

“The (CISG) Road Less Travelled”
Case Comment on GreCon Dimter Inc. v. J.R. Normand Inc.

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Abstract:

At first glance, the Supreme Court of Canada's recent decision in *GreCon Dimter Inc. v. J.R. Normand Inc.* appears to be a case upholding the primacy of international commercial arbitration, choice of forum and choice of law clauses. Upon closer scrutiny, however, the Supreme Court of Canada failed to consider the application of the UN Convention on Contracts for the International Sale of Goods (CISG) to the overall dispute. Interestingly, the same choice of forum and choice of law clauses were considered by the United States Court of Appeals a year earlier in *GreCon Dimter, Incorporated v. Horner Flooring Company, Incorporated*. In either of the Canadian and American *GreCon* decisions, the parties' (and their respective counsel's) characterization of the legal issues, including jurisdictional arguments, ultimately guided the domestic forum court's jurisprudential analysis. Unlike *GreCon v. Horner*, choice of forum remained a live issue when it reached the Supreme Court of Canada in *GreCon v. Normand*. In both cases, the parties' choice of law remained an important, but not exclusive, factor in the domestic court's overall determination of proper forum. While the Supreme Court of Canada did not address the applicability of the CISG in *GreCon v. Normand*, perhaps another opportunity awaits Canada's highest court to contribute to the CISG's global jurisconsultorium.

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The Supreme Court of Canada has recently released an interesting, if not problematic, appellate decision in the case of *GreCon Dimter Inc. v. J.R. Normand Inc. et al.*, (July 22, 2005) [*GreCon v. Normand*]¹. At first glance, while *GreCon v. Normand* appears to be a case upholding the primacy of international commercial arbitration, choice of forum and choice of law clauses,² closer scrutiny suggests that the Supreme Court of Canada failed to consider the application of the CISG to the overall dispute.³ Thus, while reaching the correct result, an opportunity for Canada's highest court to contribute to the wealth of international CISG jurisprudence⁴ was missed, yet again.⁵

¹ *GreCon Dimter Inc. v. J.R. Normand Inc. et al.*, 2005 SCC 46, (2005) 255 D.L.R. (4th) 257, (2005) 336 N.R. 347, (2005) J.E. 2005-1369 (S.C.C.) [cited to D.L.R.]

² For recent legal commentaries from an international commercial arbitration perspective, see Laurent Debrun, "Canada: The Choice Of Forum Clause Takes Precedence Over Legislative Rules Giving Jurisdiction To Québec Courts" (18 October 2005) available at: <http://www.mondaq.com/article.asp?articleid=35534&lastestnews>; and Frédéric Bachand, "L'efficacité en droit québécois d'une convention d'arbitrage ou d'élection de for invoquée à l'encontre d'un appel en garantie", (2004) 83(2) *Canadian Bar Review* 515.

³ Where the contract was formed (the "*locus contractus*") and its corollary, the law of the place where the contract is concluded (the "*lex loci contractus*"). See J.G. CASTEL & JANET WALKER, *CANADIAN CONFLICT OF LAWS*, VOL. 2, 31-5 – 31-7 (6th ed.), Markham: Lexis Nexis-Butterworths, 2005); Antonin I. Pribetic, "Bringing Locus into Focus": A Choice-of-Law Methodology for CISG-based Concurrent Contract and Product Liability Claims, *Pace Rev. of the CISG (2004-2005)* (Munich: Sellier European Law Publishers, 2006) (forthcoming) currently available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=578566

⁴ UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, April 11, 1980, S. Treaty Doc. No. 98-9 (1984), U.N. Doc. No. A/CONF.97/19, 1489 U.N.T.S. 3. Adopted in Canada federally on May 1, 1992 by the *International Sale of Goods Contracts Convention Act*, S.C. 1991, c. 13 and subsequently by all constituent provinces and territories, including the province of Quebec: see *An Act Respecting the United Nations Convention on Contracts for the International Sale of Goods*, R.S.Q., c. C-67.01, available at <http://www.canlii.org/qc/laws/sta/c-67.01/20051019/whole.html> See the CISG Canada website, (hosted by Osgoode Hall Law School, York University - member of the autonomous network of Convention websites), available at <http://www.cisg.ca>; <http://www.yorku.ca/osgoode/cisg>.

⁵ "A global jurisconsultorium on uniform international sales law is the proper setting for the analysis of foreign jurisprudence." Vikki Rogers and Albert Kritzer, in "*A Uniform International Sales Law Terminology*", in Schwenzer, I. / Hager, G. eds., *Festschrift für Peter Schlechtriem zum 70. Geburtstag*, Tübingen: J.B.C. Mohr / Paul Siebeck (2003) 223-253, available at: <http://cisgw3.law.pace.edu/cisg/biblio/rogers2.html>, cited by Camilla Baasch Andersen, in "*The Uniform International Sales Law and the Global Jurisconsultorium*" available at http://www.cisg-online.ch/cisg/The_Uniform_International_Sales_Law_and_the_Global_Jurisconsultorium.pdf. See also, Peter J. Mazzacano, *Brown & Root Services v. Aerotech Herman Nelson: The Continuing Plight of the U.N. Sales Convention in Canada*, *Pace Rev. of the CISG (2004-2005)* (Munich: Sellier European Law Publishers, 2006) (forthcoming) available at: <http://cisgw3.law.pace.edu/cisg/biblio/mazzacano.html>.

