Forum Non Conveniens: the Canadian Experience

It is generally recognized that the modern doctrine of Forum Non Conveniens (FNC) can be traced back to Scottish Law. Paradoxically, although the law in Scotland is often considered to bear strong similarities with that of civil law jurisdictions, the FNC doctrine, was met in civil law countries, unlike in most common law jurisdiction, with much skepticism.

Canada enjoys a peculiar dual common law/civil law regime. While the province of Quebec applies French-style civil law, the other provinces apply British-style common law. Yet, despite such differences, Canada’s response to the FNC doctrine has been remarkably uniform under both regimes.

At a time where the exponential growth of international trade and commerce and the development of international conventions (such as the Montreal Aviation Convention of 1999) is forcing jurisdictions around the world to adapt and to standardize approaches, the unusual Canadian dual adoption of the FNC doctrine may provide some useful hindsight.

FNC comes to Canada

FNC made one of its first apparitions in common law Canada in 1977 when the Supreme Court of Canada (the SCC) made the following comment in obiter: “In my view the overriding consideration which must guide the Court in exercising its discretion by refusing to grant such an application as this must, however, be the existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice.”

16 years later the SCC clearly reaffirmed that FNC was part of Canadian common law in the Amchem case. In Amchem the SCC essentially decided that once a Canadian court is competent, it can still decline its jurisdiction, if it is of the view that another foreign jurisdiction is “clearly more competent”. Although the SCC cited with approval the classic FNC British cases, it appeared to

1 Prepared by Me Éric Vallières, with the assistance of Alexandre Forest, in connection with the panel presentation on the doctrine of Forum Non Conveniens in the aviation industry at the IATA Legal Symposium 2011, at the Fairmount Vancouver Hotel on February 15, 2011.
2 One of the earliest statement of the principle was made in Longworth v. Hope (1865) 3 Macph (Ct of Sess) 1049 at 1053, a Scottish judgement.
5 Ibid at p.448.
adopt a slightly more restrictive approach, and to put some emphasis on the fact that the foreign jurisdiction must be clearly more competent: “under this test, the court must determine whether there is another forum that is clearly more appropriate” 8

Under the test developed subsequently by Canadian common law courts, a multitude of factors can be considered to determine whether another jurisdiction is “clearly more competent”. These factors include: the place of business of the parties, the location of the evidence, the applicable law, whether the plaintiff is merely trying to gain a strategic advantage, the existence of foreign proceedings or the injustice of foreign proceedings. This list of factors is however not a finite one. The Canadian case law often reaffirms that an FNC analysis is a matter of judicial discretion, and that the judge is free to take into account any consideration deemed relevant in any given case.9

In practice, the list of factors relevant to the FNC analysis is very similar to the list of factors that the Canadian common law courts are bound to consider when they determine whether they have jurisdiction in the first place. Indeed, the Canadian common law test for asserting jurisdiction calls upon the Court to review very similar facts and circumstances, with a view to assess whether the subject matter of the proceedings has a “real and substantial connection” (RSC) with the court. Over the years, in light of this symmetry between the two tests, the distinction between such RSC test and the FNC test became increasingly blurred.10

In Van Breda, a 2010 decision, the Ontario Court of Appeal11 reminded Ontario lower courts that “there is a clear distinction to be drawn between legal jurisdiction simpliciter and the discretionary test for FNC.”12 After going through the RSC test, the Canadian common law courts must conduct the FNC analysis, which is a distinct analysis altogether. Indeed, unlike the RSC test, the FNC analysis entails a degree of judicial discretion. By way of example, in Van Breda, the Ontario Court of Appeal first considered that it was competent on the basis of the technical analysis of the connecting factors (the RSC analysis), and then in a second step (the FNC test), the court refused to decline its jurisdiction, since it was not persuaded that Cuba was a clearly more appropriate forum than Ontario for the case at bar.

