THE (CISG) ROAD LESS TRAVELLED: *GRECON DIMTER INC. V. J.R. NORMAND INC.*

1. Introduction

The Supreme Court of Canada has recently released an interesting, if not problematic, decision in the case of *GreCon Dimter Inc. v. J.R. Normand Inc.*[1] While at first glance *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 United Nations Convention on Contracts for the International Sale of Goods (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 jurisprudence[4] was

1. *GreCon Dimter Inc. v. J.R. Normand Inc.* (2005), 255 D.L.R. (4th) 257, [2005] 2 S.C.R. 401, 336 N.R. 347.
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" (October 18, 2005), available online at <http://www.mondaq.com/article.asp?articleid=35534&lastestnews>; 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 Can. Bar Rev. 515; and Stephen L. Drymer, "SCC decision helps the evolution of international arbitration law", *The Lawyers Weekly*, December 16, 2005, p. 13.
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 and Janet Walker, *Canadian Conflict of Laws*, 6th ed. (Markham, LexisNexis Butterworths, 2005), vol. 2, at pp. 31-5 to 31-7; Antonin I. Pribetic, " 'Bringing Locus into Focus': A Choice-of-Law Methodology for CISG-based Concurrent Contract and Product Liability Claims", *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2004-2005, Pace International Law Review* (ed.) (München, Sellier European Law Publishers, 2006), pp. 179-223.
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 Québec: see An Act Respecting the United Nations Convention on Contracts for the International Sale of Goods, R.S.Q., c. C-67.01, available online 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 online at <http://www.cisg.ca>; <http://www.yorku.ca/osgoode/cisg>.
5. See Peter J. Mazzacano, "Brown & Root Services v. Aerotech Herman Nelson: The Continuing Plight of the U.N. Sales Convention in Canada", *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2004-2005, Pace International Law Review* (ed.) (München: Sellier European Law Publishers, 2006), pp. 169-78.
6. *GreCon v. Normand*, *supra*, footnote 1, at pp. 262-63.
7. CISG, *supra*, footnote 4, 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*, section 4.

missed yet again.[5]

2. Factual Background

The plaintiff, Scierie Thomas-Louis Tremblay Inc. (Tremblay) operated a saw mill 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 purchase of this equipment 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 Québec companies, such that the CISG did not apply.[7]

The second contract was a contract of sale[8] entered into on May 26, 1999 between GreCon and Normand 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]

It is the second contract that 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 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).[10]

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

9. The decision of the Supreme Court of Canada and the lower court decisions of the Québec Superior Court and Court of Appeal ([2004] R.J.Q. 88) in *GreCon v. Normand* are all unclear on whether the price quote was communicated via facsimile transmission, e-mail 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, *supra*, footnote 4, would have been inapplicable:

> 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, "Electronic Communications under CISG" (available online at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html>):

> 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.

10. *GreCon v. Normand*, *supra*, footnote 1, at pp. 407-408.

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.[11]

The customer, Tremblay, thereafter instituted an action in damages against the supplier, Normand, in the Superior Court of Québec. 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 which had resulted 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 Québec, 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.*".[12]

3. Supreme Court of Canada's Analysis

LeBel J., on behalf of the unanimous Supreme Court of Canada,[13] allowed the appeal, upholding the declinatory exception based on the Québec authority's want of jurisdiction and dismissing the action in warranty in the Superior Court of Québec. In considering arts. 3148, para. 2, 3139 and 3135 C.C.Q.,[14] LeBel J. remarked:

> The interaction of the relevant provisions leads to a conflict in determining the jurisdictional connection. While art. 3139 C.C.Q. extends the Québec 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.

11. *Ibid.*, at p. 263.
12. *Ibid.*, at p. 264.
13. McLachlin C.J.C., Bastarache, Binnie, Deschamps, Fish and Charron JJ. concurring.
14. Articles 3148, para. 2, 3139 and 3135 C.C.Q. read as follows:

> 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 Québec authority has jurisdiction to hear an action in warranty.[15]

The Supreme Court of Canada's analysis is firmly rooted in the view that art. 3148, para. 2 of the C.C.Q. establishes the framework within which a Québec 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. LeBel J. noted:

> 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").
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> . . . . .
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> 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.[16]

However, as Professor Walker observes:

> In Québec, paragraphs one and two of article 3111 of the Civil Code provide:
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> A juridical act whether or not in 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.

