SUPREME COURT OF CANADA

CITATION: GreCon Dimter inc. *v.* J.R. Normand inc., [2005] 2 S.C.R. 401, 2005 SCC 46

DATE: 20050722
DOCKET: 30217

BETWEEN:

GreCon Dimter Inc.
Appellant
v.
J.R. Normand Inc. and Scierie Thomas-Louis Tremblay Inc.
Respondents

OFFICIAL ENGLISH TRANSLATION

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 61)
LeBel J. (McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish and Charron JJ. concurring)

GreCon Dimter inc. *Appellant*

v.

J.R. Normand inc. and Scierie Thomas-Louis Tremblay inc. *Respondents*

Indexed as: GreCon Dimter inc. *v.* J.R. Normand inc.

Neutral citation: 2005 SCC 46.

File No.: 30217.

2005: February 10; 2005: July 22.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

on appeal from the court of appeal for quebec

Private international law — Jurisdiction of Quebec courts — Choice of forum clause — Action in warranty — Quebec supplier sued in damages by Quebec business for failure to deliver equipment — Incidental action in warranty against German manufacturer for failure to supply equipment to Quebec supplier — Contract between German manufacturer and Quebec supplier including choice of forum clause in favour of German court — Whether Quebec court hearing principal action has

jurisdiction to hear incidental action in warranty — Civil Code of Québec, S.Q. 1991, c. 64, arts. 3135, 3139, 3148.

A German manufacturer's failure to deliver certain equipment to a Quebec supplier caused the partial nonperformance of the supplier's obligations to a customer operating a business in Quebec. The customer instituted an action in damages against the supplier in the Superior Court of Quebec. The supplier called the German manufacturer in warranty, and the manufacturer moved to dismiss the action in warranty on the basis of a choice of forum clause in its contract with the supplier. According to that clause, only a German court had jurisdiction. The Superior Court applied art. 3139 *C.C.Q.* to dismiss the declinatory exception on the basis that the unity of the actions must prevail over the contractual choice of court provided for in art. 3148, para. 2 *C.C.Q.* The Court of Appeal affirmed the dismissal of the declinatory exception and resolved the conflict between art. 3139 and art. 3148, para. 2 by applying art. 3135 *C.C.Q.* relating to the *forum non conveniens*.

Held: The appeal should be allowed. The declinatory exception based on the Quebec authority's want of jurisdiction should be allowed and the action in warranty in the Superior Court of Quebec should be dismissed.

The fundamental substantive rule of the autonomy of the parties prevails over the suppletive procedural rule of the single forum. Article 3148, para. 2 *C.C.Q.* must take precedence over art. 3139 *C.C.Q.* in the context of an action in warranty where a choice of forum clause applies to the legal relationship between the parties to the proceeding if, as in the case at bar, the clause indicates a clear intention to oust the jurisdiction of the Quebec authority. In such circumstances, the Quebec authority

must decline jurisdiction. This conclusion flows both from the legal context of the provisions and from their hierarchy. [1] [18] [46]

The legal context consists of Quebec's codification of private international law and the objectives specific to that law, namely the principle of the autonomy of the parties and the legal certainty of international transactions. In enacting art. 3148, para. 2, the Quebec legislature recognized the primacy of the autonomy of the parties in situations involving conflicts of jurisdiction. This legislative choice, by providing for the use of arbitration clauses and choice of forum clauses, fosters foreseeability and certainty in international legal transactions. The choice is also related to the trend toward international harmonization of the rules of conflict of laws and of jurisdiction. Aside from certain exceptions, which do not include art. 3139 and do not otherwise apply in the case at bar, there is nothing to suggest that the legislature intended to limit the parties' ability to oust the Quebec authority's jurisdiction by agreement in respect of conflicts of jurisdiction. Article 3148, para. 2 constitutes the cornerstone of a legislative policy of respect for the autonomy of the parties and must therefore be interpreted broadly. The purpose of art. 3139, which extends to an incidental demand the Quebec authority's jurisdiction to hear a principal demand, is primarily to ensure the efficient use of judicial resources, and the provision is the product of domestic procedural considerations; as an exception to the principle that a court must determine its jurisdiction on a case-by-case basis, this provision must be interpreted narrowly. Such an interpretation is not inconsistent with the principles to which art. 3139 gives effect, and is consistent with the hierarchy of the rules set out in the *Civil Code* in this respect. [19-37]

The hierarchy of the rules leads to the primacy of the principle stated in art. 3148, para. 2. As art. 3139 is merely a permissive provision that is procedural in nature, its scope is narrow and its application is subordinate to the application of art. 3148, para. 2, which gives full effect to a clear intention expressed in a valid and exclusive choice of forum clause. Moreover, the requirement that art. 3148, para. 2 be interpreted in a manner consistent with Quebec's international commitments confirms that choice of forum clauses are binding despite the existence of procedural provisions such as art. 3139. [37-45]

The line of cases followed by the trial judge, in which the courts refused to enforce choice of forum clauses in the context of actions in warranty, is irrelevant, since the courts that decided those cases failed to consider the state of private international law in Quebec since the reform of the *Civil Code*, and in particular the principle of the primacy of the autonomy of the parties. As for art. 3135 *C.C.Q.*, which codifies the doctrine of *forum non conveniens* and which the Court of Appeal applied to reconcile art. 3148, para. 2 with art. 3139, it is inapplicable in the case at bar. Article 3135 has a suppletive function and is applicable only where the jurisdiction of the Quebec court has first been established. [48-56]

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Applied: *Camionex inc. v. Bombardier inc.*, REJB 99-13575; **distinguished:** *A S G Industries Inc. v. Corporation Superseal*, [1983] 1 S.C.R. 781; **disapproved:** *Crestar Ltd. v. Canadian National Railway Co.*, [1999] R.J.Q. 1191; *Guns N'Roses Missouri Storm inc. v. Productions musicales Donald K. Donald inc.*, [1994] R.J.Q. 1183; **referred to:** *Spar Aerospace Ltd. v. American Mobile Satellite*

