Treatment of international

International Contract Law Research Paper

The Treatment of International

Contracts in Canadian Law

*Citation Style: McGill Guide (Canadian Guide to Uniform Legal Citation)

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I. Introduction

This brief paper will begin with an overview of the Canadian legal system, discussing first the two-level system encompassing both the federal and provincial levels of government. Then, a brief discussion on the doctrine of federalism and how the judiciary can affect legislation that has been put forth and finally a short history of how and why the laws of Quebec differ so greatly from the rest of the country. The next part will outline what contracts fall into provincial or federal jurisdiction and the importance of jurisprudence in contract law. The next section touches on the major similarities and differences between the treatment of domestic and international contracts in the Canadian system. The implications and consequences of choice of forum are then discussed. The last section discusses three type of contracts that are governed at least in part by international law in Canada, these are sale of goods contracts, electronic contracts and trade agreements.

II. Canadian Legal Structure Overview

a. Two Level System

The Canadian legal system is a common law system, with much of its foundation and early case law inherited from the old English common law and equity. The legal system is split into both federal and provincial jurisdictions (ten provincial Crowns) for a total of eleven jurisdictions of governmental authority. The division of powers between federal and provincial is outlined in sections 91 and 92 of the *Constitution Act, 1867*

(formerly the *British North America Act of 1867*), one of the key documents in the Constitution of Canada.[1]Both levels of government are subject to the Constitution of Canada, which is " the supreme law of Canada and any law that is inconsistent with provisions of the Constitution is, to the extent of the inconsistency, of no force and effect".[2]

b. Doctrine of Federalism

The Doctrine of Federalism creates a separation of powers between the three branches of government, being the legislature, the executive and the judiciary. The role of the judiciary is " to interpret and apply the law," the role of the legislative branch is " to decide upon and enunciate policy" and the role of the executive is " to administer and implement policy".[3]The Canadian courts can determine whether legislation is declared unconstitutional or *ultra vires* the provincial or federal powers. The decisions of the Supreme Court of Canada, established in 1875, have a national or unifying effect on provincial laws and essentially melds the ten provincial hierarchies into a single national system. However, new legislation can replace common law created by the courts, creating an endless cycle of revisions and new interpretations of Canadian laws.

c. Quebec: The Odd One Out

Quebec is unique among the provinces in that it is a civil law jurisdiction, this is because of Quebec's historical relationship with France and the *French Civil Code* . The *Civil Code of Quebec* came into effect on January 1, 1994, replacing the *Civil Code of Lower Canada* enacted in 1865.[4]However, it is important to note that public law, criminal law and other federal law operate

according to Canadian common law regardless of the provincial law system as the jurisdiction is exclusively federal.[5]

Contracting parties will want to remember that Canada is a bilingual country, where English and French are both official languages, especially when doing business in Quebec. The Charter of the French Language requires contracts that are pre-determined by one party, or those that contain printed standard clauses, to be in French.[6]This will apply to both domestic and international contracts.

III. Contract Law: Provincial or Federal Power?

An early but important contract case, *Citizens Insurance Company v Parsons* , 1881, helped to define the broadly worded powers listed in section 91 (federal powers) and 92 (provincial powers) of the Constitution.[7]The Court determined that business and contractual issues that take place wholly within the province fall under section 92(13) " Property and Civil Rights," while international, interprovincial and general trade and commerce issues that impact the dominion as a whole fall under section 91(2) " Regulation of Trade and Commerce."[8]This concluded that the federal government does not have the right to regulate business within a province. It also broadened the scope of the provincial power, section 92(13) to be understood as " Property and Civil Rights" and contracts and the rights arising from them.

In the Anglo-Canadian common law provinces, most contract law is based on the decisions of judges in contract litigation over the years. However, most of the individual provinces and territories have codified some principles of contract law in their respective *Sale of Goods Acts* .[9]Quebec, as stated

above is a civil law jurisdiction and therefore does not have contract law, but rather has its ownlaw of obligationsthat is codified in book five of the Quebec Civil Code.[10]Some provinces have other legislation that can provide some guidelines on domestic contracts, such as various *Consumer Protection Acts* which can imply terms and conditions into sale of goods contracts. [11]Contracts that fall under Federal jurisdiction can have federal legislation such as the *Competition Act* apply.[12]There exists no all encompassing legislative framework to account for all types of contracts, essentially, if the contract is not one of sale of goods, then it will be guided by jurisprudence.

IV. Domestic versus International Contracts

Regardless of the type of contract, or the scope, basic elements need to be met in order for the contract to be considered valid and enforceable. This includes an offer and an acceptance, a meeting of the minds, certainty of the terms, an intention to be bound, and in some cases consideration. A contract, regardless of domestic or international, will generally be voided for fraud or misrepresentation. Domestic and international contracts also both include party autonomy, meaning the parties are free to choose the contracting parties and term freedom, meaning the parties are able to choose and agree to the terms of the contract. However, legislation can and does place constraints on the parties' freedom to choose any terms they want.[13]This constraint is more rigorous for international contracts, where legislation can affect the rules as to the jurisdiction to bring an action and which jurisdiction's law will apply to the issue (choice of law).