> 3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where
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> . . . . .
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> However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.
>
> 3139. Where a Québec authority has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross demand.
>
> 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.

15. *GreCon v. Normand*, *supra*, footnote 1, at pp. 266-67.
16. *Ibid.*, at p. 269.

> 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 Québec between two Québec parties and to be performed there, the parties cannot internationalize their contract in order to evade the mandatory provisions of the law of Québec that would be applicable had they not designated a law. This rule, which is bilateral, resembles that which prevails elsewhere in Canada.[17]

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 Québec and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention), the latter of which not only deals 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.[18] The fundamental conflict, according to LeBel J., arises from the legislative rules, on the one hand, and the parties' freedom of contract, on the other, thereby highlighting the importance of the role of party autonomy to a contract in private international law.[19] The conflict is manifested by the interaction of art. 3139 C.C.Q., which extends the Québec authority's jurisdiction to include an incidental action, whereas art. 3148, para. 2 C.C.Q. denies that authority any jurisdiction, and further precludes the application of art. 3135 C.C.Q.[20]

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17. Castel and Walker, *supra*, footnote 3, at p. 31-37.
18. *GreCon v. Normand*, *supra*, footnote 1, at pp. 270-71, citing *Eagle River International Ltd. (Syndic de)*, [1999] R.J.Q. 1497 at pp. 1501-502 (S.C.), affd [2000] R.J.Q. 392 (C.A.), affd 207 D.L.R. (4th) 385 *sub nom. Sam Levy & Associates Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978 *sub nom. Sam Levy & Associés Inc. v. Azco Mining Inc.*; *Intergaz inc. v. Atlas Copco Canada Inc.*, [1997] Q.J. No. 3942 (QL) at para. 10 (S.C.); *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) (S.C.).
19. *GreCon v. Normand*, *ibid.*, at p. 267.
20. *Ibid.*, at pp. 267-76.

LeBel J. held that the courts below erred in failing to give primacy to art. 3148, para. 2 by not deferring to the parties' autonomy expressed in their choice of forum. Although party autonomy was subject to certain limits, none were applicable to the instant case.[21] Consequently, the lower courts improperly expanded the scope of art. 3139 and relied on case law that was no longer applicable following the enactment of art. 3148 in the C.C.Q.[22]

The Supreme Court of Canada concluded that both clauses were enforceable. LeBel J. further held that art. 3135 attributes a suppletive function to the doctrine of *forum non conveniens*, which only applies if the jurisdiction of the Québec court has already been established according to the rules governing jurisdiction and allows the court to decline jurisdiction. The Supreme Court of Canada, therefore, found that art. 3135 cannot be used to reconcile the application of other provisions, such as arts. 3139 and 3148, para. 2.[23]

4. Applicability of the CISG

It is difficult to reconcile the Supreme Court of Canada's decision in *GreCon v. Normand* 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 court acknowledged the conceptual distinction between arbitration agreements and choice of law/forum clauses.[24] The court's observation that the principles of the New

21. Art. 3151 C.C.Q. confers exclusive jurisdiction on a Québec authority over actions founded on civil liability for damage suffered as a result of exposure to or the use of raw materials originating in Québec. Art. 3149 C.C.Q. confers jurisdiction on a Québec authority in cases involving consumer or employment contracts and prohibits waiver of jurisdiction. Furthermore, the final portion of art. 3148 C.C.Q. provides that a defendant may by its actions submit to the jurisdiction of the Québec authority despite a contrary intention expressed in the contract. *GreCon v. Normand*, *ibid.*, at pp. 270-71 *per* LeBel J.

22. The Supreme Court of Canada declined to follow its earlier decision in *ASG Industries Inc. v. Corp. Superseal*, [1983] 1 S.C.R. 781, 50 N.R. 300 and the line of cases that followed, including *Crestar Ltd. v. Canadian National Railway Co.*, [1999] R.J.Q. 1191 at p. 1200 (S.C.) and *Guns N'Roses Missouri Storm Inc. v. Donald K. Donald Inc.*, [1994] R.J.Q. 1183 at p. 1187, 114 D.L.R. (4th) 441 *sub nom. Clavel v. Productions Musicales Donald K. Donald Inc.* (C.A.).

23. *GreCon v. Normand*, *supra*, footnote 1, at pp. 279-82.

