

**UNIFORM LAW CONFERENCE OF
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CIVIL SECTION

**Report on Québec law and the
*Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and
Commercial Matters* (concluded on July 2, 2019)**

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[1] This report is divided into two parts. The first part compares Québec law to the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* concluded at the Hague on July 2, 2019 (“Convention” or “HC2019”).¹ Similarities and differences will be highlighted. The second part assesses the implications of implementing the Convention in Québec. It will outline the required and optional changes to be made to Québec law, the advantages and disadvantages of the possible options and their impact on Québec practice. Recommendations will conclude this report. The articles will not necessarily be discussed in the order that they appear in the Convention and frequent references will be made to the Explanatory Report of the Convention (“Report”).²

1 - Comparison of Québec law to the Convention

[2] First, this section will address the geographical, temporal, material and personal scope of application of the Convention; then, the requirements for recognition and enforcement and indirect jurisdiction. Lastly, the provisions on procedure, declarations and interpretation will be analyzed.

1.1 Scope

1.1.1 Geographical Scope

[3] The Convention applies³ between Albania,⁴ Andorra,⁵ Montenegro,⁶ the United Kingdom,⁷ Ukraine,⁸ the European Union, its twenty-seven (27) Member States⁹ with the exception of Denmark, and Uruguay.¹⁰ A Contracting State may, by notification, elect not to establish relations with another Contracting State under the Convention (Art. 29(2) and (3) of the Convention).¹¹ This possibility is not open to Canadian provinces and territories (Report, para. 411). So far, no State has availed itself of this possibility.

[4] The Convention provides that a Contracting State which, like Canada, includes two or more territorial units in which different systems of law apply, shall not be bound to apply the Convention to situations which involve solely those different territorial units (Art. 22(2)).¹² The Convention also provides for the possibility for such a State to declare that the Convention will apply to all of its territorial units or solely to one or more of those units. The declaration shall expressly state the territorial units to which the Convention applies. Otherwise, the Convention shall extend to all territorial units of the State (Art. 25).¹³ A State may, at any time, amend the declaration it has made or submit further declarations in accordance with Article 30 of the Convention.¹⁴ If Canada were to become a Party to the Convention, the Convention would enter into force in the provinces and territories to which Canada has declared the Convention to apply, on the first day of the month following a period of 12 months (Art. 28(2)(a) of the Convention). Thereafter, if Canada extended the application of the Convention to other territories and provinces, the Convention would enter into force in those territories and provinces on the first day of the month following a period of 3 months after notification of the declaration (Art. 28(2)(b) of the Convention).

[5] For its part, the Civil Code applies to the recognition and enforcement of all judgments rendered outside Québec, including judgments rendered in other jurisdictions in Canada (Art. 3077 and 3155 CCQ).

[6] Thus, the geographical scope of the Convention is more restrictive than that of Québec law.

1.1.2 Temporal scope

[7] The Convention applies to the recognition and enforcement of judgments if, at the time the proceedings were initiated in the State of origin, the Convention applied between that State and the requested State (Art. 16).

[8] The Civil Code applies to judgments rendered after January 1, 1994, excluding those that were pending on that date.¹⁵

[9] In terms of temporal scope, the Convention is therefore more restrictive than Québec law.

1.1.3 Material scope

[10] The Convention, like the Civil Code, applies to judgments in civil or commercial matters, as well as to judicial settlements (Art. 11 of the Convention; Art. 3155 and 3163 of the CCQ). However, the material scope of the Convention is narrower than that of the Civil Code since Article 3163 of the CCQ covers all settlements (“transactions”) that are enforceable in the State of origin, whereas the Convention is limited to judicial settlements either approved by a court of a Contracting State or concluded during proceedings before such a court, and which are enforceable in the same manner as a judgment in the State of origin. According to the Explanatory Report (Report, para. 298), the Convention, which provides for the enforcement of judicial settlements but not their recognition, does not prevent a court from granting *res judicata* to a foreign judicial settlement under domestic law. Neither the Convention (Report, para. 114 *et seq.*) nor Québec law specifies which law governs the attribution of *res judicata* to a recognized judicial settlement (law of the State of origin or law of the requested State). If Québec law were to apply, Art. 2633 of the CCQ provides that a settlement (“transactions”) has, between the parties, the authority of *res judicata*.

[11] The Convention excludes certain matters because they are already subject to other international conventions, because it is difficult to reach a multilateral consensus on them, to avoid uncertainty arising from divergent interpretations under domestic law, or because judgments rendered in these matters, which are often subject to exclusive jurisdiction, are not usually recognized and enforced in other States (Art. 2 of the Convention, Report, para. 44 and 57).¹⁶ Ultimately, the Convention applies mainly to matters covered by Book Five of the Civil Code –

“Obligations” (contracts and liability),¹⁷ as well as to actions *in rem* concerning immovable property (Art. 6).

[12] The Convention also provides the possibility for a State to make a declaration to exclude a matter when it has a significant interest in not applying the Convention to that matter. The State making such a declaration must ensure that the declaration is no broader than necessary and that the excluded matter is clearly and precisely defined (Art. 18 of the Convention). The European Union and Andorra have thus declared, in accordance with Article 18, that the Convention would not apply to leases of non-residential buildings located in the European Union or in the Principality of Andorra. Andorra has also stated that the Convention would not apply to the recognition or enforcement of judgments in employment contracts against an employee.

[13] In Québec law, Articles 3151, 3155 and 3165 of the CCQ provide that a foreign judgment cannot be recognized and enforced when the dispute concerns civil liability for any injury suffered in Québec or outside Québec resulting from exposure to, or use of, raw material originating from Québec, whether or not this raw material has been processed.¹⁸ A declaration to exclude from the scope of the Convention civil liability resulting from exposure to, or use of, raw material originating from Québec would therefore be necessary to implement the Convention in Québec, unless Québec law is amended to bring it into conformity with the Convention. The declaration, if made subsequent to ratification, shall take effect three months after the date of receipt of the notification by the depositary and shall not apply to judgments rendered in proceedings that have already been initiated before the court of origin at the time it takes effect (Art. 30(4) and 30(5) of the Convention; Report, para. 341 and 419).

[14] Thus, in terms of subject matter, the scope of the Convention is both more restrictive and broader than that of Québec law.

1.1.4 Personal scope

[15] According to the Convention, a judgment is not excluded from its scope merely because a State, including a government, a government agency or a natural person acting for a State, was a party to the dispute.¹⁹ However, it allows a State to declare that it will not apply the Convention to judgments arising from proceedings to which any of the following is a party: (a) that State or a natural person acting for that State; or (b) a government agency of that State or a natural person acting for such a government agency. The declaration shall not distinguish between judgments where the State, a government agency of that State or a natural person acting for either of them is a defendant or claimant in the proceedings before the court of origin. As in the case of the declaration relating to excluded matters, the State making such a declaration shall ensure that the declaration is no broader than necessary and that the exclusion from the scope of application is clearly and precisely defined (Art. 19(1)).

[16] Recognition or enforcement of a judgment given by a court of a State that made such a declaration may be refused if the judgment arose from proceedings involving the declaring State or the requested State, one of their government agencies or a natural person acting on their behalf, within the limits specified in the declaration (Art. 19(2)). According to the Explanatory Report (Report, para. 349-350), a judgment rendered against a declaring State in another State will not be recognized or enforced in the declaring State but may be recognized in other States if the conditions set out in the Convention are otherwise met. If a judgment is rendered in a declaring State against another State, the latter may not recognize or enforce it, but it may still be recognized in other States if the Convention's conditions are met. Lastly, if a judgment is rendered in one State in favour of a declaring State, that judgment may be recognized and enforced in other States if the Convention's conditions are otherwise met.

[17] The declaration, if made subsequent to ratification, shall take effect three months after the date of receipt of the notification by the depositary and shall not apply to judgments rendered in proceedings that have already been initiated before the court of origin at the time the declaration takes effect (Art. 30(4) and 30(5) of the Convention; Report, para. 347 and 419).

[18] Pursuant to Art. 1376 of the CCQ, the rules set forth in Book Five – “Obligations” apply to the State and its agencies, and to all other legal persons established in the public interest, subject to any other applicable legal rules. The *Financial Administration Act* provides for the payment of sums required to enforce a judgment that has acquired the force of *res judicata* against the State.²⁰ To our knowledge, there are no other rules specific to the recognition and enforcement of judgments rendered against the province of Québec, its agencies, and legal persons established in the public interest, but consultation with the Québec government would be necessary to confirm this.

[19] Thus, the personal scope of the Convention appears similar to that of the Civil Code.

1.2 – Requirements for recognition and enforcement

[20] The Convention establishes the general principle that a judgment rendered by a court of a Contracting State is recognized and enforced in another Contracting State if it satisfies certain requirements set out therein which relate primarily to the jurisdiction of the court of the State of origin (Art. 5 and 7). The Convention also provides that in a Contracting State like Canada, which comprises two or more territorial units with different legal systems, a court in one territorial unit is not obliged to recognize or enforce a judgment from another Contracting State solely because the judgment has been recognized or enforced in another territorial unit of the same Contracting State (Art. 22(3)).

[21] An exhaustive list of grounds for refusal allows, but does not oblige, the requested State to refuse recognition or enforcement (Art. 7). It is not open to a Contracting State to refuse recognition

and enforcement on other grounds under its domestic law (Art. 4 (1) of the Convention; Report, para. 112). Under the Convention, it is therefore for the court of origin to determine whether it is *forum conveniens* and not for the requested court to assess whether the court of origin should have declined jurisdiction. This is consistent with Québec law.²¹ Domestic law may, however, still allow for recognition and enforcement (see para. 1.2.1). According to the Explanatory Report, States may (i) enact legislation that excludes refusal in some of the circumstances set out in Article 7, or provides for refusal in all of these circumstances, (ii) require recognition and enforcement in some of those circumstances, (iii) specify additional criteria relevant to the exercise of discretion or (iv) leave everything to the discretion of the court (Report, para. 246).

