

CHOICE OF LAW AND THE JURISDICTIONS OF FRANCE, QUEBEC AND ONTARIO

You are Canadian exporter who decides to enter into a contract with a French distributor. A conflict arises in which your distributor fails to respect a contractual clause of exclusivity. Don't presume that your conflict will automatically be resolved before the Canadian courts applying Canadian law, or that the litigation will be decided by an international tribunal applying a universal international law !

Certain international litigation cases may be subject to an international convention, such as the *Vienna Convention*, applicable to international sales contracts of merchandise, or the *Rome Convention*, relative to the applicable law concerning contractual obligations.

One must not forget the unanimously recognized principle of autonomy of the will, by which parties are free to contractually determine the law which will be applicable to them. Often, parties will select a national law applicable to their contract, although they may also opt to include an arbitration clause, upon which conflicts arising out of the contract will be submitted to arbitration.

In this article, we will focus on the impact of a choice of national law on the resolution of a conflict. Two possibilities exist are thus available to our Canadian exporter and French distributor :

1. The law of the exporting country, in our case the law of Canada, which can be the law of Ontario, Quebec, or that of another province;
2. The law of the importing country, in our case the law of France.

An exporter will more often than not wish to select her national laws since these are most likely to be the laws that she knows best. However, the laws of the importing country may well be the most favourable in her case. This is precisely the type of situation that will be explored in this article.

It must be remembered that at the juridical level, substantial differences exist between France, Ontario and Quebec. Such differences can be to a large extent traced back to two great legal traditions, the civil law and the *Common law*.

Ontario and other English-speaking Canadian provinces are officially *Common law* jurisdictions inspired from the English model. For its part, France follows the civilian model inherited from Roman law. As for the Province of Quebec, it is in a class of its own as a mixed jurisdiction combining elements from both the *Common law* and the civil law.

In France, as is characteristic of the civil law tradition, law has primacy while jurisprudence plays a secondary, supplementary role (at least in theory). This is reflective of the theory of the separation of powers elaborated by Montesquieu : the legislator creates the laws, while the judge applies them.

In Canada and other common law jurisdictions, jurisprudence plays a much larger role such that it forms a set of case law which must be followed. This is reflective of the doctrine *stare decisis*, whereby the lower (superior and provincial) courts typically follow the rulings of the higher (appellate) courts.

In private law matters, Quebec is officially a civilian jurisdiction whose law is codified in the *Civil Code of Quebec* and the *Code of Civil Procedure*. However, one of Quebec's distinguishing features is that its jurisprudence plays a more important role as compared to classical civil law jurisdictions. Moreover, Quebec law remains influenced by a civil procedure and institutions inspired from the *Common law*. The Province's juridical identity is thus best characterized as hybrid.

The choice of applicable law to the contract selected by our exporter and her co-contractant will therefore engender numerous consequences that will have an impact on the resolution of the dispute.

For this reason, in this matter more than in any other, prudence must always be paramount !

I. Structure and Organization of Judicial Courts

A broad understanding of the organization of the court systems in France and Canada is fundamental to any litigation. Going to the wrong court or tribunal can waste a lot of precious, limited time and funds, and does not interrupt prescription!

A. The French court system

The French court system is a largely binary system divided between public and private matters. At the first instance, it is divided into three general categories of jurisdiction: civil, penal, and another category for specialized tribunals.

1. First Instance Jurisdictions

The competence of jurisdictions in civil matters at first instance is determined according to the monetary value of the action, and along the lines of personal or movable actions. Note that in France, commercial matters are not initially considered part of the civil regime.

Recently, the *Loi du 26 janvier 2005* was introduced to simplify the determination of competence among the first instance civil jurisdictions: the *Tribunal de grande instance*, the *Tribunal d'instance*, and the *juges de proximité*.

The *Tribunal de grande instance* (TGI) is now competent in civil matters valued at over 10,000 euros as well as all cases (regardless of the amount of money involved) in family law (marriage, divorce, adoption, successions), seizure of immovables, patents, trademarks, and dissolutions.

The *Tribunal d'instance* (TI) is now competent in personal or movable civil actions not exceeding 10,000 euros, subject to appeal.

Finally, the *juges de proximité* saw their competence enlarged by the *Loi du 26 janvier 2005*. These non-professional magistrates now have final competence for civil cases worth up to 4,000 euros. Also by virtue of the new legislation, the *juges de proximité* may now be seized not only by physical persons but by legal persons as well.

The specialized courts include the *Conseil de prud'hommes* which handles conflicts between employees and their employers on the basis of work contracts, the *Tribunal des affaires de sécurité sociale* which deals with social security litigations, the *Tribunal paritaire des baux ruraux* which handles agricultural issues et the *Tribunal de commerce*.

The *Tribunal de commerce* has final competence for matters of 4,000 euros or less. Its competence extends to the whole of commercial litigation matters, such as :

- conflicts between merchants in the exercise of their profession,
- conflicts between associates of a commercial enterprise,
- conflicts arising from the sale of a business,
- conflicts concerning commercial acts between merchants and non-merchants,
- conflicts associated with regulations and liquidations.

2. The *Cour d'appel*

An appeal is an ordinary recourse for reforming or annulling the decision made at first instance. The *Cour d'appel* has competence in fact as well as in law.

The *Cour d'appel* is divided along different specialized chambers according to the nature of the litigation (civil, commercial, penal, social, etc.).

3. The *Cour de cassation*

Located at the summit of the judicial hierarchy, the *Cour de cassation* is charged with the task of considering, in conformity with the findings in fact determined by the judges of fact, the legality of the decisions rendered in the prior courts, and *casse* or "break" the decisions in violation of the rule of law.

The *Cour de cassation* is not considered a third level of jurisdiction in that it only examines the findings of law by prior judges, and not of fact. The judges of fact (at first instance and at the *Cour d'appel*) are the only ones who determine the facts of a case, and this principle is not overturned by appeal, or *pourvoi*, to the *Cour de cassation*.