24. *Ibid.*, at p. 270 (para. 24), p. 271 (para. 27) and p. 275 (para. 38). LeBel J. states at p. 278 (emphasis added):

> As a result of the requirement that art. 3148, para. 2 C.C.Q. be interpreted in a manner consistent with Québec'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.

25. *Ibid.*, at pp. 276-78.

26. CISG, *supra*, footnote 4, Article 1. Neither Articles 2 nor 3 would have been applicable in the *GreCon v. Normand* case. Further, since both Germany and Québec would be considered "contracting states", neither party would be from a contracting state that has made an Article 95 declaration that it will not be bound by Article 1(1)(b).

York Convention are incorporated into both the C.C.Q. and the Québec Code of Civil Procedure[25] 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's sphere of application is contained in Articles 1 to 6. Article 1 reads:

> (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.[26]

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 Québec, are signatories to the CISG.[27] Since GreCon's place of business was in Germany and Normand's place of business was in Québec, 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 art. 3111 of the C.C.Q.[28] One problem that may arise is in the wording of s. 5(2) of the Canadian federal CISG statute, which seems to conflict with sub-paragraph (1)(b) of the CISG:

> 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.
>
> (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.[29]

Arguably, s. 5(2) of the International Sale of Goods Contracts Convention Act 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:

> (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"[30] is reflected in Article 6 of the CISG, which provides: "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."[31]

27. The Convention was signed by the former German Democratic Republic on August 13, 1981 and ratified on February 23, 1989 and entered into force on March 1, 1990. Upon accession, Canada declared that, in accordanee 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 July 31, 1992, Canada withdrew that declaration.) In a declaration received on April 9, 1992, Canada extended the application of the Convention to Québec and Saskatchewan. In a notification received on June 29, 1992, Canada extended the application of the Convention to the Yukon Territory. In a notification received on June 18, 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 current 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>.

28. Castel and Walker, *supra*, footnote 3, at p. 31-3 to 31-4.

29. *Supra*, footnote 4, s. 5(2).

30. *GreCon v. Normand*, *supra*, footnote 1, at p. 271.

31. The following excerpt from the Pace School of Law CISG W3 website (citing Canada's pre-eminent CISG scholar, Professor Jacob Ziegel) 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 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:

> 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.[32]

Thus, Article 4 excludes issues such as fraud,[33] lack of capacity, misrepresentation, duress, mistake,[34] unconscionability, and contracts

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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. Ziegel'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 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 online at <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>.

32. 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, April 11-20, 1988, United Nations document A/43/17, paras. 98-109. CLOUT reports are published as United Nations documents A/CN.9/SER.C/ABSTRACTS/1to A/CN.9/SER.C/ABSTRACTS/42. The forty-two CLOUT reports are also available online 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, notes 33, 41 and 42 and cases cited therein.

33. See Peter Schlechtriem, "The Borderland of Tort and Contract — Opening a New Frontier?" (1988), 21 Cornell Int'l L.J. 467 at pp. 473-74, stating that the CISG does not preempt claims for "misrepresentation, fraud, betrayal and intentional harm to economic interests", available online at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem.html> and analysis of the Québec Superior Court decision in *Sonox Sia v. Albury Grain Sales Inc. infra*, footnote 46, at pp. 16-20.

34. Professor Kritzer notes:

> There are also issues which may or may not be regarded as within the purview of the Convention, "mistake" for example. When there is a mistake, some commentators believe that contract rights and remedies are in many cases governed solely by the Convention, except in the case of fraud. Others regard mistake as a validity doctrine that is reserved unto domestic law.

"Checklist on the CISG": adapted excerpt from Albert H. Kritzer, ed., *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (The Hague, Kluwer Law International, 1994), available online at <http://www.cisg.law.pace.edu/cisg/biblio/kritzer2.html>. See also Patrick C. Leyens, "CISG and Mistake: Uniform Law vs. Domestic Law — The Interpretative Challenge of Mistake and the Validity Loophole", Pace International Law Review, *Review of the Convention on Contracts for the International Sale of Goods (2003-2004)* (München, Sellier European Law Publishers, 2005), pp. 3-51, also available online at <http://www.cisg.law.pace.edu/cisg/biblio/leyens.html>.

35. See Jacob S. Ziegel and Claude Samson, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods, Article 4 Commentary* (July 1981), available online at <http://www.cisg.law.pace.edu/cisg/text/ziegel4.html>.

