Hague Convention Choice of Court Agreement - Quebec Law 2007

Proceedings

Upcoming Meeting

CIVIL LAW SECTION

QUEBEC LAW AND THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS OF 2005

By Frédérique Sabourin[1], **Quebec City**

Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have not been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the Conference and its Delegates. Please consult the Resolutions on this topic as adopted by the Conference at the Annual meeting.

Charlottetown Prince Edward Island, September 2007

[1] The object of this report is to set out the differences that exist between Quebec law and the Hague *Convention on Choice of Court Agreements* of 2005[2](hereinafter referred to as the "Convention"). Our approach will not be a section-by-section analysis but will be more general in scope, focusing on the three key obligations in the Convention: (1) that of the court chosen by the

parties; (2) that of the court that is seized but is not the court chosen by the parties; and (3) that of the court asked to recognize and enforce the judgment given by the chosen court.

Obligations of the court chosen by the parties

[2] The Convention is designed to give effect to choice of court agreements, that is to say agreements by which the parties designate the courts that will have jurisdiction to decide their disputes (art. 3). This possibility is given to the parties only in civil and commercial matters.

The *Civil Code of Quebec* (C.C.Q.) also provides that a choice of court agreement may be concluded in personal actions of a patrimonial nature (art. 3148, par. 1 (4°) C.C.Q), which thereby excludes real actions[3] and personal actions of an extrapatrimonial nature. These limitations are somewhat reminiscent of the first paragraph of article 2639 C.C.Q., which provides: “Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration”. On this point, therefore, the Convention and Quebec law are to the same effect.

[3] However, the Convention excludes a large number of civil and commercial matters and makes it possible for a declaration to be made excluding even more (arts. 2 and 21).[4] Contracts for household purposes (involving consumers) and contracts of employment are thus excluded from the Convention. In Quebec law, according to the very language of article 3149 C.C.Q., it is not possible to raise against a consumer or worker his or her waiver of the jurisdiction of the courts of his or her residence or domicile.[5] According to the case law,[6] the waiver referred to in article 3149 C.C.Q. would specifically occur only where there was an arbitration clause[7] or a choice of court clause referring to foreign courts and where the action is brought against the weaker party. A new distinction has been made by recent amendments to the *Consumer Protection Act*.[8] Choice of court clauses cannot be raised against a consumer or an employee, whether they are agreed to before, or after, the occurrence of the dispute, but arbitration clauses, on the other hand, are permitted in consumer contracts once the contract has been concluded and the dispute has arisen.[9]

[4] Choice of court clauses are permitted in insurance contracts under the Convention, except for those entered into by consumers.[10] The courts in Quebec have not yet had an opportunity to address the validity of choice of court clauses in insurance contracts and the doctrine is divided. According to Goldstein and Groffier, *Czajka* v. *Life Investors Insurance Co. of America*[11], a decision of the Superior Court, confirms the view of Castel and Talpis to the effect that the jurisdiction established by article 3150 C.C.Q. is not exclusive.[12] A more recent decision in which an arbitration clause had been agreed to also followed their view.[13] In our opinion, choice of court clauses are certainly allowed in insurance contracts under Quebec law, since article 3150 C.C.Q. does not exclude the application of other more general provisions such as article 3148 C.C.Q. They are probably also allowed in insurance contracts concluded by consumers, since the *Consumer Protection Act*[14] does not apply to these contracts. The Convention is more explicit than Quebec law on this point.

[5] Article 3 *c)* of the Convention sets out the formal requirements that a choice of court agreement must meet for the Convention to apply. It must have been entered into or documented in writing or by any other means of communication that renders information accessible so as to be usable for subsequent reference. If the agreement does not meet these conditions, the Convention will not apply to it. However, the Convention does not prohibit Contracting States from enforcing such an agreement or the resulting judgment under their own domestic law. In Quebec law, the *Act to establish a legal framework for information technology*[15] would also make it possible to give effect to a choice of court clause in a technological medium, subject to the rules in the *Civil Code* governing the admissibility of evidence. Furthermore, since there are no particular formal requirements for a choice of court agreement, unlike the situation with respect to arbitration agreements,[16] a choice of court agreement could even be oral since a contract is formed by the sole exchange of consents between persons having capacity to contract, according to article 1385 C.C.Q. On this point, therefore, the scope of the Convention is more restrictive than that of Quebec law.

[6] Concerning the substantive requirements, article 3 d) of the Convention provides that a choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Therefore, the validity of the choice of court agreement must be determined independently, in the light of the tests set out in the Convention. It is therefore open to the chosen court to find that the contract is not valid without at the same time making the choice of court agreement invalid. On the other hand, of course, it is also possible that the reason why the contract is invalid also applies to the choice of court agreement: everything will depend on the circumstances and the applicable law. In Quebec law, *the Civil Code* does not contain any particular rule governing choice of court clauses, unlike articles 2642 and 3121 C.C.Q.,[17] which clearly provide that an arbitration agreement is severable from the main contract. The courts have not yet had an opportunity to rule on the question of the independence of the choice of court agreement from the main contract, but it may be assumed that the solutions will be similar to those adopted for arbitration agreements, especially since, under article 1438 C.C.Q., “a clause which is null does not render the contract invalid in other respects, unless it is apparent that the contract may be considered only as an indivisible whole”. On this point, therefore, the Convention is more explicit than Quebec law, although probably to the same effect.

[7] Which law applies to a choice of court clause? The Convention does not expressly address this question and refers generally to the rules of the chosen court, including its conflict of laws rules (see *infra* par. [13]).

[8] The chapter of the Convention on jurisdiction applies solely to exclusive choice of court agreements, that is to say agreements that exclude the jurisdiction of any court in another Contracting State.[18] The Convention would not apply to an asymmetrical choice of court agreement drafted so as to be exclusive with respect to proceedings instituted by one of the parties but not to proceedings instituted by the other.

[9] The Convention applies only to international cases (art. 1). In other words, if a situation is

otherwise strictly foreign because the parties reside in the same State and their relationship and the other relevant elements of the dispute are linked solely to that State, the mere fact that a Quebec court is chosen does not make it international in terms of jurisdiction (art. 1 (2)). A Quebec court would not therefore be required to hear the dispute.[19] In that case, article 19 provides that a declaration may be made that the Quebec courts could decline to hear cases to which an exclusive choice of court agreement applies if the only connection with Quebec is the choice of court clause.

The risk that the courts of Quebec might be overburdened does not *prima facie* warrant such a declaration, in our view, especially when the requirement that there be a connection between the chosen court and the case submitted to it is not a requirement in Quebec law, subject to the doctrine of *forum non conveniens*[20] (see *infra* par. [18]).

[10] The Convention defines the residence of a legal person for the purpose of determining whether a case is international (art. 4, 2nd paragraph). Quebec law does not include specific private international law rules. The definitions of domestic law accordingly apply. Residence is the place where a person usually resides (art. 77 C.C.Q.). There is no specific definition for legal persons. Normally, residence will correspond to an establishment; in the case of suretyship for costs, however, it is the location of the head office that determines the place of a company's residence. [21] The head office must be in Quebec when the legal person is incorporated under Quebec law, and in Canada when it is incorporated under federal law.[22] In the latter case, a legal person would be considered to be domiciled in Quebec if its statutory seat or its actual domicile were there. The location of its central administration could therefore play a role in Quebec law in determining the residence of a legal person. As far as the essential character of an establishment as the main establishment is concerned, given the possibility that a person may have more than one residence, this issue should apply only in determining domicile, which is defined as the head office (art. 307 C.C.Q.). Even a secondary establishment should normally be capable of qualifying as a residence. In this regard, Quebec law has a larger scope than the Convention.

[11] We should note, moreover, that, according to the first paragraph of article 3077 C.C.Q., "where a country comprises several territorial units having different legislative jurisdictions, each territorial unit is regarded as a country". A*rticle 25of the Convention is to the same effect, but adds that a Contracting State that comprises two or more territorial units in which different systems of law apply shall not be bound to apply the* Convention to situations involving solely those different territorial units. This means, therefore, that the Convention would not apply in the event that a choice of court clause agreed to by the parties, one from Quebec and the other from another Canadian province, chose the courts of Quebec. Thus, on this point, the scope of the Convention is narrower than that of Quebec law.

[12] According to the Convention, the chosen court shall hear the case when proceedings are instituted in that court (art. 5). In Quebec law, when the parties confer jurisdiction on the courts of Quebec, this jurisdiction is also recognized (art. 3148, par. 1 (4) C.C.Q.).[23] On this point, therefore, the Convention and Quebec law are in agreement.

[13] The main exception to article 5 of the Convention provides that the chosen court is not

required to hear the case if the choice of court agreement is null and void under the law applying to the court, including its conflict of laws rules.[24] In Quebec law, there is no provision similar to article940.1 of the *Code of Civil Procedure* (C.C.P.), which makes it possible to challenge the validity of arbitration clauses, that applies to choice of court clauses. The solution favoured by the doctrine is that the same rules should be applied to both types of clauses and, in this regard, has invited the legislature to review the rules governing the international jurisdiction of Quebec courts and to consolidate them into a full set of rules.[25] The report of the Comité de révision de la procédure civile [civil procedure review committee], tabled in 2000, is to the same effect since it recommends the inclusion in the C.C.P. of a consistent and complete chapter on private international law that would include the rules governing arbitration currently included in Book VII of the C.C.P.[26] It must be noted, however, that neither the provisions of the C.C.P. nor those of the *United Nations Commission on International Trade Law Model Law on International Commercial Arbitration* or the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, on which they are based, indicate which law applies to make an arbitration agreement null and void. In these circumstances, it is difficult to say whether the substantive law or the conflict of laws rules would govern the validity of a choice of court clause in Quebec law.

[14] Indeed, it is possible to contemplate the application of Quebec substantive law since, according to article 3078 C.C.Q.,[27] the agreement must be an agreement under Quebec law. Thus, Quebec law would apply to defects in consent that might entail the nullity of the choice of court clause. In *HSBC Bank Canada c. Nytschyk*,[28] the Superior Court accepted to decline jurisdiction, as sought by a surety domiciled in Ontario, and dismissed the action brought by the financial institution on the basis that the last part of the choice of court clause at issue in that case did not apply because it was contained in a contract of adhesion and was abusive and exorbitant. [29] In that clause, the bank had reserved to itself a unilateral right to sue the surety in the courts of the province or country of its choice, in that case the courts of Quebec. The defendant, for his part, had submitted himself irrevocably to the jurisdiction of the Ontario courts. Moreover, the law that applied to the contract was the law of Ontario. There was no specific choice of court clause in the agreement. The law of Quebec was applied without the Court justifying its decision in any manner whatsoever.

