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Résumé de l'article

L'article 3136 C.c.Q. énonce une exception aux règles de compétence généralement applicables aux autorités québécoises. Fondé sur le principe de nécessité et en l'absence de for, il autorise une autorité à se saisir d'une affaire qui ne relève pas directement de sa compétence lorsqu'il est impossible ou « déraisonnable » pour les parties d'avoir accès à une autorité étrangère et que le litige présente néanmoins un lien suffisant avec le Québec. De ce fait, l'article 3136 confère une compétence discrétionnaire à une autorité québécoise. Cette discrétion, déjà limitée par les critères de l'article 3136, a en outre fait l'objet d'une interprétation encore plus réductrice par la Cour d'appel dans l'affaire *Lamborghini*. L'élément crucial est que la juridiction de nécessité implique que le litige soit assujetti à un remède efficace dans le for du Québec. Par ailleurs, alors que la condition relative à la disponibilité d'un remède efficace rend l'exercice de la juridiction de nécessité raisonnable, celui-ci devient déraisonnable en raison de la condition exigeant que des démarches étrangères soient instituées. Le critère de remède est soit ignoré, soit jugé sans valeur tant par la doctrine que par la jurisprudence. S'appuyant sur une approche comparative entre le droit civil et la common law, l'auteur propose en première partie une analyse générale de cette règle exceptionnelle et insiste particulièrement sur la législation suisse dont les rédacteurs de l'article 3136 C.c.Q. se sont sans doute inspirés. Dans une seconde partie, l'article 3136 est mis en perspective avec les dispositions générales du Code et son historique législatif est souligné. La troisième partie est consacrée à l'analyse des divers éléments de l'article, tandis que dans la dernière partie, l'auteur aborde l'étude des décisions judiciaires relatives à l'application du principe de nécessité et l'absence de for.

Forum of necessity in Quebec Private International Law: C.c.Q. art. 3136*

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ABSTRACT

Article 3136 C.c.Q. is a departure from the general rules of jurisdiction applicable to a Quebec authority. Based on the principle of necessity and in the absence of an appropriate forum, it authorizes an authority to exercise jurisdiction in relation to a matter not subject to its direct jurisdiction when it is impossible or unreasonable for the parties to access a foreign authority and when the litigation has a sufficient connection with Quebec. Article 3136 thus confers a discretionary jurisdiction on a Quebec authority. This discretion is limited by the definitional elements expressed in article 3136 and has been further narrowed by an

RÉSUMÉ

L'article 3136 C.c.Q. énonce une exception aux règles de compétence généralement applicables aux autorités québécoises. Fondé sur le principe de nécessité et en l'absence de for, il autorise une autorité à se saisir d'une affaire qui ne relève pas directement de sa compétence lorsqu'il est impossible ou « déraisonnable » pour les parties d'avoir accès à une autorité étrangère et que le litige présente néanmoins un lien suffisant avec le Québec. De ce fait, l'article 3136 confère une compétence discrétionnaire à une autorité québécoise. Cette discrétion, déjà limitée par les critères de l'article 3136, a en outre fait l'objet d'une interprétation encore plus

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inappropriate interpretation by the Court of Appeal in Lamborghini. *The critical factor is that necessity jurisdiction implies that the litigation is subject to an effective remedy in the Quebec forum. Availability of an effective remedy renders reasonable the exercise of necessity jurisdiction and the requirement that foreign litigation be instituted, unreasonable. However, the factor of remedy is ignored, or without expression, in both doctrine and jurisprudence. Supported by a comparative approach between the civil law and the common law, the first part presents a general analysis of this exceptional rule with particular attention to the Swiss law which inspired the drafters of article 3136. In the second part, article 3136 is considered in context with the general provisions of the Code and the legislative history of the provision is clarified. The third part analyzes the definitional elements of the article and the last part examines its application as reflected in the relevant jurisprudence.*

réductrice par la Cour d'appel dans l'affaire Lamborghini. *L'élément crucial est que la juridiction de nécessité implique que le litige soit assujetti à un remède efficace dans le for du Québec. Par ailleurs, alors que la condition relative à la disponibilité d'un remède efficace rend l'exercice de la juridiction de nécessité raisonnable, celui-ci devient déraisonnable en raison de la condition exigeant que des démarches étrangères soient instituées. Le critère de remède est soit ignoré, soit jugé sans valeur tant par la doctrine que par la jurisprudence. S'appuyant sur une approche comparative entre le droit civil et la common law, l'auteur propose en première partie une analyse générale de cette règle exceptionnelle et insiste particulièrement sur la législation suisse dont les rédacteurs de l'article 3136 C.c.Q. se sont sans doute inspirés. Dans une seconde partie, l'article 3136 est mis en perspective avec les dispositions générales du Code et son historique législatif est souligné. La troisième partie est consacrée à l'analyse des divers éléments de l'article, tandis que dans la dernière partie, l'auteur aborde l'étude*

des décisions judiciaires relatives à l'application du principe de nécessité et l'absence de for.

SOMMAIRE

INTRODUCTION

1. Article 3136 of the *Civil Code of Quebec*[1] permits a Quebec authority to hear a legal dispute, notwithstanding the absence of jurisdiction, provided that the dispute has a sufficient connection with Quebec and instituting foreign proceedings is either

1. S.Q. 1991, c. 64 (in force 1 January 1994) (hereafter C.c.Q.).

impossible or unreasonable. This "forum of necessity" or "necessity jurisdiction" is an integral component of the codification of private international law rules in Book Ten of the *Civil Code*. Unlike *renvoi*[2] and the preliminary question, which serve to determine the appropriate choice of law to resolve a legal dispute, necessity jurisdiction is directed at ensuring the existence of an available forum when a legal dispute does not fit within the usual rules of jurisdiction. Together, these and other tools provide flexibility to private international law and promote justice between parties in a world of international mobility of goods, services and persons.

