another document proving that the future union would be recognised under the law of the nationality or the law of the place of domicile or the law of the habitual residence of at least one of the future foreign spouses. Instead, it was recklessly decided to make sure there actually would be a schizophrenic situation by adopting the following rule in 2013[28]:

> **5.** (1) A marriage that is performed in Canada and that would be valid in Canada if the spouses were domiciled in Canada is valid for the purposes of Canadian law even though either or both of the spouses do not, at the time of the marriage, have the capacity to enter into it under the law of their respective state of domicile.

[28] Civil Marriage Act, LC 2005, c 33 as amended in 2013.

In effect, this rule makes it valid under Canadian law to enter into a same sex marriage if performed in Canada – but not outside - even though both spouses lack any capacity to do so according to the law of the place where they live, usually the law of their domicile. It must be mentioned however that, theoretically, the rule does not limit its domain to same sex marriage and covers any type of incapacity such as incapacity stemming from religious divergences or invalidity due to close family links between spouses. However, the spirit of the rule is aimed at same sex marriages since those unions, which by now obsess many politicians' mind, provoked its implementation.

As a result, Canadian conflict rules governing the essential validity of same sex marriages are two-folds:

1. Same sex or heterosexual marriages performed in Canada are governed by the (Canadian) law of the place of celebration.
2. Marriages performed outside of Canada are still governed by the law of each future spouse's domicile.

Obviously, this piecemeal legislation is still incoherent. Either it is acceptable that family status could be governed by a private parties' indirect choice of law[29] through a choice of place of registration. Then such acceptance should equally cover all marriages and the place of celebration will be the new connecting factor for all. Or, such a private ordering of family law is still not acceptable: then the connecting factor should be the domicile (or nationality of habitual residence of each spouse) for all types of marriages without discriminating between local and foreign unions.

2. International Jurisdiction

In every country of the world, the same basic needs are shaping the content of the law relating to international jurisdiction. From a public law point of view, one must provide for a *proper and efficient administration of justice*, which means that any court rendering a decision should have a real and substantial connection with the dispute so that it will affect the situation. Otherwise, it will be a waste of scarce legal resources. From a private law perspective, any modern system of jurisdiction rules must also bring *procedural fairness and equity* between the parties. Reaching those two fundamental objectives means finding a delicate balance between four variables. Addressing the needs of a globalized world means implementing *broad jurisdictional rules*, well adapted to the context of international disputes. So a measure of flexibility has to be built into the system. However, broad jurisdictional rules needed in this open international legal market raise the opportunities to shop for a favourable forum. *Forum shopping* may also lead to *parallel proceedings* relating to the same dispute between the same parties and therefore to potential contradictory decisions. Moreover, flexibility implies raising considerably the level of *uncertainty*, to the detriment of the development of international relations.

Maintaining a balance between those four variables has been the pragmatic context in which the legislator in Quebec has had to adopt jurisdiction rules. Those rules reflect indeed a pronounced preoccupation to avoid multiple parallel proceedings. The first prong of such a policy has been to make sure there is a real and substantial connection between the Quebec courts and the dispute (2.1). The same idea lead to the codification of the *forum non conveniens* doctrine in order to

[29] In favour of this liberal approach, see for instance: Yuko Noshitani, 'Global Citizens and Family Relations' (2014) *ELR* 134.

decline jurisdiction whenever a foreign court would be in a better position to deal with the matter than Quebec judges (2.2). Moreover, Quebec case law has embarked on a rigid policy favouring choice of forum clauses (2.3.).

2.1. Real and Substantial Connection

Art. 3148 C.c.Q. states the following rules:

> 3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where
> (1) the defendant has his domicile or his residence in Québec;
> (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
> (3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec; […]

Under this article, Quebec courts have jurisdiction either when a fault was committed in Quebec or when an injurious act occurred there or when damage was suffered there. While requiring a link with only one of the elements conditioning civil liability could be considered to lack a real and substantial connection, leading to exorbitant jurisdiction, Quebec rules include a discretionary power not to exercise it under the doctrine of forum non conveniens (art. 3135 C.c.Q.).

However, an alternative approach to restrict jurisdiction has been used when economic loss was suffered in Quebec. A deep debate erupted among the courts[30] since a majority of them decided that financial damages suffered there by a Quebec company would not give jurisdiction even though art. 3148 C.c.Q. did not set such a limit. In order to take jurisdiction, there must be a «material» event happening in Quebec, like the absence of payment due in Quebec: merely accounting the financial loss there would not be enough. The reasoning behind such a trend was that it would give an exorbitant jurisdiction to Quebec courts in *commercial* disputes since it would be enough that a Quebec company would be domiciled there in order to claim, as a *plaintiff*, that it suffered *financial* damages there since its patrimony would be situated in Quebec. However, an opposite trend allowed jurisdiction when personal *corporal* damages occurring abroad to a victim domiciled in Quebec would later be felt and therefore suffered there. Even if taking jurisdiction on such a situation could be considered quite broad, it was felt that it was justifiable in civil (not commercial) disputes, in order to protect a victim.