The *Cour de cassation* renders two types of judgments :

- When it renders a *rejet du pourvoi*, the procedure stops and the decision becomes irrevocable.
- When it decides to "break" a decision, it sends the case before a jurisdiction of the same level as that which rendered the attacked decision, or before the same but differently composed jurisdiction.

B. The Canadian court system

Unlike the European system where the law is uniform but the administration of the courts is left to each country, the opposite is true in Canada, where the central federal government administers the courts. As well, the Canadian court structure is unitary, as opposed to the French binary division between public and private matters. For example, the same Canadian superior court handles both private as well as public (for example, criminal) law issues. As a result, the Canadian court system has become very complex and the specific jurisdictions of each court vary from province to province.

1. First Instance Courts

Generally, the Canadian court system is composed of three main branches: the Provincial Courts, the Superior Courts, and the Federal Courts. For civil matters, the difference between the Provincial and Superior Courts is mostly based on the monetary value of the case. The figures below reflect the amounts set by the provinces at the time this article was written, in 2005, but are subject to changes.

The value of a claim includes the combined value of an individual claim and a counterclaim, but does not include the combined value of multiple claims. This is based on the principle that the court's competence is determined by the basis of each individual person. However, special circumstances such as class actions are handled by the Superior Court.

a. Quebec

Currently, the provincial Court of Quebec handles claims of up to \$70,000. It is further subdivided into the Small Claims Division and the Civil Division.

The Small Claims Division handles claims of \$7,000 or less. The procedure is informal and the parties act alone, without the benefit of counsel unless the case is a complex one and representation is authorized. The judge leads the debates, questions the witnesses, and hears the parties. Judgments are final and without appeal.

The Civil Division handles claims over \$7000 and up to \$70,000.

The Superior Court of Quebec is the court of general jurisdiction and hears cases of at least \$70,000. Commercial cases are heard in the Commercial Division. The Superior Court also hears class action cases and appeals from the provincial Court of Quebec.

b. Ontario

Ontario is generally considered to have the largest and most active network of tribunals in Canada and one of the most important in North America.

In Ontario, civil matters are heard before the Ontario Superior Court of Justice, itself subdivided into three entities: the *Small Claims Court*, the *Divisional Court* and the *Superior Court* (all of which are divisions of the Ontario Superior Court of Justice).

The *Small Claims Court* hears matters of \$10,000 or less while the *Divisional Court* hears matters between \$10,000 and \$25,000.

The *Superior Court* hears civil matters when the value of the case exceeds \$25,000. Just like the Superior Court of Quebec, it has concurrent jurisdiction in certain matters with the Federal Court.

2. Federal Courts

Federal Courts are directly administered by the federal government. Present in all provinces, they rule in federal (or shared) fields of competence including immigration and refugee law, intellectual property law, and maritime law.

3. Courts of Appeal

Unlike the French *Cour d'appel*, the Canadian courts of appeal may not judge in fact, but only in law. The same is true of the Supreme Court of Canada. This is based on the idea that the first instance judge is the only judge who heard the testimonies first-hand, and is hence the best-suited to make determinations of fact. The Courts of appeal and the Supreme Court thus gives deference and discretion to the trial judge in determinations of fact.

Appeals in law may be lodged directly with the courts of appeal from the provincial and the superior Courts.

In Quebec, the Court of Appeal only hears matters where the value in dispute is at least \$50,000. For matters where the value of dispute is less than \$50,000, permission must be given by a judge of the Quebec Court of Appeal.

In Ontario, the Ontario Court of Appeal hears appeals worth more than \$500. Cases worth less than \$500 need leave to appeal.

Because of the intermediary appeals court that is the Divisional Court, appeals are regarded more favourably in Ontario than in Quebec.

There is a separate Federal Court of Appeal for appeals from the Federal Courts.

4. The Supreme Court of Canada

The Supreme Court of Canada is the highest court in Canada. It has final competence in criminal, civil and constitutional matters and hears matters of national interest. As such the role of the Supreme Court of Canada is not that of correction of errors of the lower courts. As a rule, since the Supreme Court decides which cases it will hear, appeals to that court must be authorized. The judgments of the Supreme Court are always final and without appeal.

The Supreme Court of Canada may also give advisory opinions, or references, in absence of a dispute. This is peculiar to the Canadian court system.

II. Jurisdiction and Competence in Private International Disputes

Whether you are a French company investing in Canada or a Canadian company breaking into the French market, you will invariably enter into numerous contracts and agreements with physical and legal persons of a country whose laws you do not know. In the event of a conflict, which legal system should you turn to? International commercial litigation can be daunting for those who do not inform themselves of the foreign country's laws prior to doing business there.

The interest in knowing the private international laws of each State thus resides in the possibility of determining how one national jurisdiction will proceed in the resolution of a conflict of laws and competence in its designation of the applicable law and the competent court.

Note that the designation of applicable law is often a delicate situation in that it depends on the designation of the competent jurisdiction. In effect, it is up to the jurisdiction seized in the litigation, in the absence of an express contractual designation, to designate the law applicable to the contract, in view of its own private international laws.

A. France

1. Designation of the competent jurisdiction

The competence of a jurisdiction is its aptitude to hear a case or, as Professor Perrot put it, "to exercise its power of jurisdiction."

The determination of the competent jurisdiction considers firstly the order, degree, and nature of the jurisdiction apt to hear the given case, in accordance with the principles of subject-matter competence (*ratione materiae*), as we have briefly studied above in the organisation of the judiciary in France and Canada.

Secondly, geographical factors among all the jurisdictions of the same order will be considered, and the determination will be made in function of the link between a business to a determined place. Such is the object of territorial competence, sometimes called *ratione loci*.