[15] Another solution would be to allow the question of nullity (for fraud, error, principal fraud, fear) to be governed by the Quebec conflict of laws rules, that is to say by the law chosen by the parties (art. 3111 par. 1 C.C.Q.), which, as we noted earlier (see *supra* par. [6]), may differ from the law that applies to the main contract. Absent a choice of law, or if the chosen law makes the choice of court clause invalid, the law of the State that is most closely connected with the clause would apply (article 3112 C.C.Q.). Article 3113 C.C.Q. cannot be applied in this situation, where the obligations of the contractual parties under a choice of court clause are no more specific than others (as is also the case in partnership or exchange contracts, for example). In fact, this provision creates a simple presumption[30] that the closest connections exist with the law of the State in which the party who must provide perform the obligation featured in the contract has his or her

residence or, if the contract is concluded as part of the activities of a business, its establishment. If the parties have not chosen the law that applies to their choice of court agreement, the applicable law could accordingly be that of the chosen court or that which applies to the main contract.

[16] On the other hand, a party's incapacity to conclude a choice of court agreement conferring jurisdiction on the Quebec courts would be subject to the law of that party's domicile in the case of a natural person, or to the law under which it was incorporated in the case of a legal person (art. 3083 C.C.Q.). However, one thing is clear: once the applicable law has been identified, if that law is a foreign law, reference to its conflict of laws rules is excluded by article 3080 C.C.Q.[31] The Convention makes no specific provision in this regard. Everything would depend on the rules of law applied by the chosen court.

[17] On this point, therefore, the Convention and Quebec law do not essentially differ but neither is much more explicit than the other. At least, the Convention eliminates use of the law of the court that is seized but no chosen to decide these matters.

[18] Unlike Quebec law, the Convention excludes the possibility that the chosen court might decide not to hear the case because another court seems to be more appropriate. Thus, in a Quebec Court of Appeal case,[32] Kardiak Productions inc. had signed a management contract with Kathleen Sergerie (an artist known in Quebec simply as Kathleen). In its general provisions, this contract included a choice of court clause selecting the Ontario courts and, in a specific provision amending another clause (this may have been an erroneous reference) a choice of court clause selecting the Quebec courts. According to the Court of Appeal, the contract expressed the intention of the parties to seize to the Quebec courts of any disputes that related to the interpretation and application of the contract. A recording contract had subsequently been entered into by Kardiak and Sony Music Canada inc. securing the services of Kathleen. This contract included a choice of court clause conferring jurisdiction on the Ontario courts[33] to decide any dispute arising under the contract. When she was sued in Quebec for damages by Kardiak, Kathleen was granted a transfer of the action to the Ontario courts, which were better able to decide the dispute, according to article 3135 C.C.Q.[34] This isolated decision is not the last word on this question, according to one author.[35] However, since the language of article 3135 C.C.Q. does not prohibit the use of the *forum non conveniens* principle when a choice of court clause is present, it would be necessary to exclude this possibility by implementing the Convention. Indeed, on this point, the Convention and Quebec law differ.[36]

[19] While, in Quebec law, a choice of court clause may always be challenged by the *forum non conviens* principle, we are of the view that the *litis pendens* principle no longer avails, on the other hand. Indeed, according to article 3137 C.C.Q., the chosen Quebec court could not stay proceedings seisin if proceedings had previously been instituted in another court or if a judgment had already been given, because *litis pendens* could not arise in a case where the foreign judgment given or to be given could not be recognized and enforced in Quebec. Now, if there is an exclusive choice of court clause selecting the courts of Quebec, a foreign judgment given by another court would never be recognized because in no case would it fill the condition set out in

article 3155 (1) C.C.Q. that the foreign authority have jurisdiction. Although there is no case on this question in Quebec, it may be assumed that, on this point, the Convention and Quebec law are in agreement.

[20] Paragraph 3 of article 5 of the Convention includes specific provisions that allow the chosen court to apply its rules related to jurisdiction over subject-matter or the allocation of jurisdiction among the courts of a Contracting State. In Quebec law, the case law has repeatedly stated that the provisions of the C.C.P. come into play only when jurisdiction has been established under Book X.[37] Thus, if the parties choose the Quebec courts or the courts of Quebec, articles 34, 68 and 73.1 C.C.P., for example, will determine whether the Court of Quebec or the Superior Court has jurisdiction and in which judicial district the case may be heard. A more explicit choice of court clause would not make this clause null and void, however; it merely means, in all probability and in the absence of case law on this specific question, that it would be ignored. On this point, therefore, the Convention and Quebec law are in agreement.

The duty of the court seized that is not the court chosen by the parties

[21] In Quebec law, prior to 1994, when the parties chose a foreign court, this choice was never considered to be exclusive and the Quebec courts retained jurisdiction.[38] Since 1994, it has been possible for the parties to exclude the jurisdiction of the Quebec courts but, the language of the clause must be clear. Thus, in *M.F.I.*,[39] the Superior Court noted that the use of expressions such as “exclusive (of all other jurisdictions)”, “any” or “all” (actions), “only (be taken in or enforced before the chosen jurisdiction)” and “irrevocably (attorn to)”, expressed the intention of the parties to exclude the jurisdiction of any other court. In that case, the choice of court clause was asymmetrical.[40] The Convention creates an irrebuttable presumption[41] of exclusivity unless the parties give an express indication to the contrary. It would thus amend the law of Quebec in this regard.

[22] According to both article 6 of the Convention and the end of article 3148 of the *Civil Code of Quebec*, a Quebec court that is not the chosen court should decline to hear a case when the proceedings are instituted in that court. This is what usually happens and, in this regard, the Quebec courts have on many occasions exhorted parties to contracts in Quebec to read their contracts carefully.[42] More often than not, in fact, foreign courts, usually those in Ontario[43] (see *infra* par. [38]) or the US,[44] although sometimes also in Italy,[45] Germany,[46] Switzerland,[47] France,[48] Bahamas[49] or Scotland,[50] are chosen by the parties under standard or general clauses to which the Quebec party does not appear to pay sufficient attention. On this point, the Convention and Quebec law are in agreement.

[23] Article 6 of the Convention sets out five express exceptions to the duty of a court that is not chosen to decline jurisdiction: a) the agreement is null and void under the law of the State of the chosen court, including its conflict of laws rules; b) a party lacked the capacity to conclude the

agreement under the law of the State of the of the court seized (including its conflict of laws rules);[51] c) giving effect to the agreement would lead to a manifest injustice[52] or would be manifestly contrary to the public policy of the State of the court seized in accordance with its own concepts;[53] d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or e) the chosen court has declined to hear the case.

[24] However, it must still be possible to show that there was indeed a meeting of minds. To do this, article 6 a)of the Convention provides for the application of the law of the chosen court, including its private international law rules. If it is clear (and this may refer both to the factual and the legal situation) that there cannot have been a meeting of minds, according to the Explanatory Report, there is, on the other hand, no need to examine the validity of the clause in accordance with the law designated by article 6 a); the court seized but not chosen will apply its own law.[54]

In *Hewlett-Packard France* c. *Matrox Graphics Inc.*, the Court referred to a sheer struggle opposing companies that exchange their reciprocal terms and conditions, each sincerely believing that theirs would prevail.[55] In that case, there was a choice of court clause in the terms and conditions of one company selecting the courts of Texas, but none in those of the other company. Even though the latter had not been as consistent as the first in sending its terms and conditions, it was the first to lay down the rules in question by placing its rules on the back of its first order form in legible and accessible print. The Court was of the view that, when two companies find themselves in a situation of reciprocity, it is incumbent on the company that was the first to receive an order form or other document containing terms and conditions by which it intends not to abide to protest. At that particular point, either the companies negotiate or they refuse to conclude a contract. Therefore, the choice of court clause selecting the courts of Texas had never been accepted by both parties and the Quebec courts were validly seized. The court so held without considering Texan law.

[25] Since 1994, in Quebec law, a choice of court agreement conferring jurisdiction on foreign authorities has been set aside for two main reasons, usually though not always related[56] to the more general problem of contracts of adhesion:[57] either 1° there was no meeting of minds since the unilateral clause outside the contract was not brought to the attention of the other party, which is prohibited by article 1435 C.C.Q.;[58] or 2° the clause is found to be abusive, contrary to article 1437 C.C.Q.[59]

[26] The first case, where there is no meeting of minds between the parties, illustrates what was discussed in paragraph [24]: absent a meeting of minds of the parties, there is no agreement and the Convention does not apply.[60] In Quebec law, as in any other contract, no particular formal requirements are imposed to establish the existence of consent to a choice of court clause. Acceptance may be express or tacit (art. 1386 C.C.Q.)[61]but there must be acceptance. The choice of court clause cannot be introduced surreptitiously in a complicated form[62] or be made impossible to view because there is a host of different kinds of information in print that is too small in a document that has no apparent structure,[63] or that has not been included in pre-contractual or contractual documents; it may not be printed deceitfully and imposed unilaterally

after the fact on the back of an invoice accompanying delivery of the equipment.[64] On this point, therefore, the Convention and Quebec law are in agreement.

[27] The second case, that of a choice of court clause that is abusive, is more complex because it has given rise to curial controversies in Quebec law. Indeed, on the one hand, in *2617-3138 Québec inc.* c. *Rogers Cantel Inc.*,[65] the Superior Court stressed the fact that while article 3149 C.C.Q., to which we referred earlier (see *supra* par. [3]), protects consumers and employees, it does not contain anything particular concerning the adhering party. Furthermore, the issue of jurisdiction must be resolved before the substantive question. Also, it would be the province of the chosen court to consider this question.

[28] On the other hand, in Quebec, the case law has sometimes asserted that protection against abusive provisions in the case of contracts of adhesion applies only when the Quebeclaw is the substantive law applicable to the contract. Thus, in *United European Bank and Trust Nassau Ltd.* c. *Duchesneau*, the applicable law was that of Bahamas; moreover, the client sued the banking institution and the clause conferring jurisdiction on the Bahamian courts was not in any way abusive.[66]

[29] It may be asked, however, what would happen if the law applicable to the contract were the law of State X and the chosen court that of country Y. Absent an express choice of law by the parties to govern their choice of court clause, which law would the Quebec courts seized but not chosen apply to determine whether the clause was abusive? One thing is certain: once the applicable law is identified and if that system is foreign, the application of the conflict of laws rules of this system is excluded under Quebec law by article 3080 C.C.Q.[67] The Quebec court would not therefore apply the conflict of law rules of the chosen court. On this last point, therefore, the Convention and Quebec law differ.