Corp., [2002] 4 S.C.R. 205, 2002 SCC 78; *Lamborghini (Canada) inc. v. Automobili Lamborghini S.p.A.*, [1997] R.J.Q. 58; *Z.I. Pompey Industrie v. ECU-Ligne N.V.*, [2003] 1 S.C.R. 450, 2003 SCC 27; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90; *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178, 2003 SCC 17; *171486 Canada inc. v. Rogers Cantel inc.*, [1995] R.D.J. 91; *Dobexco Foods International inc. v. Van Barneveld Gouda Bv*, [1997] Q.J. No. 1100 (QL); *Conserviera S.p.A. v. Paesana Import-Export inc.*, [2001] R.J.Q. 1458; *Eagle River International Ltd. (Syndic de)*, [1999] R.J.Q. 1497; *Intergaz inc. v. Atlas Copco Canada inc.*, [1997] Q.J. No. 3942 (QL); *Équipements Eustache Lamontagne ltée v. Équipements Belarus du Canada ltée*, [1994] R.D.J. 599; *Birdsall inc. v. In Any Event inc.*, [1999] R.J.Q. 1344; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4; *Kaverit Steel & Crane Ltd. v. Kone Corp.* (1992), 85 Alta L.R. (2d) 287; *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113; *Kvaerner Enviropower Inc. v. Tanar Industries Ltd.* (1994), 24 Alta. L.R. (3d) 365; *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257; *Fibreco Pulp Inc. v. Star Shipping A/S* (2000), 257 N.R. 291; *La Sarre (Ville de) v. Gabriel Aubé inc.*, [1992] R.D.J. 273; *Gariépy v. Simard*, REJB 2003-45302; *Pelletier v. Standard Life*, [2000] Q.J. No. 2837 (QL).

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Act to amend the Civil Code and the Code of Civil Procedure in respect of arbitration, S.Q. 1986, c. 73.

Civil Code of Québec, S.Q. 1991, c. 64, arts. 83, 1730, 2638, 3098, 3107, 3111, 3121, 3134, 3135, 3136, 3137, 3139, 3140, 3148, 3149, 3150, 3151, 3165, 3168(5).

Code of Civil Procedure, R.S.Q., c. C-25, arts. 71, 222, 940.1.

Treaties and Other International Instruments

Convention on the Choice of Court, The Hague Convention, concluded November 25, 1965, arts. 5, 6.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 3, art. II(3).

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APPEAL from a judgment of the Quebec Court of Appeal (Otis, Rochette and Morissette JJ.A.), [2004] R.J.Q. 88, [2004] Q.J. No. 173 (QL), affirming a decision of Corriveau J., [2003] R.L. 260 (*sub nom. Scierie Thomas-Louis Tremblay inc. v. J.R. Normand inc.*), [2003] Q.J. No. 1262 (QL). Appeal allowed.

François Marseille, *Nicholas J. Krnjevic* and *David A. Johnson*, for the appellant.

Pierre C. Bellavance and *Gabrielle Brochu*, for the respondent J.R. Normand inc.

No one appeared for the respondent Scierie Thomas-Louis Tremblay inc.

English version of the judgment of the Court delivered by

LEBEL J. —

I. Introduction

1 This appeal raises the private international law issues that arise from the application, in an action in warranty brought by a Quebec importer against a German manufacturer, of a choice of forum clause in which the parties have opted for a foreign authority. In this context, diametrically opposite conclusions are reached depending on whether the jurisdictional connection is determined by applying art. 3139 or art. 3148, para. 2 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"). The Quebec Court of Appeal unanimously held that, despite the existence of the choice of forum clause directing the parties to a German court, the action in warranty brought by the Quebec importer had to be heard by the Quebec court that was hearing the principal action. For reasons relating primarily to the role of the autonomy of the parties to a contract in private international law and to the hierarchy of the laws that are relevant in this case, I find that the Court of Appeal and the trial judge erred in law. Accordingly, the declinatory exception based on the existence of a choice of forum clause in favour of a foreign authority should be allowed.

II. Origin of the Case

2 The appellant, GreCon Dimter inc. ("GreCon"), describes itself in the pleadings as a German corporation that manufactures and sells specialized equipment used in processing plants and sawmills. It has no place of business or assets in Quebec. The respondent, J.R. Normand inc. ("Normand"), whose head office is in Quebec, specializes in the sale and service of industrial woodworking machinery, tools and supplies. Scierie Thomas-Louis Tremblay inc. ("Tremblay"), the other respondent, operates a sawmill north of Lac Saint-Jean, in Quebec, and its head office is located in that province.

3 This case arises out of two contracts. The first is one 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 ("Equipment"). The purchase of the Equipment was part and parcel of a modernization plan being undertaken to improve and expand production at Tremblay's sawmill.

4 The second contract is a contract of sale entered into on May 26, 1999, by GreCon and Normand under which the Equipment was to be supplied to Normand for resale to Tremblay. 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. 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 would be decided in accordance with German law:

Choice of Forum

> It is agreed, by and between the seller and buyer, that all disputes and matters whatsoever arising under, in connection 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).

5 As a result of problems encountered by GreCon in designing it, the scanner was not delivered to or installed at Tremblay's plant by the date provided for in the contract between Normand and Tremblay, namely August 20, 1999. As a result, Tremblay had to set up a temporary system for cutting wood, and it proved to be inadequate. GreCon was unable to deliver the scanner until April 2001. Because of the numerous delays and the problems it had encountered, Tremblay decided to give Normand notice on April 19, 2001, that it intended to resiliate the contract. Consequently, the Equipment was never delivered to Tremblay.

6 As a result of these events, Tremblay instituted an action in damages against Normand in the Superior Court of Quebec on July 3, 2002; the action was based on a professional seller's liability for latent defects and on multiple alleged faults in the performance of contractual obligations. In that principal action, Tremblay claimed to have suffered damage in the order of $5,160,331 because the equipment actually supplied by Normand was defective and because the Equipment was never delivered, with the result that Tremblay suffered a decline in output and productivity. Tremblay also sought a refund of deposits that had been paid to Normand.