It is traditionally admitted, in virtue of the Latin adage *Actor sequitur forum rei*, that the plaintiff must seize the jurisdiction of the defendant. In other words, the territorially competent jurisdiction is that which is in the residence of the defendant (NCPC, art. 42).

However, the interests of the good administration of justice may diminish the application of this principle. Various factors (evidentiary efficiency, protection of certain categories of litigants, nature of the litigation, relationship between the object of the litigation and another place, etc.) serve either to impose the competence of another jurisdiction or to offer the plaintiff the possibility to opt for another tribunal.

French law thus often provides an option of competence to the benefit of the plaintiff in contractual matters as well as tort.

Furthermore, there are subsidiary rules of competence of French jurisdictions, linked to the nationality of the parties, which constitutes real privileges of jurisdiction for the French plaintiff or defendant. Thus, by virtue of article 14 of the *Code civil*, a French person can compel his or her foreign co-contractant to appear before a French judge. As well, by virtue of article 15 of the *Code civil*, the French defendant has the right to be heard by his or her national judge.

2. Designation of the law applicable to the contract

a. Unification of private international law within the EU

The Rome *Convention on the Law Applicable to Contractual Obligations*, signed 19 June 1980, is a European convention which applies universally to parties domiciled in a European State, even if the applicable law is that of a third party State.

This *Convention* applies to contracts concluded after its entry into force (1 April 1991). It provides that the contract is regulated by the law chosen by the parties. The choice of law must be express or result in certainty from the dispositions of the contract or from the circumstances of the case. The parties may choose to apply the designated applicable law to the totality or to a part of their contract.

The *Convention* presumes that the contract has the strongest ties with the country of residence of the party who must furnish the prestation at the time of the conclusion of the contract. For enterprises or legal persons, the ties are with the country of its central administration.

However, if the contract is concluded in the exercise of the professional activity of the party, the country with which there are the strongest ties is the where its principal establishment is situated or, if according to the contract the prestation must be furnished by an establishment other than the principal establishment, the country where this other establishment is situated.

The *Rome Convention* contains special protective dispositions for certain types of contracts (consumer and labour contracts).

Finally, the *Rome Convention* reserves the “the application of the international conventions to which a contracting State is or will be party.” Thus, important conventions ratified by France remain applicable. Such is the case with the *Vienna Convention of 11 April 1980*, rendering uniform the rules of international sales.

A proposition in 2006 will change the appellation of the *Rome Convention* to *Rome I*, and will modernize the *Convention*. Henceforth, parties may choose as applicable law rules which do not originate from a State, such as international conventions or rules of commercial usage. For certain often-used contracts (sales, services, distribution, IP), article 4 provides rules for special conflicts. In the absence of choice of law by the parties, the contract is regulated by the laws of the country with which it has the strongest ties.

This proposition will complete two other initiatives : *Rome II* which harmonizes the applicable rules for tort (in the course of being adopted), and *Brussels I Regulation on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*.

b. International unification relative to the international sale of goods

The *Vienna Convention*, a United Nations treaty, rendered uniform the law concerning contracts of international sale of goods. It came into force in France on 1 January 1998, and in Canada on 1 May 1992.

The *Vienna Convention* applies uniformly across the board, no matter if the presiding judge is French or Canadian. The application of this *Convention* presupposes the existence of a contract of international sale of goods between parties who have their establishments in different contracting States (e.g. a sale between a French company domiciled in Paris, and a Canadian company domiciled in Toronto).

There is an abundance of litigation cases in which this *Convention* is tacitly excluded by virtue of its article 6, notably when parties exclusively plead national laws.

In light of these circumstances, the *Cour de cassation* has adopted a very restrictive interpretation of tacit exclusion, ruling that the *Vienna Convention* is imposed on the French judge who must apply it, even when it is tacitly excluded according to article 6, as soon as the parties place themselves under a determined law (1^{ere} Civ. Cass., 25 October 2005).

B. Quebec

The international competence of Quebec courts is given by the *Civil Code of Quebec* (CCQ) in articles 3134 to 3154. As a general rule, Quebec follows a civilian approach in the sense that the judge has little discretionary power in identifying the competent jurisdiction, as opposed to Ontario.

1. Competence

The general presumption is that in the absence of special provisions (listed below), Quebec courts are competent when the defendant is domiciled in Quebec.

A Quebec court may also hear a dispute if it does not normally have competence, in circumstances of absolute necessity or impossibility. In these cases, the dispute must

have sufficient connection with Quebec, and proceedings cannot possibly or reasonably be required to be instituted outside Quebec (3136, CCQ).

Where a Quebec court is competent to rule on the principle demand, it is also competent to rule on an incidental demand or a cross-demand (3139, CCQ).

2. Incompetence

The CCQ codifies the common law principle of *forum non conveniens* in article 3135, and gives exceptional discretion to a Quebec court to determine whether or not it is the most competent to hear the case. This article has, however, been strictly interpreted by the Quebec Court of Appeals in *Spar Aerospace* [2000].

In conformity with the principle of *litis pendens*, Quebec courts may, by the action of a party, decline to rule 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 Quebec, or if such a decision has already been rendered by a foreign authority (3137, CCQ).

3. Specific Provisions

In personal actions of a patrimonial nature, a Quebec court is competent where (3148, CCQ):

- The defendant has his domicile or residence in Quebec;
- The defendant is a legal person, is not domiciled in Quebec but has an establishment in Quebec, and the dispute relates to its activities in Quebec;
- A fault was committed in Quebec, damage was suffered in Quebec, an injurious act occurred in Quebec, or one of the obligations arising from a contract was to be performed in Quebec;
- The parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;
- The defendant submits to its jurisdiction.

However, if a defendant has previously contracted to settle the dispute in another specific jurisdiction, in a foreign jurisdiction, or through arbitration, Quebec courts will generally enforce this agreement. The parties' choice of forum is thus respected in Quebec.