Those courts belonging to the restrictive trend adopted in effect the European approach which restricts jurisdiction based on damages occurring in one European country to the place where the *first impact* of the fault materialized and excludes jurisdiction based on ricochet (or the place of the second impact of the fault). However, in principle, the European regulations do not allow for a discretionary power to decline jurisdiction since it is based on the traditional approach. Therefore it is essential in such a context to set rigid rules up front since there is no escape clause. But Quebec law on jurisdiction allow for more flexibility so it does not seem to be justified to adopt such a restrictive approach.

Another instance where the existence of a real and substantial connection between Quebec judges and the situation arose recently. The dispute was related to art. 3148 (2°) C.c.Q. This rule codifies the Quebec version of taking jurisdiction when a foreign company is *doing business* within the jurisdiction. Such a connection is widely known in common law countries. It has often been

[30] See : Gerald Goldstein, 'De la localisation et de la pertinence du préjudice économique ou continu aux fins de la compétence internationale des tribunaux québécois' (2010) 69 *Revue du barreau* 169.

considered exorbitant by civil law countries. So Quebec law requires that «the defendant is a legal person not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec». The establishment of the foreign company could be seen as an additional element of a link with Quebec when the activity in Quebec relates to such establishment. However the courts have decided that it is not necessarily the case. It is enough that a foreign company has some activities in Quebec plus an establishment there, even though such establishment has nothing to do with the litigious activity.

Furthermore, in *ACCI v. Anvil Mining*[31], some plaintiffs have tried to invoke these factors in order to shop for a forum in Quebec in a peculiar situation that had no real and substantial connection with the Province. ACCI, a Canadian organisation whose aims are to protect the rights of war crime victims was suing an Australian Company (Anvil Mining) in Quebec for an alleged complicity in a war crime committed in Congo.

The Australian company is a mining firm doing business in Congo. In 2004, there was a rebellion there and the Congolese army confiscated the trucks of the company to reach the place where the rebellion was happening. The soldiers killed civilians. There was no trial in Congo of the people responsible for the crimes. The victims tried to sue in Australian but could not get any lawyer to help them, The Canadian organization then sued the company in Quebec since it had an establishment there since 2005 that dealt with the promotion of the company's shares in the North American market. The Quebec court took jurisdiction under art. 3148 (2°) C.c.Q. stating that there was an establishment of the Australian company there and the activity in Quebec of Anvil Mining was linked to the dispute since it was related to the asset of the company, the mine in Congo. The Court of Appeal dismissed the action[32], and rightly so. It held there was absolutely no link between Quebec and the dispute since the establishment in Quebec was only created there one year after the tragic events in Congo. Moreover, when Anvil Mining started some activity in Quebec, it was not linked to the litigious facts since it was only related to the sale of the shares which were not part of the cause of action. Quebec courts had no jurisdiction over the dispute and it was an obvious case of forum shopping,

Those examples illustrate the preoccupations of most Quebec judges who strive to make sure that their decision will have a serious effect on the dispute in terms of proper administration of justice.

2.2. Discretionary Power to Decline Jurisdiction (*forum non conveniens*)

Even though it could bring uncertainty, Quebec law has adopted and codified the doctrine of *forum non conveniens* in order to provide for flexibility[33]. Art. 3135 C.c.Q. states in the following terms:

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[31] *Association canadienne contre l'impunité (ACCI) v Anvil Mining Ltd* 2011 QCCS 1966, reversed by 2012 QCCA 117, [2012] RJQ 153 (CA).

[32] *Anvil Mining Ltd v Association canadienne contre l'impunité (ACCI)* 2012 QCCA 117, [2012] RJQ 153 (CA).

[33] On this topic, see : Gerald Goldstein, 'Chap. Canada (Québec)' *in* James J Fawcett (éd), *Declining Jurisdiction in Private International Law*, (Oxford : Clarendon Press, 1995) 146-157; Sylvette Guillemard and others, 'Les difficultés de l'introduction du *forum non conveniens* en droit québécois' (1995) 36 *C de D* 913; Gerald Goldstein and Ethel Groffier, *Traité de droit civil. Droit international privé*, vol 1, *Théorie générale* (Cowansville: Éditions Yvon Blais, 1998) n° 134; Geneviève Saumier, '*Forum non conveniens, Where are we now*?' (2000) 12 *SCLR* (2d) 121; Jeffrey A Talpis and Shelly L Kath, 'The Exceptional as Commonplace in Quebec *Forum non conveniens* Law: *Cambior,* a case in Point' (2000) 34 *RJT* 761 ; Frederique Sabourin, 'Motifs permettant de ne pas exercer la compétence : *forum non conveniens* et litispendance internationale', fascicule 9, in *JurisClasseur Québec*, volume *Droit international privé*

> Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide

This flexible rule gives a Quebec judge a wide discretionary power to consider all the circumstances and to decline jurisdiction whenever a foreign judge is in a better position to decide. As a result, it is always possible for a litigant to contest the opportunity to exercise the jurisdiction given by any rule. A deep level of uncertainty grips the defendant who will never be sure that the jurisdiction rule will be applied to the situation until the court decides. However, several solutions have been proposed in order to limit uncertainty.