36. *GreCon v. Normand*, *supra*, footnote 1, at p. 280.

37. 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 online at <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html> (citations omitted). See also Peter Schlechtriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd ed. (New York, Oxford University Press, 2005), pt. 1, ch. I — Sphere of Application — Article 6, pp. 82-92; Michael Joachim Bonell and Fabio Liguori (Italy), excerpt from "The U.N. Convention on the International Sale of Goods: A Critical Analysis of

contrary to public policy.[35] 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 Québec authority in the event of an action in warranty. Therefore, the Québec Superior Court and the Québec Court of Appeal both erred in not declining jurisdiction.[36]

(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 Professor Schlechtriem, a pre-eminent 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.[37]

In a recent ruling, the German Appellate Court (*Oberlandesgericht*) Zweibrücken held that:

> The parties neither agreed to exclude the application of the CISG pursuant to Article 6 CISG nor replaced it by the application of the BGB [*Bürgerliches Gesetzbuch*-German Civil Code] or the HGB [*Handelsgesetzbuch*-German Commercial Code]; the mere fact that the parties were not aware of the applicability of the CISG and therefore cited the provisions of national German Law — as the [Buyer] did is not to be considered as sufficient [to rebut the applicability of the CISG] . . .[38]

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

> (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.

According to Professor 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.

Current International Case Law — 1997 (Part 1)" (1997), Uniform Law Review 385, available online 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 online 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 Preëmption under the 1980 Vienna Sales Convention (CISG)" (2003), 13 Duke J. of Comp. & Int'l L. 263 at pp. 270-74, available online 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" (1995), 29 International Lawyer 525, available online at <http://www.cisg.law.pace.edu/cisg/text/winship6.html>.

38. Germany, February 2, 2004, Appellate Court Zweibrücken, available online on the CISG W3 database, Pace University School of Law, online at <http://cisgw3.law.pace.edu/ cases/040202g1.html>.

> 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 . . . *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.[39]

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. While such a finding would not affect the court's finding on choice of forum, it would have provided insight on the need to apply "uniform law" rather than "foreign law" to the dispute. 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".[40] LeBel J. cites, among others, the Supreme Court of Canada's decision in *Z.I. Pompey Industrie v. ECU-Line N.V.*,[41] which characterized the appropriate test for enforcement of forum selection clauses as the "strong cause" test referred to in *The "Eleftheria"*.[42]

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

> 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:

39. 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, in J. Herbots and R. Blanpain eds., *International Encyclopaedia of Laws — Contracts*, Suppl. 29 (The Hague, Kluwer Law International, December 2000), 1-192, fn. 3 and CISG case law cited therein, available online at <http://www.cisg.law.pace.edu/cisg/biblio/loo6.html>. I am grateful to Professor Albert Kritzer for bringing this point to my attention.
40. *GreCon v. Normand*, *supra*, footnote 1, at p. 269.
41. *Ibid.*, at p. 269 *per* LeBel J., citing *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450, 224 D.L.R. (4th) 577 at para. 20 *per* Bastarache J. (McLachlin C.J.C. and Gonthier, Iacobucci, Major, Binnie and LeBel JJ. concurring).
42. [1969] 1 Lloyd's Rep. 237 (Adm. Div.).

> 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.[43]

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 Québec law, it may be arguable that the parties' intention to oust the Québec court's jurisdiction was not so clearly expressed.[44] At a minimum, the parties' choice of law and choice of forum would no longer be exclusively "foreign" (*i.e.* German) from a conflicts of law perspective.[45]

43. *Z.I. Pompey Industrie v. ECU-Line N.V.*, *supra*, footnote 41, at p. 462 (emphasis added).
44. See M. Paul Michell, "Forum Selection Clauses and Fundamental Breach: *Z.I. Pompey Industrie v. ECU-Line N.V., The Canmar Fortune*" (2002), 36 C.B.L.J. 453.
45. In Castel and Walker, *supra*, footnote 3, at pp. 31-5 to 31-6, Professor Walker notes:
> If the parties have not expressed their choice, they may, nevertheless, have demonstrated it with reasonable certainty in a number of different ways . . . [i]f the parties have agreed that the court of a particular place shall have jurisdiction over the contract, there is a strong inference that the law of that place is the proper law. Other factors from which the courts have been prepared to infer the intentions of the parties as to the proper law are the legal terminology in which the contract is drafted, the form of the documents involved in the transaction, the currency in which payment is to be made, the use of a particular language, the connection with a preceding transaction, the nature and location of the subject matter of the contract, the residence (but rarely the nationality) of the parties, the head office of a corporation party to the contract, or the fact that one of the parties is a government . . . Where the parties have not expressed a choice as to the proper law and no such choice can be inferred from the circumstances of the case, the proper law of their contract is the system of law with which the transaction has the closest and most real connection. The court does not seek to find some presumed or fictitious intention of the parties, but rather holds the contract to be governed by the system of law with which, in all the circumstances it is most closely and really connected. Whilst firm rules cannot be laid down, the court will look to such factors as the place of contracting, the place of performance, the place of residence, or business of the parties, and the nature and subject matter of the contract. When the place of contracting is the same as the place of performance, the court may find it difficult to determinate that any other law is the proper law of the contract. [Citations omitted.]

