Civil Code of Québec
Code civil du Québec

THE RECOGNITION OF FOREIGN JUDGMENTS IN QUEBEC - THE MIRROR CRACK'D?*

Geneviève Saumier**
Montréal

Eight years after coming into force, Québec's regime for the recognition of foreign judgments remains largely untested. Examining the internal structure of that regime, the author challenges some early interpretations of the Civil Code's new rules, calling for a more careful application of the mirror principle as it applies to the evaluation of foreign jurisdiction in international litigation. Such jurisdictional scrutiny is also subject, within Canada, to the constitutional limits derived from Morguard. The author examines the impact of that jurisprudence for Québec law, particularly in light of recent appellate decisions from other provinces. Finally, different treatment of truly foreign decisions is considered, including the possibility of a two-tiered system for recognition, itself derived from a limited extra-territorial power for provinces in the field of private international law.

Le nouveau régime québécois de reconnaissance des décisions étrangères, en place depuis plus de huit ans, n'a pas encore vraiment été mis à l'épreuve. L'auteur examine la structure interne de ce régime en vue de proposer une interprétation nouvelle du principe du mirroir, applicable à l'évaluation de la compétence des tribunaux étrangers dans les litiges internationaux. Suite à la jurisprudence Morguard, une dimension constitutionnelle s'ajoute à cette vérification juridictionelle. L'auteur analyse l'impact de ce développement sur le droit québécois, à la lumière de jugements récents des tribunaux d'instances supérieures d'autres provinces. En dernier lieu, l'auteur considère la possibilité d'un traitement différent des décisions internationales, dérivé d'une compétence extra-territoriale provinciale limitée en matière de droit international privé.

* Agatha Christie, *The Mirror Crack'd From Side to Side* (New York: Collins, 1962).

** Geneviève Saumier, of Faculty of Law and Institute of Comparative Law, McGill University, Montréal, Québec. I gratefully acknowledge the financial support of the Wainwright Foundation.

I. *Introduction*

A jurisdiction's reaction to foreign judgments provides insight into its perception of its own boundaries — geographic, cultural and legal, among many others. The recent codification of Québec's law of recognition[1] marked an important shift in its outlook, bringing it into step with more "modern" approaches, where openness has replaced scepticism toward judicial decisions from abroad.[2] Such a change has also occurred throughout the Canadian common law provinces, as a result of the Supreme Court's monumental jurisprudence in the field.[3] Despite

[1] It would be more technically correct to speak of "recognition and enforcement" since both treatments of foreign judgments are actually referred to in the Civil Code, as they are generally in most legal systems. Both involve giving some effect to a foreign judgment, although enforcement usually relates to money-judgments whose recovery may require the mechanisms of execution available under local law. Recognition, on the other hand, can be more indirect, such as when a Québec court declines jurisdiction on the grounds that a foreign decision has already dealt with the dispute. In this text, the term "recognition" should be read to include enforcement unless specified otherwise.

[2] For example, French law (mainly judge-made) originally imposed onerous conditions on the recognition of foreign judgments, most of which have been eliminated over the course of the last fifty years: see generally B. Audit, *Droit International Privé*, 3rd ed. (Paris: Economica, 2000) at 384-417. Of course, within the European Union, the free movement of judgment is assured within the structure of the Brussels Convention (now Regulation 1347/2000, JOCE L 160/19), see Audit, *ibid.* at 418 and ssq. Similarly, Swiss law, which was an important source to the codifiers of the Civil Code of Québec, demonstrates remarkable openness with limited conditions: *Loi fédérale sur le droit international privé*, 18 déc. 1987; see generally A. Samuel, "The New Swiss Private International Law Act" (1988) 37 Int'l & Comp. L.Q. 681 at 685.

[3] Starting with *Morguard Investments* v. *De Savoye*, [1990] 3 S.C.R. 1077 [hereinafter *Morguard*]; followed by *Hunt* v. *T&N plc*, [1993] 4 S.C.R. 289 [hereinafter *Hunt*], *Amchem Products Inc.* v. *B.C.* (1993), 102 D.L.R. (4th) 96 [hereinafter *Amchem*] and *Tolofson* v. *Jensen*, [1994] 3 S.C.R. 1022. More recently but less relevant are the decisions in Re *Antwerp BulkCarriers* (2001), 207 D.L.R. (4th) 612 and *Holt Cargo* v. *ABC Containerline*, [2001] S.C.J. no. 89 (Q.L.).

this apparent harmony of principle, the regime of recognition under the Québec Civil Code stands apart, and not only because comprehensive codification has effectively pre-empted the necessarily piece-meal judicial model of law reform adopted by the Supreme Court.

This paper will examine one aspect of Québec's regime, namely the rules governing the recognition and enforcement of foreign judicial decisions found in Book Ten of the Québec Civil Code. This will be done in two parts. In the first section, I will undertake a close review of the relevant provisions on recognition and enforcement. Particular attention will be paid to the structure of the Code and the extent to which coherence and consistency are achieved. This section will include a detailed argumentation for an alternative interpretation of the jurisdictional criteria for recognition. Specifically, I will argue that considerations of *forum non conveniens* and *lis pendens* should be excluded from the jurisdictional enquiry at the recognition stage. My conclusion will be that the mirror principle, enshrined in the opening provision of the chapter on the jurisdiction of foreign authorities, is cracked in more than one way. In relation to the internal structure of Book Ten, the mirror reflects only a very limited and perhaps even warped image. In its worst light, the provision is reduced to insignificance. In its best light, it still suffers from lack of rigour.

This reading of the Civil Code limits the ability of Québec courts to refuse recognition of foreign judgments. The second section of the paper addresses an different constraint, this time imposed by the Canadian Constitution as interpreted by the Supreme Court in its key decisions of *Morguard* and *Hunt*. The essence of those judgments was the identification of an implied "full faith and credit" obligation between provinces to recognize and enforce each others judgments. In this section, I will suggest that the impact of *Morguard* and *Hunt* is of two distinct types in Québec. First, there is no doubt that the recognition principle constitutionally mandated by the Supreme Court in *Hunt* applies in Québec. This raises the possibility of challenges against certain provisions of the Civil Code that could otherwise block the enforcement of a judgment from a sister-province. I will consider how this could take place. Second, because it is based in the federal structure of the country, the constitutional imperative of recognition does not hold for truly foreign decisions. In considering what limits remain, I will argue that the traditional prohibition against provincial extra-territoriality fails to respond adequately to the particularity of private international law. Absent a transfer of competence to the federal list of powers, it may be necessary to imagine a limited scope for provincial extra-territoriality in this field. In fact, such a conclusion is already implicit in the international sphere, where multilateral conventions on private international law currently acknowledge the specificity of federal models.

The conclusion to this second part suggests that the mirror is also cracked from another perspective. Indeed, if the argument in this part is persuasive, the end result is a two-tiered system for recognition of foreign judgments in Québec (and perhaps also Canada for that matter): one within the country and one without. While this is not necessarily problematic, it is neither expected nor

reflected in the Code itself, or, for that matter in the jurisprudence of the Supreme Court.

II. *Québec Law of Recognition: The Mirror Principle under the Microscope*

Foreign judgments are treated quite generously by Québec law. Indeed, under the Civil Code,[4] recognition is the principle.[5] Limited grounds for refusing recognition are listed in an exhaustive manner.[6] This openness to foreign judgments is recent, however, as it is a product of the reform of 1991 which came into effect in 1994.[7] Québec courts have thus only experienced this new regime for seven years. As a result, many of the codal provisions governing recognition have yet to be interpreted by courts and the musings of jurists remain largely untested.[8] A body of case law is developing slowly although most of it remains at the lower level with only a few appellate decisions[9] and no review by the Supreme Court of Canada as of yet.

---

[4] In addition to causing important changes to the relevant rules, codification shifted the location of recognition rules from the Code of Civil Procedure to the Civil Code. While my examination will focus mainly on the substantive law, the structural aspect of the reform cannot be ignored. In fact, the interpretative challenges that I will raise flow from both of these aspects.

[5] The relevant provisions from the Civil Code of Québec are included as an appendix to this paper.

[6] Art. 3155 states that recognition is the norm except in the following cases: (i) the foreign *court* did not have jurisdiction as provided by Québec law, or (ii) the foreign *decision* (a) is not final, (b) was rendered in violation of procedural justice, (c) violates public policy, (d) enforces foreign tax laws, or (iii) there is a question of *lis pendens* (my emphasis).

[7] See generally, J.E.C. Brierley, "The Renewal of Québec's Distinct Legal Culture: the New Civil Code of Québec" (1992) 42 U.T.L.J. 484.

[8] Research on Book Ten of the Civil Code of Québec yields a very limited number of sources and most of these are published in French. See H.P. Glenn, "Droit international privé" in *La réforme du Code civil*, vol. 3 (Québec : P.U.L., 1993) at 760-69; J.A. Talpis & J.-G. Castel, "Interprétation des règles du droit international privé" in *La réforme du Code* civil, *ibid.* at 911-18; G. Goldstein & J.A. Talpis, "Les perspectives en droit civil québécois de la réforme des règles relatives à l'effet des décisions étrangères au Canada" (1995) 74 R. du B. can. 641, (1996) 75 R. du B. can. 115, G. Goldstein & E. Groffier, *Droit international privé: théorie générale*, vol. 1 (Cowansville, Qc.: Yvon Blais, 1998). And in English: H.P. Glenn, "Recognition of Foreign Judgments in Québec" (1997) 28 Can. Bus. L.J. 404 and Glenn, "Codification of Private International Law in Québec" (1996) 60 RabelsZ 231. Although the Code itself is bilingual and therefore more accessible (and equally authoritative in both languages), the novelty of the provisions on private international law increases the challenges of interpretation. Because foreign judgment-creditors are likely to come from jurisdictions with which Québec has close economic ties, English-language doctrine on Québec recognition rules plays a key role. This remains true even if local counsel is involved in an enforcement procedure.

[9] For a review of cases from 1994 to 1999, see G. Saumier, «La pratique judiciaire du droit international privé au Québec » (1994) 8 R.Q.D.I. 356, (1996) 9 R.Q.D.I. 146, (1998) 11 R.Q.D.I. 402, (1999) 12 R.Q.D.I. 1. The Québec Court of Appeal has not rendered any relevant decisions in patrimonial matters although it has dealt twice with recognition of foreign divorces: see *A.K.* v. *H.S. (Droit de la famille - 2054)*, [1998] A.Q. no. 1573 (Que. C.A.), leave to appeal to the Supreme Court of Canada refused, and *H.C.* v. *M.F.*, Q.J. no. 162 (C.A.) (Q.L.).

In this section, I will endeavour to map out the structure and principles of the C.C.Q. in this area. My purpose is to provide an understanding of the way in which recognition and enforcement operates under the Québec régime. To that end, I will offer a brief overview of the relevant provisions. This will be followed by a critical examination of doctrinal and judicial views on some key issues, including the role of *forum non conveniens* and *lis pendens* in the evaluation of foreign jurisdiction.

The general principle under the Code is that foreign judgments are entitled to recognition and enforcement by Québec courts if the foreign court had jurisdiction to render the decision.[10] According to article 3164 C.C.Q., the recognized grounds for foreign jurisdiction provided under Title Four are essentially those available to Québec courts as listed under Title Three.[11] This principle of jurisdictional reciprocity — or mirror principle — is made subject to a further overall requirement that the dispute between the parties was "substantially connected" with the state of original adjudication. This mirror principle is not comprehensive, however, as it is supplemented by a series of specialized jurisdictional rules applicable to discrete areas of law. In this section, I will examine this structure, in particular (i) the relationship between the general rule and the specific rules in Title Four, and (ii) the relationship between Title Four and Title Three. This critical analysis will highlight weaknesses in this chosen structure that give rise to interpretational difficulties. In other words, the mirror may well be cracked, or at least in need of a good cleaning.

A. *The Internal Structure Of Title Four Of Book Ten (Articles 3164-3169)*

The drafting of Article 3164 is rather unfortunate. This is particularly true with respect to its relationship with the remaining provisions of Title Four.[12]

---

[10] Art. 3155: "A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following circumstances: (1) the authority of the country where the decision was rendered has no jurisdiction under the provisions of this Title [being Title Four: Recognition and Enforcement of Foreign Decisions and Jurisdiction of Foreign Authorities]." The other conditions are (2) finality of foreign judgment, (3) respect of fundamental principles of procedure, (4) no *lis alibi pendens*, either domestically or internationally, (5) no contradiction with public policy, and (6) the judgment doesn't enforce foreign taxation laws. Conditions (2), (3) (5) and (6) are known to common law jurisdictions and their application in Québec is broadly comparable. Condition (4) is particular and will be discussed in greater detail *infra*, text accompanying note 59.

[11] Art. 3164: "The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the country whose authority is seized of the case." [Title Three deals with international jurisdiction of Québec authorities.].

[12] I am not the first to note this poor drafting: See Goldstein & Groffier, *supra* note 8 at 416, Talpis & Castel, *supra* note 8 at 919. However, my intention here is to subject this section to a more thorough analysis which will lead me to conclusion different from those put forth by Goldstein et al.

Two of these provisions appear to transform the mirror into a magnifying glass by broadening the scope of jurisdiction admitted for foreign jurisdictions in comparison with Québec courts. One other provision appears to merely reformulate, perhaps uselessly as will be discussed in Section 2 below, the mirror principle with respect to three jurisdictional rules governing Québec courts. The last article of Title Four — for it only contains five articles — actually restricts the mirror's reflection by narrowing the jurisdictional bases in six areas. I will examine these in turn.

1. *Broadening the reflection*

The broadening effect is found in relation to status issues and flows from particularities of the Canadian constitutional landscape. For example, in terms of filiation, Québec courts will recognize foreign jurisdiction based either on domicile or nationality whereas Québec jurisdiction can only flow from domicile.[13] This is a necessary consequence of the federal nature of Canada in which nationality is inappropriate to allocate jurisdiction among provinces.[14]

The second broadening case relates to divorce where the Civil Code, in article 3167, is more generous in its recognition of foreign divorces than its domestic counterpart, the *Divorce Act*.[15] This situation is peculiar, however, because divorce is a federal matter under Canadian constitutional law and the federal *Divorce Act* provides its own rule for the recognition of foreign divorces.[16] The broadening effect under the Civil Code is said to follow the principle of validation in matters of status that has received general approval in international instruments and modern private international law codifications.[17] Nevertheless, the constitutionality of art. 3167 C.C.Q. has been questioned by some commentators.[18] A judicial challenge against the constitutionality of art. 3167 C.C.Q. was successful at first instance but on appeal, the court refused to confirm that finding while dismissing the appeal on other grounds.[19]

---

[13] Compare articles 3166 and 3147 C.C.Q.