I. Factual Background

The Plaintiff, Scierie Thomas-Louis Tremblay Inc. ("Tremblay") operated a sawmill in the Province of Québec. The Defendant, J.R. Normand Inc. ("Normand"), also a Québec company, serviced and sold industrial wood working machinery. The Co-Defendant, GreCon Dimter, Inc. ["GreCon"] is a German manufacturer that manufactured and sold specialized equipment used in processing plants and sawmills, but had no place of business or assets in Québec.

a) The GreCon Contracts: Domestic, International or both?

GreCon v. Normand involved two contracts. The first contract was entered into on May 14, 1999, by Normand and Tremblay for the supply and delivery of equipment, including in particular a saw line and a scanner to optimize the milling of wood, the purpose of which was part of an overall modernization plan undertaken to improve and expand production at Tremblay's sawmill.⁶ Clearly, the first contract was a "domestic" contract between two Quebec companies, such that the CISG did not apply.⁷

The second contract was a contract of sale⁸ entered into on May 26, 1999, between GreCon and Norman under which the equipment was to be supplied to Normand for resale to Tremblay. The Supreme Court of Canada held that this contract was formed by Normand's acceptance of a price quote submitted by GreCon on April 12, 1999, after Normand had approached the German company to purchase the equipment.⁹

⁶ *Grecon v. Normand*, SCC, at 262-3.

⁷ Art. 1(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States [emphasis added]

⁸ While the Supreme Court of Canada refers to the second contract as simply a "contract of sale", the author submits that it constitutes an "international contract of sale" as defined under Art. 1(1)(a) and 1(1)(b) of the CISG), see discussion on the applicability of the CISG, *infra*.

⁹ The decision of the Supreme Court of Canada and the lower court decisions of the Quebec Superior Court and Court of Appeal in *GreCon v. Normand* are all unclear on whether the price quote was communicated via facsimile transmission, email or regular mail. In any event, it appears as though the contract was in writing, such that issues concerning oral contract formation rules under the Article 11 of CISG would have been inapplicable:

CISG Art. 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

According to the *CISG-Advisory Council Opinion no 1*, COMMENT,

11.1 The purpose of CISG Art. 11 is to ensure that there are no form requirements of writing connected to the formation of contracts. The issue of electronic communications beyond telegram and telex was not considered during the drafting of the CISG in the 1970s. By not prescribing any form in this article, CISG enables the parties to conclude contracts electronically. See also UNCITRAL Model Law on Electronic Commerce Art. 5.

(available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html>)

It is the second contract which is of immediate import in relation to the applicability of the CISG. In particular, the quote included a choice of forum and choice of law clause, which provided that any dispute between the parties would be subject to the ***exclusive jurisdiction of the German courts*** and with ***German law as the governing law***:

Choice of Forum

It is agreed, by and between the seller and buyer, that all disputes and matters whatsoever arising under, in connexion with, or instant to this contract (whether arising under contract, tort, other legal theories, or specific statutes) shall be litigated, if at all, in and before a court located in Alfeld (Leine), Germany to the exclusion of the courts of any other state or country.

Choice of Law

This agreement is governed by and construed under the laws of Germany to the exclusion of all other laws of any other state or country (*without regard to the principles of conflicts of law*). [Emphasis added]

As a result of problems encountered by GreCon in designing the scanner, it was not delivered to or installed at Tremblay's plant by the date provided for in the contract between Normand and Tremblay (August 20, 1999). Consequently, Tremblay had to set up a temporary system for cutting wood, which proved to be inadequate. GreCon failed to deliver the scanner until April 2001. Due to numerous delays and encountered problems, Tremblay gave notice to Normand on April 19, 2001, that it intended to repudiate or resile the contract. Consequently, the equipment was never delivered to Tremblay.¹⁰

The customer, Tremblay, thereafter instituted an action in damages against the supplier, Normand, in the Superior Court of Quebec. Tremblay claimed against Normand for professional seller's liability for latent defects and various alleged faults in the performance of contractual obligations. In the principal action, Tremblay claimed damages of \$5,160,331 for defects and non-delivery of equipment resulting in Tremblay suffering a decline in output and productivity. Tremblay also sought a refund of deposits that had been paid to Normand. Subsequently, Normand filed an incidental action in warranty against GreCon also in the Superior Court of Quebec, alleging the inadequate performance of GreCon's contractual obligations, namely, a failure to deliver some of the equipment and delays in delivery. Normand sought indemnification in full from GreCon for any award that might be made against it in the main action brought by Tremblay. The Supreme Court of Canada noted that "under the *Civil Code*, a manufacturer is bound by the seller's warranty of quality and becomes a co-debtor of the warranty with the seller, which means that the seller may call the manufacturer in warranty: art. 1730 *C.C.Q.*"¹¹

¹⁰ *Grecon v. Normand*, SCC, at 263.