C. Ontario

In the Common law, the traditional rules attributing competence are based on the capacity of the tribunal to notify or “serve” the initial statement of claim to the defendant. The international competence of Ontarian courts is thus based on the service of claims outside of Ontario (Rule 17 of the Ontario *Rules of Civil Procedure*)

In spite of a conceptually different approach and which leaves a larger margin of discretion to the judge, the result obtained in Ontario is sensibly the same as in Quebec. Note that it is possible for the plaintiff to serve the act outside of Ontario without the authorization of the tribunal in the following cases:

- The contract was concluded in Ontario;
- The clauses of the contract stipulate that it must be regulated or interpreted in conformity with the laws of Ontario;
- The parties have recognized the competence of Ontario tribunals to resolve all disputes relative to the contract;
- The non execution of the contract took place in Ontario, even if it was preceded or accompanied by a non execution outside the province which made impossible the execution of the part of the contract that had to be executed in Ontario.

Note also that the Ontario courts are competent if a tort was committed in Ontario, or if a damage arising from a tort, the non execution of a contract, the breach of a fiduciary duty or a breach of confidence, took place in Ontario.

According to these rules and the principles found in the *Civil Code of Quebec* studied above, it is clearly possible for both jurisdictions to have concurrent competence. In these cases, the Ontario court would apply the doctrine of *forum non conveniens* to resolve the problem, also codified under article 3135 of the *Civil Code of Quebec*.

To do this, the defendant does not prove that the seized court is incompetent; rather, he must demonstrate two things on a balance of probabilities:

- That there is another forum who is clearly more appropriate,
- That the seized court’s declination of competence will not unduly prejudice the plaintiff

Once the defendant accomplishes this, he or she may ask the seized court to decline competence. In determining whether to accept or decline competence, a court will consider several factors such as the domicile of the defendant, the location of the evidence and key witnesses, the location of the cause of action, the jurisdictional advantages/disadvantages of the parties, and the interests of justice.

III. Recognition and enforcement of foreign judgments in Private International Disputes

French and Canadian courts have long been aware of the necessity of establishing a privileged relationship in the recognition and enforcement of each other's judicial judgments. Hence, a *Convention* was signed on 10 June 1996 between the governments of France and Canada concerning the recognition and execution of judicial decisions in civil and commercial matters, as well as mutual aide in matters of alimony.

This *Convention* of 1966 was never entered into force. Its ratification could not take place following the France's signing of the *Amsterdam Treaty*, in which signatory States (including France) lost their competence to negotiate with non-signatory States in matters covered by the Treaty, which included the judicial cooperation among States.

A. France

The *Convention* of 1966 between France and Canada having never been ratified, the recognition and enforcement in France of a Canadian judgment must look to the French rules of civil procedure, subject to international regulation.

Depending on the nature of the foreign decision and the consequences that the litigant intends to cause, these conditions may be considered over the course of the specific enforcement procedure.

The TGI, presided by a single judge, has exclusive authority during the enforcement procedure, with the ability to send the case before another collegial jurisdiction.

The objective of the procedure is in the verification of the regularity of the foreign judgment according to five, strictly interpreted criteria:

- The international competence of the foreign tribunal for the case at hand;
- The regularity of the foreign procedure followed;
- The application for the competent law according to French laws of conflict;
- The conformity of the foreign decision to public international order;
- The absence of fraud in the law or decision, as in the case of forum shopping.

It is possible to appeal a judgment that refuses enforcement.

B. Quebec

1. Recognition and Enforcement of Foreign Decisions

In Quebec, there is a presumption that courts will recognize and declare enforceable a decision rendered outside Quebec except in the following cases (3155, CCO):

- The authority of the country where the decision was rendered had no jurisdiction (see "Recognition of Foreign Jurisdictions," below);
- The decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;

- The decision was rendered in contravention of the fundamental principles of procedure;
- A dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Quebec, whether it has acquired the authority of a final judgment (*res judicata*) or not, or is pending before a Quebec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Quebec; the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
- the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
- the decision enforces obligations arising from the taxation laws of a foreign country.

Recognition or enforcement of a foreign judgment 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 of the CCQ (3157). However, a foreign court's competence to hear a case must mirror the criteria set forth by Quebec for its own courts (3164, CCQ).

2. Recognition of foreign jurisdictions

As a general principle, Quebec courts will determine the competence of a foreign court through the application of the same set of criteria it applies to itself (at 3148, CCQ) in the determination of its own competence (3164, CCQ).

Hence, the competence of a foreign authority is recognized only in the following cases (3168, CCQ):

- the defendant was domiciled in the country where the decision was rendered;
- the defendant possessed an establishment in the country where the decision was rendered and the dispute relates to its activities in that country;
- 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;
- the obligations arising from a contract were to be performed in that country;
- 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;
- the defendant has recognized the jurisdiction of the foreign country.

The competence of a foreign country is not recognized by Quebec courts in the following cases (3165, CCQ):

- where Quebec law grants exclusive jurisdiction to its authorities to hear the action which gave rise to the foreign decision;
- where Quebec law recognizes the exclusive jurisdiction of another foreign authority;

- where Quebec law recognizes an agreement by which exclusive jurisdiction has been conferred upon an arbitrator.

Quebec courts may thus block foreign judgments relating to raw materials originating in Quebec, since they have exclusive jurisdiction over matters relating to these raw materials (3129 and 3151, CCQ, cited in Part II).