[14] This is the case as well for the United States.

[15] R.S.C. 1985, c. 3 (2nd Supp.) [R.S.C., c. D-3.4].

[16] See section 22.

[17] See *Commentaires du ministre de la Justice: le Code civil du Québec*, vol. III (Québec : Publications du Québec, 1993) under art. 3167 C.C.Q.

[18] See Talpis & Castel, *supra* note 8 at para. 492, Goldstein & Groffier, *supra* note 8 at 431-32. But see contra Glenn, *Droit international privé*, *supra* note 8 at 774-75 who argues instead that the additional grounds under 3167 would probably fit into a general "real and substantial connection" category that has been accepted by courts in other provinces.

[19] *A.K.*, v. *H.S. (Droit de la famille 2054)*, [1997] R.J.Q. 1124 (Sup. Ct.), [1998] A.Q. no. 1573, (C.A.).

The mirror principle really has no role to play here. Indeed, these two broadening provisions on filiation and divorce are self-contained and include all of the possible jurisdictional grounds for recognizing foreign decisions concerning filiation and divorce. In evaluating the jurisdiction of the foreign court, there is really no additional need to refer to the general rule on reciprocity or to the corresponding rule for Québec jurisdiction. This raises the question whether or not the additional criterion of "substantial connection" in Article 3164 must be met in these two cases.

Such a conclusion, it seems to me, would contradict the *favor validatis* principle said to underlie these broadening provisions. Moreover, I would argue here, as I will again in sub-section c) below, that the adoption of specialized jurisdictional rules for recognition purposes involves the selection and designation of those connections that are deemed to be sufficiently substantial to justify recognition. To append a discretionary mechanism for concrete re-evaluation of these connections appears to defeat the very objective behind their adoption. In the end, therefore, these two articles should stand alone to determine foreign jurisdiction in the cases they refer to — no appeal to article 3164 is necessary or justified.[20]

2. *Hall of mirrors*

In addition to prescribing when foreign jurisdiction will be recognized, Title Four also specifies when it will not be recognized. This is the case, for example, in article 3165 where the Code admits that a particular jurisdiction will sometimes have the exclusive right to deal with a dispute because of the subject-matter or because of an agreement between the parties. In such circumstances, a decision rendered by any other foreign authority will not be granted recognition. This rule is made to apply whether exclusivity is granted to a Québec jurisdiction, to a foreign jurisdiction or to an arbitral jurisdiction.

An example of the first case is found in relation to civil liability connected to raw materials originating in Québec.[21] This is the well-known "asbestos" provision which is meant to shield Québec asbestos producers from foreign litigation by giving Québec courts and Québec law exclusive control over such claims.[22] Examples of the other two cases of exclusivity include forum selection

---

[20] Whether or not this argument is maintained in relation to the general jurisdictional grounds available to Québec courts under Chapter I of Title Three will be discussed *infra* in Part B, section 2.

[21] See article 3151 which refers back to article 3129 C.C.Q.

[22] For a thorough discussion of this issue see H.P. Glenn, "La guerre de l'amiante", (1991) 80 Rev. cri. de d.i.p. 41 and Glenn, *Droit international privé, supra* note 8 at 413-14. To date, a single reported case has dealt with this provision in relation to a U.S. judgment: *Worthington Corporation* v. *Atlas Turner Inc.*, 235-05-000074-006, Québec Superior Court, 20 January 2001, AZ-50082727, J.E. 2001-407 (a motion to dismiss the action for recognition and enforcement was refused on the basis that the application of art. 3165 was a question for the trial judge hearing the action).

clauses and arbitration agreements.[23] While these listed exceptions are helpful reminders, their inclusion in Title Four is essentially redundant. Indeed, the mirror principle in article 3164 already includes them.

The "asbestos" recognition provision is redundant because the general reciprocity rule in article 3164 is sufficient to exclude the jurisdiction of foreign courts. Indeed, under article 3151, Québec courts are granted exclusive jurisdiction over such cases where certain connections to the province have been established. In such circumstances, should a foreign court take jurisdiction and render a decision nonetheless, enforcement procedures before a Québec court could be rejected on the basis of article 3164 alone.

Repetition is also evident with respect to the exclusivity of foreign jurisdictions. The rules on jurisdiction already specify that forum selection clauses must be respected whether the designated forum is a court or an arbitral body. Where a plaintiff brings suit in a Québec court, the defendant need only invoke such a clause for the Québec court to dismiss the case and send the parties before the chosen forum.[24] There is really no discretion available to refuse such a request.[25]

Let us assume, in a recognition context, that the judgment-debtor had unsuccessfully challenged the jurisdiction of the foreign rendering court on the basis that the parties had agreed to submit all disputes to a court other than the forum chosen by the plaintiff. Faced with a judgment from that foreign court, would its jurisdiction be recognized by a Québec court? Using the mirror principle of Article 3164 gives a negative answer. Indeed, as noted above, Québec courts are incompetent when faced with a jurisdictional agreement designating another forum.[26] Reciprocity would therefore dictate that the foreign court be deemed incompetent and that its

[23] Examples of exclusivity based on subject-matter may include: real actions concerning property in Québec (art. 3152) and custody of children domiciled in Québec (art. 3142). The tentative nature of this statement reflects the fact that the relevant provisions do not speak of exclusivity, as does art. 3151; moreover, in terms of custody, Québec courts will consider themselves competent even where the child is not domiciled in Québec when the issue of custody is ancillary to an action in separation or in divorce; in such cases, jurisdiction will depend on the domicile or residence of one of the spouses in Québec (art. 3146 and s. 3 *Divorce*.

[24] See article 3148.

[25] Unless, of course, the plaintiff can show that the defendant has already submitted to the jurisdiction of the Québec court. However, in such a case, the clause simply is not operative – it is not because of any discretion that the court is refusing the reference.

[26] According to the mirror principle set out in 3164, we look to the jurisdictional rules for Québec courts to determine the jurisdiction of foreign courts. According to art. 3148, Québec is a competent jurisdiction where the parties "have by agreement submitted to it all existing or future disputes..." and is not competent where the parties have designated a foreign jurisdiction: paragraphs 3148(4) and (5). In the recognition context, this means, at the very least, that where the parties have agreed upon a forum selection clause, a court other than the designated court should be without jurisdiction, just as the Québec court would be without jurisdiction *mutatis mutandis*. Admittedly, article 3148 is limited to personal actions of a patrimonial nature. Moreover, the recognition of forum selection clauses in such actions is guaranteed under 3168(5). However, there is no suggestion anywhere in the Civil Code of Québec that other types of actions are amenable to forum selection by the parties. For a detailed analysis of these questions see Bénédicte Fauvarque-Cosson, *Libre disponibilité des droits et conflits de lois* (Paris : LGDJ, 1996).

decision be refused recognition on that ground alone. In other words, paragraph 3165(2) adds nothing to art. 3164 in terms of forum selection agreements where the forum selected is outside Québec.

Is the answer any different if the designated forum was Québec but the foreign court disregarded that and exercised jurisdiction over the parties' dispute?[27] From the perspective of the foreign court, the Québec court is a foreign jurisdiction. In considering the rendering court's decision to overlook such a choice of jurisdiction clause, the Québec court should treat the clause in the same manner as above and refuse to recognize the foreign court's claim to jurisdiction. In other words, as they refer to forum selection clauses, neither paragraph 3165(1) nor para. (2) adds anything to the mirror principle of article 3164.

Forum selection clauses are also specifically protected in para. 3168(5) While article 3168 will be discussed fully below, it is worth noting here that forum selection clauses are mentioned in para. 5 of that article, as providing legitimate jurisdiction in the forum designated by the parties. In this section on the "hall of mirrors", the question is whether the recognition of exclusivity of the designated forum in 3168(5) is already covered by 3165 and 3164. I would argue that the redundancy argument presented above applies here too but with a caveat.

At the outset, article 3168(5) provides that the exercise of jurisdiction by a court that had been designated under a forum selection clause will be justified in the eyes of the Québec court. This in turn triggers the recognition and enforcement of the ensuing foreign judgment. Such a result follows also from the mirror principle of art. 3164 since article 3148 establishes the jurisdiction of Québec courts where the parties have designated those courts by agreement.

A Québec court is not, of course, obliged to exercise this jurisdiction; indeed, under art. 3135, it may decline to do so on grounds of *forum non conveniens*.[28] This is unlike the case where the plaintiff brings suit in Québec in contravention of an agreement designating a foreign jurisdiction. In that case, the Code stipulates that Québec courts are incompetent. There is no *forum conveniens* principle that would allow the Québec court to take jurisdiction, even if the court would have had jurisdiction but for the forum selection clause.[29] In other words, the parties designating Québec courts as their selected forum for dispute resolution may not be guaranteed to have their case heard there — if they designated another jurisdiction, however, they can be sure that a Québec court will hold them to it. In the recognition context, the only way for

[27] The answer to this question is relevant to this section of the paper but is critical to the next section.

[28] This is similar to the position in Canadian common law provinces; see generally C. Walsh, "Choice of Forum Clauses in International Contracts" *in The Continued Relevance of the Law of Obligations: retour aux sources (McGill Meredith Lectures)* (Cowansville, Qc.: Yvon Blais, 2000) 211 and G. Saumier, "*Forum Non Conveniens*: Where are we now?" (2000) 12 Sup. Ct. L. Rev. (2d) 121.

[29] One could argue that only the specific grounds of jurisdiction would be displaced by the forum selection clause, leaving the general rules intact so that a Québec court could take jurisdiction in case of emergency, necessity or for provisional measures. This would follow from the fact that these provisions apply where the Québec court is otherwise incompetent.

this result to obtain is by way of the mirror principle and then only if 3164 includes a reference to the *forum non conveniens* principle of art. 3135 as well. That very question is the subject of the next section of this paper. For the moment, however, it is at least fair to say that para. 3168(5) does not add anything to the mirror principle put forth in 3164. This makes it as redundant as the other two paragraphs of art. 3165 dealing with forum selection clauses.

What about arbitration agreements? Deference to these is specifically reserved by para. 3165(3) such that a contradictory exercise of jurisdiction by a foreign court will not be recognized. The argument of redundancy can again be made with respect to arbitration agreements. Indeed, article 3148 already provides that where the parties before a Québec court have agreed to arbitration, the Québec court is without jurisdiction to hear their dispute. Given the language of art. 3164, there is no need to repeat this jurisdictional limitation in 3165(3).[30]

The most straightforward explanation for the "hall of mirrors" effect in Title Four flows from the fact that article 3165 C.C.Q. was drawn from the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.[31] Unlike Book Ten of the Québec Civil Code, this international convention merely seeks to determine rules for the recognition and enforcement of judgments across borders. It does not govern the establishment of jurisdiction in international cases. In such a context, it makes perfect sense to include a clause governing the recognition of exclusive jurisdiction, either in terms of subject-matter or agreement between the parties.[32] No redundancy can arise since the provision stands alone in the Convention.[33] It is not surprising,

[30] In addition, Québec has ratified the 1958 *New York Convention on Recognition of Foreign Arbitral Awards* and the 1985 *UNCITRAL Model Arbitration Law* and has incorporated their provisions in its Code of Civil Procedure: see art. 948 C.P.C. and on arbitration generally, art. 940 C.P.C. and ssq.

[31] 1144 U.N.T.S. 89. It can also be found in Conference de la Haye de droit international privé, *Recueil des Conventions (1951-1988)*, (The Hague: Imprimerie Nationale, 1989) at 107 and on the Conferences website: www.hcch.net. Drafted by the Hague Conference, it was signed only by the Netherlands, Portugal, and Cyprus. This source is explicitly recognized by the drafters and the legislator: see Office de révision du Code civil, *Rapport sur le Code civil du Québec: Commentaires*, vol. II (Québec: Éditeur officiel, 1978) at 1012 and *Commentaires du ministre de la Justice: le Code civil du Québec*, vol. III, *supra* note 17 under art. 3165 C.C.Q. For a discussion of exclusive jurisdiction in the context of that convention see Conférences de La Haye de droit international privé, *Actes et documents de la Session extraordinaire du 13 au 26 avril 1966: Exécution des jugements* (La Haye: Imprimerie Nationale, 1969) at 37-38.

[32] Article 12 of the Convention.

[33] The Convention leaves it up to internal national law to define areas of exclusive jurisdiction. I should add that the wording of the provision in the Convention was the subject of vigorous and lengthy debate at the time of its adoption. At issue was its mandatory or discretionary nature – resolved in favour of a discretion, contrary to the Québec provision – and the actual meaning of exclusivity: see Conférences de La Haye de droit international privé, *Actes et documents de la Session extraordinaire du 13 au 26 avril 1966: Exécution des jugements*, *supra* note 31 at 189-190, 209-14, 215-17, 302-03. Numerous member-states objected to this article or to parts of it. This situation contributed to the total failure of the convention (only 3 ratifications).

therefore, that a similar provision has difficulty fitting into a *complete* codification of private international law.

The end result, therefore, is that the protection of exclusive jurisdiction in the Québec Civil Code, whether based on subject-matter or agreement, is repeated three times in the context of recognition of foreign judgments: once, in the general mirror rule of 3164, once in the exception to 3164 spelled out in 3165(2) and again in the limitative list of accepted jurisdictional connections for personal actions in 3168(5). One might argue in favour of such repetition, if only for didactic purposes.[34] After all, most of these provisions represent new law in Québec. On the other hand, if this didactic purpose is not consistent throughout the chapter, as will be seen in the section with respect to the narrowing effect of art. 3168, it begins to appear more coincidental than intentional. Moreover, it opens the door to distinctions between the notion of exclusive jurisdiction of Québec courts and foreign courts (or authorities), thereby possibly subverting the general principle of recognition expressed in article 3155 and the primary principle of reciprocity in article 3164.

3. *Narrowing the reflection*

The interpretation of Title Four is also challenged by the interaction between the general statement of article 3164 and the specific rules of article 3168. The essential question is whether the latter is an exception to the former. An affirmative answer could mean that the mirror principle does not apply to cases covered by article 3168. The impact of such a conclusion is not singular: it can support or hinder the recognition of foreign judgments.

In article 3168, the Code sets out six specific grounds for assessing the jurisdiction of foreign courts rendering judgments in personal actions of a patrimonial nature. This essentially refers to all foreign money-judgments arising from the law of obligations (ie. contract and tort). Article 3168 deals in turn with jurisdiction based on connections with the defendant and jurisdiction based on connections with the subject of litigation.

In terms of connections to the defendant, foreign courts are treated more strictly than Québec courts. Indeed, only the defendant who was domiciled on the territory of the foreign court is within that court's jurisdiction whereas mere residence in Québec will suffice for domestic jurisdiction.[35] Moving to

[34] For a discussion of the educational dimension of codification, see G. Cornu, Linguistique juridique, 2nd ed. (Paris: Montchrestien, 2000) at 299-300. For a similar discussion regarding the Civil Code of Québec, see N. Kasirer, "Honour Bound" (2001) 47 McGill L.J. 237.