¹¹ *Grecon v. Normand*, SCC, at 264.

II. Supreme Court of Canada's Analysis

Lebel, J. on behalf of the unanimous Supreme Court of Canada¹² allowed the appeal, upholding the declinatory exception based on the Quebec authority's want of jurisdiction and dismissing the action in warranty in the Superior Court of Quebec. In considering Articles 3148, para. 2, 3139 and 3135 C.C.Q., Lebel J. remarks:

¶ 17 The interaction of the relevant provisions leads to a conflict in determining the jurisdictional connection. While art. 3139 C.C.Q. extends the Quebec authority's jurisdiction to include an incidental action, art. 3148, para. 2 C.C.Q. denies that authority any jurisdiction. As will be seen, the application of the latter provision also precludes the application of art. 3135 C.C.Q.

¶ 18 This appeal therefore raises the issue of the nature of the relationships between arts. 3148, 3139 and 3135 C.C.Q. in the context of the determination of whether a Quebec authority has jurisdiction to hear an action in warranty.¹³

The Supreme Court of Canada's analysis is firmly rooted in the view that Article 3148, para. 2 of the C.C.Q. establishes the framework within which a Quebec court must determine jurisdiction in conflict of laws situations. Moreover, it recognizes and accords primacy to the autonomy of the parties who determine their own conflict rules by agreement. At page 269 of the decision, Lebel J. notes:

¶ 23 The recognition of the autonomy of the parties reflected in the enactment of art. 3148, para. 2 C.C.Q. is also related to the trend toward international harmonization of the rules of conflict of laws and of jurisdiction. That harmonization is being achieved by means, inter alia, of international agreements sponsored by international organizations such as the Hague Conference on Private International Law and the United Nations Commission on International Trade Law ("UNCITRAL").

¶ 24 Thus the wording and legislative context of art. 3148, para. 2 C.C.Q. confirm that in enacting the provision, the legislature intended to recognize the primacy of the autonomy of the parties in situations involving conflicts of jurisdiction. Moreover, this legislative choice, by providing for the use of arbitration clauses and choice of forum clauses, fosters foreseeability and certainty in international legal transactions.¹⁴

¹² McLachlin C.J.C., Bastarache, Binnie, Deschamps, Fish and Charron JJ. concurring.

¹³ *Grecon v. Normand*, SCC, at 266-7.

¹⁴ *Grecon v. Normand*, SCC, at 269.

However, as Prof. Walker observes:

In Quebec, paragraphs one and two of article 3111 of the Civil Code provide:

A juridical act whether or not it contains a foreign element, is governed by the law expressly designated in the act or the designation of which may be inferred with certainty from the terms of the act.

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

The court is bound by the express choice made by the parties subject to articles 3076 and 3079 of the *Civil Code*. The implied choice must result with certainty from the terms of the contract (e.g. the use of a certain type of contract), not from the surrounding circumstances. The contract need not contain any relevant foreign element. However, if it does not, for instance, in the case of a contract concluded in Quebec between two Quebec parties and to be performed there, the parties cannot internationalize their contract in order to evade the mandatory provisions of the law of Quebec that would be applicable had they not designated a law. This rule, which is bilateral, resembles that which prevails elsewhere in Canada.¹⁵

The *Grecon v. Normand* judgment analyzes the contractual choice of law, choice of forum and jurisdictional issues from the prism of the Civil Code of Quebec (C.C.Q.) and the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) (the “New York Convention”), the latter of which deals not only with the recognition and enforcement of arbitral awards but also extends legal protection to arbitration agreements.

In order for the choice of forum or choice of law clause to be enforceable, the clauses must be mandatory, unambiguous and precise enough to demonstrate the parties’ express intention to confer exclusive jurisdiction to a foreign court or arbitral institution.¹⁶ The Supreme Court of Canada concluded that both clauses were enforceable. Lebel J. further held that Article 3135 attributes a suppletive function to the doctrine of *forum non conveniens*, which only applies if the jurisdiction of the Quebec court has already been established according to the rules governing jurisdiction and allows the court to decline jurisdiction. Article 3135 cannot, therefore, be used to reconcile the application of other provisions, such as arts. 3139 and 3148, para. 2.¹⁷

¹⁵ Castel and Walker, *supra*, note 4 at 31-7.