   See also *Bank Van Parijs en de Nederlanden Belgie N.V. v. Cabri*, [1993] O.J. No. 1786 at paras. 5 and 8, 19 C.P.C. (3d) 362 (Gen. Div.) *per* O'Connor J.

In *Sonox Sia v. Albury Grain Sales Inc.*[46] the Québec Superior Court recently considered the validity of an arbitration clause specifying that all contractual disputes be arbitrated by the ICC[47] in London, U.K., with the CISG[48] stipulated as the governing law. In *Sonox*, the plaintiff, Sonox Sia, a Latvian company, bought grain from a Canadian company, Albury Grain Sales Inc. for a price of approximately $4 million (CAN). Sonox delivered a deposit of $413,000 as stipulated in the contract. Alleging a default by Sonox, Albury refused to deliver the grain shipment or return the deposit. Sonox then commenced an action in the Québec Superior Court against Albury and two of its principals, alleging fraudulent misrepresentation, claiming that Albury was involved in an international fraud scheme in collecting deposits from purchasers without any intention to deliver up under the contracts of sale, thereby rendering the contracts void *ab initio* (based upon a lack of consent). Sonox sought declaratory relief, an order upholding the pre-judgment seizure and damages in the amount of $800,000.

The defendant, Albury, brought a motion under art. 164 of the Code of Civil Procedure, raising lack of jurisdiction in the subject-matter

46. [2005] Q.J. No. 9998 (QL) (Que. S.C.), aff'd [2005] Q.J. No. 17960, 2005 QCCA 1193 (Que. C.A.), District of Montreal (*per* Otis, Rayle and Hilton JJ.A.).
47. *Ibid.*, at para. 31, the court clarified that the reference to the "ICC" was actually to the ICC — International Court of Arbitration in London, the United Kingdom.
48. *Supra*, footnote 4. The reference to the "Laws of Canada" appears redundant, insofar as the CISG forms part of the laws of Canada both federally and within each of the constituent provinces, including the Province of Québec, since its accession on May 1, 1992.

from the declinatory exception based on the arbitration clause. Albury sought dismissal of the action or, alternatively, an order staying the action and remitting the parties to arbitration. The arbitration clause read as follows:

> Article 11: Binding Arbitration
>
> 11.1 The buyer and seller agree to attempt to resolve all disputes in connection with this contract or the fulfillment [*sic*] of this contract through friendly discussion. If the dispute cannot be resolved through friendly discussion, the dispute shall be arbitrated in London, United Kingdom by the ICC *with the prevailing law to be the "United Nations Convention on Contracts for the International Sale of Goods (1980)" and the laws of Canada.*[49]

Sonox argued that while arbitrators generally have jurisdiction to interpret and apply contracts, they lacked jurisdiction to declare contracts void *ab initio*. Alternatively, Sonox argued the fraudulent misrepresentations allegedly made by Albury vitiated the requisite consent for voluntary submission to arbitration.

Buffoni J.S.C. further considered the validity or enforceability of the parties' choice of forum and choice of law contained in the contractual arbitration clause. Relying on Québec jurisprudence,[50] the motions judge held that actions alleging false representations and seeking annulment of a contract *ab initio* were not by nature excluded from the application of an arbitration clause. Buffoni J.S.C. also rejected Sonox's lack of consent argument, relying on art. 2642 of the Civil Code of Québec, which states that an arbitration clause is a contract distinct from the main agreement. Thus, the arbitration clause was deemed "severable" from the contract, a finding which is consistent with Article 81(1) of the CISG respecting avoidance of contracts generally.[51]

49. *Sonox, supra*, footnote 46, at para. 10 (emphasis added).