[35] Compare paragraph 3168(1) with paragraph 3148(1).The second listed ground, relating to corporate defendants, combines the two types of connections and reflects the domestic rule: jurisdiction is predicated on the presence of an "establishment" and a dispute related to its activities. Compare paragraph 3168(2) with paragraph 3148(2). Admittedly, the distinction between notions of domicile and residence has become rather muted under the new Code: see articles 74-80 C.C.Q.

jurisdiction based on the subject-matter of the dispute, paragraph 3168(3) applies to civil liability and requires that both the damage and the wrongful act took place in the foreign jurisdiction. This is significantly narrower than the domestic rule which specifies that these are alternative connections (3148(3)). In a contractual dispute, foreign jurisdiction based on the place of performance of "the obligations arising from" the contract is admitted (3168(4)). Again, Québec courts will assume a broader jurisdiction based merely on "*one of* the obligations" being due in the province (3148(3) *in fine*).[36] The fifth ground relates to forum selection clauses as was discussed in the previous section.[37] Finally, the last accepted ground of foreign jurisdiction is based on the defendant's submission to the foreign authority (3168(6)), which is also a basis for the jurisdiction of Québec courts.[38] The overall effect is therefore one of narrowing the reflection of Québec jurisdictional bases when the mirror is turned toward foreign jurisdictions.

Moreover, this list of admitted foreign jurisdictional grounds is presented in Chapter II as a limitation on the reciprocity principle by the very terms of article 3168 itself. It states that "[in] personal actions of a patrimonial nature, the jurisdiction of a foreign authority is recognized *only* in the following cases...".[39] This suggests that no other grounds of jurisdiction will be accepted for the purpose of recognition and enforcement of foreign judgments falling within the category of personal actions of a patrimonial nature. Glenn rejects this conclusion for reasons of legislative drafting history. He notes that in the penultimate version of the Code,[40] the introductory article of Title Four, Chapter II, art. 3141, opened with the words: "In the absence of any special provision...", a caveat that was dropped in the final version.[41] This conclusion

[36] My emphasis. Both Goldstein & Groffier, *supra* note 8 at para. 182, and Glenn, *Droit international privé*, *supra* note 8 at para. 125, suggest that this narrow scope might be broadened by an appeal to 3168(3) if the damage flowing from a contractual breach is suffered in a third country and the breach is defined as a fault having occurred there. I would tend to disagree with this because I am of the view that the jurisdictional rule in 3168(3) does not apply to contracts, but this is not the place to engage in such a debate!

[37] Compare paragraph 3168(5) with paragraph 3148(5). The former also reproduces the limitations on forum selection clauses in consumer and employment contracts that determine the jurisdiction of Québec courts: see article 3149. It should be noted that 3148(5) requires that Québec courts respect arbitration agreements as well – this reference to arbitration is not found in 3168. It is found instead in para. 3165(3). It should be noted further that the enforcement of foreign arbitral awards is governed by rules found in the Québec Code of Civil Procedure which embody the rules of the *New York Convention* and the *Uncitral Model Arbitration Law*. See *supra* note 30.

[38] Compare paragraph 3168(6) with paragraph 3148(5). See further, on the question of submission, G. Saumier, "Les objections à la compétence internationale des tribunaux québécois: nature et procédure" (1998) 58 Revue du barreau 145.

[39] Article 3168, my emphasis. The French version is to the same effect: "la compétence des autorités étrangères n'est reconnue que dans les cas suivants... »

[40] Québec National Assembly, Bill 125, 1990.

[41] See Glenn, *Droit international privé*, *supra*, note 8 at para. 127 (referring back to note 250).

is not fully persuasive, however, since the penultimate version did *not* include a specific provision dealing with foreign jurisdiction in personal actions of a patrimonial nature. It is therefore arguable, in my view, that the restrictive language of article 3168 is sufficient to prevent any broadening of the list of jurisdictional criteria by recourse to the mirror principle, and this despite the removal of the limiting words originally included in the opening provision. [42]

It is perhaps not as obvious that the restrictive language of article 3168 excludes reference to the mirror principle altogether. If the specificity of art. 3168 prevents the expansion of admitted jurisdictional criteria, it may not exclude a narrowing effect.. In other words, it remains to be seen whether foreign exercises of jurisdiction can be rejected *despite* satisfying the jurisdictional requirements of art. 3168.[43] That question will be addressed in the next part of this paper. The argument there will lead me to conclude that in personal actions of a patrimonial nature, satisfying the jurisdictional requirement under article 3168 is always sufficient but not necessarily essential for recognition under Québec law.

B. *The Relationship between Title Four and Title Three*

While the imprecision and redundancies detailed in the previous section may not, in and of themselves, lead to intractable problems in the application of the provisions to actual cases, they are indicative of a lack of structural cohesiveness. It is this very structural weakness that has allowed, I would argue, some commentators to put forward an interpretation of article 3164 that is highly problematic and that ought to be rejected.

As discussed above, article 3164 establishes a general rule for assessing the jurisdiction of foreign courts. The rule adopted is a rule of reciprocity: if a Québec court would have been competent *mutatis mutandis*, then a Québec court will recognize the jurisdiction of the foreign court. Because the rules establishing the jurisdiction of Québec courts are provided in the Code, article 3164 refers to the section of the Code where these jurisdictional rules are found, that is, Title Three entitled "International Jurisdiction of Québec Authorities".

This Title is divided into two chapters: Chapter I on "General Provisions" and Chapter II on "Special Provisions". It is the first chapter that causes the

[42] Support for this conclusion can be found in Goldstein & Groffier, *supra* note 8, although they simply assert that art. 3168 excludes reference to the mirror principle, without any discussion of the legislative history. Castel and Talpis take a middle position, it seems, holding that the mirror principle does not apply with respect to articles 3166-68, but they maintain, that the "substantial connection" requirement of art. 3164 *in fine*, does apply to those provisions: see Castel & Talpis, *supra* note 8 at para. 483 and 485. To my mind, the *favour validatis* condition underlying articles 3166-67 challenges that claim. As for art. 3168, the connections are already stricter for foreign jurisdictions than for Québec courts. Adding a further requirement of connexity seems excessive and frankly contradictory.

[43] I specify "jurisdictional" because there are, of course, other grounds for refusing recognition, as indicated previously.

greatest difficulty in the context of recognition. Let me therefore begin with a short description of the second chapter.

Chapter II on specific jurisdictional rules for Québec courts[44] is itself divided into three sections. The first section deals with "personal actions of an extrapatrimonial and family nature" and provides jurisdictional bases for custody, filiation and adoption, support, nullity and effects of marriage. The second section is concerned with "personal actions of a patrimonial nature" consisting mainly of civil liability, including contractual liability, with special rules for consumer, employment and insurance contracts. The third and final section covers "real and mixed actions" relating to property, successions and matrimonial regimes. The overall correspondence between these criteria for domestic jurisdiction in international cases and recognized assumptions of foreign jurisdiction was discussed in the previous section. It was suggested there that reciprocity is substantially restricted in personal actions of a patrimonial nature. On the other hand, reciprocity is more accurately reflected in relation to the other two sections of Chapter II since no exceptions are provided save for the broader criteria for filiation and divorce as well as the general requirement of a close connection imposed under art. 3164 *in fine*.

It is the first chapter of Title Three that is problematic. This chapter consists of seven articles spelling out the "general provisions" governing the international jurisdiction of Québec courts. The first provision sets out the general jurisdictional criterion under Québec private international law: the domicile of the defendant (3134). Two articles then allow an otherwise competent Québec court to decide not to exercise its jurisdiction — in the case of *forum non conveniens* (3135) or *lis alibi pendens* (3137). The remaining four general provisions grant exceptional and usually limited competence to a Québec court for reasons of necessity, emergency, protection of assets and people or administrative convenience.[45] These four exceptional cases obviously assume that the Québec courts are not otherwise competent, in the international sense, to hear the claim. Together with the specific head of jurisdiction noted above, these seven general rules form the entirety of Title Three dealing with the international jurisdiction of Québec courts.

When it comes time to assess the jurisdiction of a foreign court, the mirror principle enshrined in article 3164 refers back to Title Three. The reference to Title Three in article 3164 contains not words of limitation. This suggests that the reference to reciprocity applies to the entirety of Title Three, including the general and the specific provisions in that title. In other words, if the foreign court's jurisdiction does not correspond to any specific jurisdictional basis recognized under Chapter II of Title Three, recourse may be had to the general provisions of Chapter I of the same Title. For example, if the default domiciliary

[44] The reference to "Québec authorities" is misleading – really only courts are relevant here. Use of the term "authorities" is meant to encompass foreign bodies who may not accurately be called "courts" but who render decisions of a judicial or quasi-judicial nature.

[45] See articles 3136, 3138, 3139 and 3140 C.C.Q.

rule is not satisfied and no other specifically listed connection is present, a foreign assertion of jurisdiction may still be recognized on the basis of necessity, if the Québec court would have felt justified to assume jurisdiction under art. 3136 in similar circumstances.

This reasoning applies equally well to the other three bases enumerated in Chapter I, Title Three, and upon which Québec courts can exceptionally rest their jurisdiction. As for the domicile of the defendant as a general basis for jurisdiction, it will obviously justify a foreign court's jurisdiction where, as 3134 states, no provision of Chapter II applies to prevent it. In contrast, the remaining two provisions of Chapter I do not establish bases for asserting jurisdiction. These two provisions are directed instead at the *exercise* of jurisdiction by Québec court where jurisdiction is *otherwise established* under Title Three. The inclusion of these two provisions within the gaze of reciprocity has different consequences than the previous five.

The effect of a reference to Chapter I of Title Three in article 3164 is thus of two types. First, such a reference may allow a Québec court to refuse recognition of a foreign judgment on jurisdictional grounds. By way of the mirror principle, the Québec court would hold that, had it been faced with the facts before the foreign court, it would have declined to exercise its jurisdiction, in accordance with the doctrine of *forum non conveniens* or *lis alibi pendens*. Such a reference to Chapter I of Title Three would therefore broaden the scope of jurisdictional review mandated by article 3155.[46] Second, the reference to Chapter I of Title Three in article 3164 could serve to extend the admitted jurisdiction of foreign courts beyond what the Code provides for in the specific rules of Title Four. This implies an effect contrary to the first one, that is, an extension of the mirror principle, even beyond the limitations imposed by article 3168, for example, and therefore a greater likelihood of recognition than might otherwise be expected. These outcomes are potentially contradictory and require further analysis.

In the first case, the inquiry must focus on whether it is, and then whether it should be, open to a Québec court to refuse to recognize a foreign judgment on the grounds that a Québec court, in similar circumstances, would have declined to adjudicate the dispute because of either *forum non conveniens* or *lis alibi pendens*, that is, despite being otherwise competent to do so. In my view, there are several reasons to reject such a conclusion. First, it confuses the issue of jurisdiction *simpliciter* with the discretion to exercise or decline jurisdiction. Second, and this applies only to *lis alibi pendens*, it is difficult to support under the current text of the Code, particularly in light of art. 3155(4). Third, it is not coherent given the nature and structure of Book Ten on Private International Law. This argument will be discussed in section 1 below. And fourth, it confuses the recognition analysis with the anti-suit injunction analysis, at least as the latter is articulated by the Supreme Court in the *Amchem* decision. As for the

[46] Recall that article 3155 sets out the general principle of recognition which applies unless the foreign court had no jurisdiction.

second case set out above, its resolution is also confronted by the apparently unequivocal language of the Code although the notion of jurisdiction *simpliciter* may also be useful to provide a solution. That issue will be the subject of section 2.

1. *More broadening of the reflection*

a) *Jurisdiction simpliciter and the discretion to decline jurisdiction*

The doctrine of *forum non conveniens* is new to Québec law since the adoption of the Civil Code of Québec in 1991.[47] It is perhaps excusable, therefore, that the precise relationship between this doctrine and the rules of international jurisdiction remains to be fully fleshed out. In their interpretation and application of the doctrine, Québec courts have been remarkably open to guidance from Canadian common law courts. including the Supreme Court's pronouncements on the question in the 1991 case of *Amchem*. This approach has been met with some criticism from Québec commentators who have suggested that, in fully embracing the doctrine, Québec courts have ignored the wording of article 3135, which limits the application of the discretion to exceptional cases.[48] More fundamentally, this broad judicial endorsement of *forum non conveniens* by Québec courts tends to underplay the critical link between the doctrine and rules of international jurisdiction. Indeed, the approach to jurisdiction in the Civil Code is sufficiently different from its Common Law counterpart for the role and place of *forum non conveniens* to take account of this specificity. In particular, and this is the relevant point here, the distinction between jurisdiction *simpliciter* and the discretion to decline jurisdiction is well established in Common Law jurisdictions but not in Québec. However, the distinction between these two notions is critical, in my view, particularly in the context of foreign judgment recognition.

Essentially, a court is said to possess jurisdiction *simpliciter* when its connections with the parties or the litigation, as the case may be, are sufficient,

---

[47] See generally article by S. Guillemard, F. Sabourin & A. Prujiner, "Les difficultés de l'introduction du *forum non conveniens* en droit québécois" (1995) 36 Cahier de droit 913. The importation of *forum non conveniens* into Québec law is a first for a civil law jurisdiction.

[48] See J. Talpis & S.L. Kath, "The Exceptional as Commonplace in Québec *Forum Non Conveniens* Law: *Cambior*, a Case in Point" (2000) 34 R.J.T. 761, But see contra: Comité de révision de la procédure civile, *Une nouvelle culture judiciaire* (Québec: Ministère de la justice, 2001) at 215-216, where it is recommended that the condition of exceptionality be removed. Resistence to the doctrine in Continental Europe is illustrated by its absence from the uniform rules governing jurisdiction in the European Union: see H. Gaudemet-Tallon, "Le 'forum non conveniens', une menace pour la convention de Bruxelles?" (1991) 80 Rev. crit. de d.i.p. 491. At the multilateral Hague Conference on Private International Law, the draft Convention on jurisdiction and recognition has included a version of *forum non conveniens* (art. 22) although its application is specifically excluded at the recognition stage (art. 27, October 1999 draft). For the full text of the Draft Convention see www.hcch.net.

in law, for that court to adjudicate on the merits of the dispute.[49] In the Canadian common law provinces, jurisdiction *simpliciter* is established through a combination of compliance with rules of service and the "real and substantial connection" requirement derived from *Morguard*. The addition of the second component is relatively new, however, and prior to that time, jurisdiction *simpliciter* was basically drawn from the rules of service alone. Once jurisdiction *simpliciter* is established, the defendant can still ask the court to stay the proceedings, usually on the basis of a *forum non conveniens* argument.[50] A distinction is drawn between jurisdiction *simpliciter* and the discretionary power to decline that jurisdiction under the *forum non conveniens* doctrine.