¹⁶ *Grecon v. Normand*, SCC, at 270-1: citing, *Eagle River International Ltd. (Syndic de)*, [1999] R.J.Q. 1497 (Sup. Ct.) at pp. 1501-2; *Intergaz inc. v. Atlas Copco Canada inc.*, [1997] Q.J. No. 3942 (QL) (Sup. Ct.), at para. 10; *Équipements E. Lamontagne ltée v. Équipements Belarus du Canada ltée*, [1994] R.D.J. 599 at p. 607. Lebel J. also notes that there must be a *consensus ad idem*, failing which the clause is deemed invalid: see *Dobexco Foods International inc. v. Van Barneveld Gouda Bv.*, [1997] Q.J. No. 1100 (QL).

¹⁷ *Grecon v. Normand*, SCC, at 279-282.

III. Applicability of the CISG

It is difficult to reconcile the Supreme Court of Canada's decision in *Grecon v. Norman* on the basis of the exclusive applicability of either the C.C.Q. or the New York Convention to the second contract given the wording of either the choice of forum or choice of law clauses. Granted, the Supreme Court of Canada acknowledged the conceptual distinction between arbitration agreements and choice of law/forum clauses.¹⁸ The Supreme Court of Canada's observation that the principles of the New York Convention are incorporated into both the C.C.Q. and the *Québec Code of Civil Procedure*,¹⁹ recognizes the primacy of arbitration agreements, which is itself derived from Article II (3) of the New York Convention, such that arbitration agreements must be recognized and enforced. However, this begs the question whether the second contract of sale was, in fact, governed by "German law" generally, or the CISG, specifically.

a) The CISG's sphere of application

The CISG sphere of application is contained in articles 1 to 6. Article 1 reads:

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.²⁰

¹⁸ *Grecon v. Normand*, SCC, at 270 (¶ 24), 271 (¶ 27) and 275 (¶ 38). Lebel J. states at 278 (¶ 45):

¶ 45 As a result of the requirement that art. 3148, para. 2 C.C.Q. be interpreted in a manner consistent with Quebec's international commitments, arbitration clauses are binding despite the existence of procedural provisions such as art. 3139 C.C.Q. *Although this explanation applies to arbitration clauses, it should be kept in mind that art. 3148, para. 2 C.C.Q. also refers to choice of forum clauses. For the sake of consistency, the same position should be adopted in respect of both types of clauses.* Indeed, it would be difficult to justify different interpretations for clauses that have the same function, namely to oust an authority's jurisdiction, and that share the same purpose, namely to ensure that the intention of the parties is respected in order to achieve legal certainty. Thus, it would seem incongruous, in the context of an action in warranty, to give art. 3139 C.C.Q. precedence over art. 3148, para. 2 C.C.Q. with regard to a choice of forum clause and to take the opposite approach with regard to an arbitration clause--in other words, to respect the intention of the parties in one case but to thwart it in the other. [emphasis added]

¹⁹ *Grecon v. Normand*, SCC, at 276-8.

²⁰ CISG, Art. 1. Neither Articles 2 nor 3 would have been applicable in the *Grecon v. Normand* case. Further, since both Germany and Quebec would be considered "contracting States", neither party would be

Article 1 must be read in conjunction with Article 2 (Exclusions from the Convention) and Article 3 (Goods to be manufactured; services). Pursuant to article 1, sub-paragraph (1)(a), the CISG applies to a contract of sale between parties whose places of business are in two different contracting States. Both Germany and Canada, including Quebec, are signatories to the CISG.²¹ Since GreCon's place of business was in Germany and Normand's place of business was in Quebec, both parties were from "Contracting States", suggesting, *prima facie*, that the CISG applied as the governing law for the second contract.

b) Interplay between the CISG and Canadian implementing legislation

Furthermore, under sub-paragraph (1)(b), had the parties specified the law of a non-contracting State, the court may still have determined that the CISG applied where "the rules of private international law lead to the application of the law of a Contracting State" pursuant to article 3111 of the C.C.Q..²² One problem that may arise is in the wording of sub-section 5(2) of the Canadian federal CISG statute which seems to conflict with sub-paragraph (1)(b):

Application	5. (1) The Convention applies in respect of contracts that are subject to the Convention and that are entered into by Her Majesty in right of Canada or on behalf of Her Majesty in right of Canada by any departmental corporation or agent corporation.
Exclusion of Convention	(2) Parties to a contract to which the Convention would otherwise apply pursuant to subsection (1) may exclude its application in accordance with the terms of the Convention and, in particular, by providing in the contract that other law applies in respect of the contract. ²³

from a Contracting State which has made an Article 95 Declaration that it will not be bound by Article 1(1)(b)).