B. Ontario

1. Recognition of foreign decisions

To grant enforcement of any foreign judgment, an Ontario court must be satisfied of three things:

- The court that granted the judgment must have been competent to try the case. The fact that the foreign court was competent according to its own rules is not determinative. Canadian courts have adopted the “real and substantial connection” test to determine if the foreign court in fact had a real and substantial connection with, and hence competence for, the case at hand. In considering whether or not the foreign court had a real and substantial connection with the case, the Canadian court may consider a number of factors, including the circumstances of the plaintiff, defendant, as well as the subject matter, but there is no clear-cut answer. This is reflective of the discretion given to the judiciary, which is resisted in Quebec.
- The foreign court must have acted in accordance with due process, meaning that the legal **procedure** must have been just and fair;
- The original judgment must have been a final judgment from the originating court.

2. Procedure

To enforce foreign judgments, the judgment creditor must initiate a new lawsuit in Ontario, but the judgment creditor typically does not need to try the same case all over again. This is because common law Canadian courts have tended to adopt the “full faith and credit” principle (from the United States Constitution), giving the benefit of the doubt to the laws of another jurisdiction, and respecting and enforcing that jurisdiction’s decisions unless there is a very good reason not to do so.

An Ontarian court will not usually be concerned with whether the foreign judgment would have been granted under Canadian law; the defendant cannot argue that the judgment should not be enforced because he or she would not be liable in Canada. The question is merely whether the original court acted fairly and in accordance with basic principles of justice, and whether the court was competent to pass judgment on the defendant.

An action for the enforcement of a foreign judgment is likened to the enforcement of a simple debt, and usually proceeds by way of a summary judgment motion, which asks the court to declare that there is no genuine issue for trial, and to rule in the plaintiff's favour. Once the Ontario court finds in the plaintiff's favour, he or she can then proceed to enforce the Ontario decision the way any Ontario judgment would be enforced. Interest and the legal costs are usually awarded as well.

IV. Civil Procedure

A. Administration and presentation of evidence

The procedure with respect to the administration of evidence in the jurisdictions studied highlights the distinction between the two great legal traditions of civil law and Common law.

Civil law jurisdictions display a dogmatic approach to the truth, understood to be "*the substance of what is.*" The evidence is tantamount to fact and the law of evidence somewhat strays from the ideal, since it cannot expect full elucidation.

Common law jurisdictions display a greater amount of pragmatism in understanding truth as being "*the quality of what is said.*" The propositions of the parties, rather than the objective truth, are the targets of evidentiary undertakings.

Proof of a certain "Americanization" of the civil law, the French law of evidence is progressively moving towards a different culture of evidence. For its part, Quebec has opted for a model that is close to Ontario's Common law model.

1. The roles of the judge and the lawyer in the establishment of the facts

The French approach privileges written evidence over testimonial evidence. It is up to the judge to decide if he or she wants to hear a witness, and the lawyers may not compel any witnesses to appear. If the judge decides to hear a witness, there is no question that the lawyer will not play an active role in the questioning of the witness ; the inquisitorial role played by the judge reserves for him or her the right to lead the interrogation.

The importance accorded to oral testimony as well as the pleadings in the judicial systems of Ontario and Quebec constitute a notable difference from the inquisitorial French system. The lawyers in Canada are not only free to interrogate the witnesses, but also to lead a cross-examination of the witnesses.

2. The Discovery Phase, the Preliminary Interrogation or the *Mesure d'instruction*

In France, the judge is presumed to know the law (*jura novit curia*). It is therefore up to him or her to solicit and develop evidence deemed necessary. Hence, although the litigation is defined and brought by the parties, it is the judge who decides what means to implement in order to find a solution.

The phase of discovery, non-existent in France, stems from the Common law. It is employed in Quebec as "*interrogatoire préalable*" or preliminary interrogation.

Discovery is an essential means of investigation during the pre-trial phase that allows the parties to discover what evidence the other has. Its role is to redistribute the inequities in information between the parties by giving both parties mechanisms that permit the discovery of pertinent and useful information, to which they would not otherwise have access.

It should be noted that discovery in Quebec does not have the same reach and leeway as discovery conducted in Common law jurisdictions, for example in the United States, where lawyers literally "fish" for evidence. Discovery in Ontario, for its part, is somewhat restrained, but more expansive than in Quebec.

The discovery phase consists of two important aspects:

- The disclosure of documents phase which compels all parties to the litigation to disclose to the opposing party during the pre-trial phase not only all pertinent documents, but also all documents in their possession or in their control that have to do with the litigation, including documents harmful to their case. Present in Ontario, the disclosure of documents is not practiced in Quebec.
- The preliminary interrogation phase, during which it is possible for a party to interrogate the opposing party or a third party (exceptionally) on all the facts relevant to the litigation. This mechanism, available in Ontario, is only available in Quebec for litigation cases valued at over \$25,000.

The request for a preliminary interrogation is addressed to a judge and can be contested by the opposing party if it is useless, inappropriate, or will not advance the debate.

In practice, examinations for discovery are not difficult to obtain for the judges have only written requests from which to evaluate the pertinence of an interrogation. In situations of doubt, an objection to an examination for discovery will not be accorded, except if the requesting party is manifestly "fishing" for evidence.

In Quebec, it is possible to compel the production of certain documents by the opposing party during examination for discovery. The access to documents is however subject to the authorization of the judge and is not automatic, as is the case with disclosure of documents in Ontario. Furthermore, Quebec judges apply stricter

criteria in the authorization for production of documents than in the authorization for examination for discovery.

If a witness is located in a foreign country, it is possible for the court to request through rogatory commission the assistance of a foreign tribunal to proceed with the interrogation. The nature of the information to be obtained would be communicated to the foreign tribunal.

3. Franco-Canadian and Franco-Québécois Conventions for Facilitating Civil Procedure

The *Franco-British Convention* of 2 February 1922 was extended to Canada. It takes into account in the law of evidence the differences in procedure between the civil and common law countries, as briefly discussed above.

Articles 5 to 9 of the Convention address the issue of rogatory commissions. The role of rogatory commissions is limited to the hearing of witnesses (art. 5 and 6), and the execution of such can be made by judicial authorities of the requested State, by diplomatic agents or consular of the requesting State, and also by any person designated by a judicial authority of the requested State.