7 On October 2, 2002, Normand filed an incidental action in warranty against GreCon in the Superior Court of Quebec. In support of its action, Normand alleged the inadequate performance of GreCon's contractual obligations, namely a failure to deliver some of the Equipment and delays in delivery. The respondent sought to be indemnified in full by GreCon for any award that might be made against it in the principal action brought by Tremblay. It should be 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.*

8 On December 18, 2002, GreCon raised a declinatory exception that challenged the jurisdiction of the Quebec courts. By a motion for declinatory exception based on art. 83 and art. 3148, para. 2 *C.C.Q.*, GreCon sought to have Normand's action in warranty dismissed on the ground that the choice of forum clause in the contract between the two companies barred the Superior Court of Quebec from exercising its jurisdiction in disputes between the two parties. Under that clause, only a court located in the city of Alfeld, Germany, would have jurisdiction. Normand responded that the principal action was already before the Superior Court and that art. 3139 *C.C.Q.* therefore gave that court jurisdiction over the action in warranty notwithstanding the existence of a choice of forum clause. Normand added that the Quebec courts were a more appropriate forum because of the connexity between the principal action and the action in warranty, and the fact that a majority of the witnesses in both actions were from Quebec.

III. Judicial History

A. *Quebec Superior Court*, [2003] R.L. 260

9 Corriveau J. held that, despite the existence of a choice of forum clause in favour of a foreign authority, it was in the parties' interest for the action in warranty to be heard by the Quebec court responsible for hearing the principal action. The trial judge, relying on the Superior Court's decision in *Crestar Ltd. v. Canadian National Railway Co.*, [1999] R.J.Q. 1191, stated that a choice of forum clause cannot deprive a Quebec authority with jurisdiction to hear a principal action of its power to hear an incidental action. Accordingly, the choice of forum clause is frustrated by the application of art. 3139 *C.C.Q.*, which requires that the principal action and the incidental action be heard by the Quebec authority. Having found that art. 3139 *C.C.Q.* applied, the judge dismissed the motion for declinatory exception.

B. *Quebec Court of Appeal*, [2004] R.J.Q. 88 *(Otis, Rochette and Morissette JJ.A.)*

10 The appellant appealed the judgment on the motion for declinatory exception to the Quebec Court of Appeal. In that court, the appellant's primary argument was that art. 3148, para. 2 *C.C.Q.* takes precedence over art. 3139 *C.C.Q.* because it is more specific than the latter provision, because it is mandatory in nature and because it is new law. The appellant added that the rule laid down in art. 3139 *C.C.Q.* does not make a particular hearing method mandatory and that, at most, it confers a discretion on the court hearing the principal action. The respondent Normand contended that art. 3139 *C.C.Q.* is a specific provision that supplements the general rules relating to personal actions of a patrimonial nature and that confers jurisdiction, and that it must therefore be applied notwithstanding the existence of a choice of forum clause.

11 Rochette J.A., writing for the Court of Appeal, began by noting that exclusive choice of forum clauses are now valid since the reform of the *Civil Code* and the enactment of art. 3148, para. 2 *C.C.Q.* However, given the existence of art. 3139 *C.C.Q.*, which concerns actions in warranty, a decision as to whether a Quebec authority has jurisdiction cannot be based solely on the existence of a choice of forum clause and on art. 3148, para. 2 *C.C.Q.* In the judge's opinion, art. 3139 gives the Quebec courts jurisdiction in the case at bar, having regard to the degree of connexity between the principal action and the action in warranty. Rochette J.A. then rejected the appellant's argument that art. 3148, para. 2 *C.C.Q.* must take precedence over art. 3139 *C.C.Q.* In his opinion, it is difficult to give one provision priority over the other: these rules were adopted for very different reasons, and the legislature did not anticipate the problems that have arisen in the instant case.

12 To resolve this problem, Rochette J.A. attempted to reconcile arts. 3148 and 3139 *C.C.Q.* by applying art. 3135 *C.C.Q.* and the doctrine of *forum non conveniens*. In his view, that doctrine can be applied where art. 3139 *C.C.Q.* is applicable, because the Quebec courts then have jurisdiction to hear the dispute. After applying the principles relating to the *forum non conveniens* that have been developed by the courts, he found that the Quebec authority has jurisdiction on the basis that this is not an exceptional case in which the Quebec authority would not be the natural forum to hear the case. The appellant had not succeeded in conveying a clear impression that a single foreign forum would be preferable, or in showing that the foreign court was plainly more appropriate than the Quebec court. Accordingly, the appeal was dismissed.

IV. Analysis

A. *Nature of the Issue and Legislative Framework*

13 This case has arisen from a situation in which the defendant in a principal action instituted in Quebec brought an action in warranty after having agreed, in a choice of forum clause, to submit any dispute arising out of its legal relationship with the defendant in warranty to the jurisdiction of a foreign authority. In this situation, three main provisions of the *Civil Code* are relevant to the determination of whether the Quebec authority has jurisdiction.

14 First, art. 3148, para. 2 *C.C.Q.* ousts a Quebec authority's jurisdiction in respect of a personal action of a patrimonial nature if the parties have chosen by agreement to submit their disputes to a foreign authority or an arbitrator:

> **3148.** In personal actions of a patrimonial nature, a Québec authority has jurisdiction where
>
> . . .
>
> 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.

15 Second, art. 3139 *C.C.Q.* confers jurisdiction on the Quebec authority to hear an action in warranty if it has jurisdiction over the principal action:

> **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.

16 And third, the Quebec authority may, on an application by a party, decline jurisdiction by virtue of the doctrine of *forum non conveniens*, which is codified in art. 3135 *C.C.Q.*:

> **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.

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. As will have been noted, the effect of the interaction of these provisions is a fundamental conflict between the legislative rules and the parties' freedom of contract, whence the need to determine the importance of the role of the autonomy of the parties to a contract in private international law. That determination will make it possible to properly delineate the scope of the provisions in question and to gauge their impact on the jurisdictional connection. Moreover, the fact that the doctrine of *forum non conveniens* is part of the discussion requires that we consider the relative importance of art. 3135 *C.C.Q.* in the process of determining the jurisdiction of the Quebec authority. This leads inevitably to the question of the hierarchy of the relevant rules.

Accordingly, in my view, the outcome of this case depends on the role of the autonomy of the parties and on the hierarchy of the relevant rules.