[30] Article 6 b) of the Convention also raises the question as to whether, in Quebec law, in the absence of case law on the question as to which law governs the capacity of the parties to conclude an agreement that excludes the jurisdiction of the Quebec courts, a Quebec court seized but not chosen would apply its conflict of laws rules and thus article 3083 C.C.Q., as required by article 6 b) of the Convention, or whether it would refer to the law of the chosen court, as provided for in article 6 a) of the Convention.

[31] Article 3136 C.C.Q. allows a court in Quebec to hear a dispute if an action could not possibly be instituted in the court chosen by the parties or where the institution of such proceedings could not reasonably be required,[68] which could reflect paragraph d) of article 6 of the Convention. This provision, which is based on Swiss federal law, is an exception to the normal rules of jurisdiction and is meant to resolve certain problems of access to justice for a litigant located on the territory of Quebec, when the foreign court that would normally have jurisdiction is inaccessible to him or her for exceptional reasons such as impossibility in law or some practical impossibility. Thus, situations may arise in which diplomatic or trading relations with a foreign State have been severed, where it is necessary to protect a political refugee or where there is

serious physical danger if the plaintiff institutes proceedings in the foreign court, etc.. This basis for the jurisdiction of Quebec courts would apply in situations of war, disorder or disturbances in a country that impacted on its judicial organization. According to the Court of Appeal, even if in view of the judicial notice principle, it must be established that it is impossible to act as a result of the inability of the courts to act or because their capacity for action is restricted, whether because the situation in the country is politically precarious or because of ongoing violent insurrection. The forum provided for in article 3136 C.C.Q. is a subsidiary forum but it must be necessary to avoid miscarriages of justice and not merely to accommodate one of the parties.[69] The cost or inconvenience of a trial abroad do not justify its application any more than the physical impossibility alleged by a party of paying the necessary costs of representation in the chosen court. Two decisions of which we are aware have considered the interpretation of article 3136 C.C.Q. in a situation where a choice of court clause existed, but the applicants were unsuccessful.[70]

[32] According to article 3138 C.C.Q.,[71] a Quebec court that is seized but not chosen may order provisional or conservatory measures. The Convention does not prohibit this or require it (article 7). Everything depends on the domestic law of each State.[72] According to the Court of Appeal, a Quebec court could order such measures even though they were to be enforced on the territory of another State and a non-complying defendant would then be subject to contempt of court proceedings in the Quebec court.[73] The Quebec courts have not yet had an opportunity to address this question in the context of a choice of court clause selecting foreign courts.

[33] In addition, the question of the relationship between article 3139 C.C.Q., which confers jurisdiction on the Quebec courts in incidental demands in guarantee, and the end of article 3148 C.C.Q., which deprives them of all jurisdiction when the parties have chosen a foreign authority, has been answered by the Supreme Court of Canada. In *GreCon*, it held that in an action in Quebec by A against B, B could not implead C because that would be contrary to the choice of court agreement between B and C designating Germany.[74] On two occasions, the courts have indicated that it would be in the parties' interest to provide that, if such a situation occurred, the Quebec courts could decide an action in guarantee despite the arbitration clause, and this was so in order that a decision could be given on all issues of the case in accordance with articles 71 C.C.P. and 3139 C.C.Q.[75] This comment could be applied to choice of court clauses. Where this is clearly what the parties' intend, it would undoubtedly be necessary to consider that the clause is not exclusive, which would mean that the Convention could no longer apply to it. Be that as it may, the decision of the Supreme Court in *GreCon* brought Quebec law into line with the Convention.

[34] Finally, it should be noted that article 3151 C.C.Q. confers exclusive jurisdiction on the Quebec courts when the case raises the issue of civil liability for any harm suffered in, or outside, Quebec as a result of exposure to or the use of raw materials, whether processed or not, originating in Quebec. Quebec law is then also imperatively applicable (art. 3129 C.C.Q.). The courts have not yet had an opportunity to address this article in the context of a choice of court clause, but on this point, given the unambiguous language of article 3151 C.C.Q., it can be asserted that the

Convention differs from Quebec law. Although article 2 (1) j) and k) of the Convention provide that this does not apply to claims for personal injury and the related moral damages brought by, or on behalf, of natural persons or to tort or delict claims for damage to tangible property that do not arise from a contractual relationship, the possibility cannot be excluded that a situation will give rise to contractual liability for damage to property caused by exposure to or the use of raw materials originating in Quebec. A declaration excluding this matter from the application of the Convention, which is allowed under article 21, would therefore be required to bring Quebec law into line with the Convention. This declaration would allow the Quebec court that is seized but not chosen, and the foreign court that is chosen to continue hearing the case. A foreign court that is seized but not chosen would still have a duty to stay proceedings in favour of the court chosen under the Convention.

[35] In addition, the question arises as to what would happen if the Quebec court were seized but not chosen in a case that only incidentally for damage suffered as a result of exposure to or the use of raw materials. As provided in article 2 (3), the Convention does not apply to certain matters listed in paragraphs a) to p) of article 2 (2), but this exclusion applies only where one of the subjects referred to in paragraph 2 is an “object” of the proceedings. This means that a dispute is not excluded from the application of the Convention if one of these matters arises as a preliminary question in proceedings where that question is not the subject-matter of the action. The Quebec courts have not yet had an opportunity to address this question.

[36] Since the Convention makes it possible to exclude same subject-matters by declaration, careful thought should be given as to the scope of the declaration that might be made. Thus, an insurance contract covering civil liability for any harm resulting from exposure to, or the use of, raw materials originating in Quebec would normally by covered by the Convention. Since such a contract provides for the insured to be compensated even for punitive damages, they would also be covered. To the extent that a Quebec court was seized but not chosen, that court would be required under the Convention to stay proceedings. Thus, a simple declaration excluding civil liability for any harm sustained in, or outside, Quebec as a result of exposure to or the use of raw materials, whether processed or not, originating in Quebec, would not be sufficient for the Quebec court to remain seized in the situation described above. To what extent it would be appropriate for a more general declaration to be made remains to be determined.

[37] We should note in conclusion that the Convention applies only to international cases (art. 1). In other words, if a case is otherwise solely connected with Quebec, the mere fact that a foreign court is chosen does not make it international. A Quebec court that is seized but not chosen would not therefore be required to stay proceedings in that case.[76] In Quebec law, the courts have not yet had an opportunity to address the question as to whether the parties may choose a foreign court that has jurisdiction in a situation where all the relevant elements are connected solely with Quebec. Two arguments have been made concerning the need for a foreign element in order for article 3148 par.2 C.C.Q. to apply. The first argument is that the legislature did not intend that a foreign element would be required for it to apply; this argument reflects a desire to give

precedence to the independence of the parties' wishes.[77] The second is that since article 3148 par.2 C.C.Q., unlike article3111 C.C.Q.,[78] does not state that the provision applies even where there is no "foreign element", and since this silence should not be ascribed to simple forgetfulness, [79] it would follow that a choice of court clause selecting a foreign court would not be permitted in the event that no foreign element was present. In our opinion, a choice by the parties of a foreign court is a foreign element that would allow use to be made of article3148 paragraph 2 C.C.Q. It seems to us that there is no legal obstacle to a choice of court clause selecting a foreign court in the event that no other foreign element is present, although the Code does not contain a similar rule to that set out in article 3111 C.C.Q. as to choice of law. The language of the current article 68 C.C.P. would justify the assumption that the choice of a foreign court is sufficient to make the provisions of Book X of the *Civil Code* on private international law applicable.[80] On this point, therefore, the Convention is more explicit than Quebec law.

[38] Moreover, we should note that the Convention would not apply in a situation, which is very common in practice, where a choice of court clause agreed to by parties one of whom is from Quebec and the other from another Canadian province, designated Canadian courts outside Quebec. Unlike the Convention, Quebec law applies to Canadian situations in the same way as situations involving elements from outside Canada (art. 3077 C.C.Q.). On this point, therefore, the scope of the Convention is more restrictive than that of Quebec law.

Duty of a court asked to recognize and enforce the judgment of the chosen court

[39] For purposes of recognition and enforcement of foreign decisions, the Convention gives a different definition of what is international. Here, it is sufficient for the judgment to have been rendered by a foreign court. This means that a case that was not international when the initial judgment was given may become international if the question of its recognition or enforcement in another State arises. Under article 20 of the Convention, a State may declare that its courts may refuse to recognize or enforce a judgment rendered by the chosen court if the case is – with the exception of the location of the chosen court – connected solely with the State where recognition and enforcement are sought. In Quebec law, articles 3155 and 3168 C.C.Q. set out the conditions for recognition and enforcement of foreign decisions without mentioning this exception. At first glance, therefore, it is hard to see what advantage Quebec would have in making such a declaration. On this point, the Convention and Quebec law are therefore in agreement, although Quebec law applies the same provisions to the recognition and enforcement of judgments rendered by Canadian courts outside Quebec (see *supra* par. [38]).

[40] Article 8 of the Convention sets out the principle that the decision rendered by the chosen court will be recognized and enforced in the courts of the requested Contracting State. According to the first paragraph of article 3155 C.C.Q., a foreign decision will be recognized and, where appropriate, declared enforceable when it has been rendered by a foreign authority of competent jurisdiction. The foreign authority will usually be considered to be such when the parties have

chosen by agreement to submit their civil and commercial disputes to that authority (art. 3168 (4°) C.C.Q.). Also, according to both article 8 (2) of the Convention and articles 3157 and 3158 C.C.Q., review of the merits of the judgment is prohibited. On this point, the Convention and Quebec law are in agreement.

[41] Article 8 (3) provides that a judgment will be recognized only if it has effect in the State of origin. According to the Explanatory Report, having effect means that it is legally valid and operative. If it does not have effect, it will not constitute a valid determination of the parties' rights and obligations. Thus, if it does not have effect in the State of origin, it should not be recognized under the Convention in any other Contracting State. Furthermore, if it ceases to have effect in the State of origin, the judgment should not subsequently be recognized under the Convention in the Contracting States.[81] Article 3155 (2°) C.C.Q. also provides that "[a] Quebec authority recognizes and, where applicable, declares enforceable any decision rendered outside Quebec except in the following cases:… the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered".