2. Article 3136 is not the only "forum of necessity" provision in Quebec private international law. C.c.Q. article 3149, for example, creates a practical necessity jurisdiction in relation to consumer and employment contracts where the consumer or worker is domiciled or resident in Quebec, notwithstanding a waiver of such jurisdiction by the consumer or worker. Without the protection of article 3149, non-Quebec vendors and employers might rely on a waiver or the added expense of foreign proceedings to insulate themselves from the claims of Quebec consumers and workers. By enacting article 3149, the legislator ensured that Quebec consumers and workers have access to justice in Quebec. Necessity jurisdiction may also be found in C.c.Q. article 3138 which confers jurisdiction on a Quebec authority to order provisional or conservatory measures, even in the absence of jurisdiction to adjudicate the dispute itself, and C.c.Q. article 3140 which confers jurisdiction to take emergency measures to protect persons or property present in Quebec.

3. In *Lamborghini (Canada) Inc.* c. *Automobili Lamborghini S.P.A.*,[3] the Quebec Court of Appeal interpreted and applied article 3136 in terms of its impossibility standard without apparent appreciation of its alternative standard, that of unreasonableness. The Court also construed article 3136 as *not* conferring upon a Quebec authority a jurisdiction which does not otherwise exist — a rather remarkable

2. *Renvoi* is excluded from Quebec private international law by C.c.Q. article 3080 which directs that a reference to the law of a foreign country does not include its conflicts rules.

3. [1997] R.J.Q. 58.

reading of article 3136 considering that it begins with the phrase "[e]ven though a Quebec authority has no jurisdiction to hear a dispute....". Early commentary on article 3136 did little more than repeat the article in summary form and note its source in Swiss law. More recent commentary has generally repeated the unfortunate interpretation of *Lamborghini*. Article 3136 invites a new approach to its interpretation.

4. Part I of this essay presents forum of necessity (or necessity jurisdiction) in its general context as a well-known but undeveloped concept in both common law and civil law systems and then considers the immediate context of article 3136, its source in article 3 of the Swiss Statute on Private International Law.[4] Part II presents the internal legislative context and legislative history of article 3136, with particular attention to doctrinal commentary. Part III analyses the founding definitional components of article 3136 and emphasizes the interpretation of the alternative standards expressed in the article; that of impossibility and of reasonableness. To demonstrate the different approaches to article 3136 in the contexts of both international commercial litigation and of family and extrapatrimonial matters, Part IV provides a brief survey of the relevant jurisprudence. There then follows a conclusion in which the basic theme of this essay is confirmed — if the value informing necessity jurisdiction is access to justice, and its counterpart of avoiding a denial of justice, then the logical limit to the application of article 3136 is the availability of an effective remedy in the necessity forum.

5. Throughout this essay, "forum of necessity" and "necessity jurisdiction" are used interchangeably. Yet, this terminology is misleading when applied to article 3136. *Necessity* implies an urgency, a pressing need, an *in extremis* situation and the absence of an alternative forum in which to seek a remedy. The Swiss Statute uses the phrase "forum of necessity" as a marginal note but article 3136 is unadorned. It may, therefore, be preferable to avoid the influences of "necessity" reasoning by referring to article 3136 as conferring a residual or exceptional jurisdiction upon a Quebec authority. Article

4. R.S. 291, RO 1988 1776. English language version is found at (1990) 29 I.L.M. 1244.

3136 contains its own internal and contextual limitations and need not be affected by words which the legislator has not chosen to use. Notwithstanding this caveat, I bow to ease of reference and use the generally accepted terminology.

I. COMMON LAW AND CIVIL LAW INSPIRATION FOR ARTICLE 3136

6. Forum of necessity did not originate with the Civil Code Revision Office and the Quebec Civil Code. It is a concept well-known to both common law and civil law. Forum of necessity is a manifestation of the underlying value that justice be done between parties to a legal dispute even if those parties are from different legal systems. It reflects a symmetry of sorts between the fundamental purpose of private international law as a means "to facilitate the flow of wealth, skills and people"[5] and the legal pretension that if there is a right, there is a means to vindicate that right.[6] It is implicit that there be a forum in which justice may be done.

7. As a preliminary matter, it is important to distinguish between rules of direct and indirect jurisdiction. Direct jurisdiction refers to the rules which determine whether a Quebec court or other authority will adjudicate a matter involving a legally relevant foreign element.[7] Indirect jurisdiction refers to the rules which determine whether a foreign authority[8]

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5. *Morguard Investments* v. *De Savoye*, [1990] 3 S.C.R. 1077, para. 31 per La Forest J.

6. In Quebec law, this principle is reflected in the *Code of Civil Procedure*, R.S.Q., c. C-25, art. 31.

7. Direct jurisdiction is know as local sense jurisdiction in common law systems and is styled "international jurisdiction of Quebec authorities" in Book Ten of the C.c.Q. These rules are expressed in unilateral form; that is, they define the jurisdiction of a Quebec authority. Bilateralism is achieved by use of a mirroring device such that the same rules apply to determine the indirect jurisdiction of non-Quebec authorities for the purpose of recognition or not of a foreign decision in Quebec.

8. In private international law, each law district is considered a "country" for analytical purposes. As expressed in C.c.Q. article 3077 : "Where a country comprises several territorial units having different legislative jurisdictions, each territorial unit is regarded as a country." For example, New Brunswick is a country; California is a country; France is a country, etc. It must also be observed that in Book Ten, Title Three, the C.c.Q. expresses jurisdiction rules in reference to a "Quebec authority", rather than to a court of tribunal. The scope of such rules is obviously broadened to apply to administrators and other decision-makers in Quebec.

exercised a jurisdiction in relation to a legal dispute such that its decision will be recognized and enforced in Quebec.[9] Under the *Civil Code of Quebec*, direct and indirect jurisdiction rules are mirrored in the sense that the rules governing the direct jurisdiction of a Quebec authority also govern the recognition of foreign decisions "to the extent that the dispute is substantially connected with the country whose authority is seised of the case".[10] Forum of necessity (necessity jurisdiction) is a form of direct jurisdiction and is clearly founded on the territoriality principle.