19 It is important, in disposing of the issues raised in this case, to examine the legislative framework within which the relevant rules operate. On this point, it should be borne in mind that the private international law of Quebec has been codified. This fundamental characteristic means that the general principles of interpretation of the *Civil Code* apply to the determination of the scope of the relevant provisions. The courts must therefore interpret the rules as a coherent whole. They must begin by examining the specific wording of the provisions. Next, they must inquire into whether their interpretation is consistent with the principles that underlie the rules: *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78, at para. 23. The particular legal framework of private international law cannot be disregarded, nor can the general objectives that are specific to that law: the principle of the autonomy of the parties and the legal certainty of international transactions: J. A. Talpis and J.-G. Castel, "Interpreting the rules of private international law", in *Reform of the Civil Code* (1993), vol. 5 B, at pp. 6 and 9.

(i) Primacy of the Autonomy of the Parties

20 Article 3148 establishes the general framework that delineates the jurisdiction of a Quebec authority in relation to contracts in proceedings based on personal actions of a patrimonial nature, subject to the specific rules that apply to cases in which the action is based on a contract of employment or a consumer contract (art. 3149 *C.C.Q.*), a contract of insurance (art. 3150 *C.C.Q.*), or civil liability for damage suffered as a result of exposure to or the use of raw materials originating in

Quebec (art. 3151 *C.C.Q.*). Article 3148 also recognizes the primacy of the autonomy of the parties: although the legislature did confer jurisdiction on the Quebec authority on the basis of the criteria of jurisdictional connection, such as domicile, fault, the damage or the injurious act, it was careful to give the parties the ability to choose to oust the authority's jurisdiction when they wish to entrust current or future disputes between them that arise out of a specific legal relationship to a foreign authority or an arbitrator.

21 Article 3148 *C.C.Q.* thus attaches considerable importance to the principle of the autonomy of the parties. The fact that the parties may, by agreement, oust the Quebec authority's jurisdiction attests to the legislature's intention to recognize the autonomy of the parties in cases involving conflicts of jurisdiction: along these lines, see Talpis and Castel, at p. 58. The legislature confirmed that intention several times in relation to conflicts of law, for example in arts. 3098, 3107, 3111 and 3121 *C.C.Q.* The legislature's intention, in enacting art. 3148 *C.C.Q.*, to disregard the line of cases in which choice of forum clauses had been held to be invalid also attests to the importance attached to this principle: *Lamborghini (Canada) inc. v. Automobili Lamborghini S.p.A.*, [1997] R.J.Q. 58 (C.A.), at p. 64. See also G. Goldstein and E. Groffier, *Droit international privé*, t. 1, *Théorie générale* (1998), at p. 361, and C. Emanuelli, *Droit international privé québécois* (2001), at p. 94.

22 It should also be noted that respecting the autonomy of the parties makes it possible to implement the broader principle of achieving legal certainty in international transactions. The parties generally give effect to their intention to exclude a dispute from an authority's jurisdiction by means of an arbitration clause or a choice of forum clause. These clauses foster certainty and foreseeability in

international commercial relations, because they enable the parties to provide in advance for the forum to which they will submit their dispute. See Talpis and Castel, at p. 58. This Court has often stressed the importance of such clauses and the need to encourage them, because they provide international commercial relations with the stability and foreseeability required for purposes of the critical components of private international law, namely order and fairness: *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450, 2003 SCC 27, at para. 20; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1096-97; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90, at paras. 71-72; *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178, 2003 SCC 17, at para. 48. This shows how deferring to the contracting parties' intention ensures the implementation of this policy of legal certainty that is an inherent feature of private international law: Talpis and Castel, at p. 64. To recognize the usefulness and effectiveness of choice of forum clauses and arbitration clauses is therefore consistent with the general principles of private international law.

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"). It should be noted in this respect that art. 3148, para. 2 *C.C.Q.* is based on arts. 5 and 6 of the *Convention on the Choice of Court* (concluded on November 25, 1965), the purpose of which is to recognize and give full effect to choice of forum clauses: *Commentaires du ministre de la Justice* (1993), t. II, at p. 2009. The general principle

of that convention is in fact that exclusive choice of forum clauses are binding. The Convention limits exceptions to this principle, as may be seen in art. 6 thereof. It is therefore apparent that the Convention, on which the *Civil Code*'s provision is modelled although the Convention itself is not in force, is the expression of a modern trend toward ensuring that in international business matters, an agreement by the parties as to the choice of forum will be admissible and will be recognized: J. Jodlowski, "Les conventions relatives à la prorogation et à la dérogation à la compétence internationale en matière civile", *R.C.A.D.I.* 1974 (III), vol. 143, 475, at p. 537; S. Guillemard, "Liberté contractuelle et rattachement juridictionnel: le droit québécois face aux droits français et européen", *E.J.C.L.*, vol. 8.2, June 2004, online. The interpretation of art. 3148, para. 2 *C.C.Q.* should take this into account.

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.

(ii) Limits on the Autonomy of the Parties

25 Nonetheless, it must be noted that certain limits are imposed on the expression of the autonomy of the parties. First, art. 3151 *C.C.Q.*, enacted by the legislature as a mandatory provision, confers exclusive jurisdiction on a Quebec authority over actions founded on civil liability for damage suffered as a result of exposure to or the use of raw materials originating in Quebec. In such cases, a choice

of forum clause cannot oust the jurisdiction of the Quebec authority. Second, art. 3149 *C.C.Q.* confers jurisdiction on a Quebec authority in cases involving consumer contracts or contracts of employment, and the waiver of such jurisdiction by the consumer or worker may not be set up against him or her. In both cases, the language used by the legislature indicates a clear intention to disregard the autonomy of the parties, or to limit it, and this suggests that when the legislature's intention is to limit the ability to oust the jurisdiction of the Quebec authority by agreement, it says so expressly.