One of them was to list all the circumstances that should be considered. The following list shows that it was not a very effective solution. A court should look at the place of residence of the parties and the witnesses, the situation of the proofs, the place of performance of an act, the location of property belonging to the defendant, the interests of both parties, the law applicable to the merits, the interests of justice, the advantages for the plaintiff to stay in Quebec, the existence of a parallel action abroad and the necessity to enforce the Quebec judgement abroad. Two of those factors are so broad that they include all the others: the *interests of justice* and the *interests of both parties* are indeed the two fundamental underlying principles of international jurisdiction. Furthermore, Quebec courts have justifiably held, first, that this list of factors should not be exhaustive, and second, that the weight given to any factor could vary according to the case, since it would otherwise illogically limit the discretionary powers of the courts.

Another, and more effective solution, was to interpret art. 3135 C.c.Q. in such a way as to require two cumulative conditions that were not apparent on its first reading. The *first* condition apparently required under the rule being that a *foreign court should be considered in a better position* to decide, after a careful comparison of the links between the litigious situation and both local and foreign courts. The comparison should manifestly favour the foreign court or the local court will keep jurisdiction. This kind of comparison is a known form of forum non conveniens among common law countries, including notably all the other Canadian provinces and most of the United States[34].

In addition, one should mention that art. 3135 C.c.Q. states clearly that the forum non conveniens doctrine should only be *exceptionally* used. It is a distinguishing characteristic of Quebec and other civil law rules dealing with forum non conveniens. In the common law jurisdictions, such a theory has usually been part of any general determination of jurisdiction: the establishment of direct jurisdiction and the use of a discretionary power to check whether or not there is a real and substantial connection between the situation and the court has been mixed in a single reasoning. On the opposite, the exceptional nature of the doctrine of forum non conveniens as expressed in art. 3135 C.c.Q. reflects a dual approach in civil law. First, a general or specific rule will govern the determination of the existence of direct jurisdiction. Then, in the second step of the analysis, a court will analyse whether or not forum non conveniens should allow the court to dismiss the exercise of such a jurisdiction. The exceptional nature of the rule is supposed to make

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(LexisNexis); Gerald Goldstein, *Commentaires sur le Code civil du Québec, Droit international privé, vol 2, Compétence internationale des autorités québécoises et effets des décisions étrangères (art 3134 à 3168 CcQ)* (Y Blais, 2013) n° 3135-500 to 3135-590; Gerald Goldstein, 'Le Forum non conveniens en droit civil. Analyse comparative à la lueur du droit international privé du Québec et du Japon' (2016) *Revue crit DIP* 51.

[34] See Arnault Nuyts, *L'exception de* forum non conveniens. *Étude de droit international privé comparé* (Bruyant/LGDJ, Bruxelles/Paris, 2003) n° 104 and 227.

sure that unlike what is seen in common law countries, the normal rules will not be displaced by a general forum non conveniens reasoning occupying the heart of the determination.

So it was generally thought that the *exceptional* nature of the rule would simply be used as a matter of interpretation of the *first condition* mentioned above in order to keep jurisdiction when a comparison of the links between a foreign court and the Quebec court would not manifestly favour the former. The comments made by the Quebec legislator of art. 3135 C.c.Q. were inducing such an interpretation. The Minister of Justice, in his comments[35], stated that, as exceptional circumstances justifying the use of art. 3135 C.c.Q. one could cite: «the witnesses availability, the foreignness of the law applicable to the merits and *the dispute and its relative closeness to a foreign judge*». Indeed, the exceptional condition was thus presented as the *equivalent of a closest connection test*. However, some scholars[36] have intimated that it might not be so exceptional that a foreign court would be in a better position than the Quebec court, so that the exceptional requirement of art. 3135 C.c.Q. should be seen as an additional and *separate* condition. In other words, in order to respect the exceptional character of the rule, one was supposed to prove that such difference in terms of closeness was in itself exceptional.

In a recent case[37], the Quebec court of Appeal admitted such reasoning. While the inferior court had decided that 3135 C.c.Q. should be used to decline jurisdiction since an American court in Georgia was in a better position than Quebec courts to deal with the situation, the court of Appeal held that it was a logical mistake since, *even though* it was proven that, indeed, the *Georgia court was in a better position*, that alone was *not sufficient to show how exceptional* was the situation under art. 3135 and Quebec courts should therefore keep their jurisdiction.

So the exact meaning of «exceptional» should be clarified. In order to make sense of this justified critic, it is nevertheless our understanding of the rule that the exceptional condition should only concern the (negative) lack of close contact with Quebec courts, not the (positive) fact that a foreign court could have a closest connection than Quebec courts. Since Quebec rule of direct jurisdiction have been carefully conceived, it would really be exceptional that those rules would not point to a close connection between a Quebec court and the dispute. Therefore, in those *rare* situations, art. 3135 would be naturally *exceptionally* used to decline jurisdiction.

As a result, it seems that two cumulative requirements should reduce the use of forum non conveniens by Quebec courts. First, one should prove that, after a comparison of the facts, a foreign court is in a better position to deal with the dispute (that is the usual form of forum non conveniens among common law countries). In addition, a proof must be given that the fact pattern points to a rare (*exceptional*) situation where the Quebec rule of direct jurisdiction does not lead to a case where *Quebec court* have a close (or real and substantial) connection. Such a second rule is indeed a second form of forum non conveniens, also found in some common law countries, as well as in Japan[38]. This interpretation of the Quebec rule, which cumulates two expressions of forum non conveniens, has a serious potential to limit its use and could therefore raise the level of certainty without losing the valuable flexibility inherent to such a theory.