1.2.1 Domestic law

[22] The Convention allows a requested State to recognize or enforce a foreign judgment under its domestic law (Art. 15) if its rules are more generous than those of the Convention, subject to the exclusive jurisdiction over immovable property provided for in the Convention, which must be respected (Art. 6). This does not pose any difficulty since under Québec law, as under the Convention, a judgment that ruled on rights *in rem* in immovable property is recognized and enforced if, and only if, the property is situated in the State of origin (Art. 3152, 3155 and 3165 of the CCQ).

[23] Furthermore, the Convention also provides for the exclusive jurisdiction of the court of the State in which the property is located with respect to residential leases of immovable property (tenancy) (Art. 5(3)), though it does not refer to Article 15 in this context. This means that a Québec court may still recognize a judgment on a residential lease rendered by a court of a Contracting State under Québec law on the basis of any of the factors set out in Article 3168 of the CCQ²², unless Québec law grants exclusive jurisdiction to the courts of another State or to its own courts (Art. 3165 of the CCQ). In our opinion, if the property is located in Québec, the Tribunal du logement [Housing Tribunal] has exclusive jurisdiction over residential leases. Consequently, a foreign judgment concerning a residential lease in respect of an immovable property located in Québec would not be recognized under either the Convention or under Québec domestic law. Short-term rentals (less than 31 days) are governed by the *Act respecting tourist accommodation establishments*, CQLR, c. H-1.01, and generally do not fall under the exclusive jurisdiction of the Tribunal du logement. However, it will always be possible for a Contracting State to recognize a judgment concerning a residential lease of immovable property located in Québec, on the basis of its own domestic law, even if Québec law grants exclusive jurisdiction to the Tribunal du logement. Making a declaration to exclude residential leases in Québec from the scope of the Convention would not change this and could prevent the recognition and enforcement of Québec judgments abroad on such matters under the Convention, though not under the domestic laws of other States (Report, para. 341).

1.2.2 Final and enforceable nature

[24] The Convention, like the Civil Code, provides that a judgment cannot be enforced if it is not enforceable (Art. 4(3) of the Convention, Art. 3155 of the CCQ). According to the Explanatory Report, a longer period of limitation for enforcement in the requested State does not extend the period of enforcement of a foreign judgment that is no longer enforceable in the State of origin. (Report, para 310.) In *Ginsbow Inc. v. Pipe and piling Supplies Ltd.*,²³ a United States judgment dated February 9, 1988, became null and void under United States law as of February 9, 1998. According to the Court, the appellant could not revive the judgment or extend its validity through exemplification proceedings commenced on February 6, 1998, even though Article 2892 of the CCQ provided for the interruption of the prescriptive period by the filing of an action in court. In addition, a request made in the United States to extend the enforcement period under Washington State law had been denied. However, according to the Explanatory Report (para. 312-313), Article 13 of the Convention does not preclude the application of a shorter enforcement period in the requested State (by virtue of its domestic or [private] international law, which may refer to the law of the State of origin or the substantive law on which the judgment is based) provided that the period does not distinguish between foreign and domestic judgments and is not excessively short. In Québec law, this issue is controversial. There are no substantive rules and legal scholars disagree. Some believe that the ten-year period provided in Article 2924 of the CCQ applies under Article 3132 of the CCQ (which provides that the procedure is governed by the law of the court seized), as is the case for the homologation of foreign arbitral awards according to jurisprudence. Others argue that the period provided by the law applied by the court of origin to resolve the merits of the dispute should apply; still others believe that the law of procedure of the State of origin should determine the applicable period. These last two views are based on Article 3131 of the CCQ (which provides that prescription is governed by the law of the court seized). In *Minkoff c. Society of Lloyd's*,²⁴ the Court of Appeal appears to have accepted the limitation period of the law of the jurisdiction from which the decision originated but, since this law had not been proven and Article 2809 of the CCQ provided that in such situations the court was to apply Québec law, it applied the ten-year limitation period in Article 2924 of the CCQ.

[25] The Convention provides that recognition or enforcement may be deferred or refused if the judgment is subject to an appeal in the State of origin or if the time limit for filing an ordinary appeal has not expired. Under the Civil Code, only refusal is contemplated in such cases (Art. 4 of the Convention, Art. 3155 in the CCQ). However, under the Convention, a refusal does not prevent a subsequent application for recognition or enforcement (Art. 4(4)), and, according to the Explanatory Report, the requested court may grant protective measures under its domestic law in the meantime to ensure the future enforcement of the judgment (Report, para. 131).

[26] According to the Explanatory Report (Report, para. 133), legislation could be adopted to allow courts to exercise discretion in choosing whether to grant, defer or refuse recognition or to determine which of the two options under Article 4(4) is available (deferral or refusal). In addition,

a State may authorize recognition or enforcement of a judgment by making it conditional on the deposit of a security to compensate the judgment debtor if the judgment is ultimately set aside or amended as a result of the appeal in the State of origin. These alternatives will be examined in the second part of the report, as Québec law currently only provides two options: the acceptance or refusal of recognition and enforcement.

1.2.3 Public order, the essential principles of procedure and fraud

[27] According to the Convention, recognition or enforcement may be refused if it is incompatible with the public policy of the requested State, particularly where the procedure used to obtain the judgment was incompatible with the fundamental principles of procedural fairness of the requested State and in situations involving infringements of security or the sovereignty of that State (Art. 7(1)c) of the Convention). According to the Civil Code, any decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except where the decision was rendered in contravention of the fundamental principles of procedure (Art. 3155(3) of the CCQ), or where the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations (Art. 3155(5) of the CCQ). The wording differs slightly but the concepts are generally the same. The Convention refers to the public policy of the requested State, but the Explanatory Report (Report, para. 263) clarifies that this refers to public policy as understood in international relations to which the Civil Code refers. The Convention also adds fraud as a ground for refusing to recognize and enforce a foreign judgment. This is not explicitly provided for in the Civil Code but could be covered under the public policy exception (Art. 7(1) b) of the Convention; Report, para. 257, Art. 3155 of the CCQ).

1.2.3 *Lis pendens* and contradictory judgments

[28] Recognition or enforcement may be refused if the judgment was rendered despite the existence of *lis pendens*, which is framed somewhat differently in the Convention than in the Civil Code. Both require the parties to be identical. Three scenarios must be distinguished: proceedings pending before a court of the requested State, and a judgment was rendered by the requested State, or by a third State.

1.2.3.1 Proceedings pending before the court of the requested State

[29] In cases where proceedings are pending before the court of the requested State, both the Convention and the Civil Code require, that this court must have been seized before the court of the State of origin. The Convention adds that there must be a close link between the dispute and the requested State, and it requires that the parties and subject matter of the proceedings be identical. Under the Civil Code the facts must also be identical (Art. 7(2) of the Convention; Report, para. 273-276; Art. 3155(4) of the CCQ). The Convention provides that recognition or enforcement

may be deferred or refused if the conditions are met, whereas under the Civil Code, only refusal is contemplated in such cases. See paras. 24-25 above.

1.2.3.2 Judgment rendered by the requested State

[30] Both the Convention and the Civil Code allow for the refusal of recognition or enforcement of the foreign judgment where a judgment has already been rendered by the requested State. In such cases, the court of the requested State need not to have been seized before the court of origin. The Convention specifies that there must be incompatibility between the two judgments, which is not provided for under Québec law. The latter states that the Québec decision may or may not have acquired the force of *res judicata*, something that the Convention does not address. Furthermore, under the Convention, only the parties to the proceedings must be identical, whereas the Civil Code adds the requirement that the subject matter and facts also be identical (Art. 7(1)e) of the Convention; Report, para. 271; Art. 3155(4) of the CCQ).

1.2.3.3 Judgment rendered by a third State

[31] Both the Convention and the Civil Code require, in cases where the judgment was rendered by a third State, that the judgment meet the necessary conditions for recognition in the requested State. In these cases, the priority of proceedings becomes relevant again. The Convention specifies that there must be incompatibility between the two judgments. This is not provided for under Québec law. According to the Convention, only the parties and subject matter of the proceedings must be identical, whereas the Civil Code adds the requirement that the facts be identical as well (Art. 7(1)f) of the Convention; Report, para. 272; Art. 3155 (4°) of the CCQ).

1.2.4 Default judgment

[32] A default judgment may be recognized and enforced both under the Civil Code and the Convention if the document initiating the proceedings²⁵ was served in a timely manner and in such a way that the defendant had the opportunity to prepare a defence (Art. 3156 of the CCQ; Art. 7(1)(a)(ii) of the Convention), or if the defendant appeared and presented a defence (Art. 3155 of the CCQ; Art. 7(1)(a)(i) of the Convention). The Civil Code refers to the law of the State where the decision was rendered to assess the validity of the service, whereas the Convention does not allow refusal of recognition or enforcement solely on the ground that service was not in accordance with the law of the State where it was carried out, the law of the State of origin, or international conventions on service of documents (Report, footnote 170). In the rare case where service is carried out in the requested State, the Convention allows that State to refuse recognition and enforcement if the service was incompatible with its fundamental principles regarding service of documents. In addition, the Convention protects defendants who appeared and presented a defence before the court of origin without contesting service, in cases where the law of the State of origin does not permit service to be contested.

1.2.5 Damages

[33] The Convention contains a provision (Art. 10) that allows a foreign judgment awarding damages exceeding the actual harm suffered to be denied recognition and enforcement—unlike Québec law, which does not specifically address this issue.²⁶ In one case,²⁷ a Californian judgment ordering the defendant to pay more than \$1 billion in damages was recognized. Judgments in three other cases were not recognized, because they were contrary to public policy.²⁸ In a final case,²⁹ the portion of an English judgment concerning the repayment of capital was recognized and severed (Art. 3159 of the CCQ) from those concerning contractual interest, which had an effective annual rate of 438%, and additional interest in the event of default, which had an effective annual rate of 73%. The Convention therefore provides an approach that is different from Québec’s “all or nothing” model (accepting or refusing recognition or enforcement) (Report, para. 293) by allowing the recognition of damages up to the compensatory portion and taking into consideration procedural costs and expenses.