26 In some situations, as indicated in the final portion of art. 3148 *C.C.Q.*, a defendant may by its actions submit to the jurisdiction of the Quebec authority despite the intention expressed in the contract. The matter can then be brought before the Quebec authority. See in this regard *171486 Canada inc. v. Rogers Cantel inc.*, [1995] R.D.J. 91 (Sup. Ct.); *Dobexco Foods International inc. v. Van Barneveld Gouda Bv*, [1997] Q.J. No. 1100 (QL) (Sup. Ct.); *Conserviera S.p.A. v. Paesana Import-Export inc.*, [2001] R.J.Q. 1458 (C.A.).

27 One last type of exception to the autonomy of the parties relates to the wording of arbitration or choice of forum clauses. Whether the jurisdiction of the Quebec authorities is ousted in a specific case will be decided on the basis of the wording of the jurisdiction clause adopted by the parties: H. P. Glenn, "Droit international privé", in *La réforme du Code civil* (1993), t. 3, 669, at p. 756. The clause must be mandatory and must clearly and precisely confer exclusive jurisdiction on the foreign authority: *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 Eustache Lamontagne ltée v.*

Équipements Belarus du Canada ltée, [1994] R.D.J. 599 (Sup. Ct.), at p. 607. There must also be a meeting of minds between the parties; otherwise the clause is invalid: see *Dobexco Foods International inc. v. Van Barneveld Gouda Bv.*

28 Thus, apart from under art. 3135 *C.C.Q.*, the situations in which the parties' expression of their intention will be limited arise out of the wording of the jurisdiction clauses, the matters specifically excluded by the legislature from the scope of art. 3148, para. 2 *C.C.Q.*, or the conduct of the defendant him or herself. Aside from those exceptions, there is nothing to suggest that the legislature intended to place any further limits on the parties' ability to oust the Quebec authority's jurisdiction by agreement in respect of conflicts of jurisdiction. This analysis supports the position that gives precedence to the principle of the autonomy of the parties.

(iii) The Rule in Art. 3139 *C.C.Q.* and Incidental Demands or Cross Demands

29 Where a Quebec authority has jurisdiction to rule on a principal demand, art. 3139 *C.C.Q.* essentially extends its jurisdiction to an incidental demand or a cross demand. This provision accordingly establishes an exception to the principle that the jurisdiction of the Quebec court is determined on a case-by-case basis: Talpis and Castel, at p. 56. It also expands considerably the potential scope of the jurisdiction of the Quebec authority, since it could be applied to a host of incidental demands that have no connection with Quebec: Goldstein and Groffier, at p. 337. This expanded scope suggests that art. 3139 *C.C.Q.* must be interpreted narrowly so as not to indirectly enlarge the international jurisdiction of the Quebec authority contrary to the specific provisions relating to the definition of its jurisdiction and the general

principles that underlie that jurisdiction: Talpis and Castel, at p. 57; Goldstein and Groffier, at p. 339.

30 Such an interpretation is not inconsistent with the principles to which art. 3139 *C.C.Q.* gives effect, and is consistent with the hierarchy of the rules set out in the *Civil Code* in this respect. The purpose of the provision is to ensure the efficient use of judicial resources and efficiency in the administration of justice by fostering the joinder of proceedings: *Birdsall inc. v. In Any Event inc.*, [1999] R.J.Q. 1344 (C.A.); J. A. Talpis, *If I am from Grand-Mère, Why Am I Being Sued in Texas? Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (2001), at p. 37. These principles are the product of domestic procedural considerations, similar to those reflected in art. 71 of the *Code of Civil Procedure*, R.S.Q., c. C-25 ("*C.C.P.*"), that must be assessed in a private international law context involving other imperatives, such as the autonomy of the parties, the legal certainty of international transactions and the need to avoid enlarging the jurisdiction of states unduly.

31 Even though art. 3139 *C.C.Q.* does not mention this factor expressly, there must be some connexity between the principal action and the incidental action. The connexity criterion derives from a line of cases decided under art. 71 *C.C.P.* It will be recalled that this provision applied in private international law before the reform of the *Civil Code* and required that the principal and incidental demands be joined, provided that there was some connexity between them: Goldstein and Groffier, at p. 336; *Commentaires du ministre de la Justice*, at p. 2002. When the courts have applied art. 3139 *C.C.Q.*, their analysis has generally focussed on determining whether there was connexity in the actions in warranty: *Crestar Ltd. v. Canadian National*

Railway Co., at p. 1200; *Guns N'Roses Missouri Storm inc. v. Productions musicales Donald K. Donald inc.*, [1994] R.J.Q. 1183 (C.A.), at p. 1187. The need to consider the connexity criterion is an additional indication of the limited scope of art. 3139 *C.C.Q.*: it, like art. 222 *C.C.P.*, confers a discretion on the judge, who may decide to sever the principal action from the action in warranty.

32 The language used by the legislature also confirms the narrow scope of the provision, and its permissive nature. Nothing in the wording of the provision suggests an intention to limit the autonomy of the parties, unlike that of art. 71 *C.C.P.*, which applies in domestic law and uses the word "must", art. 3151 *C.C.Q.*, which confers exclusive jurisdiction on the Quebec authority, or art. 3149 *C.C.Q.*, which deals with actions involving consumer contracts or contracts of employment.

(iv) *Forum Non Conveniens*

33 Articles 3135 and 3136 *C.C.Q.* are also among the components of the legislative framework that is relevant in the case at bar. They are part and parcel of a body of suppletive rules that were created by the legislature at the time of the codification and that make it possible to adapt the forum determination process to the circumstances of each case, thus providing a Quebec authority with a degree of flexibility in determining whether it has jurisdiction: arts. 3134, 3135, 3136, 3137 and 3140 *C.C.Q.* For example, art. 3136 *C.C.Q.* authorizes a Quebec authority to determine that it has jurisdiction on an alternative basis where proceedings cannot possibly be instituted outside Quebec. Article 3135 *C.C.Q.* gives an authority with jurisdiction the power to decline jurisdiction if the authorities of another country are in a better position to decide a case. These provisions may be applied only if one of

the parties raises them, as the court cannot apply them of its own motion: see *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, at para. 69. Thus, even though the articles dealing with the forum of necessity and the *forum non conveniens* appear in the general provisions section, they are exceptional provisions that are intended to be applied on a suppletive basis, as art. 3135 *C.C.Q.* clearly confirms.