8. Direct and indirect jurisdiction rules reflect legislative choices. Though the designation of this area of the law as private international law may imply otherwise, jurisdiction and choice of law rules are not truly international. Rather, they are expressions of domestic law and vary with the needs and priorities of each country. For example, to protect natural resources industries, the Civil Code declares the exclusive jurisdiction of a Quebec authority to hear civil liability claims arising from exposure to raw materials originating in Quebec whether that damage is suffered in Quebec or elsewhere[11] and reinforces that exclusive direct jurisdiction with the indirect jurisdiction rule that a foreign decision on such a claim will not be recognized.[12] Notwithstanding that jurisdiction rules are not international, a level of relative harmonization is achieved because domestic law is often inspired by international conventions to which a country may or may not be a state party. A corollary to the domestic nature of jurisdiction rules is that the absence of direct jurisdiction in a Quebec authority does not necessarily mean that such jurisdiction exists in some other forum. A foreign country may or may not confer direct jurisdiction on its authorities regardless of what in Quebec private international law is considered a sufficient connection between that country and the parties or to the

9. Indirect jurisdiction is known as international sense jurisdiction in common law systems.

10. C.c.Q. article 3164.

11. *Id.*, article 3151.

12. *Id.*, article 3165(1). The Superior Court rejected a constitutional challenge to the validity of this article in *Worthington Corporation* c. *Atlas Turner inc.*, [2003] J.Q. n° 2605 (Lemelin, J.C.S.). The case is presently before the Quebec Court of Appeal.

subject matter of the legal dispute. Such diseconomy is simply a function of the non-international nature of private international law.

9. To provide flexibility to private international law, several devices or escape mechanisms have developed to avoid the otherwise applicable general rules. *Renvoi* and the preliminary question are devices to avoid the substantive law determined by strict application of general choice of law rules in favour of a substantive law more amenable to a just result. Though C.c.Q. article 3080 excludes the application of *renvoi* in Quebec private international law, C.c.Q. article 3082 adopts a more general device, the principle of proximity, to avoid application of a choice of law rule "if the situation is only remotely connected with that law." Forum of necessity is another such device though it is directed to the place in which to adjudicate a legal dispute rather than choice of law. In a sense, forum of necessity may be considered a form of jurisdictional *renvoi* by which the Quebec legislator recognizes the existence of direct jurisdiction in a non-Quebec forum but accepts a hypothetical reference back to a Quebec authority for the hearing of the matter.[13] In exercising jurisdiction on a forum of necessity basis, a Quebec authority does not automatically apply Quebec substantive law. The governing substantive law is determined by application of the normal choice of law rules expressed in the Civil Code.

A. GENERAL INSPIRATION IN COMMON LAW AND CIVIL LAW

10. In common law systems, direct jurisdiction is grounded in personal service of a notice of action within the territory of the court or by service of the notice *ex juris*. Civil procedure rules generally enumerate methods of personal service and the permissible bases for service *ex juris* without leave of the court. For example, service *ex juris* is permitted without leave

13. Though conceptually attractive, such a characterization is obviously flawed. *Renvoi* is traditionally restricted to analysis of choice of law issues and involves proof of foreign choice of law rules. The exercise of jurisdiction on a forum of necessity basis involves no proof of foreign rules of direct jurisdiction but is exercised on considerations of impossibility and reasonableness.

in contractual disputes when the contract is made in the forum, is expressed to be governed by its laws, is subject to its courts by a forum selection clause, or if there has been a breach of contract committed within the forum; in tort, if the tort was committed within the forum; and in both contract and tort, if damage was sustained in the forum.[14] The exercise of such broad bases of jurisdiction is limited by the concept of *forum non conveniens*, the essential element of which is the existence or not of a more appropriate forum than that selected by the plaintiff. The burden of proving the existence of some other more appropriate forum generally rests upon the defendant.[15] If, upon consideration of all the relevant factors, the defendant discharges that burden of proof, the plaintiff's proceedings are stayed. If the defendant fails to satisfy the tribunal that there exists a clearly more appropriate forum in which to adjudicate the matter, the plaintiff's choice of forum is maintained. The plaintiff's choice is the default position.

11. The existence or not of a more appropriate forum often rests upon a finding of a "legitimate juridical advantage" favouring the plaintiff in the present forum. In *Gotch* v. *Ramirez et al.*,[16] an Ontario defendant argued *forum non conveniens* in an action commenced by a Pennsylvania plaintiff arising from an automobile accident in Pennsylvania. Though the relevant factual connections clearly favoured Pennsylvania as the appropriate forum, the Ontario court dismissed the defendant's motion because the Ontario proceedings provided the plaintiff with a legitimate juridical advantage. The action had been commenced just eight days before expiry of the two year prescriptive period provided by the laws of both Ontario

14. Rule 19.01(g) of the *Rules of Court of New Brunswick*, N.B. Reg. 82/73. Similar rules generally apply in the other common law provinces. If the action does not fall within the enumerated grounds, service *ex juris* may still be permitted with leave of the court. In Nova Scotia, grounds are not enumerated and service *ex juris* without leave is permitted anywhere in Canada or the United States; service elsewhere is subject to leave of the court (Nova Scotia *Civil Procedure Rules*, R. 10.07). See generally : J.G. Castel, *Canadian Conflict of Laws* (4th Ed.), Toronto, Butterworths, 1997, ch. 12.

15. *Amchem Products Inc.* v. *British Columbia (Workers Compensation Board)*, [1993] 1 S.C.R. 897, para. 33.

16. (2000) 48 O.R. (3d) 515 (S.C.J.) (Nordheimer J.). For an example of a case which dismissed an argued forum of necessity, see *Cortese (Next Friend of)* v. *Nowsco Well Service Ltd.*, [2000] A.J. No. 481 (Q.L.) (Alt. C.A.).

and Pennsylvania and proceedings had not been instituted in Pennsylvania. The defendant's motion, if granted, would have immunized her from suit because the plaintiff could not institute proceedings in Pennsylvania due to the expired prescription period.[17] The juridical advantage favoured Ontario as the forum and this advantage satisfied the "legitimate" requirement because proceedings had been instituted within the prescriptive period under Pennsylvania law.