1.2.6 Choice of court agreements and forum selection clauses in trust instruments

[34] The Convention provides that recognition and enforcement of a foreign judgment may be refused if the proceedings are contrary to a choice of court agreement or a forum selection clause in a trust instrument, whether the designated court is in a Contracting State or in a third State (Art. 7(1)(d); Report, para. 269). This ground for refusal only applies if the judgment meets one of the criteria set out in Article 5. If the judgment does not meet any of the criteria, recognition and enforcement under the Convention would not be possible (except under domestic law in accordance with Art. 15) (Report, para. 267). If jurisdiction is not contested and a defence on the merits is filed, this ground for refusal would not apply (Report, para. 268). This paragraph shall apply whenever a valid choice of court agreement, whether exclusive or non-exclusive, has excluded the jurisdiction of the court of origin. The Civil Code provides that recognition and enforcement may be refused if the foreign judgment was rendered in violation of an exclusive jurisdiction conferred either on the Québec courts or on the courts of a State other than that which rendered the decision (Art. 3165 of the CCQ). The fact that the Civil Code only refers to exclusive agreements, contrary to the Convention, is not problematic as the refusal to recognize and enforce a foreign judgment is never an obligation under the Convention.

1.3 - Bases of indirect jurisdiction

[35] The court of the State that rendered the decision must be the court provided for in Article 5 of the Convention (indirect jurisdiction).³⁰ Only one criterion needs to be satisfied, and in cases involving multiple parties, the criteria set out in Article 5 must be assessed individually for each party (Report, para. 137-138).

1.3.1 Habitual residence and domicile

[36] Contrary to Article 3168(1) of the CCQ, which considers domicile as a factor for indirect jurisdiction, the Convention provides that, if the defendant has their habitual residence in the State of the court of origin, the judgment may be recognized (Art. 5(1)(a)). For natural persons, domicile will in most cases correspond to habitual residence. For legal persons, the Convention establishes an irrebuttable presumption that they are deemed to have habitual residence in the State of their registered office, the State under whose law they were incorporated, the State of their central administration, or the State of their principal place of business (Art. 3(2)). Only the first scenario aligns with Québec law (Art. 307 and 3168(1) of the CCQ).

1.3.2 Activity and an establishment

[37] Contrary to Article 3168(2) of the CCQ, the Convention provides that if the defendant is a natural person (according to the Civil Code, it may also be a legal person), who has their principal place of business (the Civil Code does not require that the place of business be the principal one) in the State of the court of origin, the judgment may be recognized if the claim on which the judgment is based resulted from their professional activity (Art. 5 (1)(b)). Under the Civil Code, the dispute must relate to the defendant's activity in the State of the court of origin, which is not necessarily the case for the Convention.

[38] However, the Convention also provides that if the defendant (natural or legal person) has a branch, agency or other establishment without its own legal personality in the State of origin (the Civil Code provides only for "establishment"), the judgment may be recognized if the claim on which the judgment is based resulted from the activities of that branch, agency or establishment. The Explanatory Report specifies that an establishment implies a stable physical presence of the defendant in the State of origin where the defendant carries on business but excludes establishments with legal personality distinct from the defendant, such as subsidiaries (Report, para. 157). Article 5(1)(d) of the Convention corresponds more closely to Article 3168(2) of the CCQ.

1.3.3 Submission

[39] If the judgment is rendered against the claimant, other than by counterclaim, it may be recognized both under the Convention (Art. 5(1)(c)) and under the Civil Code but, in the latter case, on the basis of Article 3168(6) of the CCQ. Thus, according to the Explanatory Report, the recognition of the judgment may impede the initiation of new proceedings in another State, and its enforcement may allow for the recovery of costs and expenses (Report, para. 153). The same applies if the defendant expressly consented to the jurisdiction of the court of origin during the proceedings in which the judgment was rendered (Art. 5(1)(e) and Art. 3168(6) of the CCQ). Under both the Convention and the Civil Code, the judgment may be recognized if the defendant has presented his arguments on the merits before the court of origin without challenging its jurisdiction

within the time limits prescribed by the law of the State of origin (Art. 5(1)(f) and Art. 3168(6) of the CCQ). The Convention adds procedural safeguards not provided in the Civil Code, namely: “unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law”. The exercise of jurisdiction refers in particular to the doctrine of *forum non conveniens* (Report, para. 175).

[40] In *Barer v. Knight Brothers LLC*,³¹ the majority of the Supreme Court of Canada held, despite jurisprudential and doctrinal controversy, that a foreign judgment can be recognized and enforced if the defendant argued the merits of the case while also asserting that the foreign court had no jurisdiction. In such a situation, the Convention would allow the judgment not to be recognized and enforced under Article 5(1)(f), unless the defendant did not request the court of origin to decline jurisdiction and that was not due to the fact that such a request would have been futile.

[41] In *Cortas Canning & Refrigerating Company v. Suidan Bros. Inc./Suidan Frères Inc.*³² the defendant had unsuccessfully attempted to “save his skin” by raising the lack of jurisdiction of the Texas court, while also filing an application for an extension, two motions to dismiss and a motion for their counsel to withdraw, in addition to filing a joint status report and attending a settlement conference, but without filing a defence on the merits. Consequently, the Court seized with the application for recognition and enforcement of the U.S. judgment did not find that he had submitted to the jurisdiction of the foreign court. In such a situation, the Convention would also not allow the recognition and enforcement of the judgment under Article 5(1)(f).

[42] If the judgment is rendered against the counterclaimant, it may be recognized under the Convention (Art. 5(1)(l)(ii)). It provides, however, that, even in this case, the judgment will not be recognized if the law of the State of origin required the counterclaim to be filed in order to avoid preclusion. In Québec, the decision could also be recognized under the Civil Code on the basis of Article 3168(6) of the CCQ.

[43] If the judgment is rendered in favour of the counterclaimant, it may be recognized under the Convention (Art. 5(1)(l)(i)). The Convention provides, however, that even in this case, the judgment will not be recognized if the claim did not arise from the same transaction or occurrence as the main claim. Under Québec law, the decision could be recognized under the Civil Code based on Article 3168(6) of the CCQ. Furthermore, according to Article 172 of the CCP, the counterclaim must arise from the same source as the main claim or be related to it. This is consistent with the broad wording of the Convention, unlike, for example, Article 8(3) of the Brussels Ia Regulation,³³ which requires that the counterclaim arise from the same contract or facts on which the original claim is based (Report, footnote 149).

1.3.4 Contractual obligation

[44] According to the Convention, a judgment concerning a contractual obligation rendered by a court of the State in which the obligation was or should have been performed – in accordance with the agreement of the parties or the law applicable to the contract in the absence of an agreement on the place of performance – should be recognized and enforced unless the defendant’s activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State (Art. 5(1)(g)). According to the Civil Code, all obligations arising from a contract must have been performed in the State of origin for the judgment to be recognized (Art. 3168(4)). The Convention would therefore allow the recognition and enforcement of foreign judgments in a greater number of situations than the Civil Code.

1.3.5 Non-contractual civil liability

[45] According to the Convention, for a judgment relating to a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property to be recognized, the act or omission directly causing such harm must have occurred in the State of origin, irrespective of where the harm occurred (Art. 5(1)(j)). According to the Civil Code, the injury must have been suffered in the State in which the decision was rendered and it must have resulted from a fault committed there or from an injurious act or omission which occurred there (Art. 3168(3)). The Convention would therefore allow the recognition and enforcement of foreign judgments in more cases than the Civil Code.

1.3.6 Choice of forum

[46] Both the Convention and the Civil Code provide that a judgment may be recognized if it originates from the State chosen by the parties (Art. 5(1)(m)) of the Convention and Art. 3168(5) of the CCQ) but the latter provides that exclusive jurisdiction must not have been conferred by agreement between the parties to another foreign authority (Art. 3165(2) of the CCQ). Unlike the *Convention on Choice of Court Agreements* concluded at the Hague on June 30, 2005 (“2005 Convention” or “HC2005”), HC2019 does not cover exclusive choice of court agreements.³⁴ In addition, HC2005 covers only exclusive choice of court agreements and sets out two obligations that are absent from HC2019: (1) the obligation for the court chosen by the parties to hear the dispute; and (2) the obligation for the court seized, but not the one chosen by the parties, to decline jurisdiction. Finally, HC2005 establishes a presumption of exclusivity for choice of court agreements. In Québec law, the case law contains numerous examples of courts seeking to determine the parties’ intent. Furthermore, both HC2005 and HC2019 require that the agreement meet formal requirements: it must be concluded or documented in writing or by any other means of communication that makes the information accessible for future reference. For its part, Québec law relies on the rules of evidence (Book Seven of the Civil Code) and Article 3109 *et seq.* of the CCQ.

[47] For the effect of forum selection clauses in a trust instrument, see para. 34 above, and for their effect in consumer or employment contracts, see para. 51 *et seq.*

1.3.7 Real and mixed actions

[48] The Convention contains indirect jurisdiction rules for judgments that involve leases of immovable property (Art. 5(1)(h)), residential leases of immovable property (Art. 5(3)), the registration of a immovable property (Art. 5(3)), as well as contractual obligations secured by rights *in rem* in immovable property (Art. 5(1)(i)), whereas the Civil Code does not. At most, Articles 3152, 3164 and 3155 of the CCQ provide that a judgment rendered by the State in which a property is located may be recognized if the action is real.

[49] The Convention also contains indirect jurisdiction rules relating to trusts (Art. 5(1)(k)), whereas the Civil Code does not, although it does contain conflict of laws rules related to trusts (Art. 3107 and 3108 of the CCQ).³⁵ As pointed out in the Explanatory Report, this paragraph covers only judgments on the internal aspects of the trust (disputes between parties to the trust and third parties are subject to the other provisions of Art. 5(1)) and testamentary trusts are included (Report, para. 199 and 201). Paragraph (k) considers two bases of indirect jurisdiction. The trust instrument designates: (1) exclusively, or not, the courts of the State of origin to settle disputes relating to the validity, construction, effects, administration or variation of the trust or, (2) expressly or impliedly, the State in which the principal place of administration of the trust is situated. In both cases, the designation must precede the initiation of the proceedings. A subsequent amendment to the designation will not retroactively extinguish the connection at the time of recognition or enforcement of the judgment. See also para. 34 above.