B. *Hierarchy of the Legal Rules in Issue*

34 The analysis of the legislative framework has identified a number of characteristics specific to the provisions in issue and revealed the nature of the fundamental principles that underlie them. This information can now be used to clarify the nature of the relationships between the provisions discussed above in the context of an action in warranty.

35 The central point that emerges from the preceding analysis is the recognition of the primacy of the autonomy of the parties. Recognizing this primacy leaves considerable room for freedom of contract, subject to the limits imposed by the law or by the rules of public order, although it is worth noting here that the instant case raises no issues relating to the latter rules. It can be inferred from the language used by the legislature, the legislative context and the general scheme of Book Ten of the *Civil Code* that the autonomy of the parties has played a predominant role in the development of the rules governing the jurisdiction of the Quebec courts. The legislature reaffirmed and extended the application of this principle at the time of the reform of the *Civil Code*: Talpis and Castel, at p. 9. The existence of this fundamental principle, which underlies art. 3148, para. 2 *C.C.Q.*, underscores the need to interpret that provision broadly, even if the result is to limit the scope of art. 3139

C.C.Q. Article 3148, para. 2 *C.C.Q.* is more than a simple paragraph of limited scope; in matters relating to conflicts of jurisdiction, it constitutes the cornerstone of a legislative policy of respect for the autonomy of the parties. The courts should defer to a choice of forum clause where the parties have clearly stated that they intend to submit any disputes between them, on an exclusive basis, to a foreign authority.

36 As I noted earlier, there are rules that will limit agreements by the parties to oust jurisdiction. They derive primarily from mandatory legislative norms that limit freedom of contract (arts. 3149 and 3151 *C.C.Q.*) or give effect to an agreement to submit to the jurisdiction of the Quebec authority (final portion of art. 3148 *C.C.Q.*), or, in certain instances, from interference by considerations of public order, which need not be discussed here.

37 Article 3139 *C.C.Q.* is not one of those exceptions. Nothing in it suggests that the legislature intended it to be mandatory or intended to limit the autonomy of the parties. In fact, its nature confirms that it is of limited scope. Article 3139 *C.C.Q.* is a permissive provision that is procedural in nature, and the principles underlying it must be placed in their proper perspective in relation to the fundamental principles of private international law: the autonomy of the parties and the legal certainty of international transactions. Accordingly, even though the purpose of the provision is to ensure the efficient use of judicial resources and efficiency in the administration of justice, its reach cannot be extended to every action in warranty without regard for the intention expressed by the parties. Indeed, respecting the parties' intention is a core principle of the rules of private international law, and it in turn protects an imperative of that field of law: the legal certainty of transactions. The scope of art. 3139 *C.C.Q.* is therefore narrower than the scope of art. 3148, para. 2 *C.C.Q.* Accordingly, the

application of art. 3139 *C.C.Q.* is subordinate to the application of art. 3148, para. 2 *C.C.Q.*, which gives full effect to a clear intention, expressed in a valid and exclusive choice of forum clause, to submit a dispute to the jurisdiction of foreign authorities.

(i) Legislative Context

38 The legislative context of the provisions in issue is conducive to recognizing the autonomy of the parties. It can be seen that the fundamental structure of the *Civil Code* is consistent with the primacy of the autonomy of the parties as regards both the determination of whether a court has jurisdiction and the recognition of foreign judgments. For example, in delineating the jurisdiction of foreign authorities in the context of the reception and enforcement of judgments, art. 3165 *C.C.Q.* bars the recognition of a foreign judgment if the parties to a contract have conferred jurisdiction on the Quebec authorities or on another foreign authority. In addition, a foreign decision may not be enforced if the foreign authority has made it in violation of an arbitration clause that is valid in Quebec law: art. 3165(3) *C.C.Q.* Article 3168(5) *C.C.Q.* sets out the jurisdictional criteria to be applied to determine whether a foreign judgment may be enforced in Quebec in the case of a personal action of a patrimonial nature: if the parties have agreed to submit their dispute to the authority that made the decision, the jurisdiction of the foreign authority is recognized. Also, with respect to designation of the applicable law, there are numerous provisions that allow the parties considerable freedom of choice regarding the law that will be applicable to specific juridical acts or situations, including provisions on successions (art. 3098 *C.C.Q.*), trusts (art. 3107 *C.C.Q.*), juridical acts (art. 3111 *C.C.Q.*) and arbitration agreements (art. 3121 *C.C.Q.*). The multitude of situations in which the intention of the parties provides a basis for determining the jurisdiction of Quebec or

foreign authorities, or for resolving conflicts of laws, attests to the legislature's intention to allow room for the autonomy of contracting parties in private international law, and confirms the primacy of that principle. Recognition of the principle also goes hand in hand with the legislature's tendency toward recognizing the existence and legitimacy of the private justice system, which is often consensual and is parallel to the state's judicial system. One example of this is art. 2638 *C.C.Q.*, which defines the arbitration agreement: see *Desputeaux v. Éditions Chouette (1987) inc.*, at para. 40.

(ii) Conformity with the Development of International Law

39 The interpretation of the provisions in issue, and the resolution of the conflict between them, must necessarily be harmonized with the international commitments of Canada and Quebec. This Court has cited this principle on several occasions: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1371; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 51; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 137; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, at para. 31. The principle may be related to the presumption that the legislature is deemed not to intend to legislate in a manner that cannot be reconciled with the state's international obligations: P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 367.

40 Quebec is a party to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 U.N.T.S. 3 ("*New York Convention*"), of June 10, 1958, as a result of Canada's belated accession to the Convention, which came into

force here on August 10, 1986: *Canada Gazette*, Part II, vol. 120, No. 17, SI/86-154 and 155.