50. *Sonox, ibid.*, at paras. 16-24 *per* Buffoni J.S.C., citing *Gestion J & N Boudreault Inc. v. Domaine de la Sorbière (1991) Inc.*, [2003] J.Q. No 14333 (QL) at para. 31, J.E. 2003-2151, [2003] AZ-50197618 (S.C.); *Kingsway Financial Services Inc. v. 118997 Canada Inc.*, [1999] J.Q. No. 5922 (QL) at para. 27, [1999] AZ-50068857 (C.A.); *Société de récupération, d'exploitation et de développement forestiers du Québec v. Ouellette*, [1997] A.Q. No. 2753 (QL), 73 A.C.W.S. (3d) 388, [1997] AZ-97011706 (C.A.); *World LLC v. Parenteau & Parenteau Int'l Inc.*, [1998] A.Q. No. 736, AZ-98021411 (S.C.); *Automobiles Duclos Inc. v. Ford du Canada Ltée*, [2000] J.Q. No. 5278 (QL), [2001] R.J.Q. 173, J.E. 2001-103, [2000] AZ-01021062 (S.C.).

51. See Albert Kritzer, Editorial Remarks, *Filanto, S.p.A. v. Chilewich International Corp.*, 789 F. Supp. 1229, 1992 U.S. Dist. LEXIS 5011 (S.D.N.Y.) 1992, affd 984 F.2d 58, 1993 U.S. App. LEXIS 874 (2d Cir. 1993) also available online at <http://cisgw3.law.pace.edu/cisg/wais/db/editorial/920414u1editorial.html>.

Referring the matter to arbitration, the court held that it no longer had jurisdiction and dismissed the action against Albury. However, since the two individual defendants were not parties to the arbitration clause, the court held that "the jurisdiction of this Court on the subject-matter (*ratione materiae*) remain[ed] intact as regards these two individuals".[52] The court opined, however, that the remaining personal defendants could still move to dismiss the action against them on *forum non conveniens* grounds.[53]

As in the *GreCon v. Normand* case and reflective of Canadian jurisprudence generally,[54] the court failed to refer to any CISG case law or scholarly commentary. Specifically, the court failed to refer to the impact of the allegation of fraud vis-à-vis the validity exclusion under Article 4(a) of the CISG. Relying on the strict wording of the arbitration clause is unsatisfactory when fraud "rears its ugly head", particularly since fraudulent misrepresentations are rarely within the reasonable expectation of the parties when entering into a contract. The issue of whether the alleged fraud vitiated the contract was deferred to the arbitrator.

Furthermore, the court overlooked the contract formation rules under the CISG. In particular, the court failed to consider the timing of the plaintiff's objection to the arbitration clause based upon the alleged fraudulent misrepresentations. If Sonox had argued that the fraud was the *sine qua non* in Sonox's entering into the contract (*i.e.* but for the fraudulent misrepresentation, Sonox would not have agreed to purchase the grain),[55] then the court may have been in a

52. *Sonox, supra*, footnote 46, at para. 35. In dismissing Albury's appeal on this point, the Québec Court of Appeal stated, in part: "Albury cannot plead on behalf of these two individuals, either before this Court or before the Superior Court." In any event, and without presuming the outcome, nothing prevents Mr. Ben-Menashe or Mr. Legault from presenting a declinatory exception if they are of the view that they too are subject to the arbitration clause and that the arbitration authority is competent to decide the claim directed against them. *Albury Grain Sales Inc. v. Sonox Sia*, [2005] Q.J. No. 17960 at para. 5, 2005 QCCA 1193 (Québec C.A.).

53. *Sonox, ibid.*, at para. 36, citing Article 3135 CCQ (the *forum non conveniens* exception): "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."

54. See Peter J. Mazzacano, "Canadian Jurisprudence and the Uniform Application of the U.N. Convention on Contracts for the International Sale of Goods", Pace International Law Review, forthcoming, available online at <http://www.yorku.ca/osgoode/cisg/writings/documents/Mazzacano-CanadianCISGJurisprudence.pdf.>.