The functional equivalent of jurisdiction *simpliciter* in Québec law is found in the relevant provisions on jurisdiction in Title Three of Book Ten of the Civil Code discussed above.[51] For its part, the wording of the *forum non conveniens* provision in article 3135 C.C.Q. replicates the common law distinction between the establishment of jurisdiction and the discretion to exercise it. The provision states explicitly: "Even though a Québec authority has jurisdiction to hear a dispute..." As outlined earlier in the text, article 3155 imposes recognition unless the foreign court was without jurisdiction and article 3164 holds that the jurisdiction of foreign courts is established according to the rules applicable to Québec courts. It is difficult, at least on the wording of these provisions, to see any room to allow for considerations of *forum non conveniens* to enter into the jurisdictional inquiry.

If the criterion for recognition of foreign judgments is the valid jurisdiction of the foreign court, as is mandated by article 3155, it is hard to argue that this should be supplemented by an essentially fact-driven discretionary mechanism

---

[49] In Canadian common law provinces, rules of service frame jurisdiction simpliciter, subject to the constitutional requirement of a "real and substantial connection" imposed by *Morguard* and *Hunt*. See for example: *Muscutt* v. *Courcelles*, [2002] O.J. no. 2128 (Ont. C.A.) at paras 41-43, *Cook* v. *Parcel et al.* (1997), 31 B.C.L.R. (3d) 24 (C.A.). See also J. Blom, "The Enforcement of Foreign Judgments: Morguard Goes forth into the World" (1997) 28 C.B.L.J. 373 at 377-78 and G. Saumier, "Judicial Jurisdiction in International Cases: The Supreme Court's Unfinished Business" (1995) 18 Dal. L.J. 447.

[50] This assumes that leave of the court is not required for service outside the jurisdiction. Where such leave is required, the two-step analysis is usually combined into one since the determination that it is appropriate to serve abroad will involve considerations of *forum conveniens*. Common law provinces vary in the extent to which leave is required for service abroad. See generally J.-G. Castel & J. Walker, *Canadian Conflict of Laws*, 5th ed. (Markham, On.: Butterworths, 2002) at para. 11.10.

[51] Unlike their common law counterparts, these rules are not merely procedural, they actually confer jurisdiction on Québec courts. In *Muscutt*, *supra* note 49, Sharpe J.A. states specifically, at para. 48, that Rule 17.02(h) of the Ontario Courts of Justice Act, R.S.O., c. C.43, which allows for service abroad in relation to a claim for damages suffered in Ontario as a result of a tort committed elsewhere "is procedural in nature and does not by itself confer jurisdiction." He held that the substantive element of jurisdiction was based on the establishment of a "real and substantial connection" between the forum and the action (*ibid.* at paras 50 and 58). The implications of the distinction with Québec law will be considered below in part B.

such as *forum non conveniens*.[52] The specificity of the Civil Code's jurisdictional rules belies any claim that the jurisdictional enquiry is fundamentally driven by the doctrine of *forum non conveniens*. Otherwise, what would be the point of articulating precise connecting factors establishing jurisdiction in distinct types of situations? The possibility that the criteria in the Code are to be construed as merely presumptive indicia of jurisdiction in the context of a discretionary *forum non conveniens* enquiry is not supported by the Code.

In addition, the reciprocity rule of art. 3164 already includes a special requirement of a substantial connection to the foreign jurisdiction. In these circumstances, adding *forum non conveniens* to the list of jurisdictional conditions runs contrary to the spirit of the recognition principle and undermines the jurisdictional rules themselves. How can it legitimately be argued that a foreign court, exercising jurisdiction in accordance with grounds admitted for a Québec court (or even stricter in some instances), in a case demonstrating a substantial connection to the jurisdiction, is undeserving of recognition in Québec on *forum non conveniens* grounds? Since *forum non conveniens* is essentially a way of choosing between two *otherwise appropriate* jurisdictions, it seems to me that to ask the question is to answer it.[53]

A final argument against the reference to *forum non conveniens* to assess foreign jurisdiction for recognition purposes comes from a different angle. It relates to the anti-suit injunction and the test articulated by the Supreme Court of Canada in the *Amchem* case.[54] Generally speaking, the Supreme Court held that an anti-suit injunction should only be considered if it could be shown that the foreign court seized of the action had accepted jurisdiction in circumstances where that court was *forum non conveniens*.[55] This was presented as a stringent requirement that highlights the unusual and rather extreme nature of an anti-suit injunction. In contrast, applying a similar standard for mere recognition would be excessive.

---

[52] There is one Québec case that has applied the *forum non conveniens* provision in the recognition context: *Cortas Canning and Refrigerating Co.* v. *Suidan Bros. Inc.*, [1999] R.J.Q. 1227 (Que. S.C.). An appeal was lodged but then abandoned. It is interesting to note that the court referred to supporting doctrine, including an article by Talpis who since then has reversed his position: see J. Talpis, *If I Am from Grand-Mère, Why Am I Being Sued in Texas? Responding to Inappropriate Foreign Jurisdiction in Québec-United States Crossborder Litigation* (Montréal: Thémis, 2001) at 110, calling this reference to *forum non conveniens* "unreasonable, unjustifiable and...unpredictable."

[53] See contra H.P. Glenn, *Droit international privé, supra* note 8 at 770 and Glenn, "Recognition of Foreign Judgments in Québec", *supra* note 8, where the opposite interpretation of the relevant provisions is presented, essentially based on the absence of restrictive language in the Code.

[54] *Amchem Products Inc.* v. *B.C.*, *supra* note 3. This argument was also made in G. Saumier, *Forum Non Conveniens*: Where are we now?, *supra* note 28 at 130-31.

[55] *Amchem*, *ibid.* at 119. Many other conditions were articulated by the Court but the *forum non conveniens* criterion is the principal one in the first of a two-step analysis. The second step involves a consideration of fairness, to the parties, of litigation in each of the two (or more) fora. For a discussion of the anti-suit injunction aspects of the *Amchem* case, see H.P. Glenn, "The Supreme Court, Judicial Comity and Anti-Suit Injunctions" (1994) 28 U.B.C.L. Rev. 193.

So long, therefore, as a distinction between jurisdiction *simpliciter* and *forum non conveniens* is maintained, and I believe there are sound reasons to do so,[56] it is reasonable in principle to exclude considerations of *forum non conveniens* when assessing foreign jurisdiction for the purposes of recognition. While article 3164 does not specifically limit the scope of the mirror principle as it applies to the general provisions of Title Three, this conclusion is consistent with the language of the Code in so far as art. 3135 C.C.Q. is not a source of jurisdiction but a source of discretion. Another provision requiring the exercise of judicial discretion is art. 3137 dealing with *lis alibi pendens*. It presents its own challenges and is the subject of the next section.

b) *Lis Alibi Pendens (and International Res Judicata)*

The doctrine of *lis alibi pendens* is the subject of two provisions in Book Ten of the Québec Civil Code, articles 3137 and 3155.[57] The first comes under Title Three and grants Québec courts the discretion to decline jurisdiction where proceedings in the same dispute have already been instituted elsewhere (*lis pendens*). The second is found in Title Four, and controls the recognition of foreign decisions where multiple proceedings did, in fact, take place (international *res judicata*).[58] The question that will be addressed in this section of the paper relates to the interaction between these provisions on *lis alibi pendens* and the mirror principle of article 3164. The first question to ask is an obvious one: if reciprocity under 3164 includes a reference to article 3137, what is the purpose of article 3155(4)? The answer requires further consideration of these provisions.

According to article 3137, a competent Québec court can stay its proceedings in an international case if a party successfully invokes *lis alibi pendens*. The first, and main, condition is that the proceedings involve the same parties, facts and object. This condition is not relevant to the present inquiry although it presents its own challenges.[59] The second condition is directly relevant here as

---

[56] See Saumier, "Judicial Jurisdiction in International Cases", *supra* note 49 at 466-72.

[57] A preliminary question may be to ask why the Code contains both a *forum non conveniens* and a *lis alibi pendens* provision. Canadian common law jurisdictions subsume considerations of the latter under the former. Indeed, the presence of parallel proceedings in another jurisdiction is treated as merely as one additional component in the *forum non conveniens* analysis. See for example *472900 B.C. Ltd.* v. *Thrifty Canada Ltd.* (1998) 57 B.C.L.R. (3d) 332 (C.A.) and *Westec Aerospace Inc.* v. *Raytheon Aircraft Co.* (1999), 67 B.C.L.R. (3d) 278 (C.A.) (this case went to the S.C.C. but was adjourned and then dismissed after action in the foreign court: see [2001] S.C.J. no. 2 and 3, 15 C.P.C. (5th) 1. For a discussion see G. Saumier, "*Forum Non Conveniens*: Where are we now?", *supra* note 28 at 125-29.

[58] In a perfect world, as Sopinka J. noted in *Amchem*, *supra* note 3 at 106, the latter provision would usually not be needed because the former provision would generally eliminate the possibility of multiple proceedings and decisions. The Québec Civil Code is firmly anchored in reality, however, as the inclusion of art. 3155(4) indicates!

[59] See for e.g. Talpis, *If I Am from Grand-Mère, Why Am I Being Sued in Texas?*, *supra* note 52 at 52-58.

it involves the recognition of foreign judgments. This recognition criterion is triggered in two different ways. First, under art. 3137, a stay of Québec proceedings can be granted where a foreign decision has already been rendered and qualifies for recognition under Québec law. Second, if a foreign decision has not yet been rendered but foreign proceedings are pending, a stay can still be granted but only if the decision would be recognizable in Québec. As seen previously, the answer to the "recognizability" begins with an examination of art. 3155, the opening provision of Title Four governing recognition of foreign judgments.

The relevant sub-section for our purposes is paragraph 3155(4) which addresses the problem of multiple proceedings in a recognition context. In other words, what is a Québec court to do when faced with more than one decision in the same dispute? The Civil Code treats this situation differently depending upon whether a Québec court has ever been seized of the dispute or not.

If a Québec court has been seized of the dispute, there are two further possibilities: either a decision has been rendered or the proceedings are still pending. Where a Québec decision exists, a competing foreign decision will never be recognized, regardless of whether the foreign court was first seized of the dispute. On the other hand, where Québec proceedings are still pending at the time the foreign decision is brought to Québec for recognition, the foreign decision will be recognized only if the Québec court was seized of the action after the foreign rendering court. This means that priority is always given to a Québec decision over a foreign decision, regardless of which tribunal was first seized of the dispute. If the foreign decision is rendered before the Québec proceedings are finished, however, then the foreign decision will be given effect only if the action was instituted first in that foreign jurisdiction. The upshot of this rule is that the race to the courthouse is relevant but secondary to the race to judgment.

If a Québec court is not involved — it has not rendered a judgment or even been seized of the dispute — competing foreign judgments are treated according to their rank in time.[60] This means that a defendant can block the recognition of a foreign judgment in Québec by invoking a prior judgment from another jurisdiction.

Having canvassed the rules governing recognition under 3155(4), let us now return to a consideration of the recognizability criterion of article 3137.[61] To successfully invoke *lis alibi pendens* before a Québec court, a defendant seeking a stay will have to show that an existing (or eventual) foreign decision is recognizable under Québec law. According to 3155(4), where Québec

[60] The Code is not absolutely clear whether the relevant race is to the courthouse or to judgment when two foreign judgments are in competition. Goldstein & Groffier, *supra* note 8 at 394, state that the latter prevails.

[61] Because art. 3137 only comes into play when Québec proceedings are pending, the parts of art. 3155(4) dealing with competition between Québec judgments and foreign judgments have no application.

proceedings are pending, a foreign decision will only be recognized if the foreign court was seized of the action first.[62] This means that *lis alibi pendens*, when raised before a Québec court assessing its own jurisdiction, can only be invoked successfully if the foreign court was seized first because that is the only case where the foreign decision is susceptible of recognition under Québec law.[63] The necessary corollary is that, in applying art. 3137, if the Québec court was seized first, the foreign decision will not be recognizable and therefore, the Québec court *cannot* stay its proceedings on the grounds of *lis alibi pendens*.[64]

What does this discussion mean, if anything, to the claim that article 3164 includes a reference to article 3137? It will be recalled that such a claim involves the following argument: that in a recognition action, in assessing the jurisdiction of a foreign court, the Québec court can consider whether, *mutatis mutandis*, it would have stayed its proceedings on grounds of *lis alibi pendens*, as defined under art. 3137. An affirmative response would justify a refusal to recognize the foreign decision in question on the grounds that the jurisdictional condition imposed by art. 3155(1) was not satisfied.

Given the above discussion concerning the interplay between articles 3137 and 3155(4), such a argument has no place where Québec is one of the competing jurisdictions. Indeed, as the three following scenarios reveal, recourse to art. 3137 in those circumstances is excluded.

Scenario 1: Florida decision — Québec decision

The first possibility involves the case where a party seeks recognition of a Florida decision and the defendant objects, invoking the existence of a Québec decision in the same dispute. In such a case, the competition between the two cases is resolved without even having to consider whether the Florida court had jurisdiction. Indeed, it is obvious that the very existence of a Québec decision will automatically exclude recognition of the Florida decision: 3155(4).

Scenario 2: Florida second-seized but first to render judgment — Québec proceedings pending, first seized

The second possibility posits a slightly different scenario: the same party seeking enforcement of the Florida decision who is challenged by the defendant referring to pending proceedings before a Québec court, seized prior to the Florida court. Here the race to the courthouse favours Québec but the race to judgment is won by the foreign court. This multiplicity is again resolved without any consideration of the appropriateness of the Florida court's jurisdiction. As in the previous case, the Québec connection takes precedence based solely on the fact that the Québec court was first

[62] This is the only portion of art. 3155(4) that is relevant in the context of art. 3137 since this article comes into play when a Québec court is seized of proceedings and the defendant is those proceedings is seeking a stay. If a Québec decision already exists, the defendant will argue *res judicata* according to internal law and not *lis alibi pendens* under private international law.

[63] Of course, the foreign decision must also meet all other conditions for recognition, including jurisdiction.

[64] It may still be entitled to do so on the basis of *forum non conveniens*, however.

seized, even though no decision was rendered. This means that the Florida decision cannot be recognized: 3155(4).[65]

Scenario 3: Florida decision, first seized — Québec proceedings, second seized[66]

This is a final variation on the scenario, with Florida winning both races: first seized and first to render judgment. Here, the Québec court will enquire into the validity of the Florida court's jurisdiction. Indeed, the *lis pendens* rule of 3155(4) does not prohibit recognition since the Florida court was first seized and the Québec proceedings have not yet yielded a decision. The foreign decision must still fulfill all of the conditions of art. 3155, however, including the primary jurisdictional criterion.