²¹ The Convention was signed by the former German Democratic Republic on 13 August 1981 and ratified on 23 February 1989 and entered into force on 1 March 1990. Upon accession, Canada declared that, in accordance with article 93 of the Convention, the Convention would extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories. (Upon accession, Canada declared that, in accordance with article 95 of the Convention, with respect to British Columbia, it will not be bound by article 1, paragraph (b), of the Convention. In a notification received on 31 July 1992, Canada withdrew that declaration.) In a declaration received on 9 April 1992, Canada extended the application of the Convention to Quebec and Saskatchewan. In a notification received on 29 June 1992, Canada extended the application of the Convention to the Yukon Territory. In a notification received on 18 June 2003, Canada extended the application of the Convention to the Territory of Nunavut: UNCITRAL database: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html. For a list of CISG Contracting States, see CISG W3 database, Pace University School of Law at: <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>.

²² Castel & Walker, *supra*, note 16.

²³ International Sale of Goods Contracts Convention Act, ss.5(2).

Arguably, sub-section 5(2) of the *International Sale of Goods Contracts Convention Act* (the Canadian federal CISG statute) conflicts with the overriding goal of harmonization of international sales law and the three main principles underlying Article 7(1) of the CISG, namely its “international character,” “uniformity” and “good faith”.

Article 7 of the CISG reads:

Article 7

(1) In the interpretation of this Convention, regard is to be had to its *international character* and to the need to promote *uniformity* in its application and the observance of *good faith* in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

The Supreme Court of Canada’s own recognition of “the precedence to the principle of the autonomy of the parties”²⁴ is reflected in Article 6 of the CISG which provides:

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.²⁵

²⁴ *Grecon v. Normand*, SCC, at 271.

²⁵ The following excerpt from the Pace School of Law cisgw3 website is no less germane to the issue of conflicts between the CISG and Canadian implementing legislation:

“Examples of interpretive comments that accompanied adoptions of the CISG.

The interpretive comments recited below will presumably be followed by the courts of the State (or in the case of Canada, the province) that made them, but whether they will be followed by other courts is a matter of conjecture as they are not expressly authorized by the Convention. Article 98 of the CISG states: "No reservations are permitted unless expressly authorized in this Convention."

Canada. A summary and assessment of interpretive comments contained in implementing acts of provinces of Canada:

"The Alberta, New Brunswick and Ontario Acts . . . require the contract to state 'that the local domestic law of [the enacting jurisdiction] or another jurisdiction applies to it or that the Convention does not apply to it.' The Manitoba Act . . . indicates that the parties may exclude the Convention 'by expressly providing in the contract' that the Convention does not apply to it. Bill C-81 [of Canada's Parliament], on the other hand . . . provides that the parties may exclude the application of the Convention 'in accordance with the terms of the Convention and, in particular, by providing in the contract that other law applies in respect of the contract'. Newfoundland's approach differs yet again. Section 7(1) [of the Newfoundland Act] allows the parties to exclude the Convention 'by expressly providing in the contract that the law of the province or another jurisdiction applies to it or that the Convention does not apply to it.' Section 7(2) then goes on to make it clear that the section of the law of the province or of another jurisdiction as the proper law of the Contract shall not be interpreted so as to make the Convention apply to it." Jacob Ziegel, "Canada Prepares to Adopt the International Sales Convention", 18 *Canadian Bus. L.J.* (1991) 3. Zeigel's assessment is: "All this is . . . bound to lead to much confusion." *Id.* With respect to the Ontario Act, for example, he states: "[The interpretation recited there] may prevail before an Ontario Court but it would cut little ice

The validity of a choice of forum clause, the issue of whether a court has jurisdiction, and, generally, any other issue of procedural law are some of the issues considered outside of the scope of the CISG pursuant to Article 4 which reads:

Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.²⁶

Based upon the exclusivity and applicability of the choice of forum and choice of law clauses to the dispute, the Supreme Court of Canada concluded that the parties clearly expressed their intention to oust the jurisdiction of the Quebec authority in the event of an action in warranty. Therefore, the Quebec Superior Court and the Quebec Court of Appeal both erred in not declining jurisdiction.²⁷

outside Canada. This is because a foreign tribunal or arbitrator would probably hold that Ontario cannot unilaterally change the meaning of Article 6 of the Convention." *Id.* at 11." See CISG W3 database, Pace University School of Law, CISG: Table of Contracting States available at: <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>.

²⁶ See [UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods](#). Report of the United Nations Commission on International Trade Law on the work of its twenty first session, New York, 11-20 April 1988, United Nations document A/43/17, paras. 98-109. CLOUT reports are published as United Nations documents A/CN.9/SER.C/ABSTRACTS/1 to A/CN.9/SER.C/ABSTRACTS/42. The forty-two CLOUT reports are also available on UNCITRAL's website at <http://www.uncitral.org/>. In particular, see CLOUT Article 4 - [A/CN.9/SER.C/DIGEST/CISG/4](#) at p. 5-6, fn.'s 33, 41 and 42 and cases cited therein.