[42] A question arises, however: what happens in Quebec law to an enforceable foreign judgment if, when the application for recognition and enforcement is made, it is no longer enforceable? Which law applies to the satisfaction of the limitation period by the filing of an action, as provided for in article 2892 C.C.Q? Does this provision apply to an action for recognition and enforcement of a foreign decision? In *Ginsbow inc.* c. *Pipe and Piling Supplies Ltd*,[82] this question was answered in the negative. Article 3131 C.C.Q. provides that as to the limitation period the law governing the substantive action. As to a foreign judgment, that law is the law of the court that gave the judgment. In *Ginsbow*, according to American law, the foreign judgment had become null and void and of no force or effect as of February 9, 1998. According to the Court, the appellant could not, through exemplification proceedings commenced on February 6, 1998, extend the period for which the foreign judgment was valid or revive it once it was extinguished. This solution designed to protect the interests of judgment debtors from Quebec can be understood as a way to avoid extending the useful effect of the original judgment. Indeed, the right that would arise from the Quebec judgment to recognition and enforcement of a foreign judgment would be statute-barred after ten years under article 2924 C.C.Q., and this period would be added to that for which the original judgment had already been in effect. However, a different effect can be contemplated. Indeed, it can be argued that it would not be fair to subject the judgment creditor to the risks of delay in the judicial system in Quebec in hearing these applications. Transitional law solutions should perhaps be applied here. Thus, since Quebec law provides that the enforcement a judgment is statute-barred after ten years, this period would apply to the original foreign judgment only in light of the time that has already elapsed since it was delivered.[83] Although the language of the Convention and that of Quebec law are in agreement on this point, the interpretation given in the case law in Quebec could yield results that ad variance from those contemplated by the Convention.

[43] Article 9 of the Convention lists seven exceptions to the recognition and enforcement of a

decision.[84] These exceptions generally reflect those listed in articles 3155 and 3156 C.C.Q. Thus, recognition or enforcement may be refused when the decision would be manifestly incompatible with the public policy of the requested State. Other exceptions relate to procedural fraud and, in the case of a default decision, service of the originating or equivalent document. On this point, the Convention and Quebec law are in agreement.

[44] Article 9 applies to cases where an incompatible judgment has been rendered. If this incompatible judgment comes from the State in which the enforcement proceedings were instituted, its very existence will always constitute a ground on which recognition may be denied. In the event that the incompatible judgment comes from another State, it must have been rendered prior to the judgment given under the choice of court agreement for which recognition is sought, involve the same subject-matter and the same cause of action and meet the conditions required for it to be recognized in the requested State. On this point, the Convention and Quebec law are generally in agreement (article 3155 (4°) C.C.Q.).

[45] Article 9 *a)* of the Convention provides that recognition and enforcement of a foreign judgment may be refused if the agreement is null and void under the law of the State of the chosen court. This article 9 *a)* of the Convention applies to the capacity of a party to enter into a choice of court agreement. The rules of the chosen court, including its conflict of laws rules, accordingly apply to this question. Article 9 b) of the Convention provides cumulatively for the application of the rules of the requested court to govern the capacity of the parties to conclude the agreement. As Quebec law now stands, it would be surprising if a Quebec court asked to recognize and enforce a foreign decision reviewed these issues since, according to articles 3157 and 3158 of the *Civil Code of Quebec*, examination of the merits of a decision is not allowed. On this point, therefore, the Convention differs from Quebec law.

[46] Another exception is found in article 11. It provides that recognition and enforcement of a judgment may be refused if, and to the extent that, this judgment grants damages and interest, including exemplary or punitive damages and interest, that do not compensate a party for the actual loss or harm suffered. The problem of exorbitant damages has been commented on in a number of Quebec decisions, although they did not involve situations where a choice of court clause had been agreed to. Usually, exorbitant damages are not seen as covered by the public policy exception.[85] Thus, in *Beals* v. *Saldanha*[86], the Supreme Court held that the amount of damages would not shock the conscience of Canadians. This common law decision should also be applied in Quebec law.[87] However, in an earlier decision, where evidence of a purchase of the respondents' products in Texas for an amount of $96 had led to an award against them of nine million dollars US because of the confusion caused between these products and those of the applicant,[88] the Quebec court refused to recognize and enforce the foreign decision at all, even the compensatory portion. The main ground for the decision, however, was that, in the view of the Quebec court, the Texan court had lacked jurisdiction, but the Court commented that such an amount was so disproportionate to what a Quebec court would have awarded in the same circumstances that it was possible to conclude that it was contrary to public policy.

[47] Without imposing this solution, however, the Convention would allow the Court eventually to reduce the damages awarded rather than to refuse to recognize and enforce the foreign judgment. The Convention accordingly seems less favourable to recognition and enforcement of foreign decisions than the case law of the Supreme Court of Canada but more likely to protect the interests of the defendant. Furthermore, by introducing the distinction between the compensatory and the non-compensatory aspects of a foreign judgment, the Convention gives judgment creditors an opportunity to enforce at least the compensatory part.

[48] The enforcement of judicial settlements is covered by the Convention (art. 12), provided that there is an appropriate choice of court agreement and the transaction is accompanied by certification from the court located in the State of origin. This particular concept of judicial settlement is unknown in Quebec law. It does not mean the same thing as simple settlements [transactions] (concluded out of court), which are provided for in articles 2631 *et seq.*C.C.Q., although it plays the same role. In order to be enforceable in Quebec law, a settlement must be homologated (art. 2633 par. 2 C.C.Q.); it is then subject to the Convention in the same way as any other judgment. However, Quebec law offers the possibility that settlements that are enforceable in foreign law without being homologated in accordance with article 3163 C.C.Q. could be recognized and enforced.[89] On this point, the Convention and Quebec law are accordingly in agreement.

[49] *Article 13of the Convention, which lists the documents to be submitted, reflects a large extent to article 786 C.C.P. The Convention also provides that an application for recognition or enforcement may be accompanied by a* document issued by a court (including an officer of by the court) in the State of origin, in the form recommended and published by the Hague Conference on Private International Law. This amends the current law even though the use of the document is optional.

[50] The Convention provides further for the application of the procedure of the requested State, which does not accordingly require any change in article 785 C.C.P. Articles 15 of the Convention and 3159 C.C.Q. also provide that a judgment may be recognized and enforced only in part. Finally, article *18of the Convention abolishes the need to legalize*[90] *the documents to be filed, including an Apostille, just as article 2822 C.C.Q. also does away with the need for all formalities in the filing of documents purporting to be issued by a foreign public officer. On this point, therefore, th*e Convention and Quebec law are in agreement.

[51] A particular feature of the Convention that is of some interest for Quebec law is the possibility that the judge seized under a choice of court clause will refer the case to an appropriate domestic court (correct district or correct subject-matter jurisdiction). According to article 8 (5) of the Convention, a decision rendered following this referral will also be recognized and enforced in the other States in accordance with the Convention.[91] Indeed, in Quebec law, neither the judge nor the parties have discretionary power to choose the domestic court that has jurisdiction over the subject-matter (art. 164 C.C.P.: lack of jurisdiction may be raised at any time and may even be

ruled on by the court of its own motion). The parties may not designate the court having territorial jurisdiction in a choice of court clause. The rules set out in the *Code of Civil Procedure* must be observed notwithstanding any agreement to the contrary. Some agreements stipulate alternative territorial jurisdictions; in that case, the choice is made by the plaintiff and the defendant may object only if the court seized does not have jurisdiction. The courts have not yet had an opportunity to address the question as to whether recognition or enforcement of a foreign judgment could be refused because the domestic court chosen by the parties is not the court that gave the judgment. In our opinion, however, the condition that the court of origin have jurisdiction set out in article 3155 par. 1 C.C.Q. applies only to the State to which this court belongs and not to a specific subject-matter or territory. Moreover, articles 3157 and 3158 C.C.Q. would prevent an examination of the decision in the light of the domestic law that applies in the State whose court gave the decision. On this point, therefore, the Convention and Quebec law are in agreement.

[52] According to article 75.0.1 C.C.P., however, "in exceptional cases and in the interest of the parties, the chief judge or chief justice or the judge designated by the chief or chief justice may, at any stage of a proceeding, order that a trial be held or an application relating to the execution of a judgment be heard in another district". In that case, according to article 8(5) of the Convention, recognition and enforcement of the judgment could be refused in respect of a party who had objected to referring the case in a timely manner to the State of origin. This possibility should be sufficient to make the application of article 75.0.1 C.C.P. unattractive in a situation where the Convention applied.

[53] Article 22 includes an opt-in provision extending the applications of provisions of the Convention respecting recognition and enforcement to the decisions rendered by a court designated in a non-exclusive choice of court clause. The appropriateness of making such a declaration, whose effect would be limited between Quebec and the Contracting States to the Convention, must be carefully considered.

[54] Moreover, article 3165 C.C.Q. prevents recognition and enforcement of a foreign decision where the dispute concerns civil liability for any harm suffered in, or outside, Quebec as a result of exposure to, or the use of, raw materials, whether processed or not, originating in Quebec. The Quebec courts[92] have not yet had an opportunity to express an opinion on this provision in the context of a choice of court clause, but, given the language of article 3165 C.C.Q., it may be asserted that, in this regard, the Convention and Quebec law differ. A declaration excluding this matter from the scope of the Convention, which is allowed under article 21 of the Convention, would therefore be necessary to bring Quebec law into line with the Convention. This declaration would allow the requested Quebec court to refuse recognition and enforcement of the foreign judgment given by the chosen court. However, this judgment could be recognized and enforced in the other Contracting States. Moreover, the judgment given by the chosen Quebec court would not be recognized and enforced in the other Contracting States.

[55] According to article 10(4) of the Convention, when recognition or enforcement of a foreign judgment is requested, this may be refused if, and to the extent that, the judgment was based on a

ruling on a matter excluded pursuant to a declaration under article 21. On the other hand, as article 10 (1) of the Convention makes it clear, when a matter excluded under article 21 has arisen as a preliminary issue, the ruling on this issue will not be recognized or enforced under the Convention. The Quebec courts have not expressed an opinion on the question as to what would happen if recognition and enforcement of a foreign judgment were requested when it is based on a ruling concerning liability resulting from exposure to or the use of raw materials. Nor have they expressed an opinion on the question as to whether they would recognize and enforce a foreign judgment in a dispute that only incidentally involved liability as a result of exposure to, or the use, of raw materials. According to the Quebec Court of Appeal, however, only the formal judgment is deemed to be *res judicata*. Despite this principle, it is recognized that the rule of *res judicata* may be extended to the reasons where they include the formal decision or are intended to support it.[93]

[56] In *Society of Lloyd's* c. *Alper*,[94] the plaintiff was granted a judgment in England against the defendant, who was one of its members. Because the insurable risks relating to asbestos had been wrongly assessed, the plaintiff had had to make calls for funds against its members. The defendant was one of those who refused to respond. Although liability incurred following exposure to, or the use of, asbestos might have been at issue in an incidental manner, article 3165 C.C.Q. was not relied on to prevent recognition and enforcement of the foreign judgment and they were granted. On this point, therefore, the Convention is more explicit than Quebec law.