Another major aspect that differentiates domestic and international contracts is the consequences that a choice of law clause can bring about. This can be

an issue in domestic contracts, however, the majority of Canadian provinces have similar legislation concerning contracts, so the laws will not vary greatly throughout, unless the choice of law is Quebec, where one party is from the Anglo-Canadian common law. Canadian law is unified in many respects because of the unifying power of the Supreme Court of Canada whose decisions will be enforced throughout Canada regardless of provincial laws.

V. Freedom of Contract and Choice of Forum

The freedom to choose the jurisdiction in which any disputes will be heard generally runs counter to the aim of any jurisdiction seeking to regulate their contract, meaning to impose the regulation on the parties.[14]The issue therefore does not lie with whether parties can choose a jurisdiction, because in almost all cases the choice of forum is allowed, but whether they can enforce any decisions made by that jurisdiction. This is a very important aspect that international contracting parties will have to consider. It is further complicated by the fact that many states have different private international law, and you must consider (and argue) why the laws of one should be enforced while the other is not. This can lead to expensive and time-consuming arbitration or litigation on the matter.

The Canadian law is clear that an exclusive choice of forum clause is not an absolute bar to a court taking jurisdiction.[15]The Canadian court has discretion to do so if the party who wants to litigate in the forum shows “ strong cause” for being permitted to do so in spite of having agreed not to. [16]The “ strong cause” test and the relevant factors taken into account by the court was established in the Supreme Court of Canada decision of *ZI*

Pompey Industrie v ECU-Line NV (test initially laid out in *The Cargo Owners v The Eleftheria,* 1969 *)* .[17]Courts will however we reluctant to dismiss a choice of forum clause. In *Pompey* , the SCC emphasized that choice of forum clauses " are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law."[18]There are however, a few instances in provincial legislation that expressly nullifies the effect of a choice of forum clause.[19]

VI. Applicable International Law

a. Sale of Goods Contracts

In Canada, treaties are not self-executing, meaning international obligations do not have the direct force of law in domestic law.[20]An international obligation may require domestic legislation, either federally or provincially, or both, for its implementation. *The International Sale of Goods Contracts Convention Act* federally declares the *United Nations Convention on Contracts for the International Sale of Goods* to be in force as the law of Canada.[21]Provincial legislatures subsequently adopted the *CISG* with their respective *International Sale of Goods Acts.* Although not every province and territory were first subjected to the *CISG* (including Quebec, Saskatchewan and Yukon Territory), it is now applicable law throughout Canada.[22]

b. Electronic Contracts

The *United Nations Convention on the Use of Electronic Communications in International Contracts* applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different states.[23]Canada has not yet

federally ratified the *ECC* , however some provinces are taking their own initiative and implementing the convention through provincial legislation. At this time, both Ontario and Saskatchewan have provincially ratified the *ECC* . [24]

c. Trade Agreements

Canada has been a member of the World Trade Organization since 1995, after enacting federal legislation in 1994.[25]Canada has entered into free trade agreements with several countries (including Chile, Costa Rica, Mexico and the United States) for the purpose of expanding trade and commerce in goods and services.[26]The *North American Free Trade Agreement Implementation Act* formally enacts NAFTA, the trilateral trade agreement among Canada, the United States and Mexico.[27]This agreement has recently be renegotiated and will be federally enacted in Canada when it is finalized. These agreements that help reduce trade barriers and establish free market of goods, can have significant impact over how international contracts between these countries should be drafted.

VII. Conclusion

There is a tension between contracting parties when they have different private international laws that contradict one another. There is no international uniform set of rules that pertain to all contracts. The CISG has made a valiant effort in this regard, however many contracts still do not fall under the scope of the convention. There is room for improvement in this area, however the effort would need to be widespread, welcome and laborious to create and implement. A uniform international law relating to more types of contracts would greatly diminish many disputes which pertain

only to the question of contradicting private international questions (i. e. choice of forum, choice of law), and not the actual dispute of the contract. This would greatly reduce the cost and time that parties are subjected to when disputes arise and mediation or arbitration are not an option, or have not worked to solve the dispute.

International contracts must balance the two goals of party autonomy and state regulation. Anglo-Canadian Common law (excluding Quebec) has for the most part been drawn toward the party autonomy side, because it is a principle that is widely regarded as important and is taken into consideration in the judicial system favourable. However, Canadian courts will not lightly disregard choice of forum clauses placed into contracts, and contracting parties should therefore be fully aware of the implications and consequences of choosing certain jurisdictions to hear disputes. Contracting parties must be aware of both provincial and federal laws that apply to the international contract, since in many cases, the laws complement one another and help to fill in any gaps. Parties must also be aware of any international obligations that Canada has implemented into its domestic law.

VIII. Table of Authorities

LEGISLATION: CANADA

- *Arthur Wishart Act (Franchise Disclosure), SO 2000, c 3.*
- *Business Practices and Consumer Protection Act, SBC 2004, c 2.*
- *Canada-Chile Free Trade Agreement Implementation Act* , SC 1997, c 14.