In accordance with art. 3155(1) then, the Québec court will turn to consider whether the Florida court had jurisdiction. This will be done in accordance with the rules in Chapter II of Title Four, the first provision of which is art. 3164. Let us assume that the facts establish the necessary connections for jurisdiction under article 3168.[67] The question then becomes whether the judgment-debtor, seeking to avoid recognition of the Florida judgment, can invoke article 3137 to alter the jurisdictional conclusion flowing from art. 3168. This would be done by claiming that, *mutatis mutandis*, a Québec court would have stayed its proceedings on the grounds of *lis alibi pendens*.

This requires the Québec court to put itself in the position of the Florida court, i.e., the court first seized of the action between the parties. The Québec court would have to ask itself the following question: If it had been a court first seized of an action that was also pending before a second-seized foreign court,[68] would it have stayed its proceedings in favour of the foreign action? The answer is an unconditional no. As we have seen above, art. 3137 can only be interpreted to permit a stay where the foreign court was first seized.

These scenarios demonstrate how article 3155(4) deals exhaustively with the question of competing foreign and local proceedings, leaving absolutely no room for a further reference to art. 3137 CCQ to avoid recognition of the foreign judgment. If this is correct, then the argument that the mirror principle in art. 3164 includes a reference to art. 3137 is meaningless since there are no cases to which it can apply where one of the competing fora is Québec.

What if the competition is between two foreign judgments instead? Will this leave room for the operation of article 3137 in evaluating the jurisdiction of the foreign court(s)?

---

[65] In the second and third scenarios, the question of enforceability of the Florida decision is more likely to arise in the course of a motion to stay the Québec proceedings on the basis of *lis alibi pendens*. However, this is not the scenario of interest here. In any event, it is entirely possible that the Florida decision could come before a Québec court in an independent action for recognition and enforcement. In such cases, the main issue of contention may well relate to the condition of identity of parties, facts or object.

[66] The "Florida proceedings – Québec decision" is not relevant since we are concerned here with the interpretation of article 3164 which only comes into play in recognition proceedings before a Québec court. If there is no foreign decision, no recognition can be sought!

[67] Either under 3166, 3167, 3168 or by way of reciprocity with a remaining ground under Title 3. See discussion in Part I-A.

[68] Obviously it cannot be the case that the Québec court had already rendered its decision since, in such a case, it would not be seized of proceedings and being asked to stay them because of *lis pendens*.

Scenario 4 — Mexico, first to judgment — Brazil, second to judgment

According to article 3155(4), the Mexican judgment, being first in time should displace the Brazilian judgment, coming later. A defendant could not avoid a motion to enforce the Mexican judgment by invoking the Brazilian judgment under art. 3155(4), since the latter was later in time. But could the Mexican judgment be excluded on jurisdictional grounds, that is, by reference to 3137 via the reciprocity rule of 3164? According to the analysis of 3137 presented above, a *lis pendens* argument would succeed only if the Mexican court had been seized of the action after the Brazilian court. In such circumstances, a Québec court might well consider that the Mexican court should have declined jurisdiction given the previously-seized Brazilian court. This suggests that enforcement of the Mexican judgment could be avoided on jurisdictional grounds, but only if article 3164 includes a reference to 3137.

Does this mean that the Brazilian judgment would therefore be enforceable in Québec? Presumably so. Indeed, a defendant invoking the Mexican judgment as a bar to enforcement of the Brazilian judgment under 3155(4) would face the same argument as above, i.e. that the Mexican judgment, though first in time, is not recognizable under Québec law for jurisdictional reasons.

Unlike the first three examples, this last scenario suggests that article 3137 may indeed have a role to play in assessing the jurisdiction of foreign courts for the purpose of recognition and enforcement. A Québec court could thus refuse to recognize a foreign judgment on jurisdictional grounds even though recognition is appears to be mandated according to the Civil Code's provision on international *res judicata*. The exclusion of a foreign decision on such jurisdictional grounds can arise in two ways.

First, a foreign decision brought for enforcement before a Québec court could fail jurisdictional scrutiny under art. 3155(1) despite having successfully met a challenge based on 3155(4). This would be the case in the above example if the Mexican judgment-creditor sought enforcement in Québec. Under the international *res judicata* rule in 3155(4), the first-rendered Mexican judgment should have priority over the Brazilian decision. To be recognized, however, the Mexican judgment would still have to meet the jurisdictional condition imposed by art. 3155(1). This in turn calls for an application of 3164 and, potentially by way of the mirror principle, of the *lis pendens* rule of art. 3137. The latter examination may well lead to the conclusion that jurisdiction is not recognized by Québec because the Mexican court should have declined jurisdiction in favour of the Brazilian court, first-seized of the action.[69] The net effect of the

[69] Such a conclusion would not have the effect of granting recognition to the Brazilian decision although, as was seen above, any *lis pendens* analysis normally involves a consideration of recognizability (unless of course the defense involved a cross-claim for the recognition of the Brazilian decision). At this point, the reasoning can become quite circular as one would be lead to ask whether or not the Brazilian decision would be recognizable and, turning to art. 3155, the answer would be no because of the pre-existing Mexican judgment. Of course, this would be misconstruing the exercise since the question is, rather, whether the Mexican court, when seized of the proceedings, should have declined to exercise jurisdiction because the Brazilian court was seized-first. Given the statement of facts, we know that the Brazilian judgment was not rendered at the time the Mexican court would hypothetically have been seized of the motion to stay since the Mexican judgment was rendered first-in-time....

application of art. 3137 in this case would be to exclude recognition of a foreign judgment on the basis of *lis pendens*, contrary to the result of applying the Code's provision on international *res judicata*.

Article 3137 could also be invoked within the application of the provision on international *res judicata*. Take the case where the Brazilian judgment was brought to Québec for enforcement. Under the above scenario, the Mexican judgment would appear to pose a bar to recognition of the Brazilian judgment under art. 3155(4). However, that provision requires that the earlier foreign judgment invoked (the Mexican judgment) be itself recognizable in accordance with Québec law. This again invites a consideration of jurisdictional appropriateness and the application of 3137 via the mirror principle of 3164. Following the previous analysis, the application of 3137 would deny any effect to the Mexican judgment. Unlike the previous case, however, the application of art. 3137 in this case would have the indirect effect of allowing another foreign judgment to be recognized, here the Brazilian judgment.

Both of these examples demonstrate how it is possible to conceive of a role for art. 3137 in response to the multiplicity of foreign judgments within a recognition context. Still, it is odd that the same principle, *lis pendens*, can lead both to the recognition and the exclusion of the same judgment. I can see two explanations for this situation. Either the reference to art. 3137 is not reasonable or rational in the context of recognition and enforcement, or art. 3155(4) is simply poorly drafted. Since my ultimate goal is to advance the first argument, let me begin by considering the second one.

Article 3155(4) could be said to be poorly drafted if it failed to resolve the very problem that it is meant to address. The problem in question is that of competing foreign judgments. The question is which one to recognize. The answer is, apparently, the first-in-time. To the further question, "but what if the court to render judgment first was not the first-seized?" the answer, under that provision, is that it doesn't matter; the race to judgment is the only one that counts. Yet this answer is somewhat unsatisfactory because the secondary question does matter if the court first-seized was a Québec court. As explained previously, in such a case, even if the competing judgment was rendered first, it will lose its battle against the home team. As between two foreign judgments, the same solution could be achieved by allowing article 3137 into the discussion, following the reasoning outlined above. Of course an alternative way to achieve the same result is simply to use analogical reasoning. In other words, a court faced with the situation described above could answer the ambiguity in art. 3155(4) by analogy and adopt the standard applicable were a Québec court involved. This conclusion is a discrete one that does not interfere with the general principle of recognition or with the notion of jurisdiction. This approach is preferable to one that requires a rather convoluted recourse to article 3137, to which I would object in principle for the reasons that follow.

I suggested in the previous section on *forum non conveniens* that the reflection from the mirror principle in article 3164 should not include article 3135, despite the general reference in art. 3164 to "Title Three". My argument

is essentially the same for *lis alibi pendens* although here it is reinforced, I believe, by the presence of art. 3155(4) which makes any appeal to art. 3137 at the recognition stage either redundant or unnecessary, as argued above. The similarity with the *forum non conveniens* point is that *lis alibi pendens* is also a technique that applies to challenge the *exercise* and not the *establishment* of jurisdiction. As with the former, there is an acknowledgement that both jurisdictions seized of the dispute are equally competent to adjudicate upon it. The technique is merely one that avoids the multiplicity of proceedings and the problem of potentially contradictory results. Given this context, it seems to me that there is little justification for refusing to recognize the legitimacy of the foreign court's exercise of its jurisdiction if that jurisdiction satisfies the connections outlined in the Civil Code of Québec. Indeed, to refuse to do so seems to me to undermine the legitimacy of the connecting factors adopted in the Civil Code. Submitting the foreign jurisdictional enquiry to the discretionary mechanisms of either *forum non conveniens* or *lis alibi pendens* goes against both the spirit of the recognition principle in the Code and the structure of jurisdictional rules established in the Code.

2. *More narrowing of the reflection*

In Part A, I discussed the structure of the Civil Code's provisions on jurisdiction of foreign courts. I explained how the introductory provision, art. 3164, sets out the general principle of reciprocity — the mirror — to which it ads the "substantial connection" requirement. The four remaining provisions in Title Four provide specific rules governing the evaluation of foreign jurisdiction for the purpose of recognition of foreign judgments. One facet of the argument I presented in Part A is that these specific rules are not to be supplemented by the mirror principle. This is the case because each specific rule: (i) is already more generous than what the mirror would reflect,[70] (ii) is a mere repetition of the corresponding rule for Québec jurisdiction,[71] or (iii) is expressly more limited than the corresponding rule for Québec courts.[72]

In this section, I would like to explore these conclusions further in terms of their continued application in relation to the general jurisdictional grounds listed in Chapter I of Title III. To recall, these are the exceptional jurisdictional bases that will allow a Québec court to hear a case even though it would not normally be competent to do so.

The first case, under art. 3136 C.C.Q., establishes jurisdiction based on necessity, where it is not possible or reasonable to expect the plaintiff to sue elsewhere. For this provision to apply, however, there must be a "sufficient

[70] See *supra* Part A, section 1.

[71] See *supra* Part A, section 2.

[72] See *supra* Part A, section 3.

connection with Québec".[73] Yet for the mirror principle to apply, there must be a *substantial* connection between the dispute and the rendering jurisdiction. Given that art. 3136 assumes that the links with Québec do not meet any of the existing jurisdictional grounds, whether the general domiciliary rule or any of the specific bases, it is rather difficult to imagine a situation where the *sufficient* connection required to invoke the necessity jurisdiction will ever satisfy the *substantial* connection required under the reciprocity rule. In addition, if foreign jurisdiction based on necessity relates to a personal claim of a patrimonial nature, the judgment-creditor seeking enforcement in Québec will be confronted with art. 3168. As argued in Part A above, this article appears to provide an exhaustive list of admitted jurisdictional bases in such circumstances. Recognition of necessity jurisdiction exercised by a foreign court does not seem likely under the current language of the Civil Code in Title Four.

The second exceptional jurisdictional basis in Chapter I of Title III exists for provisional or conservatory measures where the Québec court is not otherwise competent to adjudicate on the merits of the dispute.[74] Here, the challenge to the reciprocity principle rests with the nature of such measures. One example is the freezing of assets to avoid dilapidation during litigation.[75] Since this measure would relate to assets within the territorial jurisdiction of the rendering court, there is no real possibility of "foreign enforcement" of the judgment. If the measure is in the nature of an interim injunction to do or not to do something, the question then turns to whether any court actually is competent to make such orders with an extra-territorial effect.[76] Unless the injunction is meant to have that effect, it is difficult to imagine any attempt to have it recognized or enforced elsewhere. The anti-suit injunction is perhaps the main example of such an order but it is rather difficult to fit it within the notion of a "provisional" measure since its purpose is to put an end to

---

[73] Courts in Québec have interpreted this provision restrictively, refusing to find in it a *forum conveniens* discretion. See for e.g. *Lamborghini (Canada) Inc.* v. *Automobili Lamborghini S.P.A.*, [1997] R.J.Q. 58 (C.A.) at 69.

[74] See Glenn, *Droit international privé*, *supra* note 8 at 747, who mentions seizure or freezing of assets as an example of such measures.

[75] See for example: *Ronald J. Fox (f.a.s. Aero Stock)* v. *DDH Aviation inc.*, [2001] J.Q. 5634 (Que. S.C.) rev'd [2002] Q.J. No. 2119.

[76] See for example *Martin* v. *Espinhal*, [2001] J.Q. 2282 (Que. S.C.) where the court declared null a writ of seizure before judgment targeting property in Portugal. The facts in *Hunt* may appear relevant here since they concerned an order for discovery by a B.C. court which a Québec defendant was challenging on the basis of a contrary order of non-disclosure by a Québec court. The question was not, however, whether the Québec court was obliged to recognize and give effect to the B.C. order; rather, it was whether Québec legislation could provide a valid defense to such an order. The Supreme Court answered in the negative, holding that the Québec legislation violated the *Morguard* principle by impeding litigation appropriately before a B.C. court. See also the Uniform Enforcement of Canadian Decrees Act, adopted by the Uniform Law Conference in 1997, which provides for enforcement of certain interim and provisional orders: available online at www.ulcc.ca.

foreign proceedings.[77] Moreover, such injunctions are normally issued against parties who are within the jurisdiction of the court, since their mode of enforcement is by way of contempt of court. This suggests that art. 3138 C.C.Q. is inapplicable to anti-suit injunctions in so far as it is premised on the absence of jurisdiction of the Québec court. Again, what this discussion indicates is the lack of coherence that is revealed from closer scrutiny of the general statement that the mirror principle in article 3164 includes a reference to the general provisions in Chapter I of Title III.

The same point can be made with respect to the jurisdiction of Québec courts under art. 3140. In this instance, this exceptional jurisdictional basis seeks to protect people or property situated in Québec. Typically, this provision has been used by Québec courts to issue temporary custody or access orders in the absence of such orders by the foreign court seized or to be seized of the matter.[78] From the perspective of recognition, one would not expect a Québec court to be bound by such an interim order made by a foreign court — indeed, the fact that the foreign court sent the parties to Québec justifies giving that court full latitude to issue its own interim order.