[57] Article 26 of the Convention clarifies the relationship between the Convention and other international instruments. Since Quebec is not a party to such instruments, the Agreement on Mutual Judicial Assistance between France and Quebec being a noteworthy exception, this aspect of things should not pose many problems.[95]

Conclusion

[58] Following this comparative analysis, it may easily be concluded that the Convention and Quebec civil law reveal great similarities, which should facilitate the implementation of the Convention. Indeed, the duty of the court chosen by the parties to hear the case, that of the court seized but not chosen by the parties to stay proceedings and that of the court asked to recognize and enforce the judgment given by the chosen court are found in both the Convention and Quebec law. The exceptions to these principles are also usually the same. Finally, the problem of the relationship between an incidental demand in guarantee under article 3139 C.C.Q. and the choice of court clause has been resolved by the Supreme Court, which has thus brought Quebec law into line with the Convention.

[59] Furthermore, the Convention leaves a great deal of Quebec law intact. Thus, the Convention has no effect in the case of an employment contract or a consumer contract, the internal allocation of cases is not affected and it is possible for courts in Quebec that are not chosen to continue to

order provisional or conservatory measures (art. 3138 and 3141 C.C.Q.). Finally, the recognition and enforcement procedure remains as set out in Quebec law.

[60] However, the Convention and Quebec civil law differ on certain points. Thus, the Convention establishes a presumption that the choice of court clause is exclusive. The field of application of the Convention is narrower than that of Quebec law because of the concepts of internationality and the formal requirements adopted under the Convention. Contrary to what is provided for in the Convention, the *forum non conveniens* principle could play a role in this regard in Quebec law (art. 3135 C.C.Q.),[96] whereas a referral is excluded (art. 3180 C.C.Q.) and the possibility of reducing the quantum of damages and interest awarded finds no echo. In all these cases, Quebec law should be changed to bring it into line with the Convention if the Convention is to be implemented.

[61] Also, certain provisions of Quebec law prevent a Quebec court that is not the chosen court from staying proceedings and prevent recognition and enforcement of a foreign decision when the case concerns civil liability for any harm suffered in, or outside, Quebec as a result of exposure to, or the use of, raw materials, whether processed or not, originating in Quebec (art. 3151 and 3165 C.C.Q.). Here, a declaration that is allowed under the Convention might make it possible to bring Quebec law into line with the Convention if the Convention is to be implemented.

[62] In some respects, the Convention is more explicit that Quebec civil law since the Code and the authors are silent and the courts have not yet had to decide the question.

[63] Sometimes, similar solutions may be inferred, such as one respecting the severability of the choice of court clause from the main contract. However, it would be more prudent if Quebec law were amended to facilitate the implementation of the Convention. Such amendments would have the advantage of dispelling some of the uncertainty that may exist. The same holds as to the use of the law of the chosen court (substantive law or including the conflict of laws rules) to determine the validity of the agreement (including the parties' capacity to enter into the agreement) and the law of the court seized but not chosen or the law of the requested court (substantive or including the conflict of laws rules) to determine the capacity of the parties to enter into the agreement.

[64] Unfortunately however, the Convention, which otherwise provides detailed rules on such a limited subject, does not provide more explanations than Quebec law as to the phrase "has effect" in the State of origin of a foreign judgment and its impacts on statutes of limitation. What is more, the law governing the nullity of the choice of court clause on the ground that there is no meeting of minds between the parties or that it is abusive in a contract of adhesion will undoubtedly continue to be a source of controversy. It seems that, in these cases, only the future will cast light on these questions as a result of the development of the international judicial decisions that apply the Convention in the States that are parties thereto.[97]

Annex 1 - Comparison chart of the provisions of the Convention and Quebec Law

Convention	Quebec law
Article 1: Scope	Art. 2639, 3148 (4) and final phrases; 3168 (5); 3111, 3077 C.C.Q., 68 C.C.P.
Article 2: Exclusions from scope	(1) Art. 3149, 3168 (5) C.C.Q
(1) Employment and consumers	(5) Art. 28 of the *General Regulation respecting the conditions of contracts of government departments and public bodies*, R.R.Q., c. A-6.01, r. 0.02
(5) State – party	
Article 3: Exclusive choice of court agreements	(a) Art. 3148 (5) C.C.Q.
(a) definition	(b) *M.F.I. Export Finance Inc.* c. *Rother International S.A. de C.V. Inc.*, J.E. 2004-1026 (Sup. Ct.).
(b) deemed exclusive	(c) Articles 1385, 2640 C.C.Q.; *Act to establish a legal framework for information technology,* R.S.Q., c. C-1.1.
(c) formal requirements	
(d) independence of clause	(d) Art. 1438, 2642, 3111-3113, 3121 C.C.Q.
Article 4: Other definitions	Art. 75-83, 307, 3155 par. 1 C.C.Q.
Article 5: Jurisdiction of the chosen court	Art. 3148 (4); 3078, 3080, 3111, 3112, 3135, 3137, 3155 (1) C.C.Q.; 34, 68, 73.1 C.C.P.
Article 6: Obligations of a court not chosen:	
Obligation to suspend or dismiss proceedings except where:	Art. 3139 and 3148 in final phrases C.C.Q.; *GreCon Dimter Inc.* v. *J R Normand Inc.*, [2005] SCC 46
(a) agreement null and void under law of chosen court	(a) Art. 1379, 1386, 1435, 1437 C.C.Q.
(b) capacity – court seized	(b) Art. 3080, 3083 C.C.Q.
(c)public policy exception	(c) Art. 1437 C.C.Q.
(d) exceptional reasons	(d) Art. 3136 C.C.Q.
(e) chosen court decides not to hear case	(e) Art. 3136 C.C.Q.
Article 7: Interim measures of protection	Art. 3138 and 3140 C.C.Q.
Article 8: Recognition and enforcement	Art. 3078, 3131, 3155, 3158, 3168 (5) C.C.Q.
Article 9: Refusal of recognition and enforcement	Art. 3083, 3155, 3156, 3157, 3158, 3165 (1) C.C.Q.
Article 10: Preliminary questions	Art. 3159, 3165 (1) C.C.Q.
Article11: Damages	Art. 3155 (5) C.C.Q.

Article 12: Judicial settlements	Art. 2631, 3163 C.C.Q.
Article 13: Documents to be produced	Art. 786 C.C.P.
Article 14: Procedure	Art. 785 C.C.P.
Article 15: Severability	Art. 3159 C.C.Q.
Article 16: Transitional provisions	N/A
Article 17: Contracts of insurance and reinsurance	Art. 3150 C.C.Q.
Article 18: No legalization	Art. 2822 C.C.Q.
Article 19: Declarations limiting jurisdiction	N/A
Article 20: Declarations limiting recognition and enforcement	N/A
Article 21: Declarations with respect to specific matters	Art. 3151, 3165 (1) C.C.Q.
Article 22: Reciprocal declarations on non-exclusive choice of court agreements	N/A
Article 23: Uniform interpretation	N/A
Article 24: Review of operation of the Convention	N/A
Article 25: Non-unified legal systems	Art. 3077 C.C.Q.
Article 26: Relationship with other international instruments	N/A
Articles 27to 34: Final clauses	N/A

FOOTNOTES

[1] Counsel with the Quebec Department of Justice. The author was a member of the Canadian delegation involved in negotiating the Convention, from 1996 to its conclusion in 2005. She would like to thank Andrea Schulz, the then – First Secretary of the Hague Conference on Private International Law and currently Director of the Central Authority for International Child Protection in Germany**, Andreas Bucher, Professor at the University of Geneva, Me Jeffrey Talpis, Notary and Professor of Law at the University of Montreal, for their valuable comments respectively on the Convention and on Quebec law, as well as** Éphigénie Gagné, a Master's students in maritime law at the University of Lund in Denmark, and Fannie Roy, Legal Technician, Legal Affairs Directorate, Economic, Innovation and Export Development, International Relations, Tourism, Canadian Intergovernment Relations, for carefully re-reading earlier versions of this document and their research. Finally, the author wishes to thank the University of Sherbrooke and its Faculty of Law for their financial support when the author

was an Assistant Professor there. However, the opinions expressed in the document are those of the author alone. The following sources may be consulted: A. Bucher, "La Convention de La Haye sur les accords d'élection de for" (2006), *R.S.D.I.E.*, Vol. 16, No 1, p. 29; A. Schulz, "The Hague Convention of 30 June 2005 on Choice of Court Agreements; Keynote Addresses XVIIth IACL Congress" (2006), *E.J.L.R.*, Vol. 8, Issue 1, p. 77-92 and J. A. Talpis and N. Krnjevic, "The Hague Convention on Choice of Court Agreements of June 30, 2005: The Elephant that gave Birth to a Mouse" (2006), *Sw.J.Trade Am.*, Vol. 13, issue 1, p. 1.

[2] See http://www.hcch.net/index_fr.php?act=conventions.text&cid=98.

[3] *Behaviour Communications Inc.* v. *Virtual Image Productions*, J.E. 99-1518 (Ct. Que.).

[4] As provided for in article 2(3), the Convention does not apply to certain subjects listed in paragraphs a) to p) of article 2(2), but this exclusion applies only when one of the subjects referred to in paragraph 2 is an "object" of proceedings. See *infra*, paras.[35] and [55]. Article 2(5) of the Convention also provides that the mere fact that a State is a party to a dispute does not exclude the dispute from the scope of the Convention. In Quebec, according to article 28 of the *General Regulation respecting the conditions of contracts of government departments and public bodies*, R.R.Q., v. A-6.01, r. 0.02, "a government department or public body may be a party to an arbitration agreement only after having been generally or specifically authorized to do so by the Minister of Justice". However, the Regulation makes no particular provision concerning choice of court agreements selecting foreign courts. This omission should probably be rectified.

[5] For this article, there is corresponding protection in the recognition and enforcement of foreign judgments: article 3168, par. 5 C.C.Q. Concerning the scope of article 3149 C.C.Q. for a contract of employment where there is a choice of court clause selecting the courts of Massachusetts, see *Rees* v. *Convergia*, J.E. 2005-738 (C.A.), application for leave to appeal to the Supreme Court denied (S.C.C., 2005-10-06), 30973; selecting the Ontario courts, see *Yunes* v. *Garland Canada inc.*, J.E. 2004-1458 (Sup. Ct.); for a contract of employment where there was an arbitration clause, see *Dominion Bridge Corp.* v. *Knai*, [1998] R.J.Q. 321 (C.A.); for a consumer contract including an arbitration clause, see *Dell Computer Corporation* v. *Union des consommateurs et al.* (Que.), 2007 SCC 34 (31067).

