THE INTERNATIONAL *LIS PENDENS* EXCEPTION IN QUEBEC PRIVATE INTERNATIONAL LAW AT THE DAWN OF 2020

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In the context of parallel divorce applications,[1] the Supreme Court of Canada has revisited the criteria applicable to the international *lis pendens* exception in private international law under article 3137 of the Civil Code of Québec ("**CCQ**"). The Court reminds us of the importance of the discretion given to the trial judge.

Summary of the Facts

A woman and a man were married in Belgium on December 21, 2004. Their relationship deteriorated throughout 2014 and both filed for divorce, the husband in Belgium on August 12, 2014 and the wife in Québec only three days later.

The husband asked the Superior Court to stay the proceedings on the divorce application brought by the wife in Québec due to international lis pendens under article 3137 CCQ. The husband preferred the forum of Belgium, as it would have allowed him, among others, some hope of obtaining the revocation of gifts, having a value of $33 million, given to his wife during the marriage.

The Superior Court dismissed the husband's request for a stay on the basis that a decision rendered by the Belgian court, in particular with respect to the question of the revocation of gifts made in the course of the marriage, could not be recognized in Québec because it was contrary to public order.

The Québec Court of Appeal reversed the Superior Court's decision by concluding that the trial judge had erred in his assessment of the last criterion of article 3137 CCQ. According to the Court, in the context of the analysis under articles 3137 and 3155(5) CCQ, it is not necessary to assess the conformity of the foreign law[2], but rather to base the analysis on the result of the decision. The Court of Appeal therefore concludes that the criterion of susceptibility to recognition is met in this case. Consequently, it ordered a stay of proceedings on the divorce application in Québec.

In its decision, the Supreme Court recognized that the criteria for international lis pendens were not met, but refused the stay because no reason existed to contradict the discretionary power of the trial judge.

Analysis and Commentary

We retain four elements of this recent decision by the Supreme Court of Canada:

1. Appellate courts must show great deference to a discretionary decision rendered by a trial judge;
2. The burden rests on the shoulders of the applicant requesting the stay under article 3137 CCQ;
3. The criterion of articles 3155 (5) and 3137 CCQ consists to evaluate if the foreign decision is susceptible to be recognized in Québec; and
4. The discretion granted to the court of first instance in its analysis under article 3137 CCQ is of the highest.

1. The Standard for Intervention

The Supreme Court of Canada reconfirms the Court of Appeal's great deference to the trial judge's decision in the exercise of his discretion.

Indeed, although the Supreme Court of Canada disagrees with the Superior Court's decision not to stay the divorce proceedings in Québec and confirms that the trial judge erred in interpreting article 3137 CCQ too restrictively, the Supreme Court points out that there has not been a demonstration of unreasonableness in this case and that, consequently, there is no reason to overturn the trial judge's decision. It is only in the presence of unreasonableness in the exercise of the discretion of the trial judge that the Court of Appeal may intervene and substitute its assessment for that of the trial judge.[3]

This decision reinforces an already well-established practice. Trial judges enjoy wide discretion in their analysis under article 3137 CCQ. The Court of Appeal must show great deference to the trial judge's assessment of the case. As mentioned by the Honourable Judge Gascon, “a simple difference of opinion will not suffice to justify an appellate court in substituting its own assessment for that of the trial judge.”

It is therefore now even clearer that parties appealing a decision rendered in the exercise of the trial judge's discretion must demonstrate not only the error, but also the unreasonableness of that decision.

2. The Burden of the Applicant

The Supreme Court of Canada confirms that it rests on the shoulders of the party who requests a stay of proceedings to demonstrate that all the criteria listed in article 3137 CCQ have been met:

i. The action must have been filed with the foreign forum first;
ii. This case is between the same parties;
iii. This case is based on the same facts;
iv. This file has the same subject; and
v. The foreign decision may give rise to a decision that may be recognized in Québec.

3. The Recognition Criterion

As for the fifth criterion, namely the susceptibility of the foreign decision to recognition in Québec, the Supreme Court stated that the burden on the applicant is not onerous. The applicant must only demonstrate a likelihood of recognition of the foreign decision in Québec. They must establish that it is possible that the foreign decision will not be manifestly incompatible with public order.

4. The Trial Judge's Discretionary Power

In addition to the five criteria mentioned above, article 3137 CCQ confers discretionary power on the trial judge. In other words, after having evaluated the criteria of article 3137 CCQ, the analysis does not stop there. The trial judge may use his or her discretionary power. This discretionary power allows the judge to determine whether it is appropriate to stay the decision on the application in Québec, despite the fact that the criteria of article 3137 CCQ are met. This discretion is exercised even if it is "clear that the foreign decision may be recognized in Québec".[4] This conclusion of the Supreme Court of Canada contradicts the Court of Appeal's assertion in this case that the judge's discretion would be precluded if all the criteria were met.[5]

In addition, the Supreme Court confirmed the close link between articles 3137 and 3135 CCQ. Indeed, the Court revisits the criteria set out in the Oppenheim[6] decision in the context of the analysis of the exception of forum non conveniens[7] and points out that these criteria may be considered in the exercise of the judge's discretion under article 3137 CCQ. However, these criteria must be assessed from the perspective of article 3137 CCQ. The Court then insists that this list is not exhaustive and the weight to be given to each of these criteria may vary in the light of each case. The trial judge remains free to consider criteria other than those set out in Oppenheim. The Supreme Court therefore reaffirms the broad discretion conferred on the trial judge in such circumstances.

Conclusion

The Supreme Court, by a majority, therefore allowed the wife's appeal and reinstated the Superior Court's conclusion on the refusal to stay the proceedings. Since the Belgian court equally refused the stay, the parallel divorce proceedings went forward for the parties.

It should be noted that the Honourable Judge Abella came to the same conclusion, but for different reasons. The Honourable Judge Brown dissented.

by Gabrielle Lachance Touchette and Joséane Chrétien

[1] R.S. c. P.R., 2019 SCC 49.[ps2id id='1' target='/]
[2] In this case, the judge of first instance analyzed Article 1096 of the Belgian Civil Code.[ps2id id='2' target='/]
[3] Para 79.[ps2id id='3' target='/]
[4] Para 98.[ps2id id='4' target='/]
[5] Para 70.[ps2id id='5' target='/]

[6] *Oppenheim Forfait GmbH c. Lexus maritime inc.*, 1998 CanLII 13001.[ps2id id='6' target='/]
[7] 3135 CCQ.[ps2id id='7' target='/]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.