Lastly, Québec courts can sometimes exercise jurisdiction over a party over whom they would not normally be competent because of the a link to a defendant properly within the jurisdiction of the court. This is provided by article 3139 and covers incidental and cross demands. The latter instance is certainly justified since a defendant, in acting as plaintiff, has implicitly submitted to the jurisdiction of the court. Incidental demands have been held to include claims in warranty against third parties and have constituted the bulk of decided cases under this head.[79] In several cases, Québec have allowed jurisdiction based on article 3139 C.C.Q. to supersede a forum selection clause or arbitration clause between the relevant parties,[80] arguing that the resolution of the dispute between those parties was so closely related to the main action that forced joinder of the third parties was essential for fairness to all the parties.[81] In a recognition context, how would similar jurisdiction exercised by a foreign court be considered in Québec under Title IV?

The first obstacle flows from the limitative language of article 3168, if the foreign decision is patrimonial in nature (which it was in all of the Québec cases

---

[77] Indeed, the few cases where such injunctions are discussed do not base it on art. 3138 C.C.Q. but rather on the general power of superior courts to grant injunctions under art. 758 C.C.P. See for example the discussion in *J.C.* v. *N.P.*, [1996] R.J.Q. 1010. But see Goldstein & Groffier, *supra* note 8 at 33, who suggest that art. 3138 C.C.Q. covers this type of injunction.

[78] See for example *L.B.* v. *H.D.S.*, [1999] A.Q. no. 4505 (Que. C.A.).

[79] See *Guns n' Roses Missouri Storm Inc.* v. *Productions musicales Donald K. Donald inc*, [1994] R.J.Q. 1183 (Que. C.A.), *Intergaz* v. *Atlas Copco*. [1997] A.Q. no. 3932 (Que. S.C.), *Al-Kishtaini* v. *Yesrasien Investments*, [1998] A.Q. no. 498, (Que. S.C.), *Crestar Ltée* v. *Canadian National Railway Co.*, [1999] R.J.Q. 1191 (Que. S.C.).

[80] See for example *Guns' N Roses* (arbitration clause), *ibid.*, *Crestar* v. *CNR*, *ibid.* and *Intergaz* v. *Atlas Costco*, *ibid.* (both forum selection clauses).

[81] In particular, the courts expressed concern that contradictory judgments could result if the forum selection clause or the arbitration clause allowed the defendant in warranty to avoid the jurisdiction of the Québec court: see cases listed *ibid.*

based on art. 3139). As noted above, the admitted jurisdictional bases for such instances are *only* those listed in article 3168. A court would have to disregard this in order to reach for art. 3139 via the mirror principle of article 3164. Even it this were possible, the requirement that the dispute have been "substantially connected with the *country*"[82] would still have to be met. Compared to the fairness arguments used in the Québec context, the decidedly "geographic" connections expected under art. 3164 are certainly more onerous. An additional barrier, if the Québec cases are typical, will come from art. 3165 and the non-recognition of foreign jurisdiction exercised in violation of a forum selection or arbitration clause. Admittedly, even in the face of similar language in art. 3148, Québec courts have not hesitated to give precedence to art. 3139. If reciprocity is the guiding principle, one would expect the same result in the recognition context. Much of the discussion in this paper has suggested, however, that reciprocity is not as broad as the opening provision of Chapter II, Title Four, would lead to believe. Reference to reciprocity as an interpretative tool may overextend its intended reach.

This review leads me to conclude that the mirror reference to Title Three in art. 3164 has a rather limited effect. First, it should only apply to cases that do not fall within the scope of art. 3168 — which includes the whole of the law of obligations — or within the limited purview of articles 3166 (filiation) and 3167 (divorce). Second, even where the mirror principle is applicable, it can only have the effect of *broadening* the scope of recognition, that is, by importing into Chapter II, Title Four, those exceptional jurisdictional grounds that can be exercised in circumstances of necessity or urgency and perhaps for incidental actions too. Even with reference to those jurisdictional grounds, the nature of the proceedings involved and the conditions for recognition make necessity and emergency generally unlikely candidates for the application of the mirror principle. Otherwise, the exclusion of the *narrowing* effect of *lis alibi pendens* and *forum non conveniens* obtains because these deal with the discretion to exercise jurisdiction and not the question of jurisdiction *simpliciter*. Moreover, with respect to *lis alibi pendens*, a reference to this notion in the context of recognition is either impossible or meaningless given the substance of the rule itself.

For those who had hoped to see in the mirror principle an additional tool for jurisdictional review in the recognition context, they may need to look elsewhere. The most promising avenue for decisions within Canada lies in the constitutional principle from *Morguard* and *Hunt*. In terms of truly foreign cases, however, the landscape is much murkier. I now turn to consider these two dimensions of the recognition question in Québec private international law.

III. *The Constitutional Dimension*

Ten years ago, the Supreme Court of Canada changed the common law rules on recognition of foreign judgments in the *Morguard* case. Three years later, in *Hunt*, it declared the new regime to be constitutionally mandated in a case

[82] Art. 3164 (my emphasis).

dealing with Québec's *Business Records Act*. While these two decisions have had a substantial impact on interprovincial and international litigation in this country, their full effect remains to be felt, particularly in Québec.

Prior to the Supreme Court's decisions in *Morguard* and *Hunt*, the constitutional dimensions of private international law had been raised in the literature but not before the courts.[83] The only apparent exception is mentioned by La Forest in *Morguard* where he refers to a single case, a lower court decision from Québec, to support his constitutional argument.[84] One could add that the only reason a constitutional question was asked in *Hunt* was because of the invitation to do so made in *Morguard*. Clearly, Canadian lawyers were not prepared to frame the issues in that light prior to *Hunt*.

This resistance may lie in the complexity and sometimes apparent incoherence of the applicable constitutional law. Indeed, the body of cases defining territorial limitations on provincial legislative competence leaves much to be desired.[85] In his basic text, Peter Hogg notes this difficulty as it relates to the subject of our inquiry:

> As the words « in the province » [in s 92] emphasize, the service *ex juris* rules must not exceed the territorial limit on provincial legislative power. It is not clear what that limit is.[86]

Confronted with such uncertainty, and the absence of any direct precedent, it may not be surprising that counsel would avoid the constitutional argument. It is telling that the lower courts in *Morguard* made no such argument.[87] However, this conclusion is unconvincing, as creative lawyers rarely let unclear or lack of precedent stand in the way of innovative arguments. The answer is more likely to be that the absence of a full-faith and credit clause or of a property-protecting due process clause in the Canadian constitution (both of which define recognition and jurisdictional rules in the U.S.)[88] was seen as an insurmountable obstacle, notwithstanding the existing doctrinal support. Only once the door was opened

---

[83] The existing literature was obviously instrumental in shaping the Court's unanimous findings in both *Morguard* and *Hunt*, as the numerous references in those cases amply demonstrate.

[84] The case was *Dupont* c. *Taronga Holdings Ltd.*, [1986] 49 D.L.R. (4th) 335 (Que. Sup. Ct.). And even there, the extracted passage is a direct quote from Hogg!

[85] See V. Black, "The Other Side of Morguard: New Limits on Judicial Jurisdiction" (1993) 22 Can. Bus. L.J. 4. at 17 ("Even if we confine ourselves to s. 92, we must acknowledge that in 80 years of trying, Canadian courts have yet to work out an accepted approach to the territorial limitation in s. 92(13)").

[86] P. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1996) at 282 (emphasis added).

[87] Moreover, the written arguments submitted by counsel to the Supreme Court do not propose an argument of full faith and credit. See the appellant's and respondents' facta, available from the Supreme Court archives.

[88] See generally E.F. Scoles et al., *Conflict of Laws*, 3rd ed. (St-Paul, Minn.: West, 2000) at 1139 and ssq.

in *Morguard* could the argument be presented that a constitutionally mandated recognition rule was implicit in the federal structure of the country.

Once the Court rendered its decision in *Hunt*, however, the constitutional argument became available and one may well have expected it to take flight and engender all sorts of novel arguments to either enhance or limit legislative competence, federal or provincial, in private international law. As Edinger stated in her 1995 examination of the case:

> All the constitutional possibilities raised by scholars commenting on *Morguard* are now reality, and the application of the *Morguard* principles in *Hunt* demonstrates their potency and their potential.[89]

Judicial consideration of these points has been slow but recent appellate decisions in B.C. and Ontario may herald a new era![90] Progress in Québec has not yet reached the appellate level but at least one Superior Court judge has faced a *Morguard/Hunt* challenge to Book Ten of the Québec Civil Code.[91]

---

[89] E. Edinger, "The Constitutionalization of the Conflict of Laws" (1995) 25 C.B.L.J. 38 at 58.

[90] See the "quintet" of cases lead by *Muscutt* v. *Courcelles*, *supra* note 49, *Sinclair* v. *Cracker Barrel Old Country Store Inc.*, (2002), 213 D.L.R. (4th) 643 (Ont. C.A.), *Leufkens.* v. *Alba Tours Int'l Inc.* (2002), 213 D.L.R. (4th) 614, *Lemmex* v. *Sunflight Holidays Inc.* (2002), 213 D.L.R. (4th) 627 (Ont. C.A.) and *Gajraj* v. *DeBernardo* (2002), 213 D.L.R. (4th) 651 (Ont. C.A.). All of these cases concerned the assertion of jurisdiction over out-of-province defendants in proceedings concerning damage sustained in Ontario as a result of a tort committed abroad. Defendants in *Muscutt* and *Sinclair* challenged the constitutionality of Rule 17.02(h) of the Ontario Rules of Court that allows for service *ex juris* in such cases. Writing for the Court, Sharpe J.A. rejected this claim, holding that the rules of service did not themselves *confer* plain jurisdiction and were therefore not subject to constitutional review. These rules are merely "part of a procedural scheme that operates within the limits of the real and substantial connection test." (*Muscutt*, *ibid.* at para. 50). In the B.C. case of *Teja* v. *Rai* (2002) 209 D.L.R. (4th) 148 (B.C.C.A., the Court of Appeal read *Morguard* as "having been developed for non-traditional situations, to take account of constitutional limits on a court's reach... I do not see it as establishing a new test that overrides the traditional tests." (*Teja*, *ibid.* at para. 23).

[91] See *Habberfield Estate* v. *Propair Inc.*, [2000] Q.J. no. 5955 (leave to appeal denied 2001-02-02). Following a airline crash in Québec, the estate of one Québec victim sued the airline Propair, who then called into warranty a number of defendants including the alleged manufacturer (together the "Fairchild defendants"). These defendants challenged the validity of art. 3148(3) on the basis that it did not specifically require the presence of a real and substantial connection and on the grounds that jurisdiction in this case would be *ultra vires* for reasons of extra-territoriality. The Superior Court rejected both arguments. On the first claim, the judge held that "the legislative intent was that establishing a single circumstance or condition provided in paragraph (3) of article 3148 C.c. would suffice to demonstrate a real and substantial connection for jurisdictional purposes" (at para. 20). On the second claim, the judge held that jurisdiction was appropriate because there was a sufficiently "substantial connection between defendant and forum" such as to respect the requirements of order and fairness applicable by analogy from *Morguard*. (at paras 21-27). It is interesting to note that the court answered the extra-territoriality argument by appealing to the *Morguard* principle.

In its simplest expression, the "rule" announced by *Hunt* is rather clear: provinces are required to give effect to judicial decisions rendered in another province so long as the rendering province exercised its jurisdiction appropriately. The "constitutional" dimension of the rule means that no province can legislate to limit this rule of recognition, that is, by requiring more than appropriate original jurisdiction as a condition precedent for giving effect to the out-of-province decision. The key, therefore, is the notion of appropriate jurisdiction, which, characteristically, the Supreme Court has chosen not to define concretely. Instead, it refers to two guiding principles, "order and fairness" which are to direct courts in their jurisdictional assessment.

What is the basis for the constitutional nature of the rule? There are three possibilities: it may follow from traditional division of powers, it may flow from a Charter provision or it may derive from a third source. Of course, this third option would not normally be expected since limitations on provincial powers are usually confined to the two first-enumerated sources. The most common view is that *Morguard/Hunt* is in fact an example of the third source although it is not neatly distinguished from the first and is not clearly related to the second.[92]

The passages from these two cases that set out the constitutional argument are well known but bear repeating here. In fact, most of the argument in *Hunt* consists of long quotes from the reasons in *Morguard*, thereby confirming the single thread of the argument.

In *Morguard*, La Forest J. speaking for a unanimous court, made the following statement:

> ...[T]he English rules seem to me to fly in the face of the obvious intention of the Constitution to create a single country. This presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction. A common citizenship ensured the mobility of Canadians across provincial lines, a position reinforced today by s. 6 of the Canadian Charter of Rights and Freedoms. In particular, significant steps were taken to foster economic integration. One of the central features of the constitutional arrangements incorporated in the Constitution Act, 1867 was the creation of a common market. Barriers to interprovincial trade were removed by s. 121. Generally trade and commerce between the provinces was seen to be a matter of concern to the country as a whole; see Constitution Act, 1867, s. 91(2). The Peace, Order and Good Government clause gives the federal Parliament powers to deal with interprovincial activities. And the combined effect of s. 91(29) and s. 92(10) does the same for interprovincial works and undertakings.
>
> These arrangements themselves speak to the strong need for the enforcement throughout the country of judgments given in one province. But that is not all. The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges — who also have superintending control over other provincial courts and tribunals — are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada, which can determine when the courts of one

[92] See V. Black & W. Mackay, "Constitutional Alchemy in the Supreme Court: *Hunt* v. *T&N plc*" (1995) 5 N.J.C.L. 79; C. Walsh, *Hunt* v. *T&N plc* Case-Comment, (1994) 73 Can. Bar Rev. 394 and Castel & Walker, *Canadian Conflict of Laws*, *supra* note 50 at 2.2.

> province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments. Any danger resulting from unfair procedure is further avoided by sub-constitutional factors, such as for example the fact that Canadian lawyers adhere to the same code of ethics throughout Canada. In fact, since *Black* v. *Law Society of Alberta*, we have seen a proliferation of interprovincial law firms.
>
> These various constitutional and sub-constitutional arrangements and practices make unnecessary a "full faith and credit" clause such as exists in other federations, such as the United States and Australia. The existence of these clauses, however, does indicate that a regime of mutual recognition of judgments across the country is inherent in a federation. Indeed, the European Economic Community has determined that such a feature flows naturally from a common market, even without political integration. To that end its members have entered into the 1968 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.[93]

And in *Hunt*,

> *Morguard* was not argued in constitutional terms, so it was sufficient there to infuse the constitutional considerations into the rules that might otherwise have governed issues of enforcement and recognition of judgment. But the issue was very clearly raised in this case and in fact a constitutional question was framed. Now, as perusal of the last cited passage from *Morguard* reveals, the constitutional considerations raised are just that. They are constitutional imperatives, and as such apply to the provincial legislatures as well as to the courts. In short, to use the expressions employed in *Morguard*, at p. 1100, the "integrating character of our constitutional arrangements as they apply to interprovincial mobility" calls for the courts in each province to give "full faith and credit" to the judgments of the courts of sister provinces. This, as also noted in *Morguard*, is inherent in the structure of the Canadian federation, and, as such, is beyond the power of provincial legislatures to override. This does not mean, however, that a province is debarred from enacting any legislation that may have some effect on litigation in other provinces or indeed from enacting legislation respecting modalities for recognition of judgments of other provinces. But it does mean that it must respect the minimum standards of order and fairness addressed in *Morguard*.[94]

The *sui generis* nature of the *Morguard/Hunt* constitutional principle rests on these quoted passages. Indeed, the principle appears as a self-standing constitutional principle that has a limited purpose and scope of application but which, because of its status, can suffer no exception by way of legislative amendment.