[6] In *L.V.H. Corp. (Las Vegas Hilton)* v. *Lalonde*, J.E. 2003-1118 (Sup. Ct.), appeal dismissed on motion (C.A., 2003-09-08), 500-09-013371-034, Émery J. stated that article 3149 C.C.Q. did not confer exclusive jurisdiction on the Quebec authority. It created an exceptional forum for the benefit of the consumer in his capacity as claimant. This forum was an addition to the other common law courts. There was nothing to prevent the merchant from suing a consumer in a foreign court to the extent that it had jurisdiction, for example because the consumer recognized the jurisdiction of foreign courts by not challenging their jurisdiction and not raising their lack thereof as a preliminary question. In that case, these statements were *obiter* since Émery J. had to rule on the recognition and enforcement of a foreign decision and held that the confession of judgment was not a consumer contract. It may be asked whether, given a choice of court clause, a

consumer or employee could prevent the recognition and enforcement of the foreign judgment obtained even where he or she recognized the jurisdiction of the foreign courts.

[7] In *Dell*, *supra,* note 5, the judges were divided as to whether an arbitration clause was sufficient in itself to trigger the application of art.3148,par.2, and accordingly its exceptions, including art.3149 (the judges in the minority: Bastarache, LeBel and Fish JJ.), or not (the judges in the majority Deschamps, McLachlin, Binnie, Abella, Charron and Rothstein JJ.).

[8] *Consumer Protection Act*, R.S.Q., v. P-40.1.

[9] Section 11.1 of the *Consumer Protection Act*, S.Q. 2006, v. 56, s. 2, in force on December 14, 2006, reads as follows: "Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.

If a dispute arises after a contract has been entered into, the consumer may then agree to refer the dispute to arbitration."

[10] T. Hartley and M. Dogauchi, *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention*, HCCH Publications, at http://www.hcch.net/upload/expl37f.pdf, p. 77, para. 302.

[11] *Czajka* v. *Life Investors Insurance Co. of America* J.E. 95-765 (Sup. Ct.). In this decision, the Quebec court, which had jurisdiction under article 3150 C.C.Q., stayed proceedings on the ground that the Ontario courts were better able to decide the case as a result of the application of the *forum non conveniens* doctrine codified in article 3135 C.C.Q.

[12] G. Goldstein and É. Groffier are of the view that article 3150 C.C.Q. imposes jurisdiction, and excludes any choice of court or arbitration clause, disagreeing with H.P. Glenn, J.-G. Castel and J.A. Talpis: G. Goldstein and É. Groffier, *Traité de droit international privé*, tome II, Règles spécifiques, éd. Yvon Blais, 2003, pp. 667-669, para. 418; H P. Glenn, "Droit international privé", in Barreau du Québec et Chambre des notaires du Québec, *La réforme du Civil Code: priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires*, tome 3, Sainte-Foy, P.U.L., 1993, p. 756-757, par. 95; J.-G. Castel and J.A. Talpis, "Le Code civil du Québec. Interprétation des règles du droit international privé", in Barreau du Québec et Chambre des notaires du Québec, *La réforme du Civil Code: priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires*, *ibid*., p. 909, para. 454.

[13] *Mega Bloks inc.* v. *American Home Assurance Company**, J.E. 2006-1876 (Sup. Ct.), appeal filed, 2006-06-22 (C.A.), 500-09-016809-063; motion to dismiss the appeal denied (C.A., 2006-10-02), 500-09-016809-063.

[14] *Consumer Protection Act*, *supra,* note 8, s. 5 a).

[15] *Act to establish a legal framework for information technology*, R.S.Q. v. C-1.1.

[16] According to article 2640 C.C.Q.: "An arbitration agreement shall be evidenced in writing; it is deemed to be evidenced in writing if it is contained in an exchange of communications which attest to its existence or in an exchange of proceedings in which its existence is alleged by one party and is not contested by the other party."

[17] According to article 2642 C.C.Q.: "An arbitration agreement contained in a contract is considered to be an agreement separate from the other clauses of the contract and the ascertainment by the arbitrators that the contract is null does not entail the nullity of the arbitration agreement", and article 3121 C.C.Q. provides that "Failing any designation by the parties, an arbitration agreement is governed by the law applicable to the principal contract or, where that law invalidates the agreement, by the law of the country where arbitration takes place".

[18] Article 22 of the Convention contains an opt-in provision extending the provisions of the Convention governing recognition and enforcement to judgments rendered by a court designated in a non-exclusive choice of court agreement. See *supra* par. [53].

[19] T. Hartley and M. Dogauchi, *supra,* note 10, par. 41-42.

[20] G. Goldstein and É. Groffier, *Traité de droit international privé*, *Théorie générale*, éd. Yvon Blais, 1998, tome 1, p. 359, par. 147; H P. Glenn, *supra,* note 12, p. 755, par. 91.

[21] *Montréal (Ville de)* v. *Dinasaurium Production inc.*, [1999] R.J.Q. 2563 (C.A.).

[22] *Companies Act*, R.S.Q., v. C-38, ss. 7(3) and 123.34; *Canada Business Corporations Act*, s. 19 (1).

[23] See, for example: *Impulsora Turistica de Occidente, S.A. de C.V.* v. *Transat Tours Canada Inc.*, 2007 SCC 20; J.-G. Castel, *Droit international privé*, Toronto, Butterworths, 1980, p. 697.

[24] G. Goldstein and É. Groffier state that the law governing the validity of the document also governs its nullity; contract law would therefore apply and in support, they refer to this statement by the French authors: *supra,* note 12. They also note that the *Rome Convention on the law governing contractual obligations* expressly provides for the application of contract law to the existence and validity of the contract (art. 8). G. Goldstein and É. Groffier, *supra,* note 12, p. 509. Since the *Civil Code of Quebec* is based largely on this Convention, we find this reference more conclusive than the use of French law.

[25] G.Saumier, "Les objections à la compétence internationale des tribunaux québécois: nature et procedure" (1998), 58 *R. du B.* 145.

[26] Comité de révision de la procédure civile, *La révision de la procédure civile*, Consultation Document, Québec, Government of Québec, February 2000, p.113-114.

[27] The characterization is made under the legal system of the court seized (art. 3078 C.C.Q.).

[28] *HSBC Bank Canada v. Nytschyk,* (Sup. Ct., 2002-01-14), SOQUIJ AZ-50110269, B.E. 2002BE-199, settled out of court (C.A., 2003-06-10), No. 500-09-011890-027. There was an asymmetric clause and not an exclusive agreement within the meaning of the Convention.

See *infra* [8] and note 40.

[29] According to article 1379 C.C.Q.: "A contract of adhesion is a contract in which the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable.

Any contract that is not a contract of adhesion is a contract by mutual agreement."

According to article 1437 C.C.Q.:"An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced.

An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause."

[30] According to article 2847 C.C.Q.: "A legal presumption is one that is specially attached by law to certain facts; it exempts the person in whose favour it exists from making any other proof.

A presumption concerning presumed facts is simple and may be rebutted by proof to the contrary; a presumption concerning deemed facts is absolute and irrebuttable."

[31] Article3080 C.C.Q., which includes the reference, reads as follows: "Where, under the provisions of this Book, the law of a foreign country applies, the law in question is the internal law of that country, but not its rules governing conflict of laws."

[32] *Sony Music Canada inc*. v. *Kardiak Productions inc*., J.E. 97-1395 (C.A.).

[33] Quebec private international law applies indiscriminately to cases involving foreign elements outside Quebec, whether they are connected with Canada or occur outside Canada. See *infra* par. [37].

[34] Indeed, the action of Kardiak against Kathleen was based both on the recording contract and the management contract. The action brought in Quebec could accordingly have been decided in court only against Kathleen. The application of two contracts, one of which was subject to the jurisdiction of the Ontario courts, the joinder of a solidary defendant who was essentially subject to the Ontario courts, the closer connections between Ontario and the case as a whole, the existence of a full legal remedies in Ontario and the prospect of a partial remedy in Quebec and the lack of particular harm and practical impossibility meant that it was exceptionally appropriate to apply *forum non conveniens*as codified in article 3135 C.C.Q.

[35] C. Emanuelli, *Droit international privé québécois*, Montréal, Wilson et Lafleur, 2006, p. 106, note 262: [TRANSLATION] "however, this decision is not conclusive because, *inter alia*, the parties' intention to rely on the Quebec courts was not expressly recorded in a clause

conferring jurisdiction".

[36] Article 19 of the Convention could be used to maintain a certain form of *forum non conveniens* by means of a declaration. However, we do not recommend such a declaration; see *supra* par. [9].

[37] See for cases where there was no choice of court clause: *Quebecor Printing Memphis Inc. v. Regenair inc.,* [2001] R.J.Q. 966 (C.A.) quoting H.P. Glenn, *supra*, note 12, p. 743, 754; *Centre de coopération internationale en santé et développement (CCISD) v. Aide à l'enfance Canada/Save the Children Canada*, J.E. 2006-954(Sup. Ct.); *Bérubé* v. *Burnac Corp./Corp. Burnac*, [1994] R.D.J. 347 (Sup. Ct.); *9140-0671 Québec inc.* v. *Tag Drywall inc*., Ct. Que. Beauharnais, No. 760-22-003871-046, November 17, 2004, Judge Robillard; *De Grandpré, Chaurette, Lévesque* v. *Musicalis S.A*., J.E. 2003-103 (C.A.).

[38] Prior to 1994, the rules in the *Code of Civil Procedure* were extended by the judicial decisions to international disputes in the absence of more specific rules. Article 68 C.C.P. states that it applies notwithstanding an agreement to the contrary. The jurisdiction of the Quebec courts could not validly be set aside since this is a public policy provision: *Importations Cimel Ltée v. Pier Augé Produits de beauté,* [1987] R.J.Q. 2345, pp. 2349-2350 (C.A.). Today, this provision reads as follows: "Subject to the provisions of this Chapter and the provisions of Book X of the Civil Code, and notwithstanding any agreement to the contrary …". Book X introduced specific private international law rules.

[39] *M.F.I. Export Finance Inc.* v. *Rother International S.A. de C.V. Inc.*, J.E. 2004-1026 (Sup. Ct.).

