

## **CROSS-BORDER LITIGATION**

### **RACING TO FILE YOUR LAWSUIT FIRST? MAKE SURE YOUR COURT HAS JURISDICTION!**

In intra-jurisdictional litigation, there exists in most legal systems, the rule of *lis pendens* by virtue of which, cannot co-exist, two lawsuits between the same parties, having the same cause of action and seeking the same conclusions. The second lawsuit is subject to stay or dismissal.

In cross-border litigation, the same rule applies, usually in the context of the recognition of a foreign judgment. The rule is usually contained in legislation dealing with the recognition of foreign judgments. The language used is often “the jurisdiction first seized” or “in first instance”. In essence, it is the same rule as *lis pendens*.

It is important to know, however, that in order for this rule to apply in cross-border litigation, BOTH courts must have jurisdiction. In other words, if a party has filed the lawsuit in a court having no jurisdiction, even if it was filed first, that party will not be able to use that rule to seek the dismissal of the second lawsuit or, to oppose the recognition of the foreign judgment obtained in the second lawsuit.

This was the ruling of a recent Quebec Court of Appeal decision (Family law case No. 143160, 2014 QCCA 2290).

### **THE FACTS**

Since the birth of their child, a couple were domiciled in France. Not long after the birth, the mother obtained authorization in writing from the father to take the child to her native Quebec for 2 weeks for the holidays. She and the child never returned to France. Immediately after the holidays, she filed before a Quebec court, an application for custody of the child and support for the child.

Days later, the father filed suit for custody before a French court and obtained an order against the mother ordering her to appear at a hearing in France to rule on the return of the child to France and other related measures. An agreement concerning custody of the child and other measures was reached before that hearing which was ratified by a decision of that court. The father applied to the Quebec Superior Court seeking the recognition and enforcement of that French decision. The mother opposed his application on the basis that she had first filed and that, as a result, the French decision could not be recognized. The first judge disagreed. It went to appeal.

### **THE DECISION OF THE QUEBEC COURT OF APPEAL**

The court ruled that because the mother had not obtained consent from the father to leave France definitely with her child in order to take up domicile in Quebec, the displacement of the child was illicit and did not legally constitute a change of domicile. As a result, it found that the child’s domicile had always remained in France and only a French court could therefore rule on the custody of the child.

It concluded that in order for the rule of “first seized” court (*lis pendens*) to apply, BOTH courts must have jurisdiction, following in doing so, a decision of the Supreme Court of Canada (Rocois Construction Inc. vs. Quebec Ready Mix [1990] 2 S.C.R. p. 450).

Having come to the conclusion that the Quebec court had no jurisdiction, even if it was, first seized, the Court of Appeal let stand the trial division judgment which had granted the father’s application seeking the recognition of the French court’s decision on custody.

Though very few countries ratified it, many nonetheless took inspiration from the February 1<sup>st</sup>, 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial matters.

Such was the case in Quebec, which integrated in the Civil Code Article 3155 of the *Quebec Civil Code*, which reads, in part, as follows:

“Art. 3155. A decision rendered outside Quebec is recognized and, where applicable, declared enforceable by the Quebec authority, except in the following cases:

- (1) [...]
- (2) [...]
- (3) [...]
- (4) A dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Quebec, whether or not it has acquired the authority of a final judgment (*res judicata*) is pending before a Quebec authority, in first instance, or has been decided in a third State and the decision meets the conditions necessary for it to be recognized in Quebec.
- (5) [...]
- (6) [...]”

In the Hague Convention, the relevant provision is at Article 5 which reads, in part, as follows:

#### “ARTICLE 5

Recognition or enforcement of a decision may nevertheless be refused in any of the following cases -

- (1) [...]
- (2) [...]
- (3) if proceedings between the same parties, on the same facts and having the same purpose -
  - a) are pending before a court of the State addressed and those proceedings were the first to be instituted, or

- b) have resulted in a decision by a court of the State addressed, or
- c) have resulted in a decision by a court of another State which would be entitled to recognition and enforcement under the law of the State addressed.”

### **COMMON LAW JURISDICTIONS IN CANADA**

Except for Quebec, the other provincial and territorial jurisdictions in Canada, are governed by common law.

In those jurisdictions, the international lis pendens rule is not contained in their rules concerning the enforcement and recognition of foreign judgments. Rather, they are to be found in court precedents.

Kenneth C. MacDonald in his book “Cross-Border Litigation Interjurisdictional Practice and Procedure” (Canada Law Book, 2009) dealing with Canadian common law provinces and territories states the following:

“If the contract has already been signed and a dispute has arisen, a party can still, to some extent, influence the determination of where that dispute will be litigated if the party acts quickly enough to be the first to commence proceedings. If later there are parallel actions in two or more jurisdictions, a court on a motion for a stay will consider which proceeding was commenced first.<sup>2</sup>”

### **THE EUROPEAN UNION**

In Europe, the European Union adopted Regulation No. 1215/2012, on December 20, 2012 concerning the judicial competence, the recognition and enforcement of decisions in civil and commercial matters.

The relevant provision can be found in Article 29 which reads as follows:

#### “ARTICLE 29

1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.”

One could therefore argue *a contrario* that if the first seized tribunal has no jurisdiction, the rule of first seized tribunal does not apply and could not be relied upon to block the recognition of the judgment of the second seized tribunal.

Jean G. Robert, Lawyer  
Lette & Associates  
© Jean G. Robert, 2015