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35 *Commentaires du Ministre de la Justice*, t 2 (Publications du Québec, 1993) 2000.

36 Sylvette Guillemard and others, 'Les difficultés de l'introduction du *forum non conveniens* en droit québécois' (1995) 36 *C de D* 913.

37 *Stormbreaker Marketing and Productions Inc v Weinstock* 2013 QCCA 269.

38 Arnault Nuyts, *L'exception de* forum non conveniens. *Étude de droit international privé comparé* (Bruyant/LGDJ, Bruxelles/Paris, 2003) n° 228, n° 229.

For instance, in a recent case, an Algerian lady was suing her husband in Quebec in order to obtain a separation from bed and board and custody of their children. She was residing in Quebec while both her husband and the children were residing and domiciled in Algeria. In the first instance, the Quebec court had jurisdiction over the separation action because of her residence there but could not get jurisdiction over the custody since the rule required that the children be domiciled in Québec. However the court was ready to extend its jurisdiction to the custody matter as an accessory measure to the separation according to art. 3139 C.c.Q. The court of Appeal reversed the decision and held that art. 3135 C.c.Q. should be used to decline jurisdiction[39]. In effect, suing in Quebec for the separation would mean to apply the law of Algeria, according to the conflict rule of Quebec. Since Algeria does not know separation a Quebec judge would have to refuse the separation: therefore the accessory measure relating to custody would have to be considered independently and as a result there would not be any jurisdiction over it. No separation and no jurisdiction over the custody: it was thought that under those truly exceptional circumstances Quebec courts were not in a good position to decide.

However, up to now, the vast majority of Quebec courts has not seriously considered this double requirement. Usually, the exceptional lack of closeness between Quebec and the dispute has not been independently considered. Whenever all the circumstances point to a foreign court having *closer connections* than a Quebec court, then, for all jurisdiction purposes, it will automatically be held that Quebec courts are *exceptionally* not in a good position to decide. Such reasoning will not limit the use of foreign non conveniens and will not bring more certainty to the field of international jurisdiction.

2.3. Choice of Forum Clauses

In order to bring certainty and to provide for broad jurisdiction rules, Quebec law has implemented a policy to respect choice of forum clauses. According to art. 3148 C.c.Q. :

> 3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where […]
> (4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;
> (5) the defendant submits to its jurisdiction.
>
> However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority

In addition to these very clear rules purporting to upheld agreement giving *exclusive* jurisdiction either to Quebec or to foreign courts or arbitrators[40], without requiring any specific link between the chosen court and the dispute, the Supreme court of Canada has held that the Quebec legislator has adopted a hierarchy of principles, at the top of which stands the respect due to party autonomy in choosing a court or the applicable law. As a result, Quebec case law has been very

[39] *Droit de la famille - 131 294* 2013 QCCA 883.

[40] Non exclusive clauses do not cause any serious problem: Quebec court apply them as long as the court seized of the dispute belongs to the class of alternative chosen courts. On the opposite, respecting an exclusive jurisdiction clause will imply to deny jurisdiction to *any* other court than the one chosen in the clause.

attentive to any expression of such a fundamental principle, to the point where other important considerations have been neglected.

For instance, in the Grecon case[41], the Supreme Court of Canada held that it should refuse jurisdiction over a dispute involving a German manufacturer, a Quebec retailer and a Quebec buyer, since an exclusive choice of forum clause gave jurisdiction to the German courts. However, denying jurisdiction in that case was contrary to a proper administration of justice since the main action between the Quebec retailer and the Quebec buyer, being purely domestic, was kept under the jurisdiction of the Quebec courts, while the incident action in warranty by the retailer against the manufacturer was sent to Germany.

Furthermore, a Quebec court[42] refused to order an injunction to stop the transfer of funds from a bank to a foreign company since the underlying contract gave exclusive jurisdiction to a Swiss arbitrator. However, taking jurisdiction to order the injunction even when Quebec court did not have jurisdiction on the principal action was clearly allowed under art. 3138 C.c.Q. which expressly states:

> A Québec authority may order provisional or conservatory measures even if it has no jurisdiction over the merits of the dispute.

Notwithstanding this crystal-clear rule, the Quebec court, following the Supreme court lead, declined to take jurisdiction since it held that doing so would have trumped the parties' will to give jurisdiction to the arbitrator. However, unlike State court, arbitrators have seldom any right or power to order injunctions so it seemed logical to ask a Quebec state court to help stabilize the situation before the funds were transferred. Ignoring such a pragmatic way to promote judicial collaboration between the various components of the legal environment certainly does not enhance international commercial relations. It would have been more appropriate to limit the parties' expression of will to its reasonable or logical domain.

It is worth mentioning in this perspective that art. 7 of the 2005 *Hague Convention on choice of court agreement*[43] does not exclude the possibility for a non-chosen court to order provisional measures of protection[44].