[40] The clause read as follows: "18. Jurisdiction: This Agreement shall be governed and construed in accordance with the laws of the Province of Ontario and the Government of Canada and ROTHER and MFI hereby attorn to the jurisdiction and courts thereof. Any collection action or legal enforcement relating to the collection of Cuban accounts receivable from customers of ROTHER located in Cuba, may at the option of MFI be governed and construed in accordance with the laws of the Republic of Cuba and, for these purposes only, ROTHER hereby attorns to the Cuban jurisdiction and the courts thereof. ROTHER agrees that a decree or judgment of a Canadian judicial body may be enforced against ROTHER in Cuba as if such decree or judgment were given by a Cuban judicial body and any judgment or order of a Cuban judicial body may be enforced against ROTHER in Canada, as if such decree or judgment were given by a Canadian judicial body." In the opinion of the Court, «plaintiff's use of the words "a Canadian judicial body" suggests that it was not plaintiff's intention, in the first sentence of sec.18, to give exclusive jurisdiction to the Ontario Courts. Otherwise, it would have referred to "an Ontario judicial body".… The absence of exclusive Ontario jurisdiction was confirmed when the parties attorned to Cuban jurisdiction for the purposes set out in sec.18, and also to the jurisdiction of the courts of Canada." *M.F.I. Export Finance Inc.* v. *Rother International S.A. de C.V. Inc.*, *supra*, note 39. See also *HSBC Bank Canada v. Nytschyk*, *supra*, note 28 and *United European Bank*

and Trust Nassau Ltd. v. *Duchesneau*, [2006] R.J.Q. 1255 (C.A.).

[41] See article 2847 C.C.Q., *supra,* note 30.

[42] Thus, in *Achilles (USA)* v. *Plastics Dura Plastics (1977) ltée/Ltd.*, J.E. 2006-2335 (C.A.), where an arbitration clause had been agreed to, the Court of Appeal stated in par. 26: [TRANSLATION] "At this time of globalization of markets and trans-national contracts concluded remotely by means of a telephone call or even an e-mail, the courts would be wrong to take the respondent's position and to encourage Quebec companies to close their eyes and not read contracts and then attempt to benefit from this wilful blindness. As my colleague Chamberland J. stated in *Robertson Building Systems Ltd. v. Constructions de la Source inc.*, 2006 QCCA 461, «entrepreneurs in Quebec would benefit from reading the contracts offered to them and fully understanding the implications before signing them or even accepting them tacitly by their repeated conduct.»

[43] *9065-3916 Québec inc. (Pizzeria Stratos Nicolet)* v. *Société de prêt First Data Canada inc.*, J.E. 2007-582 (Sup. Ct.); *Boutique Tania enr.* v. *Chase Paymentech Solution,* J.E. 2007-367 (Sup. Ct.); *DSD International inc.* v. *DMG Canada inc.*, J.E. 2006-1101 (Sup. Ct.), par. 50 and 51; *171486 Canada* v. *Rogers Cantel Inc.*, [1995] R.D.J. 91 (Sup. Ct.); *M.C.L. Communications Inc.* v. *Unitel Communications Inc.*, J.E. 96-721 (Sup. Ct.); *Sony Music Canada inc. v. Kardiak Productions inc.*, *supra,* note 32; *S.S.I.* v. *Adi Corp. of Canada*, J.E. 97-1744 (C.A.); *2617-3138 Québec* v. *Rogers Cantel inc.*, J.E. 98-1014 (Sup. Ct.); *2736349 Canada* inc. v. *Rogers Cantel Inc.*, J.E. 98-1178 (Sup. Ct.); *Babin*v. *Canadian Satellite Communication inc.*, Québec Sup. Ct., No. 200-05-014037-001, January 15, 2001, Bouchard J., (SOQUIJ AZ-01026075); *HSBC Bank Canada* v. *Nytschyk*, *supra,* note 28; *Société des technologies de l'aluminium du Saguenay ltée* v. *Cooper Grainger Technical Bearing Sales Ltd.,* J.E. 2004-1825 (Sup. Ct.).

[44] *Behaviour Communications Inc.* v. *Virtual Image Productions*, *supra,* note 3 (California); *Hewlett-Packard France v. Matrox Graphics Inc. (Matrox Graphics Inc. v. STMicroelectronics Inc.)*,* J.E. 2007-368 (Sup. Ct.), application for leave to appeal granted (C.A., 2007-04-12), 500-09-017464-074; application for leave to appeal granted (C.A., 2007-04-12), 500-09-017465-071 (Texas); *Honeywell international inc.* v. *Notiplex Sécurité incendie inc.*, J.E. 2006-1877 (Sup. Ct.); appeal dismissed J.E. 2007-456 (C.A.)(Connecticut)

[45] *Lamborghini Canada inc*. v. *Automobilo Lamborghini S.P.A*, [1997] R.J.Q. 58 (C.A.), p. 63.

[46] *GreCon Dimter Inc*. v. *J.R. Normand inc*., [2005] 2 S.C.R. 401; *Crestar Ltd* v. *C.N.R.,*[1999] R.J.Q. 1191 (Sup. Ct.); application for leave to appeal denied (C.A. 1999-05-20), No. 500-09-008017-998.

[47] *J.S. Finance Canada* v. *J.S. Holding*, J.E. 99-1067 (C.A.).

[48] *Camionex* inc. v. *Bombardier inc.*,J.E. 99-1378 (C.A.).

[49] *United European Bank and Trust Nassau Ltd.* v. *Duchesneau, supra,* note 40.

[50] *Classé Audio inc.* v. *Linn Products Ltd.*, J.E. 2006-516 (Sup. Ct.), application for leave to appeal denied (C.A., 2006-03-23), 500-09-016428-062. The invoice accompanying the delivery of the equipment had a choice of court clause on the reverse side selecting the laws and courts of Scotland. The applicant challenged the jurisdiction of the Quebec courts to hear the case. The trial judge denied the application on the ground that the choice of court clause was not imperative and did not confer exclusive jurisdiction on the foreign court. He found that the clause had not been discussed by the parties, no evidence of acceptance had been produced and the respondent was not aware of its existence.

[51] According to the Explanatory Report, here again, as in article 5(1), the "law" includes the conflict of laws rules of this State, T. Hartley and M. Dogauchi, *supra,* note 10, par. 149, note 184. Moreover, capacity may also be decided by the law of the chosen court under article 6 a) of the Convention: *ibid.* and para. 150.

[52] According to the Explanatory Report on the Convention, the phrase "manifest injustice" covers exceptional situations where one of the parties could not obtain a fair trial in the foreign State, perhaps of bias or corruption, or where there were other reasons specific to that party that would preclude him or her from bringing or defending proceedings in the chosen court. It might also relate to the particular circumstances in which the agreement was concluded – for example, if it was the result of fraud. The standard is intended to be high: the provision does not allow a court to disregard a choice of court agreement simply because it would not be binding under domestic law. T. Hartley and M. Dogauchi, *supra,* note 10, par. 152.

[53] According to the Explanatory Report on the Convention, the phrase "manifestly contrary to the public policy of the court seized" is intended to set a high threshold. It refers to basic norms or principles of that State; it does not allow the court seized to hear the case simply because the chosen court might violate, in some technical way, a mandatory rule of the State of the court seized. A State may not declare all agreements involving unequal bargaining powers to be invalid. T. Hartley and M. Dogauchi, *supra*, note 10, par. 153.

[54] The Explanatory Report on the Convention states that the court seized but not chosen will apply its own law rather than using the rules of the chosen court, as article 6 a) of the Convention seems to provide. According to the Report: "A choice of court agreement cannot be established unilaterally: there must be agreement. Whether there is consent is normally decided by the law of the State of the chosen court, including its rules of choice of law, though in some circumstances capacity is also determined by other systems of law. … However, the Convention as a whole comes into operation only if there is a choice of court agreement, and this assumes that the basic factual requirements of consent exist. If, by any normal standards, these do not exist, a court would be entitled to assume that the Convention is not applicable, without having to consider foreign law." (notes omitted). T. Hartley and M. Dogauchi, *supra,* note 10, par. 94 and 95.

[55] *Hewlett-Packard France* v. *Matrox Graphics Inc.*, *supra,* note 44.

[56] In *Hewlett-Packard France* v. *Matrox Graphics Inc.*, *supra,* note 44, *Société des technologies de l'aluminium du Saguenay ltée* v. *Cooper Grainger Technical Bearing Sales Ltd.*, *supra,* note 43 and in *Classé Audio inc.* v. *Linn Products Ltd.*, *supra,* note 50, the question of a contract of adhesion was not raised.

[57] According to the first paragraph of article 1379C.C.Q.:"A contract of adhesion is a contract in which the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable."

[58] According to article 1435 C.C.Q., "An external clause referred to in a contract is binding on the parties.

In a consumer contract or a contract of adhesion, however, an external clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer or adhering party, unless the other party proves that the consumer or adhering party otherwise knew of it."

[59] Article 1437 C.C.Q., *supra*, note 29.

[60] Concerning the general validity of external, illegible, incomprehensible or abusive clauses, G. Goldstein and É. Groffier suggest the possibility of bringing public policy into play exception or considering that they are necessary rules of application, *supra,* note 12, p. 508, para. 368. They add that they are of the view that a Quebec court chosen despite a clause conferring jurisdiction on a foreign court may hear a case concerning the validity of this clause. This could not be refused on the ground that it was a decision on the merits, any more than it would be prohibited from deciding whether a case fell outside the ambit of the clause: *ibid.*, p. 545, para. 377.

[61] In *Achilles (USA)* v. *Plastics Dura Plastics (1977) ltée/Ltd., supra,* note 42, the Court of Appeal noted that acceptance of the terms of a contract, including acceptance of the arbitration clause, may result from the conduct of the parties, thus ignoring a comment by the Superior Court in *Classé Audio inc. v. Linn Product Ltd.*, *supra,* note 50 (application for leave to appeal denied) that concerning article 3148 C.C.Q., "It can be argued that the word "chosen" (in French, "choisi") precludes the possibility of tacit agreement and implies that the parties must deliberately and consciously choose the agreed upon forum."

[62] *DSD International inc.* v. *DMG Canada inc.*, *supra,* note 43 refers to *United European Bank and Trust Nassau Ltd.* v. *Duchesneau*, *supra,* note 40.

[63] *Ibid.*

[64] *DSD International inc.* v. *DMG Canada inc.*, *supra* referred to at note 43, refers to *Société des technologies de l'aluminium du Saguenay ltée* v. *Cooper Grainger Technical Bearing Sales Ltd.*, *supra,* note 43 and to *Classé Audio inc.*v. *Linn Products Ltd.*, *supra,* note 50. See concerning arbitration *Eclipse Optical Inc.* v. *Bada U.S.A. Inc.*, [1998] R.J.Q. 289 (Ct. Que.), where the parties did not feel bound by an arbitration clause

appearing on the back of the invoices paid regularly by the plaintiff.