12. Legitimate juridical advantage has also been found in the availability of civil legal aid. In *Connelly* v. *R.T.Z. Corp.*,[18] the House of Lords held in favour of the plaintiff's choice of an English forum notwithstanding that the relevant considerations demonstrated the closest connection of the parties and the dispute with Namibia. The Scottish plaintiff alleged that he developed a serious illness while working at the defendant employer's mine in Namibia. In England, civil legal aid was available to assist the plaintiff in his action; in Namibia, civil legal aid was not available. In these circumstances, the House of Lords accepted that, if granted, the defendant's motion to stay proceedings would result in the plaintiff being deprived of effective access to a forum.[19] The House of Lords held that the plaintiff had demonstrated that substantial justice would not be done in the more appropriate forum and exercised its discretion not to stay the proceedings. The exercise of a residual discretion in common law superior courts to effect a forum of necessity is well illustrated in *Oppenheimer* v. *Louis Rosenthal & Co.*[20] A former employee instituted a wrongful dismissal action in England against his employer in relation to a contract of employment entered to in Germany and governed by German law. The plaintiff, a German national,

17. Prescription laws are characterized as substantive rather than procedural and therefore governed by the *lex loci delicti*, *Tolofson* v. *Jensen*, [1994] 3 S.C.R. 1022. In this instance, the law of Pennsylvania governed prescription.

18. [1998] A.C. 854 (H.L. (E)).

19. Canadian cases have also favoured the resident plaintiff injured while undergoing medical care in another Canadian province. See for example, *Dennis* v. *Salvation Army Grace General Hospital*, (1997) 156 N.S.R. (2d) 372 (C.A.) and *Oakley et al* v. *Barry et al*, (1998) 158 D.L.R. (4th) 679 (N.S.C.A.).

20. [1937] 1 All. E.R. 23 (C.A.) (Greer L.J.). The Court also held that jurisdiction existed because of the breach of contract which occurred in England — the employer did not have the plaintiff's local address so its agent in England completed and mailed the dismissal letter in England.

performed the contract in England on behalf of the employer, a German corporation. The English Court of Appeal dismissed the defendant's motion for a stay of proceedings and held, in part, that notwithstanding the "natural forum" in Germany, a stay would not be granted because of the likelihood that the plaintiff, a Jew, would not be permitted representation by a lawyer in proceedings before the German labour court and the existence of a "real risk" of arrest and imprisonment in a concentration camp if he returned to Germany. The ready availability of German lawyers in London, in that era, vitiated any fairness concern regarding the defendant's ability to present its case.

13. Forum of necessity is also well-known in civil law. Direct jurisdiction rules express a connection of a person (e.g. French nationality) or of an event (e.g. seizure in Germany of moveable or immovable property of the defendant) to the territory of the forum and the civilian judge does not generally have a discretion to decline to exercise this jurisdiction.[21] Yet, jurisprudence has recognized a subsidiary direct jurisdiction to avoid an injustice. In France, this jurisprudence is well developed. In French private international law, direct jurisdiction is based on the nationality of the parties. Article 14 of the French *Civil Code* permits a French national to institute proceedings against a resident or non-resident foreigner in relation to obligations created in France or elsewhere and article 15 declares jurisdiction over a French national in relation to obligations created in a foreign country and with a foreign national.[22] In simpler terms, a French tribunal is competent when a French national is either plaintiff or defendant. Similar to the situation which existed in Quebec under the *Code civil du Bas-Canada*, articles 14 and 15 of the

21. See H. GAUDEMET-TALLON, "De quelques raisons de la difficulté d'une entente au niveau mondial sur les règles de compétence judiciaire internationale directe" in J.A.R. NAFZIGER, S.C. SYMEONIDES, *Law and Justice in a Multistate World*, New York, Transnational Publishers, Inc. 2002, p. 62-64 and H. GAUDEMET-TALLON, "France" in J.J. FAWCETT (ed.), *Declining Jurisdiction in Private International Law*, Oxford, Clarendon Press, 1995, p. 175 : "...the French legal system determines whether the judge has jurisdiction or not. If he has jurisdiction, he must rule and cannot 'decline to exercise his jurisdiction' [...]; however, the latter knows about *exceptions de litispendance* (pleas of *lis pendens*) and *connexité* (related actions), both of which provide almost the only bases whereby the court may decide not to proceed with the case."

22. *Code civil 2001*, Paris, Édition Litec, 2001.

French *Civil Code* declare rules of internal territorial competence which are also applied to matters involving private international law. Applying an *a contrario* interpretation of articles 14 and 15, French courts initially held themselves to be without jurisdiction in relation to civil actions involving foreign nationals, even foreign nationals resident and domiciled in fact in France.[23] During the 19th and 20th centuries, courts created exceptions to the principle of incompetence to avoid a denial of justice. It is easy to consider this jurisprudence as specific applications of a forum of necessity. Starting from a position of incompetence, French jurisprudence slowly recognized direct jurisdiction in relation to actions between foreigners, for example, concerning immovable property in France, delictual responsibility arising in France, and conservatory or urgent family law matters such as fixing separate residences and support obligations between spouses.[24] French jurisprudence also recognized jurisdiction based on the defendant's French domicile in fact if it was impossible for the plaintiff to institute proceedings in the defendant's foreign legal domicile.[25] Eventually, French courts followed the trend of its own jurisprudence and abandoned the principle of incompetence in 1948.[26] With the subsequent coming into force of the 1968 *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*,[27] contemporary French law recognizes direct jurisdiction in relation to all persons domiciled (that is, resident and significantly connected) in France. As a result, the importance of forum of necessity has waned.[28] Yet, French jurisprudence continues to recognize a residual jurisdiction to avoid the denial of justice in situations which present a sufficient connection with France and which are

23. See, R. PHILLIMORE, *Private International Law or Comity* (3rd ed.), London, Butterworths, 1889, p. 726-27.

24. H. BATTIFOL, P. LAGARDE, *Droit international privé* (7th ed.) Tome II, Paris, Librairie générale de droit et de jurisprudence, 1983, p. 451-55.

25. *Id.*, p. 454.

26. *Ibid.*

27. J.O.C.E. Legislation, 31 December 1972, No. L. 299, p. 32 (French language version), 30 October 1978, No. L. 304, p. 36 (English language version). By article 2, persons are subject to suit in the contracting state in which they are domiciled and, by article 3, may be sued in another contracting state consistent with the jurisdiction rules established by the Convention. Article 3 also provides that articles 14 and 15 of the French *Code civil* are not applicable.