- *Canada-Costa Rica Free Trade Agreement Implementation Act* , SC 2001, c 28.
- *Charter of the French Language, CQLR c C-11, s 55.*
- *Civil Code of Quebec, SQ 1991, c. 64.*
- *Competition Act* , RSC 1985, c C-34.
- *Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK),* 1982, c 11.
- *Consumer Protection Act* , 2002, SO 2002, c 30.
- *Consumer Protection Act* , CCSM, c C-200.
- *Criminal Code RSC 1985, c C-46.*
- *International Electronic Communications Convention Act, 2017* , SO 2017.
- *International Sale of Goods Contracts Convention Act, SC 1991, c 13.*
- *North American Free Trade Agreement Implementation Act* , SC 1993, c 44.
- *Sale of Goods Act, RSA 2000, c S-2.*
- *Sale of Goods Act, RSBC 1996, c 410.*
- *The Electronic Communications Convention Implementation Act* , SS 2018, c E-7. 201.
- *World Trade Organization Agreement Implementation Act* , SC 1994, c 47.

LEGISLATION: INTERNATIONAL

- *United Nations Convention on the Use of Electronic Communications in International Contracts* , 23 November 2005 (entered into force 1 March 2013).

- *United Nations Convention on Contracts for the International Sale of Goods,* 11 April 1980 (entered into force 1 January 1988).

JURISPRUDENCE: CANADA

- *Citizens Insurance Company v Parsons, 1881, 4 SCR 215.*
- *Fraser v Public Service Staff Relations Board, 1985 CanLII 14(SCC), [1985] 2 SCR 455.*
- *ZI Pompey Industrie v ECU-Line NV* , 2003 SCC 27.

SECONDARY MATERIALS

- Canadian Encyclopedic Digest 4th (online), International Law, I. 2, §34.
- Canadian Encyclopedic Digest 4th (online), Internet Law, II. 3. 1, §102. 2.
- CISG: Table of Contracting States: Canada, online: .
- Joost Blom, " Regulation of Contracts in Canadian Private International Law" (2014) 31 1 Arizona Journal of International & Comparative Law.

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[1] *Constitution Act, 1982* , s 91 and 92, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[2] *Ibid* at s 52.

[3] *Fraser v Public Service Staff Relations Board* , 1985 CanLII 14(SCC), [1985] 2 SCR 455 at 469-70.

[4] *Civil Code of Quebec,* SQ 1991, c. 64.

[5]See e. g. *Criminal Code* RSC 1985, c C-46.

[6] *Charter of the French Language* , CQLR c C-11, s 55.

[7] *Citizens Insurance Company v Parsons* , 1881, 4 SCR 215.

[8] *Constitution of Canada* , *supra* note 1.

[9]See for e. g. British Columbia – *Sale of Goods Act,* RSBC 1996, c 410; Alberta – *Sale of Goods Act* , RSA 2000, c S-2.

[10] *Civil Code of Quebec, supra* note 4.

[11]See for e. g. British Columbia – *Business Practices and Consumer Protection Act* , SBC 2004, c 2; Ontario – *Consumer Protection Act* , 2002, SO 2002, c 30.

[12] *Competition Act* , RSC 1985, c C-34.

[13]Joost Blom, " Regulation of Contracts In Canadian Private International Law" (2014) 31 1 Arizona Journal of International & Comparative Law at 1.

[14] *Ibid.*

[15] *Ibid* at 4.

[16] *Ibid* .

[17] *ZI Pompey Industrie v ECU-Line NV* , 2003 SCC 27.

[18] *Ibid* at para 20.

[19] *Supra* note 13 at 5; See e. g. *Arthur Wishart Act* (Franchise Disclosure), SO 2000, c 3, s 10; *Consumer Protection Act* , CCSM, c C-200, s 209 and *Business Practices and Consumer Protection Act,* SBC. 2004, c 2, s 3.

[20]Canadian Encyclopedic Digest 4th (online), International Law, I. 2, §34.

[21] *International Sale of Goods Contracts Convention Act* , SC 1991, c 13; and *United Nations Convention on Contracts for the International Sale of Goods,* 11 April 1980 (entered into force 1 January 1988) [*CISG*].

[22]CISG: Table of Contracting States: Canada, online: .

[23]Canadian Encyclopedic Digest 4th (online), Internet Law, II. 3. 1, §102. 2; and *United Nations Convention on the Use of Electronic Communications in International Contracts* , 23 November 2005 (entered into force 1 March 2013), [*ECC*].

[24]Ontario – *International Electronic Communications Convention Act, 2017* , SO 2017, c 2; and Saskatchewan – *The Electronic Communications Convention Implementation Act* , SS 2018, c E-7. 201.

[25] *World Trade Organization Agreement Implementation Act* , SC 1994, c 47.

[26]See *Canada-Chile Free Trade Agreement Implementation Act* , SC 1997, c 14; *Canada-Costa Rica Free Trade Agreement Implementation Act* , SC 2001, c 28.

[27] *North American Free Trade Agreement Implementation Act* , SC 1993, c 44.