1.3.8 Exclusive jurisdictions

[50] The Civil Code provides that recognition and enforcement must be refused if the foreign judgment was rendered in violation of an exclusive jurisdiction granted either to Québec courts, to the courts of a State other than that which rendered the decision, or to an arbitrator (Art. 3165 of the CCQ). For its part, the Convention excludes arbitration (Art. 2(3)),³⁶ the validity of entries in public registers (Art. 2(1)(j)), the validity, nullity or dissolution of legal persons or associations between natural or legal persons, and the validity of decisions of their organs (Art. 2(1)(i)). In addition, it provides exclusive jurisdiction over residential leases of immovable property (tenancies) (Art. 5(3)) and rights *in rem* in immovable property (Art. 6). However, with the exception of the latter, the recognition and enforcement of a foreign judgment is still possible even if it was rendered in violation of exclusive jurisdiction granted to the courts of a State other than that which rendered the judgment (under the Convention or if the domestic law of the requested State so permits (Art. 15) and even if the latter has made a declaration to exclude a specific matter from the Convention (Art. 18)). See para. 23 above.

1.3.9 Consumers and employees

[51] The Convention contains specific provisions when recognition or enforcement is sought against a natural person acting primarily for personal, family or household purposes (a consumer) in matters relating to a consumer contract, or against an employee in matters relating to the employee's contract of employment (Art. 5(2)). According to the Explanatory Report, the question arises as to whether the Convention applies to contracts concluded between consumers. This will need to be resolved by the courts applying the Convention, guided by the goal of uniform application expressed in Article 20 (Report, para. 222).

[52] According to Article 3168(5) of the CCQ, the jurisdiction of foreign authorities is recognized if the parties have submitted to them disputes that have arisen or may arise between them in connection with a specific legal relationship; however, a consumer or an employee's cannot be bound by a waiver of jurisdiction that excludes the authority of their domicile.³⁷ This article could be limited to cases where the consumer enters into a contract with certain merchants.³⁸ However, the fact that a person is a party to a consumer contract does not automatically trigger the application of Article 3168(5) *in fine* of the CCQ. In fact, according to case law, a consumer's submission to the jurisdiction of a foreign authority is not a waiver that would justify refusing the recognition of the judgment under Article 3168(5) *in fine* of the CCQ. For example, in *L.V.H. Corp. (Las Vegas Hilton) v. Lalonde*,³⁹ *obiter*, the Court stated that a consumer who had incurred a gambling debt abroad and acknowledged the jurisdiction of the foreign court by not contesting it – and who, two years after the action was initiated, signed a confession of judgment – does not benefit from the protection of Article 3168(5) *in fine* of the CCQ. In other words, the Court considers that only a choice of court agreement would make it possible to invoke Article 3168 (5) *in fine* of the CCQ. Furthermore, Article 11.1 of the *Consumer Protection Act* reads as follows: “[a]ny 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.”⁴⁰

[53] According to the Convention, a judgment rendered against a consumer or an employee can only be recognized if it was rendered by the State of the consumer or employee's habitual residence, or if their consent was given before the court that rendered the judgment, whether orally or in writing (Art. 5(2)(a)). In addition, under Article 5(2)(b), paragraphs (f), (g) and (m) of Article 5(1) do not apply in matters of consumer or employment contracts. A foreign judgment on these matters cannot therefore be recognized if it is based on the parties' agreement (Art. 5(1)(m)). On the one hand, the Convention appears to be generally more protectionist than Québec law, since tacit consent and express consent given to the other party, but not to the court, results in the refusal of recognition and enforcement under the Convention. On the other, the Convention seems less protectionist than Québec law, which prohibits enforcing choice of court clauses against consumers or employees—even if they agreed to them after the dispute arose, before the court. Québec case

law has not yet addressed such a situation. Andorra has declared that the Convention would not apply to the recognition or enforcement of judgments in employment contracts against an employee.

1.1.4 – Recognition and enforcement procedure

[54] Like the Civil Code, the Convention provides that the judgment cannot be reviewed on its merits (Art. 4 (2) of the Convention, Art. 3158 of the CCQ) and that, if the decision rules on several claims that are severable, recognition or enforcement may be granted in part (Art. 3159 of the CCQ; Art. 9 of the Convention).

[55] The procedure for recognition and enforcement is generally governed by the law of the requested State, subject to the provisions of the Convention (Art. 13). In Québec law, this procedure is set out in Articles 507 and 508 of the *Code of Civil Procedure* (CCP).

[56] The Convention provides that the court of the requested State must act expeditiously (Art. 13(1)). The Explanatory Report clarifies that this Article refers only to the procedure for obtaining recognition, *exequatur* or registration for enforcement, and that the court must use the fastest procedure available (Report, footnote 235 which refers to the Hartley/Dogauchi report on the Convention on Choice of Court Agreements, para. 216). Québec law, for its part, does not contain any provision to this effect. Furthermore, according to paragraph 315 of the Explanatory Report, States may also allow a judgment debtor to request a declaration of *non-recognition* (or non-enforceability) of a judgment rendered in another State. Québec law does not specifically address this.

[57] According to the Convention, the court of the requested State may not refuse the recognition or enforcement of a judgment on the ground that recognition or enforcement should be sought in another State (Art. 13(2)). This means that *forum non conveniens* (Art. 3135 of the CCQ) is not admissible in recognition and enforcement proceedings. It is consistent with the position of the Supreme Court of Canada in *Chevron*⁴¹, where it stated that in an action for recognition and enforcement, it is not necessary to establish a real and substantial connection between the defendant or the action and the enforcement jurisdiction.

[58] As with the *Code of Civil Procedure* (Art. 508 of the CCP), the Convention provides that the judgment (Art. 12(1)(a)), and any document necessary to establish that the judgment has effect in the State of origin or, where applicable, is enforceable in that State (Art. 12(1)(c)), must be attached to the application. In addition, if the decision was rendered by default, certified documents showing that the document initiating the proceedings was notified to the defaulting party must be attached (Art. 12(1)(b)). The Code of Civil Procedure adds that the documents must demonstrate that the originating application was properly notified to the defaulting party (Art. 508 CCP). Since the Convention does not require proof of proper notification, this wording does not appear in

Article 12. The documents must be accompanied by a certified translation when required (Art. 12(4)). The Code of Civil Procedure requires that documents in a language other than English or French be accompanied by a certified translation in Québec. The translation must be in French when the party requesting recognition or enforcement of a foreign decision is a legal person (Art. 508 of the CCP).

[59] The Convention also specifies the documents to be submitted in support of an application for recognition and enforcement of a judicial settlement (Art. 12(1)(d)). The Code of Civil Procedure does not explicitly provide rules regarding the recognition and enforcement of judicial settlements.

[60] The Convention provides that the court may require any document necessary to verify that the conditions of Chapter II of the Convention have been met, if the terms of the judgment do not permit the court addressed to verify that this is the case (Art. 12(2)). An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law (Art. 12(3)).

[61] Unlike the *Code of Civil Procedure* (Art. 492 of the CPP), the Convention prohibits the imposition of security for the payment of costs relating to an application for recognition and enforcement on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought (Art. 14(1)). However, the Convention allows a State to declare that it will not apply paragraph 1 or to designate in a declaration which of its courts will not apply it (Art. 14(3)). So far, only Costa Rica has availed itself of this possibility and will therefore be the only contracting State to be able to impose security on the ground that the applicant is a foreign national or is not domiciled or resident in that State when it ratifies the Convention.⁴² Furthermore, an order for payment of costs may be rendered enforceable under the Convention (Art. 14(2)).

[62] Under Québec law, legal costs associated with a case include court costs and fees, including disbursements incurred for the physical preparation of appeal briefs and memorandums, professional fees and expenses for the service or notification of pleadings and documents, witness indemnities and allowances as well as any expert fees, interpreters fees and fees for registration in the land register or the register of personal and movable real rights. They may also include the costs related to taking and transcribing testimony filed in the court record, if that was necessary (Art. 339 of the CCP).

[63] The *Entente between France and Québec respecting mutual aid in judicial matters*⁴³ contains a provision concerning judicial surety from which French nationals in Québec are exempt. This provision would remain applicable regardless of any declaration made on the subject. Indeed,

the Agreement prevails over any provision of a general or special Act or a regulation adopted under such an Act.⁴⁴

1.5 – Declarations

[64] The Convention provides for the possibility of making five types of declarations. These include: specifying, for a State such as Canada, in which provinces or territories the Convention will apply (Art. 25); excluding specific matters from the scope of the Convention (Art. 18); excluding judgments involving a State, a government agency or a natural person acting on their behalf (Art. 19); and allowing the requirement that foreign applicants provide security for costs (Art. 14).

[65] The Convention also allows a State to declare that its courts may refuse to recognize or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State (Art. 17).

1.6 – Interpretation

[66] The Convention provides that, for the purposes of its interpretation, regard shall be had to its international character and the need to promote uniformity in its application (Art. 20).

[67] In a Contracting State where two or more legal systems apply in different territorial units with regard to any matter dealt with in this Convention: (a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit; (b) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit; (c) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit; (d) any reference to a connecting factor in relation to a State shall be construed as referring, where appropriate, to that connecting factor in relation to the relevant territorial unit (Art. 22(1)).

[68] The Convention must also be interpreted in a way that is, to the extent possible, compatible with other treaties in force for Contracting States, whether concluded before or after this Convention (Art. 23(1)).⁴⁵ To the best of our knowledge, there is no treaty in force that applies to Québec and concerns the recognition and enforcement of judgments in civil or commercial matters.