3. Recognition or Enforcement of Foreign Judgments

Two interesting points must be mentioned when dealing with the effects of judgements abroad under Quebec law. The first one involves the main condition required under art. 3155 C.c.Q.: the foreign judge must have jurisdiction according to Quebec standards (the so-called: indirect jurisdiction) (3.1.). The second one relates to multi-jurisdictional class actions (3.2).

3.1. Indirect Jurisdiction: The mirror Principle

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41 *GreCon Dimter inc v JR Normand inc* 2005 CSC 46.

42 *Ekinciler Demir Ve Celik San, a s v Bank of New York* 2007 QCCS 1615.

43 Convention on Choice of Court Agreements (30 June 2005), Hague Conference : <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>.

44 Art 7 states the following: 'Interim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures'.

The most salient feature of Quebec law in the field of indirect jurisdiction[45] is related to art. 3164 C.c.Q. The basic rule adopted by this article is called the mirror principle, expressed in the following terms:

> 3164. The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the country whose authority is seised of the case.

According to this principle, when a foreign decision is presented to the courts of Quebec for recognition or enforcement, the first requirement is that the foreign court has had jurisdiction over the dispute under our rules as applicable to foreign courts (so called indirect jurisdiction) and those rules will be the reflects in a mirror of the rules relating to the jurisdiction of the courts of Quebec. Whenever a Quebec courts has jurisdiction, then Quebec courts will recognize the same jurisdiction to the foreign court of origin, under the same circumstances. However the mirror is somewhat warped since art. 3164 adds the following specific requirement (not expressly found when the jurisdiction of Quebec courts is involved):

> … to the extend that the dispute dispute is substantially connected with the country whose authority is seized of the case

The substantial connection required has raised some delicate questions related to its exact meaning.

Its origin stems from a judgement of the Supreme Court of Canada[46] involving a conflict of law between two Canadian provinces (Alberta and British Columbia) where the Supreme Court tried to modernize the international jurisdiction rules in the common law. It held that, in order to respect the Constitutional arrangements of Canada, it was required that for a judgement from another (sister) Province to be recognised or enforced in another province, the court of origin of the judgment should have a real and substantial connection with the dispute. So it was not only interpreted as a common law rule, which would not be binding in Quebec (since the law of the province of Quebec belongs to the civil law and not to the common law), but also as a federal constitutional law which Quebec was also bound to follow. So when the Quebec legislator decided to reform the rules dealing with interprovincial or foreign judgements, it was felt necessary to integrate a requirement of a substantial connection between a foreign court (or a court of another Canadian province) and the dispute in order to respect the Constitution.

However such a requirement came to an unexpected life. Scholars and courts did not merely consider it as a lip service or formal provision to avoid constitutional problems but also as an independent requirement that involves a serious analysis. In effect, it meant that even if according to the normal rules relating to indirect jurisdiction a foreign court was considered by Quebec rules as having had jurisdiction over the dispute, in addition, Quebec courts would have to check that according to the all the factual circumstances, there really was a substantial connection between such a dispute and the foreign court. If not, then jurisdiction would be denied to the foreign court and its decision would not be recognised nor enforced.

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[45] See: Gerald Goldstein, 'The Recognition and Enforcement of Foreign Decisions in Quebec' (2014) 15 *Yearbook of Private International Law* 291-312.

[46] *Morguard Investments Ltd v DeSavoye* [1990] 3 SCR 1077.

Such additional requirement of a substantial connection is giving a discretionary power to Quebec judges to deny recognition in consideration of all the circumstances. It has the same effect as adding a forum non conveniens type of rule in the field of indirect jurisdiction. It obviously raises considerably the level of uncertainty. Courts have been actually using it to deny recognition to foreign judgments despite the fact that it seemed, prima facie, that the foreign court had jurisdiction according to the rules of indirect jurisdiction in Quebec.

The *Cortas Canning* case[47] constitutes a good example. A Lebanese company was suing a Quebec company in Texas since it had sold some cans of food in Texas bearing the same logo as the Lebanese's logo. So it was a case of trademark infringement. The Quebec company was condemned by default by the Texan court to pay over twelve millions dollars while in fact it had sold a few cans there which value did not amount to more than 96 dollars. Since it had no assets in Texas, the Lebanese company tried to have the Texan judgement enforced in Quebec. However Quebec courts denied enforcement. While the Texas court had jurisdiction according to art. 3168 C.c.Q. since a fault and damages occurred there, nonetheless, the Quebec court held that there was no substantial connection between Texas and the dispute. Art. 3164 C.c.Q. and the substantial connection requirement were used to deny recognition and enforcement in the same way as if it was a reasoning based on a forum non conveniens rule applied to indirect jurisdiction.

In addition to the fact that it brings a high level of uncertainty to the field of the recognition of foreign judgement, such reasoning raises a troubling question. What is the logic behind this disruption of the mirror principle since there is no such requirement of a substantial connection for Quebec courts? The answer is twofold. First, it is supposed that the factors chosen by the Quebec legislator in order to assert jurisdiction in Quebec already include such substantial connection since the rules of direct jurisdiction have been specially crafted for international situation.

