PRIVATE INTERNATIONAL LAW: DEALING IN YOUR JURISDICTION WITH A CLAIM GOVERNED BY FOREIGN LAW – FIND OUT WHAT THE PERIOD OF LIMITATION IS!

When a foreign plaintiff decides to file a lawsuit outside of his jurisdiction against a defendant in matters involving the extinguishing of a remedy by limitation, it is important for the defendant to know the term of limitation of the claim. Is it the law of the seized jurisdiction or the law of the state governing the claim? In Quebec, for example, a foreign seller claiming in Quebec the sale price from a Quebec purchaser under a contract of sale governed by foreign law, the limitation period is governed by the statute of limitations of the foreign state and not that of Quebec, under article 3131 of the *Civil Code of Quebec* which reads as follows:

« Art. 3131. Prescription is governed by the law applicable to the merits of the dispute.»

The rule set out in article 3131 adopted in 1994 subsequent to the reform of the *Quebec Civil Code* has the advantage of being simple. Prior to that, one had to refer to article 2190 of the old Code which contained complex rules. In certain circumstances, one could raise in defense the foreign statute of limitations and in others, the Quebec statute of limitations. It depended on whether the cause of action arose or the debt was payable in Quebec and whether the debtor had his domicile in Quebec. Foreign limitation could be raised before the Quebec courts where the cause of action did not arise or the debt was not payable in Quebec and where the debtor was not domiciled in Quebec at the date the limitation period ran out. Inversely, if the cause of action arose or the debt was payable in Quebec and the debtor was domiciled in Quebec when the limitation period ran out, one could raise the Quebec statute of limitations.

By the adoption of this article, Quebec was also following international development on this issue.

In France, the jurisprudence was to the same effect and applied its own statute of limitations if the debtor was domiciled in France, in order to protect him. But this has changed and its courts now apply the *lex causae* principle. Here is what French authors H. Batiffol and P. Lagarde in their work “Droit International Privé,” sixième édition1976, at page 303, had to say about this issue:

> "Prescription extinctive. – La Cour de cassation a jadis décidé à plusieurs reprises que le débiteur est en droit d'invoquer les dispositions de la loi de son domicile sur la prescription «en tant qu'elles le protègent contre l'action dont il est l'objet» (73). On a pu voir la consécration de l'idée qu'une créance est soumise à la loi du domicile du débiteur. Mais par arrêt du 31 janvier 1953 (73-1), la chambre civile a admis le débiteur à se prévaloir de la loi gouvernant le contrat, ses dispositions sur la prescription lui étant plus favorables que celles de la loi de son domicile. L'arrêt du 28 mars 1960 (R. 1960, 202, et la note) approuve purement et simplement l'application de la loi du contrat, sans que la question, il est vrai, ait été posée. La prescription de l'action en responsabilité délictuelle a été directement soumise à la loi applicable au délit (*supra* n. 557, note 4). Et la formule définitive a été donnée par deux arrêts de la première Chambre civile du 21 avril 1971 (73-2) affirmant que « la prescription extinctive d'une obligation est soumise à la loi qui régit celle-ci».
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> Cette solution paraît bien fondée. Effectivement si la prescription protège le débiteur, comme on le soulignait à l'appui de la compétence de la loi de son domicile, au moins plus favorable, ce n'est pas sa seule fonction, et le débiteur semble suffisamment protégé par la loi du contrat dont il a connu les dispositions; même en matière extra-contractuelle, on ne voit pas pourquoi un changement de domicile éteindrait à l'improviste les droits du créancier (74)."

The purpose of this rule is to prevent forum shopping, that is looking for and filing the lawsuit in a jurisdiction where the claim is not time-barred when it would be in the state governing the claim.

In common law provinces in Canada, the same rule was adopted by the Supreme Court of Canada in the case of *Tolofson* vs. *Jensen* [1994] 3 S.C.R. 1022. Until then, limitation was considered largely a procedural issue and as a result, the courts had adopted the rule of *lex fori*. Here is how the Supreme Court expresses itself at p. 1027:

> "The bases of the old common law rule, which held that statutes of limitation are always procedural, are out of place in the modern context. The limitation period in this case was substantive because it created an accrued right in the defendant to plead a time bar. The limitation defence was properly pleaded here and all parties proceeded on the assumption that, if Saskatchewan law applied, it was a valid

> defence. It should not be rejected by a British Columbia court as contrary to public policy. The extent to which limitation statutes should go in protecting individuals against stale claims involves policy considerations unrelated to the manner in which a court must carry out its functions and the particular balance may vary from place to place."