41 Although at first glance the Convention seems to deal solely with the recognition and enforcement of arbitral awards, it also provides legal protection for arbitration agreements. The legislature has incorporated the principles of the *New York Convention* relating to arbitration agreements into Quebec law by enacting the substance of the Convention: see *Act to amend the Civil Code and the Code of Civil Procedure in respect of arbitration*, S.Q. 1986, c. 73; A. Prujiner, "Les nouvelles règles de l'arbitrage au Québec", *Rev. Arb.* 1987.425. It should also be noted that the provisions of the *UNCITRAL Model Law on International Commercial Arbitration* of June 21, 1985 ("*UNCITRAL Model Law*"), U.N. Doc. A/40/17 (1985), Ann. I, set out in the chapter of that law dealing with arbitration agreements, on which the 1986 reform and modernization of Quebec's legal rules governing international arbitration agreements was based, closely follow the provisions of the *New York Convention*: see *Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17 (1985), Ann. I. The *New York Convention* is therefore a formal source for interpreting the domestic law provisions governing the enforcement of arbitration agreements.

42 Article II(3) of the *New York Convention* provides that "[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." The *New York Convention* thus states a general principle: the recognition of arbitration agreements.

Article II(3) has now been incorporated into the domestic law of Quebec by art. 940.1 *C.C.P.*, which gives an arbitration clause precedence over the jurisdiction of a Quebec authority. It should be noted that art. 940.1 *C.C.P.* is also based on art. 8(1) of the *UNCITRAL Model Law*, which states essentially the same principle as art. II(3) of the *New York Convention*.

43 Both the purpose of the *New York Convention* and the case law dealing with art. II(3) confirm the position that the enforcement of an arbitration agreement cannot be precluded by procedural rules relating to actions in warranty. First, the purpose of the *New York Convention* is to facilitate the enforcement of arbitration agreements by ensuring that effect is given to the parties' express intention to seek arbitration: F. 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, at pp. 540-41; A. J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981), at p. 135; T. E. Carbonneau, *The Law and Practice of Arbitration* (2004), at p. 340. The interpreter must therefore encourage arbitration clauses, and facilitate their enforcement. As Professor Bachand explains:

> [TRANSLATION] If regard is had to the goal and purpose of the New York Convention, it will be concluded that where there is doubt, the interpreter should opt for the solution that tends to ensure that arbitration agreements are binding, and that a rule that makes such agreements ineffective when they are set up against a call in warranty is incompatible with art. II(3) of the Convention. [p. 541]

44 The cases decided in other countries have tended to favour recourse to arbitration by limiting opportunities for departing from the autonomy of the parties: see Bachand, at p. 542; van den Berg, at pp. 135-37; A. J. van den Berg, "Court

Decisions on the New York Convention of 1958" (1996), 21 *Y.B. Comm. Arb.* 394, at pp. 440-41 and 457. The same trend can be observed in decisions of the courts of the common law provinces involving art. 8 of the *UNCITRAL Model Law*, which recognize that a judge is obliged to apply a valid arbitration agreement: see, for example, *Kaverit Steel & Crane Ltd. v. Kone Corp.* (1992), 85 Alta. L.R. (2d) 287 (C.A.); *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.); *Kvaerner Enviropower Inc. v. Tanar Industries Ltd.* (1994), 24 Alta. L.R. (3d) 365 (C.A.); *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257 (C.A.); *Fibreco Pulp Inc. v. Star Shipping A/S* (2000), 257 N.R. 291 (F.C.A.). Finally, in Quebec, the application of art. 940.1 *C.C.P.* is mandatory where the requirements are met. A court has no choice but to apply it: *La Sarre (Ville de) v. Gabriel Aubé inc.*, [1992] R.D.J. 273 (C.A.), at p. 277; *Gariépy v. Simard*, REJB 2003-45302 (C.Q.), at para. 9; *Pelletier v. Standard Life*, [2000] Q.J. No. 2837 (QL) (Sup. Ct.), at para. 17.

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.

46 In light of the preceding discussion, it appears that art. 3148, para. 2 *C.C.Q.* must take precedence over art. 3139 *C.C.Q.* in the context of an action in warranty where a choice of forum clause indicating a clear intention to oust the jurisdiction of the Quebec authority applies to the legal relationship between the parties to the proceeding. In such circumstances, the Quebec authority must decline jurisdiction, subject to the exceptions noted earlier.

47 This approach was first adopted by a court in *Camionex inc. v. Bombardier inc.*, REJB 99-13575 (Sup. Ct.). I will return later to my reasons for rejecting the decisions in which the opposite position was adopted. I note also that a number of authors have acknowledged the primacy of art. 3148, para. 2 *C.C.Q.* over art. 3139 *C.C.Q.* In the opinion of Goldstein and Groffier, the discretion that derives from arts. 3136, 3138, 3139 and 3140 *C.C.Q.* should be disregarded, provided that the arbitration clause falls within the scope of the law, that it is not void and that the dispute is arbitrable under the law indicated by art. 3121 *C.C.Q.*: Goldstein and Groffier, at p. 363. Furthermore, I agree with the following comment by Professor Talpis:

> . . . a forum selection clause should override jurisdiction under 3139 C.C.Q. over the parties for the incidental demand. After all, the parties probably agreed to the choice in full knowledge that a dispute between them might be the subject of litigation either as a principal or as an incidental matter. [p. 38]

(iii) Suppletive Function of the *Forum Non Conveniens*

48 This is where the question of the role of the *forum non conveniens* doctrine as codified by art. 3135 *C.C.Q.* comes into play. Article 3135 *C.C.Q.* attributes a suppletive function to this doctrine, which applies only where the jurisdiction of the Quebec court has first been established according to the usual rules governing jurisdiction: *Birdsall inc. v. In Any Event inc.*, at p. 1353; Talpis and Castel, at p. 54; Glenn, at pp. 744-45. In other words, a court may not decline jurisdiction that it does not have. The doctrine of *forum non conveniens* allows only for jurisdiction that is already recognized to be ousted. The suppletive nature of art. 3135 *C.C.Q.* necessarily means that the provision is not intended to reconcile the application of other provisions such as arts. 3139 and 3148 *C.C.Q.* Article 3135 *C.C.Q.* therefore plays a secondary role in the hierarchy of the rules governing the jurisdiction of a Quebec authority. If the structure of this area of private international law is to be respected, the authority must be determined to have jurisdiction before art. 3135 *C.C.Q.* can be applied.

C. *Validity of the Positions Adopted by the Court of Appeal and the Superior Court*

49 The findings of law made in the course of the foregoing analysis show that the Court of Appeal and the Superior Court erred in law, but in ways that differ in part. Their errors related to three main aspects of this case.