The specificity of this constitutional principle is further revealed in other parts of the judgments. For example, the following passage from *Hunt* indicates that the so-called "*Morguard* principle" is different from a traditional territorial limitation on provincial competence:

> In view of the fact that I have found the impugned Act constitutionally inapplicable because it offends against the principles enunciated in *Morguard*, it becomes unnecessary for me to consider whether it is wholly unconstitutional because, in pith and substance, it relates to a matter outside the province... I would answer the

---

[93] *Morguard, supra* note 3 at 1099-1100 (footnotes omitted).

[94] *Hunt, supra* note 3 at 324 (footnotes omitted).

> constitutional question by saying that the Act should be read as not applying to the provinces since such application would be ultra vires under the constitutional principle set forth in the *Morguard* case.[95]

This passage unequivocally indicates that a provincial statute can violate the constitutional principle of *Morguard* without necessarily having to be *ultra vires* the provincial legislature in the traditional sense. In other words, whether or not legislation would pass the pith and substance test, it could still be invalid or inapplicable based on the *Morguard* principle.[96]

Commentators who had doubted—or cautioned against—the constitutional potential of the recognition rule in *Morguard* have all had to concede that *Hunt* has had that effect.[97] There is thus no disputing that the constitutional impact of *Morguard/Hunt* is inescapable within Canada. Whenever a provincial judgment is brought before another province's court for enforcement, the full-faith and credit obligation will require that the decision be given effect.[98] Within the national context, the "foreignness" of the provinces toward each other has been formally rejected.[99] Beyond this, however, it remains to be seen whether as between Alberta and Minnesota, Québec and Germany, or any such combination, the relationship is still between "foreign sovereigns" for the purposes of private international law. In other words, the question becomes whether each province should continue to be treated as a distinct jurisdiction or "state" when it comes to truly international litigation? An argument can be made to support that view. Before attempting to answer that question, I will consider the impact of the constitutional point for Québec law.

A. *The impact of Morguard/Hunt on Book Ten of the Québec Civil Code*

I have yet to see a reported decision from Québec where the Morguard/Hunt constitutional principle was invoked to challenge the validity of a provision of the Québec Civil Code dealing with recognition of foreign judgments.[100] This

---

[95] *Ibid.* at 331-32 (emphasis added).

[96] In fact, there is substantial overlap between the so-called *Morguard* principle and traditional territorial limitations on provincial powers. It is quite unlikely that legislation meeting one test could fail the other, and vice-versa. This position is suggested by other passages in *Hunt* and *Morguard* which point to the difficulty of untangling the two approaches.

[97] For example, compare E. Edinger, "*Morguard* v. *De Savoye*: Subsequent Developments" (1993), 22 C.B.L.J. 29 at 57 with Edinger, "The Constitutionalization of the Conflict of Laws", *supra* note 89 at 52 and ff; compare H.P. Glenn, "Foreign Judgments, the Common Law and the Constitution" (1992) 37 McGill L.J. 537 at 541-42 with Glenn, "Codification of Private International Law in Québec", *supra* note 8 at 252-53.

[98] Assuming, of course, that the rendering court had properly exercised jurisdiction in the first place.

[99] For other implications deriving from this conclusion see J. Walker, "Interprovincial Sovereign Immunity Revisited" (1997) 35 Osgoode Hall L.J. 379.

[100] As noted above, *supra* note 22, the plaintiff in *Worthington Corp.* v. *Atlas Turner Inc.* has indicated, in its statement of claim, that this argument will be put to the court. Until now, however, this has not taken place.

may be because the existing codal provisions already embody the *Morguard/Hunt* principle or simply because the right case has not yet come along. A brief consideration of the first explanation should confirm that the latter is more likely to be the true cause.

Article 3165 provides the most fertile ground for an inquiry into the constitutionality of the recognition scheme in the Civil Code of Québec. Indeed, the notion of exclusive jurisdiction at the heart of art. 3165 does not sit well with the *Morguard/Hunt* criteria of "real and substantial connection". This follows because the nature of exclusive jurisdiction is such as to deny the appropriateness of any other connection, regardless of how relevant that connection may be in any given case. On its face, therefore, the concept of exclusivity seems problematic and susceptible to a constitutional challenge.

As discussed in the previous part, the Civil Code of Québec does not set forth many exclusive jurisdictional grounds for recognition purposes. The most obvious, and notorious, is article 3151 C.C.Q., which grants Québec courts exclusive jurisdiction to adjudicate civil liability claims based on "exposure to...raw materials, whether processed or not, originating in Québec."[101] Any foreign court granting judgment on such a claim could not be enforced in Québec, unless the judgment-creditor was able to avoid the jurisdictional bar imposed by the C.C.Q. It is surely only a matter of time before this situation presents itself. The prospects are rather glum for the Québec defendant, as many commentators suggest that the protective provisions may fail to exclude the recognition of a provincial judgment if the link to the adjudicating province meets the *Morguard/Hunt* requirement of a real and substantial connection.[102]

Such a conclusion does not, however, lead to the conclusion that the impugned provisions are unconstitutional and must be struck out. Instead, and this is what occurred in *Hunt*, any contradiction with the *Morguard/Hunt* principle should lead to a declaration of inoperability. This conclusion is important since the provisions remain alive and potentially applicable in a different situation such as in the international context. Again, this is exactly the result that obtained in *Hunt* and upon which the Supreme Court refused to pronounce, that is, on the implications of inoperability within Canada to the truly transnational plane.

In any event, inoperability is probably more appropriate since it is not the case that the relevant provisions of the C.c.Q. will transgress the *Morguard/Hunt* rule in every case. Indeed, if all of the connections are otherwise with Québec save for the residence of the plaintiff, for example, and absent other compelling factors, it is unlikely that any other province would meet the "real and substantial connection" test. On the other hand, since it is the *exclusive*

[101] British Columbia has similar blocking provisions: *Court Order Enforcement Act*, R.S.B.C. 1996, ch. 78, s. 40.

[102] See Goldstein & Groffier, *supra* note 8 at 455; Glenn, *supra* note 8 at 757; Talpis, *If I'm from Grandmère, Why am I being Sued in Texas?*, *supra* note 52 at 119.

character of the jurisdictional criterion that is problematic, there is really little role for it to play in the Canadian context.

Wholesale rejection of exclusive jurisdiction is unwise however. Indeed, why should exclusivity resulting from forum selection clauses or arbitration clauses not be admitted? Though *Morguard/Hunt* posits no exceptions to the real and substantial connection test, it seems obvious that the lack of such a connection will not bar recognition of a judgment by a court designated by the parties in an otherwise valid forum selection clause.[103] Where article 3165 C.c.Q. grants exclusive jurisdiction to such designated jurisdictions, it would be surprising to find a challenge based on the *Morguard/Hunt* principle and this whether the rendering court was the originally designated court or another court that took jurisdiction despite the forum selection clause. Nor is *Morguard/Hunt* unlikely to play a role with respect to arbitration since it is largely regulated by international conventions within Canada.

In other cases where jurisdiction is attached to a single connection, such as for immovables and child custody,[104] it is less clear how the *Morguard/Hunt* principle would apply. The common law origins of the *Morguard* case and language in the decision suggest that exclusivity in traditional spheres may remain legitimate. The extent to which such findings can be integrated within the civil law regime in Québec remains unexplored. While parties seeking enforcement in such cases may raise the constitutional challenge, there is very little guidance for its resolution in the Supreme Court jurisprudence.

Some have seen echoes of the *Morguard/Hunt* principle in the Civil Code itself: the substantial connection principle is embodied in the mirror principle of article 3164 C.C.Q. However, I have argued earlier that this caveat does not apply to the majority of foreign judgments for which recognition and enforcement is sought in Québec (money-judgments covered by art. 3168) and that it most definitely does not apply to exclusive jurisdiction under article 3165. Even for the remaining cases, however, it must be recalled that the substantial connection requirement under art. 3164 serves to limit the mirror principle, not to extend it. A constitutional challenge in a recognition case will always have the opposite effect since it is the recognition-seeking plaintiff who will be trying to avoid the narrow jurisdictional grounds admitted under the Civil Code in order to benefit from the broader *Morguard/Hunt* principle.

The explanation for the lack of case law in Québec on this issue cannot come from the lack of opportunity for constitutional challenge. Since success is more

[103] See *Teja* v. *Rai*, *supra* note 90, for a discussion of the application of the *Morguard/Hunt* rule to traditional jurisdictional bases such as voluntary submission.

[104] Jurisdiction over real rights in property is reserved to the jurisdiction of the location of the property (3152) while child custody can ostensibly only be determined by the court of the child's domicile (3142 C.C.Q.). Article 3142 must be read in conjunction with 3143 regarding separation of spouses and which carries with it the corollary custody claim, all of which can be brought before the court of either spouse's residence; in addition, within Canada, jurisdiction under the *Divorce Act* allows custody to be determined by the courts of the province of either spouse's ordinary residence (see s. 3).

likely in the asbestos field, I expect the first case to arise in that area. In the Canadian context, however, the issue will probably be raised in the jurisdictional context, with a defendant seeking to avoid jurisdiction in another province by invoking the exclusive jurisdiction of Québec courts.[105] As in *Hunt*, this would open the door to a constitutional challenge against the Québec provisions on jurisdiction, with unavoidable consequences for recognition and enforcement.[106]

Recent appellate decisions from Ontario indicate that this conclusion may be peculiar to Québec. In what will clearly become a leading case,[107] the Ontario Court of Appeal in *Muscutt* v. *Courcelles* confronted an argument that its rules governing service *ex juris* could be *ultra vires* the province, in violation of the *Morguard/Hunt* principles of international jurisdiction.[108] In rejecting this claim, Sharpe J.A. held that these rules of service were merely procedural, the substantive source of jurisdiction being instead the "real and substantial connection", constitutionally imposed by *Morguard/Hunt*. This characterization means that because jurisdiction is not conferred by the rules of service themselves, they are shielded from constitutional scrutiny. Instead of being subject to review, these rules are rather to be interpreted and applied in accordance with the *Morguard/Hunt* principles, that is, "in light of the constitutional principles of 'order and fairness' and 'real and substantial connection'."[109] While the full extent of this conclusion remains to be considered, it is unlikely to be relevant in Québec, where the jurisdictional rules contained in the Civil Code are certainly substantive in nature. This distinction signals a potentially different approach to constitutional challenges of Québec private international law, whether before Québec courts or elsewhere in the country.[110]

---

[105] In *Bushell* c. *T & N plc*, [1991] 60 B.C.L.R. (2d) 294 (B.C. S.C.), the B.C. court expressly rejected any argument that Québec law could have the effect of determining the B.C. court's jurisdiction over a Québec defendant. At the time, Québec law included provisions that had the same effect as 3151 and 3165 C.C.Q. See Glenn, "La guerre de l'amiante", *supra* note 22.

[106] So far, asbestos litigation in Canada does not seem to have given rise to this argument. Within the enormous Hunt litigation, challenges to B.C. jurisdiction were essentially based on *forum non conveniens* arguments: see *Bushell*, *ibid.*. But language in *Hunt* does foresee this and suggests that jurisdiction outside Québec would be appropriate: *Hunt* at 315-16.

[107] The framework for evaluating jurisdiction set up by Sharpe J.A. has already been applied by analogy in a case concerning an employment contract: *Hodnett* v. *Taylor Manufacturing Industries Inc.*, [2002] O.J. no 2281.

[108] *Muscutt* v. *Courcelles*, *supra* note 49. This appeal was heard along with four others on the question of jurisdiction over out-of-province defendants in cases concerning damages sustained in Ontario from torts committed abroad. The constitutional argument was made in only two of those cases: *Muscutt*, *ibid.* and *Sinclair*, *supra* note 90.

[109] *Muscutt*, *ibid.* at para. 48-49.

[110] Recall that in *Hunt*, the constitutionality of a Québec statute was raised before the B.C. court and its inoperability was confirmed by the Supreme Court, thereby opening the door to extra-provincial constitutional challenges.

Apart from this last point, the future course of *Morguard/Hunt* appears reasonably predictable, within Canada, at least from the standpoint of recognition and enforcement. From the perspective of the Civil Code of Québec, the exact implications of the constitutional "full-faith and credit" principle remain undetermined but there is little doubt that the recognition regime is at least subject to that overriding principle. The same cannot be said of the truly international situation.

B. *Morguard/Hunt in the International Arena*

Having determined that *Morguard/Hunt* imposes constitutional constraints on recognition and enforcement within Canada, the next question is whether it has any similar effect outside of the country. If not, it remains to be determined how other constitutional limitations operate in the recognition context, under the regime of the Civil Code of Québec.

The first point to make is that the constitutional limits flowing from the *Morguard/Hunt* principle are only effective within the national context, that is, in interprovincial situations. The second is that if there is no federal competence over private international law, then it would seem to follow that provinces must have the power to legislate with extra-territorial effect in relation to other States in the area of private international law. I will consider each of these points in turn. The upshot would be the existence of two sets of rules after *Morguard/Hunt*: one set for interprovincial cases and one set for international cases.

1. *Morguard/Hunt* is not binding internationally

The first claim is relatively straightforward. Since the full-faith and credit obligation flows from the federal nature of the country, it can only compel recognition of decisions emanating from other provinces. There can be no similar obligation attaching to decisions rendered by truly foreign courts since these courts are obviously not part of the Canadian federation.

This is not to say that the recognition principle from *Morguard* cannot be applied to these judgments. On the contrary, in Canadian common law provinces, it is now generally admitted that the *Morguard* recognition rule should be extended to these judgments. The reasons for this were clearly exposed in one of the early cases to apply the *Morguard* principle to an American judgment. In the pre-*Hunt* case of *Moses* v. *Shore Boat Builders*, the B.C. Court of Appeal drew the following conclusion in considering whether the B.C. court should enforce an Alaska judgment:

> In summary, the judgment of the Supreme Court of Canada in *Morguard*, supra, offers substantial reasons to extend the real and substantial connection test to the enforcement of foreign judgments. The principles of *Emanuel* v. *Symon* are out of keeping with the modern understanding of the principle of comity. Modern rules of international law

> must accommodate the flow of wealth, skills and people across state lines and promote international commerce.[111]

This interpretation of *Morguard* has been adopted throughout the country every since, with little resistance from the judiciary[112] or commentators.[113] The Supreme Court's subsequent decision in *Hunt* had little if no impact on this development. As noted by Edinger, there is no contradiction between the extension of the rule to foreign decisions and its constitutional status within Canada.