2 – Implementation of the Convention in Québec

[69] Implementing the Convention in Québec involves identifying, as a first step, the amendments that are necessary to bring Quebec law into conformity with the Convention. Second, it is necessary to identify other amendments that may be considered that, although not necessary, would facilitate the implementation of the Convention in Québec. These two categories are not entirely distinct. In doing so, the available options, along with their advantages and disadvantages, must be evaluated and recommendations made. Finally, in light of all these developments, an assessment of the impact of implementation on Québec practice and law can be carried out.

2.1 Necessary amendments to implement HC2019 in Québec

[70] It is important to recall that a State such as Canada can specify the provinces or territories in which the Convention will apply (Art. 25). Québec is under no obligation to implement the Convention. The necessary amendments discussed are therefore all optional in the sense that they only become necessary if the decision is made to implement the Convention in Québec.⁴⁶

[71] As can easily be seen from the first part of this report, the differences between Québec law and the Convention are numerous, although the broad legislative principles are similar. The adoption of implementing legislation is therefore inevitable to ensure that Québec law complies with the Convention.

[72] It does not seem justified to consider introducing the Convention into Chapter IV of Book Ten of the Civil Code and Book V of the Code of Civil Procedure, notably because of the much narrower geographical and material scope of the Convention compared to these Codes. In addition, the Convention provides that, for the purposes of its interpretation, regard shall be had to its international character and the need to promote uniformity in its application (Art. 20). This result is more reliably achieved through the adoption of specific implementing legislation, which allows the Codes to remain as general law and preserves the integrity and autonomy of their respective interpretive frameworks. Finally, although the relevant provisions of the Codes are based on certain international conventions to which Canada was not a party to at the time these provisions were adopted—and still is not—it does not seem appropriate to proceed similarly with this Convention. Modernizing the rules on recognition and enforcement of foreign judgments would not justify foregoing the benefits of reciprocity by becoming party to the Convention.⁴⁷

[73] The differences between Québec law and the Convention presented in the first part of this report are too numerous to be usefully repeated here. It seems that only a specific statute giving the Convention the force of law would ensure Québec law's conformity with the Convention.

[74] A few words should be added concerning the declarations permitted by the Convention.

[75] It is worth noting that the Convention allows a State to make a declaration to exclude certain matters from its scope (Art. 18). Given that Québec law precludes, as we have seen, the recognition and enforcement of foreign judgments related to liability arising from the use of, or exposure to, raw material originating from Québec, such a declaration would be necessary and should be included in the implementing legislation or regulations to ensure that Québec law complies with the Convention.

[76] Such a declaration would not, however, prevent a foreign court from retaining jurisdiction, nor would it oblige other Contracting States to refuse to recognize and enforce judgments rendered. Judgments rendered by foreign courts would not have to be recognized and enforced in Québec, but, conversely, judgments rendered by Québec courts would also not be recognized and enforced abroad under the Convention.

[77] Moreover, the question arises as to what would happen if a Québec court were seized, but not elected by an exclusive choice of court clause, in the context of a matter whose object is only incidentally liability due to the use of, or exposure to, raw material. Indeed, a Contracting State is bound by obligations provided for in the Convention even if an excluded matter is raised incidentally in proceedings having a different object or principal issue (Art. 2(2)).⁴⁸ For example, an insurance contract would fall within the scope of the Convention, even if it provided for compensation to the insured for harm suffered in Québec or outside Québec resulting from use of, or exposure to, raw material originating from Québec. In *Society of Lloyd's c. Alper*,⁴⁹ the plaintiff obtained a judgment in England against the defendant, one of its members. Having miscalculated the insurable risk of asbestos, the plaintiff had to call on its members for additional funds. The defendant is one of those who refused to respond. Although liability arising from exposure to or use of asbestos may have been incidentally at issue, Article 3165 CCQ was not raised to prevent the recognition and enforcement of the foreign judgment rendered, which were granted. Thus, on this point, the Convention is more explicit than Québec law. The exact wording of the declaration should therefore be carefully examined and provided for by regulation, for example, to facilitate its amendment.

[78] To our knowledge, no other declaration should be considered to exclude other matters, but a careful review should be conducted of situations where Québec law grants exclusive jurisdiction to its courts⁵⁰ or seeks to protect a weaker party such as consumers or employees. Indeed, a declaration, if not made upon ratification, only takes effect more than three months after being made and does not apply to judgments resulting from proceedings already pending at that time (Art. 30). Consultation with various ministries and government agencies will be necessary to determine whether such a declaration is warranted, and if so, it should be incorporated into the implementing legislation or regulations. In addition, it seems essential that discussions be held with the federal government at the appropriate time.

[79] It should also be recalled that, to ensure compliance of Québec law (Art. 492 of the CCP) with the Convention (Art. 14(1)), a declaration may be made to allow for the imposition of security for the payment of costs related to an application for recognition and enforcement (Art. 14(3)).

[80] If, in order to retain this possibility, Canada were to make such a declaration on behalf of Québec, a judgment awarding legal costs by a Québec court could not be declared enforceable in any other Contracting State.

[81] One might consider not making such a declaration, since the judgment awarding costs can be recognized and enforced under the Convention (Art. 14(2)) and Québec has already implemented the *Hague Convention on the Civil Aspects of International Child Abduction* and the *Act to secure the carrying out of the Entente between France and Québec respecting mutual aid in judicial matters*,⁵¹ which contain provisions exempting parties from the requirement to provide security from judicial surety. These provisions would remain applicable regardless of the wording of any declaration on this subject.

[82] To implement the Convention, it should be provided that no security for legal costs may be imposed in the context of an application for recognition and enforcement of a judgment originating from a State party to the Convention. However, Québec applicants seeking recognition and enforcement of their judgment abroad would not always benefit from reciprocity in other Contracting States, since those states may have made a declaration. One could also consider a provision whereby security for legal costs would be imposed upon request, on applicants who do not reside in Québec if there are insufficient assets in Québec. However, these last two solutions were not chosen as general rules during the reform of the *Code of Civil Procedure*.

[83] However, legal costs in civil and commercial matters vary greatly from State to State in terms of what they cover and the amounts involved. At the European level, for example, they are governed by national legislation and are not harmonized.⁵² Requiring a successful Québec defendant in a recognition and enforcement proceeding to pursue the recovery of legal costs abroad appears burdensome, even within the facilitating framework established by the Convention.

[84] We therefore believe that this declaration must be made and included in the implementing legislation or regulations to ensure that Québec law complies with the Convention. It is essential that discussions be held with the federal government at the appropriate time.

[85] Lastly, under the Convention, a Contracting State may, by notification, elect not to establish relations with another Contracting State under the Convention (Art. 29 of the Convention). This possibility is not open to Canadian provinces and territories (Report, para. 411). The mechanism is similar to that provided in the *Convention Abolishing the Requirement of Legalisation for Foreign Public Documents* concluded at the Hague on October 5, 1961 (“HC1961”) (Art. 12), or the *Convention on the Civil Aspects of International Child Abduction*, concluded at the Hague on

October 25, 1980 (Art. 38) (Report, footnote 267), but with one important difference: the 1980 Convention requires a positive act of acceptance to establish treaty relations, whereas under HC2019 and HC1961 the opposite applies. However, unlike the 1961 and 1980 Conventions, HC2019 does not require the establishment of federal, provincial or territorial central authorities. Therefore, one cannot rely on a network to establish a Canadian position following expert discussions.

[86] Nevertheless, it is essential that discussions be held with the federal government at the appropriate time. In this regard, a distinction must be made between when Canada accedes to the Convention and when a new State subsequently becomes a Contracting State. As set out in Article 29(3), it is only at the time of Canada's accession that it may give notice that this will not have the effect of establishing relations with a State that is already party to the Convention. This option will not be available thereafter. The Convention only allows the withdrawal of a notification that has already been made (Art. 29(4)). Moreover, once Canada becomes a party to the Convention, it may, with respect to each new State that joins the Convention, provide notification that this will not have the effect of establishing relations between that State and Canada (Art. 29(2) and Report, para. 414).

[87] The Advisory Group on Private International Law could be an appropriate vehicle for federal, provincial and territorial discussions aimed at establishing a Canadian position. Moreover, it is uncertain whether it would be appropriate to provide, as in s. 41 of the *Act respecting the civil aspects of international and interprovincial child abduction*,⁵³ that an order of the Government, on the recommendation of the Minister of Justice and the Minister of International Relations, be made to designate the States to which the implementing legislation would apply and the date of the taking of effect of the law with respect to those States. This information which is published in the *Gazette officielle du Québec* may be useful to Québec citizens. It is also available on the website of the Hague Conference on Private International Law and could be reproduced on a Québec government website that would refer to it.

[88] Finally, as the Explanatory Report indicated, the Convention does not contain any provisions prohibiting reservations. This means that reservations are permitted, subject to the normal rules of customary international law (as reflected in Art. 2(1)(d) and 19-23 of the 1969 Vienna Convention) (Report, para. 420). If Canada were to consider making any reservations, federal-provincial and territorial discussions should be held beforehand.⁵⁴

2.2 Optional amendments that would facilitate the implementation of the Convention in Québec

[89] Some optional amendments would facilitate the implementation of the Convention in Québec. Declarations concerning government parties and internationalization permitted by the

Convention, the Convention on Choice of Court Agreements, the recommended form, and other conforming amendments will be discussed in this section.

2.2.1 Declarations concerning government parties and internationalization

[90] As mentioned, the Convention provides for the possibility of excluding, by declaration, judgments involving a State, a government agency or a natural person acting on behalf of either (Art. 19).

[91] The relevance of making such a declaration is not immediately clear. Indeed, to our knowledge, proceedings involving Québec government departments and agencies abroad are rare. The Convention explicitly states that it does not affect the privileges and immunities enjoyed by States or international organizations, with respect to themselves and their property. However, a State that initiates or defends a case abroad on the merits may lose that immunity. Conversely, a government department or agency that prevails in Québec may benefit from having its judgment easily recognized and enforced abroad. Would there be an advantage in protecting Québec citizens against recognition and enforcement proceedings in Québec of foreign judgments rendered in favour of foreign States or government agencies? The prerequisites set out in the Convention should be sufficient to ensure the legitimacy of such claims. No State has yet made use of this declaration, unlike the other declarations permitted by the Convention.