28. H. BATTIFOL, P. LAGARDE, *op. cit.*, note 24, p. 463-64.

not governed by the successor to the Brussels Convention under European Community law.[29]

14. In the European Community (E.C.), jurisdictional issues are presently resolved by application of *Council Regulation (EC) N° 44/2001 of 22 December 2000*[30] which replaced the *Brussels Convention*. The Regulation, as had the *Brussels Convention*, makes its rules applicable to both direct and indirect jurisdiction within member states with the result that the appropriate forum within the E.C. is easily determined by reference to the Regulation. Subject to specific exceptions, the basic rule of jurisdiction is that "person domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."[31] In an Annex, the Regulation also prohibits the exercise of jurisdiction within the E.C. on the basis of enumerated national rules.[32] Included among these prohibited rules are those of United Kingdom founding direct jurisdiction on the service of a notice of action on a defendant temporarily present in that country or on the presence or seizure of property situated therein. For France, application of articles 14 and 15 of the *Code civil* are prohibited. Accordingly, Regulation N° 44/2001 implicitly limits the scope of application of necessity jurisdiction within the member states of the E.C. to situations in which the defendant is not domiciled in a member state.

15. National law in E.C. member states continues to recognize necessity jurisdiction. In a recent study of private international law in member states on matters of wills and succession, H. Dörner and P. Lagarde identify necessity jurisdiction in France, Germany, Netherlands, Ireland and Portugal.[33] The authorities in these countries invoke necessity jurisdiction in

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29. *Ibid.*

30. *Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition of judgments in civil and commercial maters*, (2001) O.J.E.C. p. L 12/1 The *Lugano Convention* of 16 September 1988 between the European Community and member states of the European Free Trade Association (EFTA) will soon be made to conform to the internal rules of the European Community.

31. *Id.*, article 2(1).

32. *Id.*, article 4(2) and Annex I.

33. H. DÖRNER, P. LAGARDE, *Étude de droit comparé sur les règles de conflits de juridiction et de conflit de lois relatives aux testaments et successions dans les États membres de l'Union Européenne : Rapport Final*, Würzburg, Deutsches Notainstitut, 2002, p. 19. [En ligne]. http : //europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc/testaments_successions_fr.pdf

situations in which no foreign court or authority has taken jurisdiction and there exists a sufficient connection to the forum.

16. Elsewhere, necessity jurisdiction is under active consideration. A report prepared for the Inter-American Juridical Committee of the Organization of American States has recommended favourable consideration of forum of necessity as a jurisdictional option favouring the injured plaintiff :

> the most convenient thing to do in jurisdictional issues is to present a series of options to the plaintiff. This would facilitate his access to justice, taking into account that he is the victim who has suffered the damaging consequences of an act or fact performed by the defendant.[34]

As precedents supporting its recommendation, the report refers to article 3136 of the Quebec Civil Code as well as article 3 of the Swiss Statute. The unofficial *Sixth Draft of the Model Law of Private International Law of the People's Republic of China (P.R.C.)* (2000) contains provisions permitting discretionary jurisdiction and necessity jurisdiction :

> Article 50 Discretionary Jurisdiction
>
> A PRC court may exercise its jurisdiction over an action which is not expressly provided under this law, if the court considers that the case has proper connections with the PRC and it is reasonable to exercise the jurisdiction.
>
> Article 52 Necessity Jurisdiction
>
> A PRC court may exercise its jurisdiction over an action initiated by the plaintiff, if it is evident that no other court may provide judicial remedy.[35]

The Model Law is an unofficial document prepared by the Chinese Society of Private International Law to reflect what it perceives to be generally accepted principles. Significantly, the Model Law separates the reasonableness standard

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34. A.E. VILLALTA VIZCARRA, "Recommendations and Possible Solutions Proposed to the Topic Related to the Law Applicable to International Jurisdictional Competence With Regard to Extracontractual Civil Responsibility", CJI/doc. 97/02 in Organization of American States, *Annual Report of the Inter-American Juridical Committee to the General Assembly*, Washington, O.A.S., 2002, p. 44.

35. [En ligne]. http : //translaw.whu.edu.cn/english/

(discretionary jurisdiction) and the impossibility standard (necessity jurisdiction) into distinct articles. Both article 3 of the Swiss Statute and article 3136 of the Quebec Code combine these strands into one necessity jurisdiction.

17. More recently, a draft declaration of *Principles and Rules of Transnational Civil Procedure* (2003) jointly prepared by the American Law Institute and UNIDROIT expresses necessity jurisdiction in the following terms :

> 2.2 Exceptionally, jurisdiction may be exercised, when no other forum is reasonably available, on the basis of the defendant's presence or nationality in the forum state, or presence in the forum state of the defendant's property whether or not the dispute relates to the property.[36]

This declaration establishes significant limitations on necessity jurisdiction. The presence, domicile or nationality of the plaintiff or moving party are excluded and jurisdiction is limited to a forum in which the defendant is either present or is a national, or where property of the defendant is situated. Obviously, such property will be available to satisfy a decision in the plaintiff's favour. It is also important to note that this jurisdiction is conditioned on no other forum being reasonably available and that the impossibility standard of article 3136 is omitted. It is evident that the ALI / UNIDROIT draft is much narrower than the forum of necessity jurisprudence discussed above. The difference is readily attributable to the focus of the ALI / UNIDROIT draft on transnational commercial litigation[37] while the national jurisprudence, and other documents discussed, include non-commercial matters within the scope of necessity jurisdiction.[38]

18. This section of the essay has identified necessity jurisdiction in the jurisprudence of both civil and common law countries

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36. Joint American Law Institute / UNIDROIT Draft Principles and Rules of Transnational Civil Procedure, Rome 2003. [En ligne]. http : //www.unidroit.org/english/procedure/study/76-10-e.pdf.

37. The drafters of ALI / UNIDROIT *Principles and Rules* article 2.2 consider it a basis for future application to non-commercial litigation. See *ibid.*, preamble : "These Principles are designed for adjudication of transnational commercial disputes. These Principles may be equally appropriate for the resolution of most other kinds of civil disputes and may be the basis for future initiatives in reforming civil procedure."

