

PRIVATE INTERNATIONAL LAW: DOES THE FILING OF A LAWSUIT IN A FOREIGN COURT STOP LIMITATION?

A foreign plaintiff files a lawsuit against a defendant in the latter's jurisdiction to exercise a right governed by the law of the jurisdiction of the foreign plaintiff. Does the filing of such lawsuit stop the limitation period?

On the basis of the rule existing in civil matters across Canada, in the U.K. and in France, to the effect that limitation is governed by the law applicable to the merits of the dispute, the jurisdiction seized of the lawsuit would be obliged to apply the limitation rules of the foreign jurisdiction.

An important rule in limitation which exists in most legal systems is that the filing of, commencing or bringing, a lawsuit before a court will stop or interrupt limitation until the judgment is rendered.

Where a lawsuit is filed with the courts of the jurisdiction whose laws govern the merits and hence limitation, it will be quite clear that this rule, where it exists, will apply and interruption will take place.

But, does it take place if the lawsuit is filed with the courts of another jurisdiction, a jurisdiction whose laws do not govern the merits?

Of course, the answer depends on what the rules of limitation of the jurisdiction whose law governs the merits, say.

PROVINCE OF QUEBEC

In the province of Quebec, the rule pertaining to the interruption of limitation is found in Article 2892 of the Quebec Civil Code which reads, in part, as follows:

“Art. 2892. The filing of a judicial demand before the expiry of the ...”

What constitutes a “judicial demand”?

Those are the key words. Indeed, if it is not a “judicial demand”, there will be no interruption and limitation will continue to run.

The leading case on point, in Quebec, is the case of *Drouin vs. Centre Hospitalier Fleury* [1988] R.R.A.102 (Quebec Superior Court).

The facts are as follows: A physician, who had been dismissed by a clinic, appealed the decision of the clinic to a specialized administrative government board which allowed his appeal. The physician then decided to sue the clinic before the regular courts, essentially for wrongful dismissal. At the date of filing of his lawsuit, the applicable limitation period had run out. The defendant clinic sought the dismissal of the lawsuit on that basis. The physician

argued that the filing of his appeal with the administrative government board, years before, had interrupted the limitation period.

The court ruled that the expression “judicial demand” in Article 2224 of the then “Civil Code of Lower Canada” (now Art. 2892 of the new Quebec Civil Code) should be interpreted as meaning only a court named in the Quebec Code of Civil Procedure. Since the administrative government body was not a court named in the Code of Civil Procedure, the filing of the appeal with that board had not interrupted limitation.

In essence, with only a few exceptions described in other provisions of the Quebec Civil Code (submitting a dispute to arbitration and filing a proof of claim in a bankruptcy process), only a lawsuit filed with a Quebec court interrupts limitation under Quebec law.

If we follow this reasoning, the filing of a claim governed by Quebec law both as to merits and limitation with a foreign court, would not cause interruption of limitation under Quebec law, as it is not a Quebec court. As a result, limitation would continue to run while the case winds its way through the court system of the foreign jurisdiction.

Therefore, it is important to know first what the applicable rule relating to interruption of prescription says, for if the applicable rule is the same as in Quebec, the lawsuit filed with the courts of a foreign jurisdiction would not interrupt limitation and it would become an excellent ground of defense. And for the plaintiff, it would be prudent to seek a judicial suspension or extension of limitation before proceeding or if such remedy is not available, seek measures in the foreign jurisdiction for the process to move as fast as possible.

Following is an illustration of this.

It is the case of *Ginsbow Inc. vs. Pipe and Piling Supplies Ltd* [R.E.J.B. 2000-17539] (Quebec Superior Court). A State of Washington, U.S.A., company obtains a judgment in its state court condemning a Quebec company to pay a sum of money to the Washington State company. Ostensibly unsuccessful at collecting the money, the U.S.A. company sought recognition of its judgment from the Quebec Superior Court. At the time of filing its application with the Quebec Superior Court, only days were left before the Washington States’ ten (10) year limitation period for enforcing a judgment, would run out. The application was contested by the Quebec company on various grounds. By the trial date, a few years later, over ten (10) years had then elapsed since the U.S.A. judgment was rendered. The morning of the trial, the Quebec company sought and obtained the dismissal of the application on the basis that the limitation period of ten (10) years for enforcing the U.S.A. judgment, had expired.

Plaintiff had argued that, under Quebec law, the filing of the application for recognition of the Washington State judgment had interrupted the limitation period within the ten (10) years. But the court took a different view and instead applied Washington State law under which the beneficiary of a judgment has the right, prior to the expiration of the limitation period, to seek from the court, an extension of the limitation period. The U.S.A. company had sought such an extension but it had been denied by the Washington court.

The court ruled that the ten (10) year Washington State limitation period had therefore continued to run and had expired by the date of the trial. The application was dismissed.