55. See *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 at pp. 203-207, [1994] 3 S.C.R. 377.

position to consider whether the arbitration clause was an "additional or different term" that materially altered the terms of the offer. Article 19(3) of the CISG reads:

> Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the *settlement of disputes* are considered to alter the terms of the offer materially.[56]

The court also may have considered lifting the corporate veil against the two principals based upon Article 317 of the Civil Code of Québec, which provides as follows: "In no case may a legal person set up juridical personality against a person in good faith if it is set up to dissemble fraud, abuse of right or contravention of a rule of public order." Thus, the Québec court failed to analyze critically whether the substance (not the characterization) of the fraud allegations constituted sufficient grounds to invalidate the arbitration clause, and, by logical inference, the parties' choice of forum. In any event, the validity exclusion under Article 4(a) would not restrict the plaintiff's claim to damages under Article 74.[57] Nevertheless, the *Sonox* decision is noteworthy on the scope and applicability of arbitration clauses for international sale of goods contracts where the contracting parties designate the CISG as the governing choice of law.[58]

(d) *GreCon v. Horner* — The U.S. Court of Appeals' Analysis of the Choice of Law Clause

Interestingly, the same choice of forum and choice of law clauses in *GreCon v. Normand* were considered by the United States Court of Appeals a year earlier in *GreCon Dimter, Inc. v. Horner Flooring Company, Inc.*,[59] which involved a North Carolina subsidiary of

56. CISG, *supra*, footnote 4 (emphasis added).
57. See GER OLG Köln 22U4/96, May 21, 1996, cited by John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed. (The Hague: Kluwer Law International, 1999), pp. 63-70 (§ 65(a) Remedies for Fraud).
58. For an analysis 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" (2004), 13 J. Transnat'l L. & Pol'y 347, available online at <http://cisgw3.law.pace.edu/cisg/biblio/pribetic.html>. For a discussion of gaps and exclusions under Articles 4 and 5 of the CISG, see Pribetic, *supra*, footnote 3.
59. *GreCon Dimter, Inc. v. Horner Flooring Company, Inc.*, 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).

GreCon. The U.S. 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".[60] The defendant, Horner, was a Michigan corporation that manufactured hardwood flooring.

In November 1998, GreCon entered into two contracts with Horner to supply and install a mill system at Horner's Michigan plant. The mill system comprised three commercial saws and a material handling system. The saws were manufactured in Germany,[61] while virtually all the components of the material handling system were manufactured in the United States. The court 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.[62]

Following installation of the mill system, Horner became dissatisfied with its performance and withheld payments due under the contracts. GreCon responded by filing an action in the North Carolina state court. Horner subsequently removed the case to the Western District of North Carolina 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.[63]

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

60. *Ibid.*, at p. 2.
61. Cf. *GreCon v. Normand*, where GreCon in Germany also manufactured the saw line and scanner equipment, *supra*, footnote 1, at para. 3.
62. *GreCon v. Horner*, *supra*, footnote 59, at p. 2.
63. *Ibid.*, at p. 3.

law. The U.S. Court of Appeals rejected Horner's arguments,[64] and affirmed the district court ruling which held that German law applied to the action.[65]

5. Concluding Remarks

While the U.S. Court of Appeals in *GreCon v. Horner* reached the same result as the Supreme Court of Canada in *GreCon v. Normand* 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 America,[66] such that the CISG would not apply, unless both parties expressly agreed to "opt in" to the CISG.[67] 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 Québec, nor did GreCon voluntarily submit to the Québec 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*, if GreCon's German headquartered company were a party to the action, the CISG would have applied, notwithstanding the United States has made a declaration under Article 95 that it will not be bound by Article 1(1)(h), on the basis that the United States and Germany are both "Contracting States" as defined under Article 1(1)(a).[68]

64. *Ibid.*, at pp. 5-8. According to the *per curiam* opinion (at p. 3):
> 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.

65. *Ibid.*, at p. 8.

66. 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.

67. 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 Honnold, *supra*, footnote 57, at pp. 77-87.

68. As Professor Schlechtriem remarks:
> States declaring a reservation under Article 95 are, however, (unlike states declaring reservations under Articles 92(2) and 93(3)) [footnote omitted] 'Contracting States' in the meaning of Article 1(1)(a). If the parties to the contract . . . have their places of business in the US, a Contracting (reservation) State, and in Germany, a Contracting (non-reservation) State, a court in Canada has to apply the CISG, if its conflict rules refer either to German or US law.