50 First, the positions taken by the Court of Appeal and the trial judge do not defer to the expression of the autonomy of the parties set out in the contract between GreCon and Normand. Given that the parties clearly expressed their intention to oust the jurisdiction of the Quebec authority in the event of an action in warranty, the

Superior Court should have declined jurisdiction. In the instant case, it is clear from the wording of the choice of forum clause that the clause is exclusive and is applicable to this dispute. No jurisdiction other than Alfeld, Germany, is designated as having jurisdiction over any dispute between the parties. The clause is also sufficiently broad in scope to include the action in warranty based on the contract between Normand and GreCon, because the parties extended its application to all disputes "arising under, in connection with, or instant to this contract".

51 Accordingly, the reasoning of the Court of Appeal and the trial judge also inappropriately enlarged the scope of art. 3139 *C.C.Q.* Article 3148, para. 2 *C.C.Q.* should have been given precedence over art. 3139 *C.C.Q.* because there was an exclusive and general choice of forum clause. The application of art. 3139 *C.C.Q.*, a permissive provision based on principles that are procedural in nature, is subordinate to the intention expressed by the parties to submit their dispute to a foreign authority.

52 Second, the case law cited by the trial judge does not support the position that art. 3139 *C.C.Q.* takes precedence over art. 3148 *C.C.Q.* As I noted earlier, the trial judge based his decision on the principles stated by the Superior Court in *Crestar Ltd. v. Canadian National Railway Co.* In that case, the Superior Court had decided to disregard a choice of forum clause set out in a contract for the carriage of goods and applied art. 3139 *C.C.Q.* The decision was one of a line of cases in which the courts refused to enforce choice of forum or arbitration clauses in the context of actions in warranty: see *Guns N'Roses Missouri Storm inc. v. Productions musicales Donald K. Donald inc*.

53 That line of cases is based essentially on this Court's decision in *A S G Industries Inc. v. Corporation Superseal*, [1983] 1 S.C.R. 781. In that case, a corporation had brought an action in warranty, based on a manufacturing contract, in which it alleged defects in the manufacture of the materials. The defendant in warranty, A S G Industries Inc., had no domicile, residence, place of business or property in Quebec. It raised a declinatory exception in which it argued that no court in Quebec had jurisdiction to hear the action brought against it.

54 Chouinard J. rejected the defendant's argument and said that art. 71 *C.C.P.*, under which an incidental action in warranty must be taken before the court in which the principal action is pending, applied to the appellant's case. As a result, the incidental action in warranty brought against the appellant had to be brought in the Superior Court for the district of Québec where the principal action was pending. The Court therefore decided to extend that rule of domestic territorial jurisdiction to the international level because there were no provisions in the *Civil Code of Lower Canada* to govern such situations. In the opinion of Chouinard J.:

> Article 71 sets forth a general rule applicable to any incidental action in warranty, which must be taken before the court in which the principal action is pending. There is no limitation. [p. 787]

55 Two comments must be made here. First, *A S G Industries* did not concern the enforcement of an arbitration or choice of forum clause. The case related solely to the application of art. 71 *C.C.P.* in a private international law context. Nor was the question of a conflict between that rule and the autonomy of the parties raised. Second, art. 3139 *C.C.Q.*, which now, since the reform of the *Civil Code*, reiterates the substance of the rule set out in art. 71 *C.C.P.*, is part of a new legal framework based on the underlying principles and requirements that now govern the determination of

the jurisdiction of the courts in private international law: *Birdsall inc. v. In Any Event inc.*, at p. 1353. It cannot be applied without regard to this new statutory context.

56 Accordingly, it is necessary to be circumspect, in considering the cases in which the principles applicable prior to the reform of the *Civil Code* were applied, when it comes to determining the scope of art. 3139 *C.C.Q.* For these reasons, the line of cases based on *A S G Industries* cannot apply in the case at bar. The courts that decided those cases failed to consider the state of private international law in Quebec since the reform of the *Civil Code*. To apply the cases would mean to disregard certain principles that are now considered to be fundamental, in particular the primacy of the autonomy of the parties. In my view, the trial judge erred in law by adopting the conclusions in *Crestar Ltd. v. Canadian International Railway Co.*

57 It should be noted here that the Court of Appeal rightly chose not to adopt that reasoning. Instead, it focussed on reconciling art. 3148, para. 2 *C.C.Q.* and art. 3139 *C.C.Q.* by applying the doctrine of *forum non conveniens*. However, that approach leads to serious problems.

58 The Court of Appeal's attempt at reconciliation disregards the fact that the judge's discretion to decline jurisdiction under the doctrine of *forum non conveniens* can be exercised only once jurisdiction has been established under the specific rules of jurisdictional connection. The role of art. 3135 *C.C.Q.* is not to reconcile the provisions of the *Civil Code* that determine jurisdictional connection. When the specific rules do not confer jurisdiction on a Quebec authority, art. 3135 *C.C.Q.* does not apply. The doctrine of *forum non conveniens* has no relevance in the instant case once it has been determined that the choice of forum clause applies. This is a simple

question of the hierarchy of the rules relevant to this case. For this reason, the Court of Appeal erred in law in resorting to the doctrine of *forum non conveniens* to resolve the apparent conflict of jurisdiction.

59 I would add here that since no one raised the issue of the forum of necessity under art. 3136 *C.C.Q.*, I will not address it.

60 Accordingly, having regard to the primacy of the principle of the autonomy of the parties and the hierarchy of the relevant rules, as a result of which the doctrine of *forum non conveniens* is irrelevant, the choice of forum clause set out in the contract between GreCon and Normand should have been enforced. For these reasons, I find that the judgments of the Superior Court and the Court of Appeal must be set aside and the declinatory exception allowed.

V. Conclusions

61 For these reasons, the appeal is allowed, the judgments of the Court of Appeal and the Superior Court are set aside, the declinatory exception based on the Quebec authority's want of jurisdiction is allowed, and the respondent Normand's action in warranty in the Superior Court of Quebec is dismissed, with costs throughout.

Appeal allowed with costs.

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