²⁷ *Grecon v. Normand*, SCC, at 280.

c) CISG-focused Analysis of the Choice of Law Clause

The issue thus is to determine whether the parties' choice of law in *Grecon v. Normand* effectively excluded the application of the CISG to the second contract. According to Prof. Schlechtriem, a preeminent German CISG scholar:

*If the law of a Contracting State is chosen without other qualifying terms specifying which rules are meant, as for instance the mere reference to "German law," it is long established -- and such was already the case with respect to the Hague Convention on International Sales [ULIS] -- that such a reference includes the application of CISG as part of the chosen law.[citations omitted] Regard for the choice of law of a Contracting State as a selection of the CISG, to the extent the scope of the CISG fits the transaction, is also the prevailing international practice.[citations omitted] [emphasis added]*²⁸

Article 8 of the CISG also has interpretive relevance and reads:

Article 8

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

²⁸ Peter Schlechtriem, "Uniform Sales Law in the Decisions of the *Bundesgerichtshof*" in *50 Years of the Bundesgerichtshof* [Federal Supreme Court of Germany] A Celebration Anthology from the Academic Community, (Translation by Todd J. Fox): available at <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html>. See also, Peter Schlechtriem & Ingeborg Schwenzer, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) Pt.1 Chap. I- Sphere of Application-Article 6- 82-92 (2d ed) (New York: Oxford University Press, 2005); Michael Joachim Bonell & Fabio Liguori [Italy], excerpt from "The UN Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law - 1997 (Part 1)", *Uniform Law Review* (1997) 385-395, available at: <http://www.cisg.law.pace.edu/cisg/text/libo6.html>; Jacob S. Ziegel, "Article 6", *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods*, 1981, available at: <http://www.cisg.law.pace.edu/cisg/text/ziegel6.html>; Joseph Lookofsky, "In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs And Preemption Under The 1980 Vienna Sales Convention (CISG)", 13 *Duke J. of Comp. & Int'l L.* 263, (2003) at 270-274, available at: <http://law.duke.edu/journals/djcil/articles/djcil13p0263.htm>; Peter Winship [U.S.], excerpt from Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners, 29 *International Lawyer* (1995) 525-554 available at: <http://www.cisg.law.pace.edu/cisg/text/winship6.html>.

According to Prof. Lookofsky, another leading CISG scholar, Article 8 should be resorted to in circumstances where the CISG applies by reference to Article 1(1)(a) or (b) of the CISG:

In situations like the foregoing, where the *starting point* is that the CISG applies by virtue of Article 1(1)(a)-(b), it is submitted that the issue of how *statements* like 'German law', 'French law' and 'the laws of Switzerland' should be *interpreted* should be resolved in accordance with CISG Article 8 (discussed *infra* No. 81 *et seq.*) - a provision which certainly tends to support the results reached in CISG practice.

The mere fact that the party who *drafted* a standard form *intended*, e.g. 'German law' to mean German domestic law should *not* lead to the application of domestic, unless that is *also* how the other party - or a *reasonable* person in the shoes of the other party - would interpret the clause. And if the rule in CISG Article 8(2) is supplemented by the (internationally accepted) *contra proferentem* method of interpretation (UNIDROIT Principles Art. 4.6), the effect of an *unclear* clause should not be to displace the CISG when that is the rule-set that would apply by default. *Compare* (re. the interpretation of such clauses under the ULIS) Schlechtriem, P., 'Uniform Sales Law - The Experience with Uniform Sales Laws in the Federal Republic of Germany,' *Juridisk Tidsskrift vid Stockholms Universitet* (1992) p. 7 [available at <<http://www.cisg.law.pace.edu/cisg/biblio/slechtriem.html>>]. *Compare* also re. *contra proferentem* and the interpretation of 'agreed documents' (drafted by representatives of *both* buyer and seller) Junge, W. in Schlechtriem, P., *Commentary* (1998) pp. 72-73.²⁹

Therefore, it is submitted that the interplay of Articles 1(1)(a), 6 and 8 leads to the conclusion that the CISG should have applied to the second contract. *Quaere* whether such a finding (that that the CISG applied to the overall dispute) would have impacted on the Supreme Court of Canada's approach to the jurisdictional/choice of forum issue. In particular, Lebel, J. emphasizes the importance and need to encourage such clauses in that they foster stability and foreseeability for "purposes of the critical components of private international law, namely order and fairness".³⁰ The learned Justice cites, among others, the Supreme Court of Canada's decision in *Z.I. Pompey Industrie v. ECU-Line N.V.*³¹, which characterized the appropriate test for enforcement of forum selection clauses as the "strong cause" test referred to in *The Eleftheria*.³²

²⁹ Joseph Lookofsky, Article 6 "Freedom of Contract: Convention as Supplementary Regime", excerpt from The 1980 United Nations Convention on Contracts for the International Sale of Goods, J. Herbots editor / R. Blanpain general editor, *International Encyclopaedia of Laws - Contracts*, Suppl. 29 (December 2000) 1-192. Kluwer Law International, The Hague, fn. 3 and CISG caselaw cited therein. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/loo6.html>. I am grateful to Prof. Albert Kritzer for bringing this point to my attention.