FNC Meets Civil Law in Quebec

In Quebec civil law, prior to the enactment of the new Quebec Civil Code (QCC) in 1994, courts generally refused to apply the FNC doctrine.13 Quebec’s civil law courts often mentioned that they lacked power to arbitrarily decline jurisdiction when they were otherwise granted jurisdiction by statute.

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8 Ibid.
9 Ibid.
12 Supra note 1 at par. 82.
The new QCC enacted in 1994 however clearly introduced the FNC doctrine in Quebec civil law:

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

Interestingly, the new 1994 QCC also introduced the reverse proposition. I.e., even if a Quebec court is not competent, it can still declare itself competent:

“3136. Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.”

Theses two provisions provide Quebec’s civil law courts with unusual flexibility among civil law jurisdictions. It is also interesting to note that the Quebec version of the FNC doctrine was not adopted as a counterweight to otherwise over encompassing jurisdictional rules (such as when jurisdiction is based on service within the country), or to a subjective or “vague” test (such as the RSC test applicable in common law Canada). Rather, just like in most civil law jurisdictions, the jurisdiction of Quebec courts is precisely defined by statute. For instance, the QCC asserts that Quebec courts are competent where:

“(1) the defendant has his domicile or his residence in Québec;
(2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
(3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
(4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;
(5) the defendant submits to its jurisdiction.(…)”

Despite the fact that Article 3135 Q.C.C. (cited above) clearly mentions that FNC should be “exceptional”, Quebec courts (and Quebec litigants…) embraced the FNC with much enthusiasm. Quickly, a list of relevant factors was adopted by the courts. These factors include:

1) Residence of the parties and witnesses;
2) Location of the exhibits;

14 Article 3148 QCC
3) Situs of the contract;
4) Existence of foreign proceedings;
5) Location of key assets;
6) The applicable law;
7) The strategic (and possibly unfair) advantage to the plaintiff;
8) The interest of justice;
9) The interests of the parties;
10) The need for exemplification.

The Quebec FNC test however is not applied in a rigid way. In 2002, in Spar\textsuperscript{16}, the first Supreme Court of Canada FNC case from Quebec, the SCC decided that Article 3135 QCC in fact called for an analysis very similar to the “clearly more convenient forum” FNC analysis applicable for common law Canada. Hence, the technical factors developed by civil law courts should not be assessed mechanically, but rather they have to be appreciated as a whole, in light of the circumstances, with a view to determine whether another forum is clearly more convenient.

Moreover, In both cases, that is, in civil law and in common law, the SCC decided that it was essential for the FNC test to apply, that the court be competent in the first place. Hence, where in common law Canada, the court first needs to conduct the RSC analysis, Quebec civil law courts must first see if the statutory basis for their jurisdiction is met.

If the application of the FNC doctrine in Quebec is frequent, it still remains exceptional\textsuperscript{17}. An analysis of the case law reveals that the FNC doctrine is invoked between 10 and 30 times a year, and succeeds in about 25% of the cases where it is invoked.

More than 15 years after its introduction into the Quebec civil law, it can probably be said that the FNC doctrine has brought some much needed flexibility to a jurisdiction test which would otherwise be too mechanical and rigid. In fact, the Quebec experience shows that the FNC doctrine can be introduced in civil law as a counterweight to an overly rigid approach, without creating undue uncertainty and unwarranted litigation costs.

An analysis of the cases where the FNC doctrine succeeded shows indeed that in most cases the jurisdiction of Quebec courts in the first place was only incidental or peripheral. In these days of public budgetary constraints, what state can be in favor of expanding the costs of its judicial system to cover cases that do not relate to it?

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\textsuperscript{17} The Quebec Court of Appeal in Sabre inc. v. Air Canada (#500-09-013151-030, January 29, 2003, AZ-03019075) specified clearly that the legislator used the word “exceptionally” in art. 3135 CCQ on purpose and that this should guide the application of the FNC doctrine in Quebec.