[92] Consultation with the various government departments and agencies will be necessary to determine whether such a declaration would be warranted. If so, it should be incorporated into the implementing legislation or regulations.

[93] The Convention also allows a State to declare that its courts may refuse to recognize or enforce a judgment rendered by a court of another Contracting State if the parties were resident in the requested State, and all relevant elements of the dispute—except for the location of the originating court—were connected solely to the requested State (Art. 17).

[94] We do not think that making such a declaration is warranted. This seems to run counter to the principles adopted by the codification of private international law provisions in Book Ten of the Civil Code. For example, one could imagine a case where a foreign court was chosen by the parties through a forum selection clause. Respecting party autonomy would in this case require that their choice be respected. The Minister's comments under Article 3111 of the CCQ support this view. Parties may have valid reasons for such a choice, such as selecting a neutral court or one particularly competent in applying the chosen law. Where the international element arises not from the choice of the parties, but from the claimant's decision to bring the case before a particular court, consenting to jurisdiction during the proceedings, arguing the merits without contesting jurisdiction in a timely manner, or filing a counterclaim—the HC2019 provides within its various bases of jurisdiction certain protections (see in particular Art. 5(1)(f) or (m)). Protections are also provided

for consumers and employees (Art. 5(2)). Unlike the other declarations permitted under the Convention, no State has yet made use of this particular declaration, unlike others permitted by the Convention. Making such a declaration, therefore, does not appear to be advisable.

[95] The Convention provides that a Contracting State which, like Canada, includes two or more territorial units in which different systems of law apply, is not required to apply the Convention to situations involving only those units (Art. 22(1)). It does not seem appropriate, at first glance, to extend the Convention's regime to the recognition and enforcement in Québec of judgments from other Canadian provinces and territories. This would somewhat complicate matters by maintaining two sets of rules, but the common law regime would continue to apply to non-contracting States as well. Ideally, a third, more generous regime should be established for Canadian judgments. If, upon analysis, it turns out that the Convention's regime is the most appropriate for this purpose, then its provisions could be made applicable to the recognition and enforcement in Québec of judgments of other Canadian provinces and territories.

2.2.2 HC2005 and the *Convention on the Law Applicable to Trusts and on their Recognition*, concluded at the Hague on July 1, 1985

[96] In our view, consideration should be given to implementing HC2005 at the same time as HC2019. HC2005, which only concerns exclusive choice of court agreements, complements HC2019, which deals only with non-exclusive choice of court agreements and situations where there is no choice of court agreement. In short, the two conventions are not interchangeable.⁵⁵ Their provisions are very similar and both conventions bind the same States except for Andorra and Uruguay. HC2005 also applies between Bahrain, Denmark, Mexico, North Macedonia, the Republic of Moldova, Singapore and Switzerland.

[97] It is also a good opportunity to implement the *Convention on the Law Applicable to Trusts and on their Recognition*, concluded in The Hague on July 1, 1985, alongside HC2019. Articles 3107 and 3108 CCQ are actually inspired by this Convention. To our knowledge, there are not any obstacles to implementing this Convention in Québec, to Québec declaring itself bound by it, and to Canada extending its application to Québec. The Convention applies in Australia, Canada (everywhere except in the territories and in Québec), China (Hong Kong), Cyprus, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Panama, the Netherlands, in the United Kingdom, San Marino and Switzerland.

2.2.3 Recommended form and other conforming amendments

[98] The Hague Conference developed a recommended form containing information on the existence, delivery and content of a judgment rendered by the court of origin for the purpose of recognition and enforcement in another Contracting State. Consideration could be given to incorporating this recommended form into Québec law.

[99] Forms, which were relatively uncommon in Québec law, are increasingly used.⁵⁶ So much so that a recent guide from the Fondation du Barreau du Québec, “How to Prepare for Court”, notes that forms vary from one region and one court to another, requiring litigants to ensure they choose the right documents.⁵⁷ In any event, the unusual nature of procedures for the recognition and enforcement of foreign judgments, coupled with the risk of unfamiliarity with the Convention’s specific rules, supports the use of the form recommended by the Hague Conference to ensure that if the Convention is implemented in Québec, litigants, lawyers and judges can benefit from it as easily as possible.

[100] As mentioned, according to the Explanatory Report, States may (i) enact legislation that excludes refusal in some of the circumstances provided for in Article 7, or provides for refusal in all of these circumstances, (ii) require recognition and enforcement in some of these circumstances, (iii) specify additional criteria relevant to the exercise of discretion, or (iv) leave everything to the discretion of the court. Moreover, since, according to the Convention, a refusal does not prevent a subsequent application for recognition or enforcement (Art. 4(3)), the court addressed may grant protective measures under its domestic law in the meantime in order to ensure the future enforcement of the judgment. Lastly, legislation may be adopted to allow courts to exercise their discretion as to whether to grant, refuse or postpone recognition or to determine which of the two options in Article 4(4) is available (postponement or refusal). In addition, a State may authorize recognition or enforcement of the judgment by making it conditional on the provision of security to compensate the judgment debtor if the judgment is ultimately annulled or amended following an appeal in the State of origin (Report, para. 133). Provisions to that effect could be added to the *Code of Civil Procedure*, for example, or included in the implementing legislation to facilitate the application of the Convention.

[101] Furthermore, it would be appropriate to identify the fastest procedure available to the court for the recognition and enforcement of foreign judgments under the Convention in order to meet the requirement of expediency set out in Article 13. This does not oblige Contracting States to create a new procedure, but such an option could be considered.

[102] Careful consideration should be given to what other conforming amendments should be made to the *Code of Civil Procedure*, for example, or provided for in the implementing legislation, to facilitate the implementation of the Convention.

[103] On other issues where Québec law and the Convention are not explicit, it seems that it is not always appropriate to provide clarification. For example, whether the Convention applies to contracts concluded between consumers would preferably be determined by courts applying the Convention, guided by the objective of uniform application expressed in Article 20 (Report, para. 222) rather than in a Québec implementing legislation. However, it might be useful to specify, not only for the Convention but more generally, which law governs the limitation period for an action for recognition and enforcement of a foreign judgment.

[104] Furthermore, a review of the jurisdictional rules of in Article 3134 *et seq.* of the CCQ could be undertaken in light of the 2019 Convention. Indeed, as the Explanatory Report points out, although the Convention does not aim to affect domestic provisions governing jurisdiction in international matters, judgments from States whose direct jurisdiction rules are similar to the criteria set out in Articles 5 and 6 would be more likely to circulate under the Convention (Report, para. 135).⁵⁸ In this regard, the progress made by the Hague Conference Working Group on issues of jurisdiction in transnational civil or commercial litigation should also be closely monitored.

3 - Impact on Québec practice and law

[105] Parties to a dispute who resort to arbitration benefit from recognition and enforcement of the award obtained in more than one hundred and seventy (170) States through the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* concluded in New York in 1958. Paradoxically, if a claimant initiates proceedings before a court, they may have to restart the process if the debtor's assets in the State of origin of the judgment are insufficient to enforce the judgment and the debtor does not comply voluntarily. Additionally, the claimant must ensure that their rights have not been extinguished as a result of the expiry of the limitation period.

[106] The Convention aims to remedy this shortcoming. Québec law is mainly found in Articles 3148, 3155, 3165 and 3168 of the CCQ. Although the Convention's main principles are very similar to those of the Civil Code, the implementation the Convention in Québec would require numerous changes to existing law. These changes should be articulated as clearly as possible, and appropriate training should be provided to ensure that established practices give way to a solid understanding of the new framework.

Conclusion

[107] The implementation of HC2019 aims to promote access to justice globally by strengthening judicial cooperation, thereby reducing the risks and costs associated with legal relations and international dispute resolution. It enhances the practical effectiveness of judgments to which it applies and provides the successful party with the assurance of obtaining meaningful relief. Access to justice is impeded if a judgment obtained by an injured party cannot be enforced because the other party or their assets are in another State, where the judgment is not directly enforceable. The Convention reduces the need to repeat proceedings in two or more Contracting States: a judgment on an application in one Contracting State will have effect in the other Contracting States without the need to re-litigate the merits of the case.

[108] The Convention improves legal predictability: it will be easier for businesses and individuals to determine the circumstances under which judgments will circulate between Québec and the Contracting States. It will allow claimants to make more informed choices about where to initiate proceedings, taking into account their ability to enforce the resulting judgment in other

Contracting States and the need for fairness to defendants. The Convention eliminates the need to research applicable rules in multiple different States to initiate proceedings. It provides greater certainty for businesses engaged in cross-border activities and thus establishes a legal framework more conducive to international trade and investment. Its implementation will have a positive impact on individuals and businesses.

[109] In a globalized and interconnected world, characterized by the increasing international movement of people, information and goods, the practical importance of these goals is evident. To date, no other global instrument offers the possibility of achieving these objectives, unlike what exists in the field of arbitration.

[110] Moreover, its implementation does not require the establishment of a system of central authorities like some other Hague Conventions. Its implementation should therefore not involve significant financial resources, apart from the training needed for practitioners and judges and information provided to the public.

ANNEX**CIVIL CODE OF QUÉBEC****TITLE FOUR****RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS AND JURISDICTION OF FOREIGN AUTHORITIES****CHAPTER I****RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS**

3155. A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases:

- (1) the authority of the State where the decision was rendered had no jurisdiction under the provisions of this Title;
- (2) the decision, at the place where it was rendered, is subject to an ordinary remedy or is not final or enforceable;
- (3) the decision was rendered in contravention of the fundamental principles of procedure;
- (4) a dispute between the same parties, based on the same facts and having the same subject has given rise to a decision rendered in Québec, whether or not it has become final, is pending before a Québec authority, first seized of the dispute, or has been decided in a third State and the decision meets the conditions necessary for it to be recognized in Québec;
- (5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
- (6) the decision enforces obligations arising from the taxation laws of a foreign State.