[65] *2617-3138 Québec inc.* v. *Rogers Cantel inc.*, *supra,* note 43. See also *9065-3916 Québec inc. (Pizzeria Stratos Nicolet)* v. *Société de prêt First Data Canada inc.* and *2736349 Canada inc.* v. *Rogers Cantel inc.*, *supra,* note 43. In all these cases, the chosen courts were those of Ontario and its law also applied. In *GreCon*, the Supreme Court did not mention a contract of adhesion among the limits to the freedom of choice expressed by the choice of court agreement: *GreCon Dimter inc.* v. *J.R. Normand inc.*, *supra,* note 46.

[66] *United European Bank and Trust Nassau Ltd.* v. *Duchesneau, supra,* note 40, para. 49, and paras. 75 to 78.

[67] See article 3080 C.C.Q., *supra* note 31.

[68] Article 3136 C.C.Q. reads as follows: “Even though a Quebec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Quebec, where proceedings cannot possibly be instituted outside Quebec or where the institution of such proceedings outside Quebec cannot reasonably be required.”

[69] *Thériault* v. *Gauvreau*, [1996] R.J.Q. 2328 (Sup. Ct.); *E.B. v. B.K.,* [2003] R.D.F. 997 (res.) (Sup. Ct.), J.E. 2003-1645 (Sup. Ct.); *Conserviera S.P.A.* v. *Paesana Import-Export Inc.*, [2001] R.J.Q. 1458 (C.A.); *M.C.L. Communications inc. v. Unitel Communications inc.*, J.E. 96-721 (Sup. Ct.); *Droit de la famille – 2267*, [1995] R.D.F. 646 (Sup. Ct.); *L.F.*v. *N.T.,* [2001] R.J.Q. 300 (C.A.); *H.H.N.* v. *O.X.Ng.*, [2002] R.D.F. 604 (Sup. Ct.); appeal discontinued (C.A., 2003-02-28) No. 500-09-012421-020; *Souffrant v. Haytian American Sugar Company,* J.E. 2007-371 (Sup. Ct.).

[70] *Lamborghini (Canada) inc.* v. *Automobili Lamborghini S.P.A.* and *2736349 Canada Inc.* v. *Rogers Cantel Inc.*, *supra,* note 43.

[71] Article 3140 C.C.Q., for its part, provides that all necessary measures may be taken to protect a person located in Quebec or his or her property located there in cases of emergency or serious inconvenience. This provision is often applied in conjunction with article 3138 C.C.Q. See *O.A.K.N. (Dans la situation d')*, J.E. 2004-1025 (C.Q.).

[72] However, these measures may be recognized and enforced in another State only if the law of the requested State provides for this, which is not the case in the Quebec law governing foreign provisional or conservatory measures since these are, by definition, final and a condition for recognition and enforcement under article 3155 (para. 2) C.C.Q.

[73] *Impulsora Turistica de Occidente, S.A. de C.V.* v. *Transat Tours Canada Inc.*, *supra,* note 23 (injunction). Note that Transat had not appealed from the part of the judgment of the Superior Court dismissing its application for a safeguard order. The opinion of the Court of Appeal concerned a final injunction; however, the same reasoning should apply if only an interim injunction were requested. See *contra Martin* v. *Espinhal*, J.E. 2001-1193 (Ct. Que.) (seizure).

[74] *GreCon Dimter inc*. v. *J.R. Normand inc*., *supra,* note 46.

[75] *Robertson Building Systems Ltd. v. Constructions de la Source inc.* et *Achilles (USA)* v. *Plastics Dura Plastics (1977) ltée/Ltd., supra,* note 42.

[76] T. Hartley and M. Dogauchi, *supra,* note 10, par. 41-42.

[77] Quoted in *Dell*, *supra,* note 5: J.A. Talpis "Choice of Law and Court Selection Clauses under the New *Civil Code of Quebec*" (1994), 96 *R. du N.* 183, p.218; S.Rochette, "Commentaire sur la décision *United European Bank and Trust Nassau Ltd. v. Duchesneau* — Le tribunal québécois doit-il examiner le caractère abusif d'une clause d'élection de for incluse dans un contract d'adhésion?" Droit civil en ligne, *Repères*, Bulletin de droit civil, EYB 2006-104816, P.3-4; S.Guillemard, "Liberté contractuelle et rattachement juridictionnel: le droit québécois face aux droits français et européen", *E.J.C.L.*, Vol.8, June 2, 2004, pp.25, 26, 28 and 50.

[78] Article 3111 reads as follows: "A juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the act or the designation of which may be inferred with certainty from the terms of the act.

A juridical act containing no foreign element remains, nevertheless, subject to the mandatory provisions of the law of the country that would apply if none were designated.

The law of a country may be expressly designated as applicable to the whole or a part only of a juridical act."

[79] S.Guillemard, *supra*, note 77, pp.25, 26, 28 and 50.

[80] Today, this article 68 C.C.P. reads as follows: "Subject to the provisions of this Chapter and the provisions of Book X of the Civil Code, and notwithstanding any agreement to the contrary …"

[81] T. Hartley and M. Dogauchi, *supra,* note 10, par 171.

[82] *Ginsbow inc*. v. *Pipe and Piling supplies LTD*, J.E. 2000-762, appeal dismissed J.E. 2002-53.

[83] Section 6 par. 1 of the *Act respecting the implementation of the reform of the Civil Code*, S.Q., 1992, v. 57.

[84] When it applies, the Convention does not require recognition and enforcement by the court requested, although it does not prohibit this.

[85] See *Society of Lloyd's* v. *Alper**, J.E. 2006-717 (C.S.), appeal filed, 2006-03-30 (C.A.), No. 500-09-016543-068; application for leave to appeal dismissed (C.A., 2006-07-04), No. 500-09-016543-068and *DirecTV inc.* v. *Scullion,* [2002] R.J.Q. 2086 (Sup. Ct.); appeal dismissed on motion, (C.A. 2002-11-07), No. 500-09-012621-025.

[86] *Beals* v. *Saldanha,* [2003] 3 S.C.R. 416.

[87] *Cortas Canning and Refrigerating Co.* v. *Suidan Bros. Inc./Suidan Frères inc.,* [1999] R.J.Q. 1227 (Sup. Ct.), appeal abandoned (C.A., 1999-09-09), No. 500-09-007981-996. The amount of the damages converted into Canadian dollars was $12,994,200.00. In the view of the Court, "This amount is so disproportionate with amounts awarded in similar situations in Canada and in Quebec that it could be said to be in non-conformity with public order as understood in the international context". In that case, recognition and enforcement were refused primarily on the ground that the foreign court that decided the case did not have jurisdiction. See, concerning the public policy exception for recognition and enforcement of foreign judgments: *Auerbach* v. *Resorts International Hotel Inc.,* [1992] R.J.Q. 302 (C.A.); application for leave to appeal to the Supreme Court denied (S.C.C., 1997-06-26) 25785 (gambling debt); *Mutual Trust Co. v. St-Cyr*, [1996] R.D.J. 623 (C.A.) (immovable hypothec; division in payment); *Droit de la famille-3687*, [2000] R.D.F. 505 (C.S.) (alimony, *in loco parentis*); *Droit de la famille-2054*, J.E. 98-1237 (C.A.), application for leave to appeal to the Supreme Court denied (S.C.C., 1999-01-21), 26790, (foreign divorce).

[88] *Cortas Canning and Refrigerating Co.* v. *Suidan Bros. Inc./Suidan Frères inc.*, *supra,* note 87.

[89] According to article 3163 C.C.Q.: "A transaction enforceable in the place of origin is enforceable and, as the case may be, declared to be enforceable in Quebec on the same conditions as a judicial decision, to the extent that these conditions apply to the transaction."

[90] The formality of the Apostille of the Hague Convention on legalization is not known in Quebec law since Quebec has not implemented it and Canada is not a party to it.

[91] T. Hartley and M. Dogauchi, *supra*, note 10, paras. 160, 179 to 182.

[92] *Worthington Corp.* v. *Atlas Turner inc.*, [2004] R.J.Q. 2376 (C.A.), application for leave to appeal to the Supreme Court denied (S.C.C., 2005-03-17), 30581.

[93] *Keane* v. *Imbeau*, [1987] R.D.J. 468 (C.A.); *Droit de la famille-1149*, [1988] R.D.F. 83 (Prov. Ct.); *Nadeau* v. *Société québécoise d'assainissement des eaux*, J.E. 2001-1798 (C.A.); *Burton* v. *Verdun (Ville de)*, J.E. 98-1950 (C.A.); *Liberty Mutual Insurance Co. v. Commission des normes du travail du Québec*, [1990] R.D.J. 421 (C.A.); *E.D.D.* v. *I.P.*, [1988] R.D.J. 592 (C.A.); *Canada 3000 Airlines Ltd.* v. *Aéroports de Montréal*, REJB 199-10640 (Sup. Ct.); *Église apostolique de Dieu de la Pentecôte de Montréal* v. *Waschik (Succession de)*, J.E. 99-44 (Sup. Ct.); *124298 Canada inc. (Syndic de)*, (Sup. Ct.), Montreal, No. 500-11-001412-952, 1997-10-27, Rayle J., AZ-98026001; B.E. 98BE7(Sup. Ct.); *Caisse populaire Les Chutes v. Trust général du Canada,* (Sup. Ct.), Trois-Rivières, No. 400-05-001515-973, 1997-11-27, Blondin J., AZ-98026109; B.E. 98BE216 (Sup. Ct.) referred to by D. Ferland and B. Émery, *Précis de procédure civile,* 4e éd., tome 1, Cowansville, éd. Yvon Blais, 2003, p. 284, notes 43 and 44.

[94] *Society of Lloyd's* v. *Alper*, *supra,* note 85.

[95] *Act to secure the carrying out of the Entente between France and Quebec respecting mutual aid in judicial matters*, R.S., v. A-20.1.

[96] See, concerning article 19 of the Convention, *supra,* note 36.

[97] Article *23of the Convention provides in this respect that, for the interpretation of this* Convention, regard shall be had to its international character and to the need to promote uniformity in its application. As for article *24, it provides that th*e Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for review of the operation of the Convention, including any declaration and consideration of whether any amendments to the Convention are desirable.

Uniform Law Conference of Canada
Conférence pour l'harmonisation des lois au Canada

Executive Director
c/o 15 Ettrick Crescent
Barrhaven Ontario K2J 1E9
Canada
613-986-2945