³⁰ *Grecon v. Normand*, SCC, at 269.

³¹ *Grecon v. Normand*, SCC, at 269 per Lebel, J. citing *Z.I. Pompey Industrie v. ECU-Line N.V.* [2003] 1 S.C.R. 450, 2003 SCC 27, 224 D.L.R. (4th) 577, at para. 20 (SCC) per Bastarache, J. (McLachlin C.J. and Gonthier, Iacobucci, Major, Binnie and LeBel JJ. concurring) [cited to S.C.R.] [hereinafter "Z.I. Pompey"]

³² *The "Eleftheria"*, [1969] 1 Lloyd's Rep. 237 (Adm. Div.).

In *Z.I. Pompey*, Bastarache, J. writing for the unanimous court states:

For some time, the exercise of this judicial discretion has been governed by the "strong cause" test when a party brings a motion for a stay of proceedings to enforce a forum selection clause in a bill of lading. Brandon J. set out the test as follows in *The "Eleftheria"*, at p. 242:

Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts. (b) *Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.* (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.³³ [emphasis added]

Specifically, factor 5 (b) in *The Eleftheria* refers to the applicability of foreign law, which certainly would have had a significant, albeit not determinative, impact on the exercise of the court's discretion on enforceability of choice of forum clauses. Although the "strong cause" test was not applied in *GreCon v. Normand*, the Supreme Court of Canada did consider the effect of "German law" as the chosen law. If the chosen law were held to be the "CISG" as part of Canadian law, then the parties' intention to oust the Quebec court's jurisdiction may not have been found to have been so clearly expressed.

³³ *Z.I. Pompey Industrie v. ECU-Line N.V.*, SCC, at 422.

d) *Grecon v. Horner*-The US Court of Appeals' analysis of the choice of law clause

Interestingly, the identical choice of forum and choice of law clauses were considered by the United States Court of Appeals a year earlier in *GreCon Dimter, Incorporated v. Horner Flooring Company, Incorporated*³⁴ [*GreCon v. Horner*"], which involved a North Carolina subsidiary of GreCon. The US Court of Appeals affirmed a lower district court decision that German law governed claims arising out of a commercial transaction between Horner and GreCon. In *GreCon v. Horner*, GreCon was described as "a North Carolina corporation that manufactures and installs mill equipment."³⁵ The defendant, Horner was a Michigan corporation that manufactured hardwood flooring.

In November 1998, Horner entered into two contracts with GreCon to supply and install a mill system at Horner's Michigan plant. The mill system comprised of three commercial saws and a material handling system. The saws were manufactured in Germany³⁶, while virtually all the components of the material handling system were manufactured in the United States. The US Court of Appeals noted that:

Each contract contained the following choice of law provision: "This agreement is governed by and construed under the laws of Germany to the exclusion of all other laws of any other state or country (without regard to the principles of conflicts of law)." J.A. 16, 22. Each contract also included a forum selection clause providing that all disputes regarding the contract would be litigated in a German court.³⁷

Following installation of the mill system, Horner became dissatisfied with its performance and withheld payments due under the contracts. GreCon responded by filing a collection action in the North Carolina state court, with Horner subsequently removing the case to the Western District of North Carolina and asserting and thereafter amending its various counterclaims. GreCon moved to dismiss the entire case, relying on the forum selection clause, arguing that it compelled the parties to litigate in Germany, and filing a further reply brief in July 2002, expressly stating that GreCon was relying on German law.³⁸

³⁴ *GreCon Dimter, Incorporated v. Horner Flooring Company, Incorporated*, 114 Fed. Appx. 64; 2004 U.S. App. LEXIS 23311; 55 U.C.C. Rep. Serv. 2d (Callaghan) 195 (United States Court of Appeals 4th Circuit) No. 04-1178 November 5, 2005 (unpublished opinion)

³⁵ *GreCon v. Horner*, USCA, at p. 2.

³⁶ Cf. *GreCon v. Normand*, where GreCon in Germany also manufactured the saw line and scanner equipment, supra, note 2, at ¶ 3.

³⁷ *GreCon v. Horner*, USCA, at p.2.

³⁸ *Id.*, at p. 3.

The district court eventually denied GreCon's motion to dismiss, ruling that GreCon had waived the forum selection clause by filing its complaint in North Carolina. Thus, it would appear that GreCon was deemed to have voluntarily attorned or submitted to the North Carolina court's jurisdiction. Following an exchange of pleadings, Horner then moved the district court to determine the applicable law. The US Court of Appeals rejected Horner's arguments,³⁹ and affirmed the district court to apply German law to the action.⁴⁰