3156. A decision rendered by default may not be recognized or declared enforceable unless the plaintiff proves that the act instituting the proceedings was duly served on the defaulting party in accordance with the law of the place where the decision was rendered.

However, the authority may refuse recognition or enforcement if the defaulting party proves that, owing to the circumstances, he was unable to acquaint himself with the act instituting the proceedings or was not given sufficient time to offer his defence.

3157. Recognition or enforcement may not be refused on the sole ground that the original authority applied a law different from the law that would be applicable under the rules contained in this Book.

3158. The Québec authority confines itself to verifying whether the decision with respect to which recognition or enforcement is sought meets the requirements prescribed in this Title, without considering the merits of the decision.

3159. If the decision contains provisions which can be dissociated, any one or more of them may be separately recognized or enforced.

3161. Where a foreign decision orders a debtor to pay a sum of money expressed in foreign currency, the Québec authority converts the sum into Canadian currency at the rate of exchange prevailing on the day the decision became enforceable at the place where it was rendered.

Until conversion, the determination of interest payable under a foreign decision is governed by the law of the authority that rendered the decision.

3163. Transactions enforceable at their places of origin are recognized and, where applicable, declared to be enforceable in Québec, on the same conditions as judicial decisions, to the extent that those conditions apply to the transactions.

CHAPTER II JURISDICTION OF FOREIGN AUTHORITIES

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

3165. The jurisdiction of foreign authorities is not recognized by Québec authorities in the following cases:

- (1) where, by reason of the subject matter or an agreement between the parties, Québec law grants exclusive jurisdiction to its authorities to hear the action which gave rise to the foreign decision;
- (2) where, by reason of the subject matter or an agreement between the parties, Québec law recognizes the exclusive jurisdiction of another foreign authority;
- (3) where Québec law recognizes an agreement by which exclusive jurisdiction has been conferred upon an arbitrator.

3168. In personal actions of a patrimonial nature, the jurisdiction of foreign authorities is recognized only in the following cases:

- (1) the defendant was domiciled in the State where the decision was rendered;
- (2) the defendant possessed an establishment in the State where the decision was rendered and the dispute relates to its activities in that State;
- (3) injury was suffered in the State where the decision was rendered and it resulted from a fault which was committed in that State or from an injurious act or omission which occurred there;
- (4) the obligations arising from a contract were to be performed in that State;
- (5) the parties have submitted to the foreign authorities the present or future disputes between themselves arising out of a specific legal relationship; however, renunciation by a consumer or a worker of the jurisdiction of the authority of his place of domicile may not be set up against him;
- (6) the defendant has submitted to the jurisdiction of the foreign authorities.

CODE OF CIVIL PROCEDURE OF QUÉBEC, CQLR c C-25.01

TITLE IV APPLICATIONS INVOLVING PRIVATE INTERNATIONAL LAW [...]

CHAPTER II PRELIMINARY EXCEPTIONS AND SURETYSHIP

492. If a plaintiff is not resident in Québec or, being a legal person, is not domiciled in Québec, the defendant may, at any stage of the proceeding, require that the plaintiff be ordered, under pain of

dismissal of the application, to provide a suretyship, within a specified time, as security for the legal costs the court could award against the plaintiff.

A person acting for another person under the rules of representation before the courts may also be required to provide a suretyship if the representative or one of the representative's mandators is not resident in Québec or, being a legal person, is not domiciled in Québec.

In determining the amount of the suretyship, the court considers the nature, complexity and importance of the case, including the costs involved, as well as the plaintiff's financial situation and the value of the plaintiff's property in Québec; if the plaintiff is acting on behalf of a mandator who is not resident in Québec, the court considers the mandator's financial situation. On a party's request, the court may increase or reduce the amount of suretyship if warranted by developments in the case or by the plaintiff's circumstances.

493. No suretyship covering legal costs may be ordered in judicial proceedings relating to family matters or in situations that are subject to the Act respecting the civil aspects of international and interprovincial child abduction (chapter A-23.01) or the Act to secure the carrying out of the Entente between France and Québec respecting mutual aid in judicial matters (chapter A-20.1).

[...]

CHAPTER VI RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS AND FOREIGN PUBLIC DOCUMENTS

507. The recognition and enforcement of a decision rendered outside Québec is sought by means of an originating application.

It may also be sought by means of an incidental application in the course of a proceeding by any of the parties.

508. A party seeking the recognition or the enforcement of a foreign decision attaches the decision to the application, together with a certificate from a competent foreign public official stating that the decision is no longer appealable in the State in which it was rendered or that it is final or enforceable.

If the decision was rendered by default, certified documents showing that the originating application was properly notified to the defaulting party must also be attached to the application.

Documents in a language other than French or English must be accompanied by a translation certified in Québec. The translation must be in French if the party seeking the recognition or the enforcement of the foreign decision is a legal person.

¹ For information on the genesis of the Convention, see the preparatory works and bibliography, in particular, on the website of the Hague Conference on Private International Law.

² Francisco Garcimartín and Geneviève Saumier, Explanatory Report, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2020 (183 p.) in Hague Conference on Private International Law, Acts and Documents of the Twenty-Second Session (2019), Volume I, Judgments, Booklet 5 – Explanatory Report.

³ The Convention has also been signed by Costa Rica, the United States of America, Russia, Israel, Kosovo and North Macedonia, which may therefore become parties in the future.

⁴ Since March 1, 2026.

⁵ Since June 1, 2026.

⁶ *Ibid.*

⁷ Since July 1, 2025.

⁸ Since September 1, 2023.

⁹ *Ibid.* The Member States of the European Union are: Germany, Austria, Belgium, Bulgaria, Cyprus, Croatia, Denmark, Spain, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Czech Republic, Romania, Slovakia, Slovenia and Sweden.

¹⁰ Since October 1, 2024.

¹¹ The *Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* and its *Additional Protocol of 1 February 1971 to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* have not had the desired success, in particular because of the establishment of a mechanism for the bilateralization of relations between States. The mechanism provided for in the 2019 Convention is simpler and is based on those provided for in the *Convention of 5 October 1961 abolishing the requirement of legalisation of foreign public documents* (Apostille) (art. 12) and the *Convention of 25 October 1980 on the Civil aspects of International Child Abduction* (art. 38) which are both binding on Québec and are implemented respectively by the *Act respecting the apostilles for documents to be produced in a foreign State party to the Hague Convention of 5 October 1961 abolishing the requirement of legalisation for foreign public documents*, CQLR, c. A-19.3 and the *Act respecting the civil aspects of international and interprovincial child abduction*, CQLR, c. A-23.01.

¹² The Convention adds that a court in a territorial unit of a Contracting State that includes two or more territorial units in which different systems of law apply is not required to recognize or enforce a judgment of another Contracting State solely on the ground that the judgment has been recognized or executed in another territorial unit of the same Contracting State because it complied with the requirements of the Convention (Art. 22(2)).

¹³ The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with Article 25 after the entry into force of the Convention for the State making the declaration, the first day of the month following the expiry of a period of three months after the notification of the declaration referred to in Article 25.

¹⁴ The United Kingdom has thus declared that the application of the Convention extends only to England and Wales.

¹⁵ According to section 170 of the *Act respecting the implementation of the reform of the Civil Code*, SQ. 1992, c.57: “[t]he provisions of the new Code concerning the recognition and enforcement of foreign decisions do not apply to decisions already rendered on 1 January 1994, or to proceedings pending at that time before foreign authorities.”

¹⁶ Marine pollution, liability for nuclear damage, arbitration and certain matters mentioned *below* note 17 for which there are also international conventions, including those of the Hague Conference on Private International Law. Furthermore, unlike the *Convention on Choice of Court Agreements* of 2005, the Convention does not cover exclusive forum selection agreements.

¹⁷ Personal matters (the status and capacity of natural persons, the right to privacy, the validity, nullity or dissolution of legal persons or associations between natural persons or legal persons, are expressly excluded, and the validity of decisions of their organs) and family (maintenance obligations and other matters of family law, including matrimonial property regimes and other rights or obligations arising from marriage or similar relationships), inheritance (wills and successions) and movable property as well as matters which do not qualify as private matters (tax, customs or administrative matters). Some excluded matters fall under federal jurisdiction or are shared jurisdiction (insolvency and similar matters ; passenger and freight transport ; intellectual property; barriers to competition).

¹⁸ Québec law is then also imperatively applicable (art. 3129 of the CCQ). See: *Worthington Corp. v. Atlas Turner Inc.*, 2004 CanLII 21370 (QC CA).

¹⁹ Nothing in this Convention shall affect privileges and immunities of States or of international organizations, in respect of themselves and of their property (art. 2(5) of the Convention).

²⁰ *Financial Administration Act*, CQLR, c. A-6,001, s. 10.1 and 57.

²¹ *Canada Post Corp. v. Lépine*, 2009 SCC 16 (CanLII), [2009] 1 SCR 549.

²² Conversely, it will always be possible for a State party to the Convention to recognize and enforce a judgment on a residential lease rendered in another State party that is not the State in which the property is situated, based on its domestic law.

²³ *Ginsbow inc. c. Pipe and piling supplies LTD*, J.E. 2000-762, 2000 CanLII 18551 (QC CS), appeal dismissed J.E. 2002-53, 2002 CanLII 63530 (QC CA).

²⁴ *Minkoff c. Society of Lloyd's*, 2004 CanLII 964 (QC CA). See: P. Ferland and G. Laganière, *Private International Law in École du Barreau du Québec, contracts, security interests, publicity of rights and private international law*, Law Collection 2024-2025, vol. 7, Montreal, QC, CAIJ, 2024, 267, notes 547-553; G. Goldstein, “General principles

and conditions for recognition and enforcement”, fasc. 10 in *Jurisclassseur de droit international privé*, Lexis Nexis, loose-leaf ed., para. 37-38; A. Prujiner, “International Arbitration”, fasc. 31, in *ibid.*, para. 55; F. Sabourin, *Report on the Hague Choice of Court Agreement and the Law of Québec*, ULCC Annual meeting, Charlottetown, Prince Edward Island, 2007, para. 42.