The court explicitly applied Article 3131 of the Quebec Civil Code which stipulates that limitation is governed by the law applicable to the merits of the dispute. The court concluded that “the merits of the dispute”, in the case of recognition of a foreign judgment, is the foreign judgment and that, as a result, the applicable rules of limitation are those of the jurisdiction where the judgment was rendered, namely Washington State.

There is no provision in the Quebec Civil Code giving power to a court to extend the limitation period.

The outcome was disastrous. Of course, it was not prudent to wait almost ten (10) years before seeking the recognition of the U.S.A. judgment.

We will now look at what the rules of interruption of limitation say in certain other provinces in Canada and in certain selected countries such the U.K., France and Germany.

As in Quebec, the basic rule in other provinces in Canada is that the limitation period stops running once a proceeding is commenced by issuance of a writ or statement of claim.

Does it mean that in order to operate interruption of limitation a proceeding must be commenced before a court of the province where the lawsuit is filed?

Though I have not gone through all the provincial limitations statutes in Canada, it would appear to be the case.

PROVINCE OF ALBERTA

The Limitations Act 2000 of Alberta, section 2, clearly states that the Act is applicable in respect of “a proceeding before a court created by the Province”.

PROVINCE OF BRITISH COLUMBIA

The Limitation Act of British Columbia uses the expression “bringing of an action” as the moment upon which limitation stops running. “Action” is defined as any “proceeding” in a “court” but the act contains no definition of the words “proceeding” or “court”. But by inference, one could conclude that “court” means a British Columbia Court. Indeed, in many sections, the Act states that the “court may apply” one section or another of the Act and this necessarily means a British Columbia Court.

PROVINCE OF NOVA SCOTIA

The Limitation Act of Nova Scotia also uses the expression “bringing an action” as operating interruption of limitation. The word “action” is also defined as a “proceeding in a Court” but contains no definition of the words “proceeding” or “court”. However, section 23 of the Act which deals with conflicts of laws, states that the Act “applies to actions in the province”. This would necessary mean actions brought before a Nova Scotia Court.

PROVINCE OF ONTARIO

The Ontario Limitation Act 2002 uses the expression “commencement of a proceeding” as operating interruption of limitation. The word “proceeding” is not defined in the Act. But the Act lists certain specific proceedings to which the Act does not apply or where there is no limitation period and all of those proceedings refer to proceedings governed by Ontario Law. It can therefore be inferred that only the commencement of a proceeding in an Ontario court would stop limitation.

Graeme Mew, in his “*The Law of Limitations*” (2nd Edition) on Canadian law of limitations, Butterworth 2004, at page 3, states the following:

“The party seeking a remedy must commence an appropriate proceeding in a court or tribunal having jurisdiction over the case in order to preserve its remedies and/or rights.”

In other words, a provincial court.

UNITED KINGDOM

In the U.K., limitation is governed by the Limitation Act 1980.

The limitation periods mentioned in the Act stop running once an action is “brought”, as stipulated in section 1 which reads, in part, as follows,:

“1. – (1) This Part of this Act gives the ordinary time limits for bringing actions of the various classes mentioned in the following provisions of this Part.”

The word “action” is defined in section 38 of the Act as including “any proceeding in a court of law, including an ecclesiastical court”.

“Court of law” is not defined in the Act. But a reading of the Act leads one to interpret it as meaning a domestic court in the U.K.

FRANCE

Under the French law of limitation, a lawsuit filed in the court of a foreign jurisdiction will interrupt limitation.

In France, the rule that limitation is interrupted by the filing of a lawsuit is found in Article 2241 of its Civil Code which reads, in part, as follows:

“Article 2241. La demande en justice, même en référé, interrompt le délai de prescription ...”

The expression “*demande en justice*” could be translated as a judicial demand or lawsuit, filed with a court. Just as in Quebec, the notion of “*demande en justice*” is not well defined in French law.

But a 1975 decision of the highest court in France, the *Cour de Cassation* [Ch. Civile I, 21 janvier 1975, no. 73-13851], interpreted this provision (formerly article 2244 of the Civil Code) as including a lawsuit filed in a foreign court. France, therefore, does not restrict this limitation rule to only its own domestic or local courts.

GERMANY

Germany, as France, does not restrict the interruption of limitation to the filing of a lawsuit before its own courts. A lawsuit governed as to the merits by German law commenced before a foreign court will stop limitation but under certain conditions.

Following a decision by the German High Court of Justice, the rule, in essence, is that the court proceeding filed in the foreign jurisdiction must bear a functional equivalence to that which could have been filed before a German court and that it reveal the Plaintiff’s intention to enforce the right governed by German law.

In conclusion, under the laws of certain jurisdictions, the filing of a lawsuit in a foreign court will not stop limitation but in others, it will.

Jean G. Robert, avocat
Lette & Associates
© Jean G. Robert, 2011