38. *Ibid.*

and in current international developments. Necessity jurisdiction is a generally established concept in private international law though its specific application may vary with the law of each country. It is a continually developing concept not generally codified in national law though the general nature of necessity jurisdiction is fairly consistent across legal systems. As a concept, forum of necessity is not an orphan in Quebec law; rather, it has extensive roots in both common law and civil law jurisprudence. What this survey reveals is that the legislative expression of necessity jurisdiction in the Civil Code, Book Ten, Title Three, article 3136 is unusual. The inspiration for that codification is acknowledged to be the *Swiss Statute on Private International Law*[39] and it is to that source that I now turn.

B. PARTICULAR INSPIRATION IN SWISS LAW

19. Article 3136 is inspired by article 3 of the 1987 *Swiss Statute on Private International Law.*[40] An initial draft document, prepared by a Committee of Experts in 1978, included the following forum of necessity provision :

> Si la présente loi ne prévoit aucun for, les tribunaux ou les autorités suisses peuvent néanmoins se déclarer compétents :
>
> a) lorsque la procédure à l'étranger est impossible ou excessivement difficile pour le demandeur; et
>
> b) lorsque vu les circonstances, notamment l'urgence ou la relation de la cause avec la Suisse, une déclaration d'incompétence entraînerait selon toute vraisemblance un déni de justice.[41]

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39. *Swiss Statute on Private International Law*, *supra*, note 4.

40. *Commentaires du ministre de la Justice*, vol. 2, Publications du Québec, 1993, p. 2000.

41. "Suisse — Droit international privé — projet", (1979) 68 *Rev. crit. dt. intl. priv.* 185, p. 188 (draft article 4). The Swiss Statute had its immediate genesis in a 1971 resolution adopted by the Swiss Lawyers Association which led to a Parliamentary motion of support and the creation of a committee of experts chaired by Professor Frank Vischer of the University of Basel. Working through subcommittees designated to address specific topics in private international law, the Committee produced a draft Bill in 1978 Professor François Knoepfler described the draft article as an *ad hoc* provision available "si aucun for normal n'est à disposition, à l'étranger ou en Suisse, et que la cause présente notamment un caractère d'urgence tel que le refus de statuer équivaudrait à

The draft article underwent further revision when included in a government draft Statute and when debated in the Senate and House of the Swiss Parliament. Approved by Parliament in December 1987, the Statute came into effect on 1 January 1989.[42] As enacted, article 3 of the Swiss Statute is as follows :

> For de nécessité
>
> Lorsque la présente loi ne prévoit aucun for en Suisse et qu'une procédure à l'étranger se révèle impossible ou qu'on ne peut raisonnablement exiger qu'elle y soit introduite, les autorités judiciaires ou administratives suisses du lieu avec lequel la cause présente un lien suffisant sont compétentes.

20. The modifications to article 3, from its first appearance in the experts' draft to its enacted version, are significant. Through various draft versions to enactment, article 3 maintained its reference to the "impossibility" of instituting foreign proceedings but modified the alternative basis expressed as "excessively difficult" in the expert draft to "unreasonable" in the enacted version.[43] Where the draft instructed a Swiss authority to consider all the circumstances, including urgency and the connection of the matter with Switzerland, the enacted version expresses a more general direction that there be a sufficient connection with Switzerland to identify the

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un déni de justice." F. KNOEPFLER, "Le projet de loi fédérale sur le droit international privé helvétique", (1979) 68 *Rev. crit. dt. intl. priv.* 31, p. 35. Another commentator described this draft provision as creating an "emergency jurisdiction" with the purpose being "to avoid situations in which the plaintiff is left, at least in practical effect, without a forum". S. MCCAFFREY, "The Swiss Draft Conflicts Law", (1980) 28 *Am. J. Comp. Law* 235, p. 243.

42. P.A. KARRER, K.W. ARNOLD, *Switzerland's Private International Law Statute of December 18, 1987*, Deventer, Kluwer Law and Taxation Publishers, 1989, p. 8-12. For a history of codification efforts, see G. BROGGINI, *La codification du droit international privé en Suisse*, Basel, Helbing & Lichtenhahn Verlag, 1971.

43. In its equally authentic German and Italian language versions, the critical phrase of the article "une procédure à l'étranger se révèle impossible ou qu'on ne peut raisonnablement exiger" is expressed as "*ein Verfahren im Ausland nicht möglich oder unzumutbar*" (translated as "a procedure is not possible or unreasonable abroad") and "*non è possibile o non può essere ragionevolmente preteso*" (translated as "it is not possible or it cannot reasonably be expected"), respectively. German and Italian versions per *Recueil systématique du droit fédéral* [En ligne]. www.admin.ch/ch/f/rs/291/a3.html and translated into English by *Google Translate*. See also : KARRER, ARNOLD, *supra*, note 42, p. 31.

appropriate Swiss judicial or administrative authority. The object of avoiding a denial of justice expressed in the draft version is omitted from its enacted version. At first glance, one might consider these modifications as intended to delimit the discretion accorded to judicial and administrative authorities when applying the provision. Yet, the version as enacted appears broader than that contained in the draft. The substitution of "excessively difficult" by "unreasonable" may not be overly significant given the overlap in the fields of meaning of the two qualifiers but the scope of judicial or administrative discretion is certainly broadened by the substitution of a sufficient connection for the previous reference to urgency and the probability of a denial of justice.

21. The initial reference in article 3, as drafted and as enacted, to the absence of jurisdiction according to the rules of the Statute alludes to the intention of the drafters and of the legislator to declare comprehensive rules in relation to all subjects of private international law, including jurisdiction. Though both the Swiss Statute and Book Ten of the Quebec Civil Code share this goal of comprehensiveness, their respective structures are markedly different. Book Ten of the C.c.Q. comprehensively declares rules governing the international jurisdiction of Quebec authorities in a separate Title. In comparison, the Swiss Statute commences with *general* rules declaring direct jurisdiction based on the domicile of the defendant, the agreement of the parties, and the submission or tacit acceptance by the defendant. In this general part, it also expresses rules to decline jurisdiction when the parties have concluded an arbitration agreement, to permit a Swiss tribunal to stay proceedings because of *lis pendens*, to permit an authority to order provisional measures even in the absence of jurisdiction on the merits of the matter in dispute, and to confer jurisdiction over a counter-claim when jurisdiction exists with respect to the corresponding main action.[44] The structure differs because the Swiss Statute then declares *specific* rules governing the jurisdiction of Swiss authorities, choice of law, and recognition of foreign decisions in relation to each discrete topic in private international law.