IV. Concluding Remarks

While the US Court of Appeals reached the same result as the Supreme Court of Canada on the choice of law issue, it embarked on a markedly different route. It is noteworthy that in *GreCon v. Horner*, both parties were from the same Contracting State, namely, the United States of America⁴¹, such that the CISG would not apply, unless both parties expressly agreed to "opt in" to the CISG.⁴² Furthermore, GreCon had waived the forum selection clause by attornment in the American litigation, while in *GreCon v. Normand*, GreCon had no physical presence in Quebec, nor did GreCon voluntarily submit to the Quebec court's jurisdiction. More significantly, while the American court also concluded that the choice of law clause led to application of German law, it did not engage in any analysis concerning "arbitration clauses" as did the Supreme Court of Canada to some degree in *GreCon v. Normand*. In *GreCon v. Horner*, even if GreCon's German headquartered company were a party to the action, the CISG would not have applied, given that the United States has made a Declaration under Article 95 that it would not be bound by Article 1(1)(b).⁴³

³⁹ *Id.*, at pp. 5-8. According to the *Per Curiam* opinion:

Horner argued that (1) GreCon waived the German choice of law provision by relying on North Carolina law in its complaint; (2) even if no waiver occurred, the provision was unenforceable because Germany lacked a reasonable relation to the parties' transaction; and (3) in the absence of an enforceable agreement, Michigan law controlled because it bore the most significant relationship to the transaction. (at p.3)

⁴⁰ *Id.*, at p. 8.

⁴¹ GreCon's place of business was in North Carolina and Horner's place of business was in Michigan, such that the "internationality" requirement under Art. 1(1)(a) was not met.

⁴² Where the parties are from the same State and the "internationality" requirement is not met under Art. 1(1), the parties may still "opt in" and elect to have the CISG apply. See John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed. (1999) (Kluwer Law International: The Hague), pages 77-87.

⁴³ For recent American caselaw on the applicability of the CISG, see, *Asante Tech., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1151 (N.D. Cal. 2001), which held that where parties seek to apply a signatory's domestic law in lieu of the CISG, they must affirmatively opt-out of the CISG; *Vlero Mkt. & Supply Co. v. Greeni Oy & Greeni Trading Oy*, 373 F.Supp.2d 475 at 482 (D.N.J.2005) where agreement to include a provision that New York law governed failed to specifically exclude application of the CISG and therefore the CISG remained applicable; *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 at 337 (5th Cir.2003) holding that "if the parties decide to exclude the [CISG], it should be expressly excluded by language which states that it does not apply"; *Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd.*, No. 01-5938, 2003 WL 223187, at *8 (N.D.Ill. Jan.30, 2003) which held that a contract stating the agreement shall be governed by the laws of Canada did not exclude the CISG; *contra, McDowell Valley Vineyards, Inc. v. Sabaté USA Inc. et al.*) 2005 WL 2893848 (N.D.Cal.) Federal District Court [California] where the court

Both the *GreCon v. Normand* and *GreCon v. Horner* decisions demonstrate that the parties' (and their respective counsel's) characterization of the legal issues, including jurisdictional arguments, ultimately will guide the domestic forum court's jurisprudential analysis. Unlike *GreCon v. Horner*, choice of forum remained a live issue when it reached Supreme Court of Canada in *GreCon v. Normand*. In both cases, the parties' choice of law remained an important, but not exclusive, factor in the domestic court's overall determination of proper forum.⁴⁴ While the Supreme Court of Canada did not address the applicability of the CISG in *GreCon v. Normand*, perhaps another opportunity awaits Canada's highest court to contribute to the CISG's global *jurisconsultorium*.

found that the majority of the representations about the product came from California. Hence, under the CISG, the parties' places of business were held to be in the same state and the CISG was, therefore, determined to be inapplicable to the sale and consequently the Court lacked jurisdiction over the case. For recent Canadian CISG cases involving choice of forum and choice of law issues, see *Chateau Des Charmes Wines Ltd. v. Sabate, USA, Inc.* [2005] O.J. No. 4604 Court File No. 03-CV-261424CM 3 (Ont. S.C.J.) and *Sonox Sia c. Albury Grain Sales Inc.* [2005] Q.J. No. 9998 (Court File No.: 500-17-026371-057) (Que. S.C.) (unreported). In *Sonox Sia*, the Quebec Superior Court considered the validity of an arbitration clause specifying that all contractual disputes be arbitrated by the ICC- International Court of Arbitration in London, the United Kingdom (forum selection), with the CISG stipulated as the governing law (choice of law). See Antonin I. Pribetic, Editorial Remarks, *Sonox Sia c. Albury Grain Sales Inc.*, available at <http://cisgw3.law.pace.edu/cases/050729c4.html>.

⁴⁴ For a discussion of Canadian judicial approaches to choice of forum and choice of law clauses within the context of recognition and enforcement of foreign judgments and the *forum non conveniens* doctrine, see Antonin I. Pribetic, "Strangers in a Strange Land": *Transnational Litigation, Foreign Judgment Recognition, and Enforcement in Ontario*, 13 J. TRANSNAT'L L. & POL'Y 347 (2004) available at http://www.law.fsu.edu/journals/transnational/backissues/issue13_2.html