Schlechtriem, *supra*, footnote 37, at p. 37, §44. Some commentators argue that the forum (contracting) state is indirectly bound by Article 95 and applicable declared reservations. *Cf.* Albert Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (Deventer, Kluwer Law and Taxation, 1989) at p. 78 and Honnold, *supra*, footnote 57, at p. 47.5.

For recent American case law on the applicability of the CISG, see *Asante Technologies v. PMC-Sierra*, 164 F. Supp. 2d 1142, 2001 U.S. Dist. LEXIS 16000 and 2001 WL 1182401 (N.D. Cal) 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; available online at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010727u1.html>; *Valero Mkt. & Supply Co. v. Greeni Oy & Greeni Trading Oy*, 373 F.Supp.2d 475 at p. 482 (D.N.J. 2005) where an agreement to include a provision that New York law governed failed to specifically exclude application of the CISG and therefore the CISG remained applicable; available online at <http://cisgw3.law.pace.edu/cases/050615u1.html>; *BP Oil International, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003) (Court File No. M 02-20166) *per* Jerry E. Smith, Circuit Judge, Barksdale, Circuit Judge, Fitzwater, District Judge, holding that "if the parties decide to exclude the [CISG], it should be expressly excluded by language which states that it does not apply"; available online at <http://www.ca5.uscourts.gov/opinions%5Cpub%5C02/02-20166.cv0.wpd.pdf> and also available online at <http://cisgw3.law.pace.edu/cases/030611u1.html>; 5th Circuit petition for rehearing denied July 7, 2003, available online at <http://www.ca5.uscourts.gov/opinions%5Cpub%5C02/02-20166.cv1. wpd.pdf>; *Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd.*, No. 01-5938, 2003 WL 223187, at *8 (N.D. Ill. January 30, 2003), which held that a contract stating the agreement shall be governed by the laws of Canada did not exclude the CISG; available online at <http://cisgw3.law.pace.edu/cases/030129u1.html>; *Cf. McDowell Valley Vineyards, Inc. v. Sabaté USA Inc.*, 2005 WL 2893848 (Federal District Court (N.D. Cal.)) where the court 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, available online at <http://cisgw3.law.pace.edu/cases/051102u1.html>; *American Biophysics v. Dubois Marine Specialties, a/k/a Dubois Motor Sports*, 2006 WL 225778 (U.S. Dist. Ct. D.R.I.) *per* Torres C.J., which held that a forum selection and exclusive jurisdiction clause which provided that "This Agreement shall be construed and enforced in accordance with the laws of Rhode Island" was sufficient to exclude the CISG, available online at <http://cisgw3.law.pace.edu/cases/060130u1.html>. For a recent Ontario CISG case involving choice of forum and choice of law issues, see *Chateau Des Charmes Wines Ltd. v. Sabate, USA, Inc.*, [2005] O.J. No. 4604 (QL), 143 A.C.W.S. (3d) 276 (S.C.J.) (unreported).

Both the *GreCon v. Normand* and *GreCon v. Horner* decisions demonstrate that the parties' (and their respective counsels') characterization of the legal issues, including jurisdictional arguments, ultimately will guide the domestic forum court's jurisprudential analysis. Unlike *GreCon v. Horner*, in *GreCon v. Normand* choice of forum remained a live issue when it reached the Supreme Court of Canada. 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.[69]

Antonin I. Pribetic*

69. "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 I. Schwenzer, G. Hager, eds., *Festschrift für Peter Schlechtriem zum 70. Geburtstag* (Tübingen, J.B.C. Mohr/Paul Siebeck, 2003) pp. 223-53, available online at <http://cisgw3.law.pace.edu/cisg/biblio/rogers2.html>. See Camilla Baasch Andersen, "The Uniform International Sales Law and the Global Jurisconsultorium" (2005), 24 Journal of Law and Commerce 159, available online at <http://www.cisg.law.pace.edu/cisg/biblio/andersen3.html>, noting that the authors use the term

> to denote the need for cross-border consultation in deciding issues of uniform law. It is an excellent descriptive term for the phenomenon of meeting of minds across jurisdictions in the shaping of international law. However, the term *jurisconsultorium* also lends itself well to the formation of such law in a scholarly jurisconsultorium. In essence, this article will examine the genesis of the CISG and the scholarly jurisconsultorium from which it sprang, and the need for practitioners (*i.e.* judges, arbitrators and legal counsel) to extend the jurisconsultorium in practice to ensure uniformity.

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