Rogatory commissions are transmitted by the consulate. They are executed according to the norms of the requested State within the constraints of this State's law, but also according to a special form requested by the requesting authority, under the condition that it is not contrary to the legislation of the requested State.

Execution is refused when the sovereignty or security of the State is jeopardized, and when the authenticity of the commission rogatory is in doubt. The requesting authority must be informed immediately in the case of refusal of execution.

Consular authorities may proceed without constraint to hear witnesses who may make use of their counsel, and to the production of documents by them. The nationality of the persons heard bears no importance and the deposition is received in conformity with the laws of the requesting State.

In the framework of cooperation between France and the Province of Quebec, an agreement on mutual judicial aid in civil, commercial, and administrative matters was signed on 9 September 1977 by the French and Québécois Ministers of Justice.

The requested judicial authority applies its national rules of procedure unless another procedure was requested. The requested judge may ask questions and authorize parties and their counsellors to ask questions as well. If this is asked, the questions and responses are integrally transcribed or recorded. The requesting judicial authority may have asked to be informed of the date of the place of execution. The requested judicial authority may refuse to execute a rogatory commission that doesn't enter into its attributes or that would jeopardize its competence or public order.

B. Conservatory Measures

Conservatory measures aim to preserve the efficiency of the jurisdictional authority seized in the litigation, without harming the essence of the dispute. They aim essentially at modifying, before trial, a state of affairs which give reason to believe that the tribunal may, if no action is taken, lose its faculty to resolve the litigation in an efficient manner at trial, or to assure the execution of the judgment it will render.

In all the jurisdictions studied, the purposes of conservatory measures are to avoid an irreparable harm to the litigation, to conserve evidence, and to guarantee the execution of the eventual judgment.

1. In French law

In France, the execution of a judgment may be secured through a *saisie conservatoire*.

The *saisie conservatoire* allows the creditor to seize all or part of the corporeal and incorporeal goods of the debtor. It is authorized by the *juge de l'exécution* and requires for the creditor to provide evidence of an imminent peril menacing the execution of the debt. The goods are placed under the control of the judiciary.

The *saisie conservatoire* does not entail the sale of the seized goods and in their transformation into money, rather, it simply blocks the sale of the goods until the debt is honoured voluntarily or through a judicial procedure.

The debtor may apply to the *juge de l'exécution* to have the procedure revoked.

2. In Quebec law

The equivalent of the *saisie conservatoire* in Quebec law is called the seizure before judgment (art. 733 Cpc). A seizure before judgment allows the plaintiff having obtained the authorization of the judge to place the property in question into the hands of justice pending suit when there is reason to fear that the recovery of his debt may be jeopardized without the seizure.

The mechanism may be obtained through an *ex parte* procedure though it is necessary to establish that the fears with respect to the eventual recovery of the debt are founded on precise facts as opposed to simple suspicions.

The defendant may demand that the seizure be quashed because of insufficiency in the affidavit or falsity in the allegations that it contains(738 Cpc).

3. Ontario

The Mareva injunction is considered to have introduced in Common law systems the equivalent of the French *saisie conservatoire* or the Quebecer seizure before judgment.

This *in personam* conservatory measure allows a judge to order a debtor to inform him of the whereabouts of his assets in all jurisdictions in which they are located. The judge may expressly forbid the debtor to dispose of said assets or from accomplishing certain acts, failing which the debtor may face stringent contempt of court sanctions such as prison sentences, hefty fines or a suppression of the right to stay in justice.

In evaluating whether or no the injunction should be awarded, the judge applies criteria that are similar to those that govern the emission of *saisie conservatoire* under French law:

- a strong *prima facie* case in favour of the plaintiff; and
- a real and substantial risk that the debt may not be recovered.

To these conditions are added an undertaking from the plaintiff that any and all damages caused by the injunction will be repaired (an undertaking in damages) and that all necessary elements of information will be communicated (a duty of full and frank disclosure).

In Ontario, Mareva injunctions are requested by the parties and granted by the Superior Court provided that the parties provide evidence showing that a real risk exists that the defendant will dispose of his/her goods during the course of the trial.

When the goods of the defendant in question are in a foreign country, the Mareva injunction granted by a Canadian court can still be enforced by transforming the judgment into one of that country. Canadian courts will collaborate with foreign courts to block a defendant's goods in a country. This is called a Mareva in aid.

It will be noted that this extra-territorial application of a *Common law* procedure was recognized in French jurisprudence, the Cour de Paris having confirmed, in two cases the validity of ordinances issued by the Tribunal de grande instance de Paris, which had ruled on the absence of any frustration of international public order with respect to the rights of the defence in the execution of a Mareva injunction (CA Paris, 1ère ch., sect. C, 14 juin 2001 et CA Paris 1ère ch., sect. C, 5 octobre 2000).

V. Parties to the procedure: collective lawsuits

A. Towards a recognition of *actions collectives* in France

The *action collective* (collective action) is an action permitting the judge to render one judgment to the benefit of a whole "class" of persons or in the name of a category of plaintiffs, even though the latter may not be personally identified.

Such an action cannot be engaged until a preliminary procedure has been initiated to verify if there are common elements in the relationships between the members of the class and the action against the defendant.

Two categories of collective actions can be distinguished:

- When the action of the group rests on an express mandate or a manifest will of members of the group, it is called "*opt in*" and is not considered as jeopardizing the principle of freedom to act in justice.
- When the action is commenced by the group without the consent of the person whose interests the group is acting for, it is called "*opt out*." Hence, a person can find herself in this type of class action without knowing it.

Made notorious by the widely publicized cases in the United States against the giant tobacco or pharmaceutical companies, class actions are the topic of heated political and judicial debates in France.