But if so, one could answer, and since the same factors are used in the field of indirect jurisdiction (jurisdiction of foreign courts) according to art. 3164 C.c.Q., then how is it that there is an additional requirement for those foreign courts and not for Quebec courts? The general answer to that question is that even if, in general, those connecting factors are relevant in terms of sufficient connection, it may still happen that under some specific circumstances it will not be the case.

Once again, one could logically ask why then the jurisdiction of Quebec courts is not expressly conditioned by such substantial connection requirement. The answer to that question is clear. The jurisdiction of Quebec courts is conditioned by the underlying forum non conveniens doctrine expressly mentioned by art. 3135 C.c.Q. However, this rule does not cover indirect jurisdiction. So when indirect jurisdiction is involved, the substantial requirement of art. 3164 C.c.Q. plays the same role as the one played by art. 3135 C.c.Q., when the direct jurisdiction of Quebec courts is involved. They are functional equivalent.

As a result, the Supreme Court of Canada[48] recently affirmed that art. 3135 C.c.Q. could not be used in the field of indirect jurisdiction, which is quite logical since it might be considered that the substantial connection requirement of art. 3164 C.c.Q. applying to the field of indirect jurisdiction is already playing the same role there and so there is no need to apply two rules serving the same purpose[49].

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[47] *Cortas Canning and Refrigerating Co v Suidan Bros Inc* [1999] RJQ 1227 (Sup Ct).

[48] *Société canadienne des postes v Lépine* [2009] 1 RSC 450, 304 DLR (4th) 539. See Jean-Gabriel Castel, 'Giving Effect to Out-of-Province Judgments in Class Action' (2008) *Ann Can de Droit international* 397; Geneviève Saumier, 'Competing Class Actions Across Canada: Still at the Starting Gate after *Canada Post v. Lépine*' (2010) 48 *Can Bus LJ* 462.

[49] See: *Hocking v Haziza* 2008 QCCA 800.

Even though it is better to use only one discretionary power, instead of two in the field of indirect jurisdiction, that field is still impaired in Quebec law by a high dose of uncertainty that is detrimental to international relations. One could wonder whether it would be a good idea to avoid it altogether. However, it may not be wise to get rid of any flexibility when the jurisdiction of foreign courts is involved while the same amount of flexibility is accepted in the field of direct jurisdiction.

3.2. Recognition of Multi-jurisdictional Class Actions

In Canada, as in the United States, class actions are allowed. By class action, on usually means a proceeding enabling one person of a class of persons facing the same dispute with the same defendant to sue without a mandate on behalf of all the members. However, in every jurisdiction in North America any such person cannot institute a class action without a prior authorization from a court in order to protect the rights of each member of the class since the judgement will have res judicata over them. The court will eventually authorize the bringing of the action that will ascribe the status of legal representative to the member of the class it designates and will describe in detail the class of persons involved. Since the judgment will have res judicata over the members of the described class, none of them will individually be allowed to start individual proceedings. However, depending on the system chosen by each jurisdiction seized of the action, and after having received the proper information, any person concerned can either opt in or opt out of the class action in order to avoid being subjected to the res judicata effect.

Such proceedings are more efficient than bringing thousands of similar claims that would not have been brought anyway since the amount of each claim would be too small (15, 30 dollars…). Class actions not only represent a way to allow for a better access to justice. They also constitute a special type of lucrative business in North America since they could bring millions of dollars in lawyers' fees, being usually paid as a percentage of the amount of compensation earned by plaintiffs. Moreover, since it is admitted everywhere in North America, such a business has become international. Whenever a huge dispute is involved there, against cigarettes or medical companies for instance, lawyers start running all over North America to try to reap first the hefty benefits generated by those actions.

The first step is to create a multi-jurisdictional class of members. Being originally formed as multi-jurisdictional class covering several States of the United States or several Canadian provinces, they rapidly became truly international by covering Canada as well as the United States. The main problem has been to assume jurisdiction over the parties. It is easy if the defendants are sued at the place of their domicile, since jurisdiction will then cover all the Plaintiffs members of the class. If not, if the action is brought for instance at the place where damage occurs, or at the place where the dangerous product has been sold, it will be more difficult to assume jurisdiction. Two diverging trends emerged to deal with this issue.

Either a court will only require some substantial connection with the dispute and itself. It has been the solution usually admitted by the common law courts of Canada that held that such a substantial connection was sufficient to take jurisdiction over all the members of the class notwithstanding the fact that some are domiciled or resident outside of the jurisdiction.

On the opposite, the Quebec approach has been that Quebec courts must require a substantial connection with each Plaintiff member, as if they were faced with individual claims. For instance,

in *Hocking v. Haziza*[50], a class action was brought in Ontario against a bank that asked its clients everywhere in Canada to pay illegal penalties. The judgment rendered by the court of Ontario was then presented for recognition in Quebec. It was held by the Quebec courts that even though the court of Ontario had jurisdiction over the Plaintiffs who were clients of the bank in Ontario, it had no substantial connection with the Quebec clients of the establishments of the bank in Quebec. Enforcement was thus rightly denied.

In addition to this serious legal issue, in practice, a new strategy emerged aiming to ease the situation of the defendants, a strategy that might rightly be described as a race to the bottom.