²⁵ The Convention adds: “Or an equivalent act containing the essential elements of the application”.

²⁶ In *Beals v Saldanha*, [2003] 3 SCR 416, 2003 SCC 72, the Supreme Court stated that the public policy defence is not intended to prevent the enforcement of the judgment of a foreign court having a real and substantial connection to the cause of action, for the sole reason that the claim in that foreign jurisdiction would not result in comparable damages in Canada. However, this judgment concerns only the common law provinces: G. Goldstein, “General principles and conditions of recognition and enforcement” in *Jurisclassseur de droit international privé*, fascicle 10, ed. Lexis, loose-leaf, para. 20, note 1. In *Cortas Canning & refrigerating Company v. Suidan Bros. Inc./Suidan Frères Inc.*, 1999 CanLII 12203 (QC CS), para. 89, the court refused to recognize a Texas ruling without having to rule whether the “treble damages” of more than US\$3 million for a \$96 sale of goods were contrary to public order. The judgment followed proceedings in which the defendants’ refusal to answer questions during pre-trial examination was deemed to amount to an admission of the alleged profit amount they had made.

²⁷ *Facebook Inc. c. Guerbuez*, 2010 QCCS 4649, Motion to dismiss appeal granted: *Guerbuez c. Facebook Inc.*, 2011 QCCA 268.

²⁸ In *Marciano (Receiver of)*, 2011 QCCS 7086, it was a Californian judgment ordering the defendant to pay more than \$260 million in damages. In *Adoption-13318*, 2013 QCCQ 16271, a Lebanese adoption judgment that provided for a penalty of \$1 million for non-performance by the parties to the agreement was not recognized. In *McKinnon v. Polisuk*, 2009 QCCQ 5778, an Ontario judgment ordering payment of more than \$1 million in extrajudicial costs was not recognized.

²⁹ *Awanda c. AMBC Ventures Inc.*, 2022 QCCA 1133 at para. 25, application for leave to appeal to the Supreme Court dismissed *Daniel Awanda v. AMBC Ventures Inc.*, 2023 CanLII 31578 (SCC).

³⁰ The Convention provides that, in respect of a Contracting State in which two or more systems of law relating to matters governed by this Convention apply in different territorial units, any reference to a connecting factor in respect of a State is intended, where applicable, to: this connecting factor with respect to the territorial unit in question (Art. 22 (d)).

³¹ *Barer v. Knight Brothers LLC*, 2019 SCC 13, [2019] 1 SCR 573.

³² *Cortas Canning & Refrigerating Company c. Suidan Bros. Inc./Suidan Frères Inc.*, 1999 CanLII 12203 (QC CS), para. 107-111.

³³ *Regulation (EU) No°1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, Official Journal of the European Union, 20.12.2012, L 351/1.

³⁴ For a comparative law perspective on optional choice of court agreements see M. Keyes *Optional Ohoice of Court Agreements in Private International Law*, ed. Mary Keyes, ed. Springer, 2020, and for a Québec perspective see F. Sabourin and S. Guillemard, “Optional agreements on choice of court,” in *ibid.*, pp. 107-135, Québec Report to the XXth Congress of the International Academy of Comparative Law, Fukuoka, Japan, 2017.

³⁵ The provisions of the Civil Code are inspired by the *Convention on the Law Applicable to Trusts and on their Recognition* concluded at the Hague on July 1, 1985, which covers Québec trusts, although Québec has not implemented it and is not bound by it. As a result, Canada has not extended its application to Québec.

³⁶ The consequence of this exclusion in a separate paragraph is that neither Art. 2(2) nor Art. 8(2) relating to preliminary issues are relevant to arbitration (Explanatory Report, footnote 80).

³⁷ See *Dent Wizard International Corp. c. Mariano*, 2004 CanLII 11422 (QC CS).

³⁸ Article 1384 of the CCQ refers to the *Consumer Protection Act*, CQLR c. P-40-1. Some authors advocate a broader definition than that of this Act for the purposes of the provisions of private international law, but the case law has not been clear on this matter. Gérald Goldstein and Ethel Groffier, *Droit international privé, vol. 2, specific Rules*, coll. *Treatise on Civil Law*, Cowansville, ed. Yvon Blais, 2003, pp. 619-620; Valérie Scott, “Consumer contract and contract of employment” in *Jurisclassseur de droit international privé*, fasc. 28, LexisNexis, ed. Loose-leaf, para. 4-6; *ebay Canada Ltd. c. Mofo Moko*, 2013 QCCA 1912, in matters of direct jurisdiction (art. 3149 of the CCQ).

³⁹ *LVH Corp. (Las Vegas Hilton) c. Lalonde*, 2003 CanLII 27646 (QC CS).

⁴⁰ Section 11.1 of the *Consumer Protection Act*, S.Q. 2006, c. 56, s. 2, has been in force since December 14, 2006. It further provides that “[i]f a dispute arises after a contract has been entered into, the consumer may then agree to refer the dispute to arbitration”.

⁴¹ *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69.

⁴² The Convention does not yet apply in Costa Rica.

⁴³ Implemented by the *Act to secure the carrying out of the Entente between France and Québec respecting mutual aid in judicial matters*, CQLR c. A-20.1.

⁴⁴ *Ibid.*, S. 1.

⁴⁵ This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention.

This Convention shall not affect the application by a Contracting State of a treaty concluded after that Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. Nothing in the other treaty shall affect the obligations under Article 6 towards Contracting States that are not Parties to that treaty.

⁴⁶ If that is the case, a motion of approbation and an order pursuant to the Act respecting the Ministère des Relations internationales, CQLR, c. M-25.1.1, shall be taken (art. 22.1 to 22.5).

⁴⁷ Moreover, it seems difficult for Québec to consider being able to obtain reciprocal benefits through the negotiation of bilateral agreements on the recognition and enforcement of foreign judgments with as many States as those that are party to the 2019HC. See Friedrich K. Juenger, “A Hague judgments Convention,” (1998) 24:1 Brook J Int’l 111 on bilateral negotiations between the United States and the United Kingdom.

⁴⁸ Art. 2 (2) of the Convention: [a] judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings. However, according to Article 8(1): [a] ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled. And, according to Article 8(2): Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply.

⁴⁹ *Society of Lloyd’s c. Alper*, J.E. 2006-717 (S.C.), 2006 QCCS 1203 (CanLII) inscription in appeal, 2006-03-30 (C.A.), no.° 500-09016543-068; Appeal dismissed (C.A., 2006-07-04), no.° 500-09-016543-068, 2007 QCCA 1321 (CanLII). F. Sabourin, *Report on the Convention on Choice of Court Agreements (Hague) and the Law of Québec*, ULCC Annual Meeting, Charlottetown, Prince Edward Island, 2007, para. 56.

⁵⁰ For their part, the European Union and Andorra have declared, that they will not apply the Convention to rental leases of non-residential buildings located in the European Union or in the Principality of Andorra, respectively. Indeed, according to Art. 6 of *Regulation (EU) No° 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, in matters of leases of immovable property, the courts of the Member State where the property is situated shall have exclusive jurisdiction. With regard to residential leases, the Convention already provides for the exclusive jurisdiction of the courts of the State in which the property is situated (Art. 5(3)). See *above* 1.2.1.

⁵¹ Implemented by the *Act to secure the carrying out of the Entente between France and Québec respecting mutual aid in judicial matters*, CQLR c. A-20.1.

⁵² See: Study on transparency of costs of civil court proceedings in the EU from 2007 to https://e-justice.europa.eu/sites/default/files/2012-12/cost_study_report_fr.pdf?id=6f471129-b38a-457a-8626-b0fed471ac69.

P. 61 et seq. according to which procedural costs exist in 25 of the Member States. France (since the law of 30 December 1977) and Luxembourg would be the only two countries in which this concept does not exist. The study indicates that procedural costs are rarely an obstacle to a litigant’s ability to bring his or her claim to court. These fees can very exceptionally exceed 1,000 euros. Nevertheless, in the case of an unquantified family dispute, the practical cases of national experts show that these procedural costs never exceed EUR 500 and are in the majority of cases less than EUR 100. Furthermore, the *Convention guaranteeing international access to justice* concluded at the Hague on 25 October 1980, which includes 28 States parties, but not Canada, also provides that no bond may be imposed (Art. 14).

⁵³ *Act respecting the civil aspects of international and interprovincial child abduction*, CQLR, c. A-23.01.

⁵⁴ Diana A. A. Reisman, “Breaking Bad: Fail-safe to the Hague judgments Convention,” (2021) 109:4 Geo LJ 879, p. 904, suggests that the United States make the following reservation: “the United States reserves the right to suspend the operation of the Convention with respect to a party if the United States determines that party’s rule of law and judicial independence have fallen below the international minimum standard.”

⁵⁵ F. Sabourin, *Report on the Convention on Choice of Court Agreements (Hague) and the Law of Québec*, ULCC Annual Meeting, Charlottetown, Prince Edward Island, 2007.

⁵⁶ As evidenced by articles 136,137, 145,146, 235, 269, 271, 330, 393, 497, 516, 520, 546, 566, 681 and 682 CCP as well as the list found on a government page based on Order No. 4384 of the Minister of Justice dated December 13,

2020 relating to Court Regulations <https://www.Québec.ca/justice-et-etat-civil/systeme-judiciaire/formulaires-modeles/proces-civil> and https://www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/professionnels-nonsecurise/FR/code-civil/MJQ_Arrete_4384_Signe_F.pdf

⁵⁷ Fondation du Barreau du Québec, “How to Prepare for Court”, at https://fondationdubarreau.qc.ca/assets/documents/20240419_Comment_se_préparer_pour_la_cour_matière_civile.pdf

⁵⁸ Québec appears to be in a similar position to Australia: Michael Douglas et al., “The HCCH judgments Convention in Australian Law,” (2019) 47:3 Fed L Rev 420, p. 436.