Its introduction into France was officially favoured by President Jacques Chirac in January 2005 during his wishes for the new year. The government established a working group in charge of studying a project centered on the rights of consumers.

The *Conseil national des barreaux* (CNB) also approved of the principle of class actions in France during a general assembly in January. The CNB does not limit the possibility of class action to consumer law, but wishes to apply the principle to collective catastrophes, defective products, contractual law, social law, competition law, and banking law.

In light of the present state of French law, a direct transposition of American-type class action seems impossible. There are three major obstacles to its introduction:

- The first problem consists of prohibitions contained in article 5 of the French Civil Code which imposes on judges the obligation to motivate their decisions and to expose if only summarily the pretensions and reasoning of the parties;
- The second problem, a procedural one, is linked to the *res judicata* authority of the judgment;
- The last problem rests in the application of the maxim "*nul ne plaide par Procureur*" which imposes the identification of all co-litigants, it being forbidden to represent an unnamed group of persons.

French law nevertheless recognizes the principle of the representation collective interests in judicial procedures.

Two procedures to that effect were instituted in consumer law, the collective action instituted by the law of January 5, 1988 and the *action en représentation conjointe* introduced in 1992. These were refined in 1994 and 2003 respectively to include the rights of shareholders and investors in financial products.

With respect to *actions en représentation conjointe*, the inconveniences are numerous.

Indeed, an association may act in the name of several consumers having withstood damages from the same situation and represent their interests before a court of justice, though this can be done only if the consumers have personally consented to the action. The association cannot act in the name of consumers whose identity remains unknown as is the case in a collective class action lawsuit.

This type of action aims only to repair the individual harm caused to persons having given a mandate to the association, rather than repairing the collective harm caused to consumers or investors in general.

Finally, in a case of a failed lawsuit, consumers are stripped of their right to initiate an individual action as it is considered that they already exercised their right through the association that was mandated. Overall, such actions are therefore not very common in practice.

In the face of the failures of the classical procedures, certain legal professionals specialized in computer law gathered in a company created by a lawyer whose aim is to promote collective class actions of the *Common law*-type in France.

The company's internet site "*classaction.fr*" therefore offered to connect consumers and lawyers in the aim of initiating a collective class action lawsuit.

In a judgment dated December 6th 2005, the Tribunal de grande instance de Paris sanctioned the website for "*illegal judicial marketing*" and forbid the site from "*offering online collection of judicial representation mandates, failing which a fine of 15.000 euros would be imposed for every such mandate*" moreover the site was ordered to pay a sum of 2.500 euros to several associations.

Note that site was already warned by an order emitted in June 2005 by the *Conseil des avocats* of the Paris Bar and condemned in an ordinance from the Tribunal de grande instance de Lille for illegal advertising and marketing.

B. Class Action in Quebec and Ontario

Class actions were adopted in Quebec and Ontario in the pursuit of three objectives: increasing the access to justice, economy of judicial resources, and the modification of behaviour of large enterprises.

Although the procedures are very similar in both provinces, the preliminary stage of authorization in Quebec (certification in Ontario) seems easier to obtain in Quebec, known as the “haven” for class actions. Even so, the utilisation of class actions remains low in Canadian provinces, compared to their American neighbour.

Quebec was the first Canadian province to introduce the class action into legislation in 1978. It is now incorporated in Book 10 of the CCP.

Class actions are generally brought by physical persons. It is nevertheless possible for a small companies or legal persons to bring about class actions.

In Quebec, the criteria for authorization are wide, for the representative need only prove an appearance of right between the alleged facts and the result sought after. Furthermore, in doubt, Quebec courts favour authorization. This bias toward plaintiffs accumulated over the years, and in 1982, the authorization of class action became immune to appeal, while groups refused authorization can still appeal their decision. Moreover, the reform of the *Code of Civil Procedure* in 2002 limited the contestation of the defendant to an oral pleading, except if it obtains permission from the judge to submit a written defence.

In Ontario, class actions are regulated by *Class Proceedings Act*. Courts are typically favourable to class action procedures; however, the criteria for authorization are interpreted more strictly than in Quebec courts, particularly that which requires the class action be the best means available to the group of plaintiffs (non-existent in Quebec). The *Act* does not contain provisions for asymmetrical appeal or limitations on the defendant's right to appeal. It seems thus that Quebec is more favourable to plaintiffs at the authorization phase.

Both provinces, aware of the impact of a decision rendered in the absence of most of its litigants, have developed certain measures to mitigate negative impacts of class actions. The courts, after having granted authorization, obligate the plaintiffs to send a notarized notice to warn all its members. These members can thus opt out of the procedure or decide to stay.

Collective class actions are primarily used by consumers though the procedure is available in other domains, both in Quebec and in Ontario. Although the procedure is not without its problems, it is becoming increasingly popular as a means of seeking redress.

C. Financing class actions

The financing of class action lawsuits takes place through public funds or contingency fees.

1. Public Funds

Quebec facilitates the exercise of certain class actions that fulfill the necessary criteria (well-foundedness, excessive economic charge for the parties, etc.) by permitting their financing through public funds. This fund was created through the introduction of class actions in 1978, as well as for the purposes of access to justice. The class in question would only reimburse the fund if it wins the suit.

Ontario also has a public fund for the purpose of financing class actions. However, contrary to the Quebec public fund, the extent of the coverage provided by the Ontario public fund is more limited and does not include lawyers' fees, another reason which contributes to the public perception of Quebec being the "paradise" of class action law suits.

2. Contingency Fees

A contingency fee is a convention between the lawyer and his/her client according to which the parties agree that lawyer fees will be paid to the lawyer only if the plaintiff wins the lawsuit.

Contingency fees are expressly forbidden under French law. However, similar criteria may intervene in order to mitigate the lawyer fees, for example when success fees are combined with a base honorarium fee. It is therefore possible for parties to agree that a complementary honorarium will be added to a fixed honorarium in function of the results of the litigation and the amount recovered. This option is often used by lawyers representing salaried workers before Conseil de prud'hommes.