3. 2.1. The New Game in Town: A Race to the Bottom

This strategy involves the following five steps.

The first step is to convince a «friendly» potential member of the class to start a class action in the jurisdiction where the applicable law will be the least detrimental to the defendant (for instance in Ontario, where the applicable law might be the law of Ontario). It could be the place where the law designated by the conflict rule will give the lowest amount of compensation, or will be the most detrimental to consumer protection. It is also necessary at this stage to compose a multi-jurisdictional class of members that includes all the persons in the same situation everywhere in North America.

The second step will be to manage to get the approval from the court of the class action. Thus your friendly member will be nominated as the official representative of the class.

The third and parallel step will be to negotiate an out of court settlement based on the hypothesis of the application of the law that is the least detrimental to the defendant. As a result, the settlement will cost less to such defendant. For instance, in the HSBC case, *none* of the clients of the bank would have their illegal penalties reimbursed, but the lawyers' fees of the «friendly» representative would be paid by the bank…

The fourth step will seek the approval and homologation of the settlement by the court seized of the class action (Ontario), preferably *at the same time* as the court approves the class action and designates the representative of the class. Thus, ideally from the defendant's perspective, pending the expedition of notices to the potential members that they could *opt out* of the action, there will be a minimal amount of time between the crystallisation of the different parts of the strategy. In addition, no potential member will have the opportunity to further argue over the content of the settlement that was previously discussed between the friendly representative and the lawyers of the defendant... Once the homologation of the settlement has been secured, it will be res judicata between the defendant and the class of plaintiffs involved. No member of it will be allowed to bring an individual claim there.

However, this is not the end of the plan since it is an international situation. The lawyers of the defendant have to make sure that no foreign court deals with the dispute in a less favourable way. So the fifth and final step to complete the strategy will be to *have* the *judgement* (from Ontario) having homologated the settlement *recognised* in all the other jurisdictions where other potential plaintiff members are domiciled or resident (Quebec and elsewhere) so that it will block any proceedings there. Thus the nickname we gave to this strategy as «a race to the bottom».

There have been several class actions from Ontario actually striving to block or swallow class actions brought in Quebec where the protection of the plaintiffs was better. Ironically, the same

[50] 2008 QCCA 800.

strategy has been used in some class actions brought in the United States striving to swallow Ontario and Canadian class actions… Several multi-jurisdictional class actions actually succeeded in lowering the protection of the plaintiffs, even though such actions were meant to facilitate a better access to justice for those plaintiffs. However, others were less successful. In Quebec, in two cases involving those class actions, including the previously discussed Hocking case[51], recognition of judgements from Ontario were denied, even though one of them went up to the Supreme Court of Canada[52]. The various motives given to deny recognition include the lack of jurisdiction of the foreign court over the members from Quebec and the violation of basic principles of procedural fairness.

The last interesting development that is worth mentioning also relates to multi-jurisdictional class actions, although it could have happened in another context.

3.2.2. The future of recognition: Parallel or Joint Judgments

In the 90's three class actions were brought at the same time in three Canadian provinces: Ontario, Quebec and British Columbia against the Red Cross who had been distributing tainted blood causing hepatitis C. The parties reached a Settlement Agreement covering the three class actions and the courts of each province were assigned a supervisory role under the agreement after its homologation in the three provinces.

In 2012, a lawyer for the Plaintiffs brought a motion in Ontario, Quebec and British Columbia, asking whether supervising judges from those 3 provinces could *sit together to hear a motion in Alberta* (another Canadian province). They were supposed to hear three parallel motions there arising under the Settlement Agreement.

In the lower courts, all three judges in Ontario, Quebec and British Columbia agreed that they had the *power to conduct such a hearing together outside of their respective jurisdiction*[53]. While the Minister of Justice in Quebec did not appeal, both the Ministers of Justice of Ontario and British Columbia did appeal, contesting that their judges had such power. The Court of Appeal of British Columbia allowed the appeal[54] and held they did not have such power. However the Court of Appeal of Ontario confirmed the lower court decision[55] and affirmed that the common law as it should be interpreted in a modern context did not forbid judges to sit outside of their jurisdiction. The Supreme Court of Canada finally confirmed this interpretation[56].

This extraordinary dispute seems to show where the future of recognition of foreign decision lies. It constitutes a strikingly promising avenue of thoughts and the sky seems to be its limit. Following this train of ideas, one could imagine for instance three judges, one from China, one from Japan and one from Thailand, sitting together in Singapore for a joint hearing in international proceedings.

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51 *Hocking v Haziza* 2008 QCCA 800.

52 *Société canadienne des postes v Lépine* [2009] 1 RSC 450, 304 DLR (4th) 539.

53 See *Parsons v The Canadian Red Cross Society* 2013 ONSC 3053, 363 DLR. (4th) 352; *Endean v Canadian Red Cross* 2013 BCSC 1074.

54 *Endean v British Columbia* 2014 BCCA 61.

55 *Parsons v Ontario* 2015 ONCA 158.

56 *Endean* v. *British Columbia*, 2016 CSC 42.