This approach was followed by the Supreme Court in *Castillo* v. *Castillo* [2005] SCC 83. In effect, the Supreme Court rejected the traditional common law classification of statutes of limitation: those which bar a remedy and those which extinguish a right. It held that statutes of limitation are to be classified as substantive.

In England, the principle of the competence of the *lex causae* was adopted in 1984. Prior to that, the position at common law created difficulties, as illustrated by the following excerpt of "Dicey, Morris and Collins on The Conflict of Laws", Vol. 1, Sweet & Maxwell, 2006, at p. 197:

> "The *lex causae* and the *lex fori* may differ not only in their periods of limitation but also in the nature of their limitation provisions. In considering foreign rules as to limitation the English courts have traditionally applied their own classification based on the distinction between barring a right and extinguishing a remedy. The position resulting from this approach, which would still be adopted in countries following the English common law rules, can be illustrated by reference to the different situations which can arise: (i) if the statutes of limitation of the *lex causae* and of the *lex fori* are both procedural, an action will fail if it is brought after the period of limitation of the *lex fori* has expired although that of the *lex causae* has not yet expired [77]; but will succeed if the period of limitation of the *lex fori* has not yet expired although that of the *lex causae* has expired.[78] The first limb of this rule may still leave it open to the defeated claimant to seek his remedy in another jurisdiction. But its second limb has been criticized in that it may in effect enable a creditor to enlarge his rights by choosing a suitable forum; and that it may cause injustice to a debtor who, in reliance of the *lex causae*, has destroyed his receipts.[79] (ii) If the statute of limitation of the *lex causae* is substantive but that of the *lex fori* is procedural, the *lex fori* will probably apply if its period of limitation is shorter than that of the *lex causae* on the ground that it is inconvenient for the forum to hear what it considers to be stale claims.[80] But once a substantive period of limitation of the *lex causae* has expired, no action can be

> maintained even though a procedural period of limitation imposed by the *lex fori* has not yet expired: in such a case there is simply no right left to be enforced.[81] (iii) If the statutes of limitation of the *lex causae* and of the *lex fori* are both substantive, it is probable that the same results would follow as in the case just considered.[82] (iv) If the statute of the *lex causae* is procedural and that of the *lex fori* substantive, strict logic might suggest that neither applies, so that the claim remains perpetually enforceable. A notorious decision of the German Supreme Court once actually reached this absurd result.[83] But writers have suggested various ways of escape from this dilemma,[84] and it seems probable that a court would apply one statute or the other".

The 1984 *Foreign Limitation Periods Act* put an end to this position and adopted the general principle that the limitation rules of the *lex causae* are to be applied in actions in England.

In one reported case in Quebec, the court applied the statute of limitation of Ontario to an alimony order which had been rendered by an Ontario court. The case is *N.K.* vs. *K.S.M.* (QSC [2002] R.D.F. 249.

Therefore, the accessory - limitation – must follow the principal – the law governing the merits of the claim, or the *lex causae*.

Hence where such a rule exists, it is important to first determine which law applies to the merits of the case. Then find out what the term of limitation is under the law governing the merits.

In Quebec, the issue arises most commonly when the courts are asked to recognize a foreign judgment. In Quebec, the term of limitation of a judgment rendered by a Quebec court is ten (10) years. And in most modern jurisdictions, the term of limitation is the same. In some, it could be shorter. But under article 3131 of the *Quebec Civil Code*, the shorter limitation period of the *lex causae* would be applied.

Since limitation constitutes a powerful, and often lethal ground of defense which, in addition, can be raised at the very outset of a lawsuit, it is therefore important at the very beginning of the lawsuit, to know the limitation period applicable under foreign law, to the lawsuit filed in your jurisdiction, if this rule of private international law exists therein.

Another interesting issue in private international law also dealing with limitation, is whether or not the filing of a lawsuit in a foreign jurisdiction interrupts the running of the limitation, when it normally would if the claim were filed in the courts of one's own jurisdiction. That will be the subject of a future article.

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