In Quebec, contingency fees have been authorised since 1956. It is, however, necessary for such fees to be based on a written convention allowing for just and reasonable lawyer fees (in practice, this means that this fee must be limited to 30% of the value of the total action). The judge may use his discretionary power in order to reduce such fees if he/she deems it to be too high.

Similarly, contingency fees are allowed in Ontario. In the case *McIntyre Estate v. Ontario* (2002), the succession of McIntyre, a smoker who died of lung cancer, initiated an action against Imperial Tobacco and Venturi Ltd. McIntyre's succession asked the court for a declaration validating a contingency fee with the lawyers representing it in the case. The court deemed that an outright prohibition of such a convention was not justified.

VI. Compensation of Damages

A. The Determination of Damages

At the closing of the trial, the damages plus interest will be given by the losing party to the winning party. The differences among the three jurisdictions reside mainly in the method of calculation of damages.

1. Punitive damages

In France, the sum of damages and interest correspond to the sum of the damaged caused, of which the plaintiff must make proof before the court.

This limitation of the sum of damages and interest is one marked difference between the French system and the Canadian (Ontario and Quebec) system, where judges may grant punitive damages in excess of the simple reparation of damages suffered. This addition is perceived as a penalisation of the person found guilty of an intentional or seriously negligent fault.

In Canada, the sums remain reasonable and are in no way comparable to the astronomical sums found in the United States where punitive damages has seen an incredible rise thanks to movements for consumer protection and their influence on the popular jury who bear the task of evaluating and allocating the damage. This evolution affects primarily manufacturers, whether of automobiles, aeronautics, pharmaceuticals, or tobacco.

The French law has begun to integrate these evolutions. A report given by the *Commission Catala sur l'avant projet de réforme du droit des obligations et du droit de la prescription* presented at the *Garde des sceaux* on 22 September 2004 provides for the modification of certain notions such as compensation of damages, lost of opportunity, fault, and above all to authorize the granting of punitive damages, recalling principles adopted in the *Civil Code of Quebec*.

This proposition may pose some problems of compatibility with the principles of European Community law, and notably with the proposition for rules applicable to extra-contractual obligations, Rome II, which upholds that punitive damages are contrary to the public order of the European Community.

2. Compensation for Economic Loss

In the name of compensation for economic loss, the tribunals have also admitted the compensation for damage suffered as result of the impossibility to profit from a good, during a determined period of time. We are also speaking of loss of exploitation.

It must be underlined that the civilian systems of France and Quebec admit in the quantum of damages and interest the loss of (*lucrum cessans* in latin), which has always been problematic in the common law, where pure economic loss traditionally

couldn't enter into the equation. Today, this is not necessarily true anymore, as Canadian courts have shown themselves to be more favourable of it.

3. Non-pecuniary damages and moral injury

In the framework of compensation for damages to goods, the indemnification of moral injury is at last allowed.

The *Cour de cassation* allowed the compensation for moral injury suffered by a legal person, whose products were used in the filming of a pornographic movie (Cass. com., 6 Nov. 1979 : D. 1980, jurispr. p. 94).

If positive French and Quebec law favour still the compensation of moral injury, doctrinal sources have expressed doubt in the immoral character of monetary compensation for suffering, and as well in the difficulty in determining the value of an injury that is in essence subjective.

This critique explains the reticence of the common law to include into the calculation for monetary compensation moral prejudice which is so difficult to quantify.

B. Specific modalities of contractual compensation in international law

In cases of loss, destruction, or deterioration of a corporeal good, the victim has the right to obtain the reintegration of an identical good into his or her patrimony. This is a possibility which is also provided for by the *Vienna Convention*, ratified by both France and Canada.

Furthermore, the victim can obtain compensation for a variety of accessory damages. The tribunals do not always grant to the victim a sum which corresponds to the cost of the replacement of the good. When supplementary fees are involved, they are calculated into the total indemnity.

In cases of depreciation of the good following its deterioration, the victim can obtain an indemnity of which the sum equals the minus-value of the good, as soon as proof is made of this minus-value.

If the accessory prejudice consists of a lessening of the enjoyment of the good, the seized jurisdiction will determine the sum of the indemnity after having established the value of the use of the good by its owner.

A commercial disruption can also accompany the deterioration of a good. This damage is compensable in French law.

Conclusion

The jurisdictions of France, Quebec, and Ontario will tend to give effect to contractual clauses of choice of forum. In turn, the identity of the chosen jurisdiction in such clauses can have multiple ramifications in a serious litigious case.

Indeed, the three jurisdictions studied are composed of tribunals whose domains of subject matter and territorial competence are not defined uniformly. The extent of the questions examined by the Cour d'appels in France will be more thorough, where the judge may revise a first-instance judgment in law as well as in fact. In Quebec and Ontario, only the first-instance judge is competent in an examination on the facts.

Remember that there are certain particularly pertinent differences in the domain of civil procedure, a domain in which the Quebec law seems closer to the Ontarian common law rather than to French civil law. For example, Quebec's civil procedure allows oral testimony, including direct examinations and cross examinations of witnesses, conducted by the lawyers instead of by the judge who plays a rather passive, non-inquisitorial role.

The numerous differences that exist among the three jurisdictions are attributable to the historical distinctions that subsist in the common and civil legal systems. However, it is important to recognize that often, the two great legal systems employ very different means to arrive at similar ends; this is especially the case with regard to the determination of international competence of tribunals.

Finally, note that there is a tendency for the historical differences between the common and civil legal systems to blur. Hence the debate concerning class actions is gaining momentum in France, and the common law jurisdictions are starting to recognize and allow compensation for moral damages – these examples illustrate that globalisation is not limited to the field of economics, but extends also to the legal domain.