> ...*Hunt* suggests further that the non-constitutionally mandated use to which the British Columbia courts have been putting the new *Morguard* recognition rule, namely, extending it to non-Canadian judgments, is correct.[114]

While the *Morguard* recognition rule may well be extended to truly international cases, it is clearly not binding on provinces who can choose to vary it by legislation.

The possibility of legislative derogation from the *Morguard* principle has not generally been exploited. While the Québec Civil Code has established a comprehensive scheme of rules governing recognition and enforcement of foreign judgments, it treats all non-Québec judgments on an equal footing.[115] In the common law provinces, most legislation in place concerns registration of foreign judgments, a matter that has been found not to be subject to the *Morguard* rule.[116] Only Saskatchewan, New Brunswick and British Columbia have statutes concerning enforcement, though the first two were adopted decades before the *Morguard/Hunt* decisions and are therefore not a response thereto.[117] The B.C. statute, on the other hand, represents an attempt to incorporate the *Morguard* principle within a recognition statute although it applies only to Canadian judgments.

---

[111] (1993), 106 D.L.R. (4th) 654 at 667.

[112] The case of *Evans Dodd* v. *Gambin Associates* is often mentioned as the one case where *Morguard* was not extended to an American case. The reason given was that it would be unfair to the defendant since the law had changed after the American decision was rendered. It should be noted that the decision was eventually reversed on appeal: *Evans Dodd* v. *Gambin Associates* (1994), 17 O.R. (3d) 803 (Gen. Div.), rev'd [1997] O.J. no. 1330 (C.A.).

[113] Although recent commentary suggests that it may be time for a review of the status quo. See for example J. Walker, "*Beals* v. *Saldanha*: Striking the Comity Balance Anew" (2002) 5 Cdn. Int. Lawyer 28 and G. Saumier, "What's in a Name: Lloyds, International Comity and Public Policy" (2002) C.B.L.J. (forthcoming).

[114] Edinger, "*The Constitutionalization of the Conflict of Laws*", *supra* note 89 at 64.

[115] See art. 3077: "Where a country comprises several territorial units having different legislative jurisdictions, each territorial unit is regarded as a country." The French version uses the term "État" (State) rather than "country".

[116] See generally Castel & Walker, *supra* note 50 at para. 14.12 and ssq.

[117] See Castel & Walker, *ibid.* at para. 14.12 and 14.15. *Foreign Judgments Act*, R.S.S. 1978, C. F-18, *Foreign Judgments Act*, R.S.N.B. 1973, c. F-19 and *Enforcement of Canadian Judgments Act*, R.S.B.C. 1996, c. 115 (not yet in force).

For interprovincial issues, the legislation, if applicable, must be interpreted to conform to *Morguard* or it will be held inapplicable in the Canadian context. For truly foreign cases, however, *Morguard* becomes irrelevant throughout the country either because in the common law provinces it is but a common law rule that is subject to derogation or amendment or because it has no effect in Québec, being a common law rule.

Setting aside the *Morguard* principle does not evacuate the constitutional question in the international context. Even though the full faith and credit obligation is due only to provincial judgments, recognition and enforcement rules applied to truly foreign decisions must still meet the traditional constitutional constraint imposed on provincial power: the extra-territorial limitation. Similarly, exercises of jurisdiction over international cases will still have to respect territorial restrictions. The key question thus becomes the definition and scope of that limitation.

2. *Extraterritorial Limitation on Provincial Law*

The traditional territorial limitation on provincial law is one that the Supreme Court has preferred to leave unexplored in this area. For example, in relation to the *Québec Business Concerns Records Act*, which the Supreme Court deemed constitutionally inapplicable to proceedings in British Columbia, the question arose whether it could apply in relation to proceedings before an American state. The Supreme Court expressly refused to answer this hypothetical question in *Hunt*. Commenting on this issue, Edinger concludes that a s. 92 analysis would quickly resolve the issue:

> Whatever one's opinion about the proper characterization of the object and purpose of the Act, it is highly improbable that the Act could be upheld as legislation in relation to property and civil rights in the Province of Québec after the Supreme Court of Canada in *Hunt* has described it as being aimed at litigation outside Québec. This is straight Churchill Falls analysis: the property regulated by the Act is in the province, but the Act is aimed at civil rights outside the province. Legislation aimed at civil rights outside a province is ultra vires.[118]

While this line of reasoning is certainly consonant with existing approaches to s. 92 analysis, it is problematic in the context of private international law.

It is not so simple to maintain that the *Churchill Falls* analysis easily applies to private international law for if it does, all provincial exercises of power in that field will be ultra vires. Indeed, the very nature of private international law is that it is directed, principally, at "rights" that are claimed to arise in foreign places, under foreign law. Any refusal to give effect to such rights will therefore necessarily involve extra-territorial reach which would appear to run afoul of traditional constitutional limitations

[118] E. Edinger, "The Constitutionalization of the Conflict of Laws", *supra* note 89 at 57-58 [emphasis in original].

on provincial power.[119] In order to preserve provincial competence over private international law, it is therefore essential to develop an alternative approach to constitutional scrutiny of legislative competence in this field.

In the jurisdictional sphere, this issue is illustrated by the two following questions. First, when should a court agree to hear a case that is connected to more than one jurisdiction? Second, what effect should a court give to judgments or orders rendered in other jurisdictions? If these are the two jurisdictional questions posed by private international law, how can the rules that address them not be found to violate the constitutional limitation on provincial power as defined by the *Churchill Falls* jurisprudence? Even if the pith and substance of such rules were directed at rights in the province, it cannot reasonably be said that the effect on extra-provincial rights is merely incidental. On the contrary, the decision as to which foreign defendants can be hauled into court and which foreign rulings will be given executory force is at the heart of a private international law rule. Any such rule will necessarily affect a "right" outside the enacting state's borders.

For example, a foreign defendant may argue that he has a contractual "right" to be heard before another venue because of a forum selection clause or an arbitration clause contained in the contract under dispute. Litigation before another province's court could arguably violate such a right. In terms of recognition, the refusal to recognize a foreign judgment could certainly be seen as an infringement of a right possessed by the judgment creditor as against the judgment debtor. And yet the circularity of this argument seem obvious. For it is precisely the role of private international law to determine which law will define the "rights" that a party is claiming. One cannot claim that a province is extinguishing rights outside the province without first having determined which law defines and gives effect to these rights. So long as law and legal rights are conceived of as territorially-bound, private international law will be pre-occupied with the effect of crossing those boundaries.

Pending a change in our understanding of the sources of law and legal rights, one solution to this dilemma is to free private international law from the shackles of extra-territoriality defined according to a *Churchill Falls* analysis. This analysis is clearly unsuitable to a subject-matter which is precisely concerned with the effect to be given to foreign rights and claims. One cannot speak of "incidental effects" on extra-provincial rights in private international law. That is the core of the subject and until it is removed from the provinces' sphere of competence, by constitutional amendment, it must be treated autonomously. The implicit recognition of this provincial sphere of competence is evident in the context of international negotiations in the field of private international law. Not only do Canadian delegations include provincial representatives but Canada will insist on the inclusion of a so-called

[119] Alternatively, the territorial limitation on provincial power may not even extend to this field. According to Castel & Walker, the fact that the Constitution does not speak to judicial authority may exempt jurisdictional rules from challenges based on extra-territoriality: Castel & Walker, *supra* note 50 at para. 2.1.

"Canada-clause", that allows for ratification while reserving the possibility that not all provinces will adhere to the international norm.[120]

For example, in the 1980 Hague Convention on the Civil Aspects of International Child Abduction, the following article specifies this particularity:

> Article 31 In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units:
>
> a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
>
> b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.[121]

In other words, it is the territory of the competent legislator that is relevant for the purpose of private international law and not the geographical territory of the political State.[122]

In light of this, one might ask: if the Supreme Court was able to find an "implicit" full-faith and credit clause in the Canadian constitution, why could it not also find an "implicit" extra-territorial power for provinces in the sphere of private international law? While provinces may not be treated as sovereigns within the federation, these limitations do not necessarily apply with regards to other States in matters of private international law.[123]

---

[120] For a representative example, see the most recent Hague Convention on the International Protection of Adults (2000), Article 55 available online at hcch.net.

> 1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
>
> 2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
>
> 3. If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

[121] Available online at: www.hcch.net.

[122] However, in private international law, the "borders" are not necessarily traced in accordance with political borders. The borders are drawn instead between various spheres of legislative competence. This notion is particularly evident in a federal structure where members of the federation have exclusive competence over certain subject-matters notwithstanding their subjection to a single constitution. Similarly in some countries, other sub-divisions may have jurisdiction over particular matters without any requirement for uniformity The clearest example is religious laws, many of which can co-exist within a single political entity, but each of which is treated as "sovereign" within it sphere of competence.

[123] Of course, this sovereignty is very limited in scope; it need not extend to granting provinces treaty powers or international status although in theory there is nothing excluding this save traditional public international law theory.

International agreements may provide a second solution by allowing for a uniform approach across the country, at least in relation to truly international cases. The success of the Hague abduction convention suggests that this may be a viable route. On the other hand, the relative failure of numerous harmonization efforts in Canada[124] and the apparent imminent failure of a more recent Hague project on jurisdiction and recognition underscore the difficulty of achieving a consensus on these issues amongst jurisdictions with divergent legal traditions and political priorities. Since neither element is foreign to the Canadian legal landscape, the prospect of continued uncertainty on this front is the only reasonable forecast at this point.

IV. *Conclusion*

In this paper, I attempted to present the multiple facets of Québec law dealing with the recognition and enforcement of foreign judgments. My aim was two-fold. First, I wanted to subject the specific provisions of the Québec Civil Code to a close analysis, seeking to resolve certain interpretational issues which remain outstanding or which, in my view, deserve reconsideration. In that context, one of my objectives was to provide an alternative interpretation of the mirror principle, one that rejects a broader appeal to discretionary techniques such as *forum non conveniens*, and favours predictability and openness. A related goal was to support a stronger version of the jurisdictional criteria for the recognition of money-judgments, which constitute the bulk of foreign decisions brought before Québec courts. Concerns that this may be too strict in a Canadian context were addressed in the second part of the discussion, which followed my second aim. That was to consider the constitutional dimensions of private international law in Québec in light of the *Morguard/Hunt* jurisprudence.

My argument on the constitutional dimensions is rather straight-forward. Within Canada, it is clear that the *Morguard/Hunt* principle of recognition cannot be avoided by invoking contrary provisions of the Québec Civil Code. Indeed, the constitutionalization of that principle invites challenges to some of the narrower jurisdictional bases in Title Four of Book Ten. The asbestos exclusivity basis is but one example, albeit one susceptible to successful challenge. Regardless of the apparent egregiousness of any one provision, constitutional review of Québec private international law, while legitimate, should consider the overall scheme of Book Ten and the comprehensiveness of the codification.

---

[124] The *Enforcement of Canadian Judgments (and Decrees) Act* (1992 & 1997) has received six ratifications; *Foreign Judgments Act* (1934): 2 ratifications; *Court Jurisdiction and Proceedings Transfer Act* (1994): 2 ratifications. Since 1996, the ULCC has also been drafting a new act to replace the *Foreign Judgments Act* and a final version was conditionally adopted at the 2001 annual meeting. See online at: www.ulcc.ca and discussion in Castel & Walker, *supra* note 50 at para.14.20.

Finally, in the truly international realm, I am not convinced that the traditional extraterritoriality arguments function with respect to private international law. Unless the allocation of competence over that subject-matter is subject to review, its exercise by provinces cannot realistically be subjected to ordinary "pith and substance" analysis, lest it be evacuated altogether. While international conventions may promise uniformity in the future, current obstacles to broad-based harmonization on that plane suggest a different landscape for the time being. For Québec courts, that may mean a two-tiered system, with greater internal obligations imposed by *Morguard/Hunt*, and more legislative freedom vis-à-vis truly "foreign" jurisdictions. This may not be the most enviable position to espouse, but it is at least relatively transparent and responsive to the codification of private international law in the Civil Code of Québec.

Appendix

Relevant provisions of the Civil Code of Québec

BOOK TEN - TITLE FOUR
RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS AND JURISDICTION OF FOREIGN AUTHORITIES

CHAPTER I RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS

3155. A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:

(1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title;

(2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;

(3) the decision was rendered in contravention of the fundamental principles of procedure;

(4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Québec, whether it has acquired the authority of a final judgment (res judicata) or not, or is pending before a Québec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec;

(5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;

(6) the decision enforces obligations arising from the taxation laws of a foreign country.

3156. A decision rendered by default may not be recognized or declared enforceable unless the plaintiff proves that the act of procedure initiating 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 learn of the act of procedure initiating 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. A Québec authority confines itself to verifying whether the decision in respect of which recognition or enforcement is sought meets the requirements prescribed in this Title, without entering into any examination of the merits of the decision.

3159. Recognition or enforcement may be granted partially if the decision deals with several claims that can be dissociated. [...]

CHAPTER II JURISDICTION OF FOREIGN AUTHORITIES

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

3165. The jurisdiction of a foreign authority 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 a foreign authority is recognized only in the following cases:

(1) the defendant was domiciled in the country where the decision was rendered;

(2) the defendant possessed an establishment in the country where the decision was rendered and the dispute relates to its activities in that country;

(3) a prejudice was suffered in the country where the decision was rendered and it resulted from a fault which was committed in that country or from an injurious act which took place in that country;

(4) the obligations arising from a contract were to be performed in that country;

(5) the parties have submitted to the foreign authority disputes which have arisen or which may arise between them in respect 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 recognized the jurisdiction of the foreign authority.

The relevant provisions of TITLE THREE are the following

TITLE THREE INTERNATIONAL JURISDICTION OF QUÉBEC AUTHORITIES

CHAPTER I GENERAL PROVISIONS

3134. In the absence of any special provision, the Québec authorities have jurisdiction when the defendant is domiciled in Québec.

3135. Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

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

CHAPTER II SPECIAL PROVISIONS

SECTION II PERSONAL ACTIONS OF A PATRIMONIAL NATURE

3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where

(1) the defendant has his domicile or his residence in Québec;

(2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;

(3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;

(4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;

(5) the defendant submits to its jurisdiction.

However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.