Indeed, such a panel would already be possible today under the rules of the SICC (Singapore International Commercial Court)[57]. However, today, under those rules, our three judges would render a judgement from Singapore that would have to be recognised elsewhere in order to obtain *res judicata* in China, Japan and Thailand[58]. But the future could lead towards two more promising direction, as the Canadian proceedings show.

Let's consider first the more modest one. We could witness *three parallel judgments* taking place in the middle of intense exchange of ideas and rich and tight collaboration. Actually, some instances of *case management conferences* are already happening among several modern courts, including probably the SICC. Obviously, there would be problems to overcome, such as the followings, which indeed have been raised in the Canadian proceedings we mentioned: How do we manage those proceedings when different procedural rules apply to the hearing for each judge? Isn't it contrary to the sovereignty of Singapore to allow foreign judges to summon witnesses there? How could these judges reach similar decisions when the applicable law under the respective conflict rules of each judge are different? How is it possible to respect the fundamental principle of an «open court», a court open to the public at large, when most of the people making such public reside outside of the place of the proceedings? Despite those seemingly daunting problems, there are ways to propose answers to each of them.

In terms of procedural rules, of course, it is easier when the different judges, as it was the case in the Canadian class action case mentioned above, come from similar procedural backgrounds. For instance, as is the case with the SICC, it would be easy to take jurisdiction if the law of each judge would include the respect of choice of forum clauses under the same conditions. Ratifying the 2005 Hague Convention on choice of forum clauses would be an obvious solution. Furthermore, adopting a common procedural frame specially aimed at those parallel proceedings could be feasible taking into account the international nature of the situation.

In terms of sovereignty, there is no serious issue as long as the sovereign States concerned gave their mutual consent to such proceedings. In addition, it is worth mentioning that nowadays, most modern scholars do not generally include private international law questions among States sovereignty but as private issues.

Diverging conflict law rules should also evolve towards harmonious principles. Such harmonization is far from impossible. At least, it is possible to reach some common ground since private international law rules relate to similar problems everywhere and the relevant solutions are not so numerous nor basically different, as the APPIL project and the numerous Hague conventions aptly show.

Finally, the open court principle does not require that the whole world sit in the same courtroom. Videoconference could easily provide for a good solution.

Generally speaking, we are not there yet except when modern courts are involved. However such an open practice could spread soon.

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[57] See: for a general source of SICC rules : <http://www.sicc.gov.sg/Guide.aspx?id=81>; for a general overview, see : <http://www.sicc.gov.sg/About.aspx?id=22>; for the proceedings, see SICC User guides : <http://www.sicc.gov.sg/documents/docs/SICC_User_Guides.pdf>.

[58] For the enforcement abroad of judgments rendered by the SICC, see: SICC, 'Note on Enforcement of SICC Judgments' : <http://www.sicc.gov.sg/Guide.aspx?id=81>. See Anselmo Reyes, 'Recognition and enforcement of interlocutory and final judgements of the Singapore International Commercial Court' (2015) 2 *J. Int'l & Comp. L.* 337.

Furthermore, a second and more daring development could happen: a *joint judgement* rendered by a three judges panel from different countries, *having simultaneously res judicata in those different countries without any need for a special proceedings to have it recognised or enforced* in those countries. We are certainly not there yet, but we certainly could work today to reach this aim soon.

CONCLUSION

Nowadays, new social and legal aspirations have emerged, such as the ones produced by same sex couples, or couples' desires to benefit from a secure status (registered partnership, civil union) close to the one involved under the rules of traditional marriage, or such as the ones related to consumer or victims invoked in class actions. Due to the emerging globalization of human relations, those aspirations transcend borders and easily reach an international dimension. In such a new context of potential legal competition[59], it is no longer enough to provide for unilateral and apparently automatic answers previously designed for private local consumption. People will try to find happiness under better skies.

Whichever orientation is chosen by each system to answer those aspirations, either by catering to the needs of private parties, or by staying closer to the needs of the society at large, *avoiding schizophrenic situations* belongs to the fundamental aims of any modern legislator in any given international situation. More precisely, the recent developments mentioned in this study tend to show that rules of private international law must strive to find a balance between two faces of *material justice* expressed in two words: *predictability* and *proximity*.

Whenever issues relating to which court should take jurisdiction, which law should apply and whether or not a foreign decision should be given effects by local courts, judges need to take into consideration the expectations of private parties in order to convince their public that justice had be rendered in any particular situation involving foreign element. One quick reflexive answer given by often politically motivated actors has been to forge rules fixing the problem on a short-term basis, without looking over the hill towards the near future (when another political team might have to deal with the consequences), without giving too much consideration to the logic of the legal system at large.

There always will be a tension between legal conservatism and post modernism since legal rules cannot be developed as fast as each society evolves. Quebec rules on Private international law reflect such a tension ever since it was modernized in 1994. From a comparative law perspective, anyway, it is essential to realize that at least a good basis should be adopted on which such evolution will have to be legally imprinted. This is the key to a rich and fruitful participation to international relationships that are unavoidable anyway at the age of the Internet. The aim of this paper was to suggest some answers to those contemporary questions.

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[59] See on this topic: Horatia Muir Watt, 'Aspect économiques du droit international privé' (2004) t 307 *RCADI* 25.