44. *Swiss Statute on Private International Law*, *supra*, note 4, articles 2, 5-10.

22. The dual standards of impossibility and unreasonableness found in article 3 are also expressed elsewhere in the Swiss Statute. In relation to family and extra-patrimonial matters, the Swiss Statute permits subsidiary jurisdiction based on the Swiss domicile of origin of one of the parties when an action either cannot be brought or "cannot be reasonably demanded" to be brought in the place of the domicile (or in some matters, the habitual residence) of one of the parties. This version of forum of necessity jurisdiction applies to proceedings concerned with marriage, divorce and separation, filiation by birth, and adoption.[45] The Swiss Statute also permits domicile of origin jurisdiction in relation to the succession of a Swiss national abroad "to the extent that the relevant foreign authorities do not engage themselves in this respect".[46] Thus, the scope of necessity jurisdiction in article 3 is limited by a form of forum of necessity applicable to family and extra-patrimonial jurisdiction rules. Jurisdiction based on the domicile of origin does not apply to patrimonial matters so Swiss nationals domiciled abroad are not similarly protected in relation to contractual or extra-contractual obligations, and company law matters.[47] Book Ten, Title Three of the *Civil Code of Quebec* contains no equivalent to domicile of origin jurisdiction.

23. In commentary on the 1978 Committee of Experts' draft, Frank Vischer and Paul Volken emphasized the subsidiary nature of necessity jurisdiction given the comprehensive expression of jurisdiction rules and recognized a discretion in the decision-maker when applying such jurisdiction : "Il appartient au juge de dire si le système juridique suisse préfère supporter un déni de justice ou supporter qu'un for basé sur des liens tenus soit donné."[48] In a commentary subsequent to

45. *Id.*, articles 47, 60, 67, and 76, respectively.

46. *Id.*, article 87 al. 1. In relation to property in Switzerland of a deceased foreigner domiciled abroad, Swiss authorities may exercise jurisdiction in succession "to the extent that the foreign authorities do not hear the case" (article 88 al. 1).

47. Like the Quebec Civil Code, Swiss consumers, are ensured access to a Swiss court notwithstanding any renunciation contained in a consumer contract contract. *Id.*, article 114. Though jurisdiction rules are expressed to protect Swiss workers, the rules are not expressed notwithstanding any renunciation (article 116). For discussion of Quebec law on this point, see text at *infra*, note 74.

48. F. VISCHER, P. VOLKEN, *Loi fédérale sur le droit international privé (Loi de d.i.p.) : Projet de loi de la commission d'experts et Rapport explicatif*, Zurich, Schulthess Polygraphischer verlag A.G., 1978, p. 253-54.

enactment of the Swiss Statute, Professor Vischer continued to stress "denial of justice" as the underlying value informing the interpretation of article 3 :

> The negative conflict can lead to a "déni de justice" for the claimant, if he cannot obtain jurisdiction on the grounds that no State considers its courts competent. It is generally recognized that public international law demands that States should take the necessary precautions to provide respective jurisdiction or order to avoid denial of justice. The European Convention on Human Rights even confers on the prohibition of denial of justice the quality of being a human right (Art. 6, para. 1).[49]

This is a remarkable commentary. It goes very far indeed if Professor Vischer intended to link necessity jurisdiction with the total absence of jurisdiction elsewhere. This would require consideration not only of the ordinary jurisdiction rules of the Swiss Statute but a negative conflict of jurisdictions in which no country asserts jurisdiction in relation to the legal dispute. The evidential burden imposed upon a moving party would be oppressive. Fortunately, article 3 of the Swiss Statute is not directed solely at this narrow possibility. It includes within its ambit situations in which jurisdiction may indeed exist in foreign authorities but it is not reasonable to require the plaintiff to avail of that jurisdiction. It should also be observed that article 6 of the *European Convention on Human Rights*, though undeniably directed at access to justice for the determination of civil rights and obligations, affirms the right to trial within a reasonable time.[50] Article 6 assumes the existence of jurisdiction and is silent on the appropriate grounds of jurisdiction. It focusses on when jurisdiction should be exercised rather than what jurisdiction should be exercised.

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49. F. VISCHER, "General Course on Private International Law" in (1992) 232 *Recueil des cours* 9, p. 204. Article 6, para. 1 of the *European Convention on Human Rights* states :

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law[...].

50. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4.XI.1950, art. 6(1) :

24. The real significance of article 3, according to Professor François Knoepfler and P. Schweizer, is the creation of the alternative standard that foreign proceedings are not reasonably required.[51] Swiss jurisprudence had long recognized the impossibility standard so its codification added nothing to the law. These authors describe the impossibility standard as aimed at preventing the denial of formal justice and assert that the new "reasonableness" standard represents a more generous opening which must, nevertheless, remain exceptional.[52] These authors illustrate the "impossibility" standard found in older Swiss jurisprudence by the example of an informal refugee who arrives in Switzerland for political reasons and of a person claiming asylum.[53] Writing just after enactment of the Swiss Statute, Knoepfler and Schweizer predicted a more generous application of article 3 in a family law context as opposed its application in a commercial and corporate law context and hailed article 3 as a source of additional protection for Swiss nationals abroad.[54] Their prediction seems rather intuitive and has proven accurate.

25. Swiss courts have indeed applied article 3 in family law matters. Necessity jurisdiction has been exercised particularly when the matter did not involve the rights of third parties and there appeared no valid reason to refuse the requested relief and, more generally, when the evidence established that foreign

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In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

51. F. Knoepfler, P. Schweiser, "La nouvelle loi fédérale suisse sur le droit international privé (partie générale)", (1988) 77 *Rev. crit. dt. intl. priv.* 207, p. 218-219.

52. *Id.*, p. 219. As well, the Swiss authority must find a sufficient connection of the matter with Switzerland.

53. Citing *Jurisprudence des autorités administratives de la Confédération*, 1957, no. 65; 1958 no. 39; 1959/60 no. 76.

54. F. Knoepfler, P. Schweiser, *loc. cit.*, note 51, p. 219.

courts would not exercise jurisdiction.[55] In these instances, the courts found sufficient connection with Switzerland to justify the exercise of jurisdiction. In one case, a United States national living in Spain applied for relief from the period of enforced widowhood required before remarriage under Swiss law (*délai de viduité*). The applicant and her fiancé, a Swiss national also resident in Spain, wished to marry in Switzerland before the birth of their child. The Swiss court accepted jurisdiction because, on the evidence, neither a United States nor a Spanish court would grant a remedy, the enforced period of delay being unknown in those legal systems. One commentator has observed that the proper defendant in the proceedings, the registrar of marriages, is a state official domiciled in Switzerland and that direct jurisdiction therefore existed on that basis alone without the need to invoke necessity jurisdiction.[56] In another marriage case, a court exercised necessity jurisdiction to relieve a woman from a similar delay period applicable under Swiss law to a divorcee. The woman, a Czech national and domiciliary resident in Switzerland and recently divorced in the Czech Republic, wished to marry her Swiss fiancé in Switzerland within the prescribed period. The court granted her request. In a third matter, concerning divorce, a Swiss domiciliary invoked necessity jurisdiction to modify the terms of a Swiss divorce decree concerning parental authority. At the time of the application, the applicant's former wife and their child, both Swiss nationals, were residents of Japan and, by the time of judgment, the applicant himself had relocated to the United States where he established his domicile. On the evidence that neither a Japanese nor a United States court would exercise jurisdiction, the Swiss court accepted to exercise necessity jurisdiction. The court held that Swiss nationality and domicile of

55. These cases are summarized in S. OTHENIN-GIRARD, "Quelques observations sur le for *de nécessité en droit international privé suisse* (art. 3 LDIP)", (1999) *R.S.D.I.E.* 251, p. 279 *et seq.*

56. A. BUCHER, *Droit international privé suisse tome I/1 : Partie générale — Conflits de juridictions*, Basel, Helbing & Lichtenhahn S.A., 1998, p. 96.

the parties (at the relevant times) were sufficient connections with Switzerland for the purposes of article 3.[57]

26. Swiss courts have applied article 3 to matters outside the realm of family law. Necessity jurisdiction has been exercised over the succession to movable property in Switzerland when the applicant satisfied the court that proceedings in the deceased's country of domicile would not include consideration of that property. A Swiss court has also expressed the opinion that necessity jurisdiction may be appropriate in a situation, not present in the case before it, in which a decision in a foreign proceeding is unlikely to be made within a reasonable time.[58] More recently, in a commercial matter involving a credit guarantee of U.S. $4 million, a Swiss court rejected argued application of necessity jurisdiction when the evidence disclosed that the action in debt relief was available, though in a different form, in the forum conventionally selected by the parties.[59]

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57. In another decision, a Swiss court rejected as forum shopping an action in divorce which it held did not present a situation of necessity. The plaintiff, a woman of German nationality and domicile, instituted an action in divorce in Switzerland against her non-Swiss husband. She argued that the one-year period of separation required under German law was too severe and that she should not reasonably be expected to wait to proceed before a German court.

58. Tribunal fédéral, 5 mars 1991, S.J. 1991, p. 457 as cited in S. Othenin-Girard, *loc. cit.*, note 55, p. 281, note 102. In this case, a Dutch national and an Argentine married in the Netherlands (by which she gained Dutch nationality) and after several years moved to Switzerland where they separated in 1969. In proceedings instituted by the husband, the Dutch court granted a divorce order and made a support order in favour of the wife. The husband appealed the support order to the Dutch appeal court. Approximately four years later, the Dutch appeal court had not decided the appeal and the wife instituted a motion for provisional measures before the Swiss court. By this time, both husband and wife had acquired Swiss domicile and the wife had taken Swiss nationality. The Swiss court rejected the argued forum of necessity jurisdiction on the finding that the Dutch courts had dealt appropriately with her provisional measures motion and within a reasonable time. Otherin-Girard observes that the existence of jurisdiction based on the Swiss domicile of the parties obviated recourse to forum of necessity in any event. *Ibid.*, p. 282.

59. 1re Cour civile, Cour fédérale, 1er février 2002 reported [En ligne]. www.polyreg.ch/bgeunpubliziert/Jahr_2001/Entscheide_4C_2001/4C.189__2001.html

27. As the acknowledged inspiration for article 3136, the interpretation of article 3 of the Swiss Statute is of immediate interest when considering necessity jurisdiction in Quebec law. Article 3 enunciates two strands of necessity: (i) when proceedings elsewhere are impossible because a foreign authority would not exercise jurisdiction and (ii) when proceedings elsewhere are unreasonable. The remarriage cases discussed above clearly illustrate the impossibility standard because the impediment at issue existed only under Swiss law and not under the relevant foreign law. These cases and the succession case also illustrate an exercise of jurisdiction to provide the moving party with a remedy effective within the forum — relief from an impediment to a marriage to be performed in Switzerland and an order regarding succession to movable property situated in Switzerland. The non-commercial cases generally reflect a more liberal attitude to necessity jurisdiction than that found in international commercial litigation involving sophisticated parties and a claim for millions of dollars. The requisite sufficient connection to the forum is justified by the presence of the moving party in the territory coupled with an effective remedy in the forum, the presence of movable property within the territory again subject to an effective remedy and the nationality and domicile of the parties. However, it must be recalled that article 3 is not the only necessity jurisdiction expressed in the Swiss Statute. Jurisdiction exercised in family and extra-patrimonial matters on the basis of a Swiss domicile of origin is a failsafe protection of Swiss nationals not reproduced in the Quebec Civil Code but which should be considered when assessing the scope of article 3136. Finally, Swiss doctrine clearly recognizes judicial discretion as a critical element in the application of article 3 and this discretion is well illustrated in the jurisprudence. Underlying doctrinal and jurisprudential analysis of article 3 is the principle of access to justice and its corollary that justice must not be denied; implicit is that justice be effective.

28. Having discussed necessity jurisdiction in the general context of common law and civil law legal systems and in the particular context of the Swiss Statute which inspired article 3136, I now turn to necessity jurisdiction in the context of the Civil Code itself.

II. Forum of Necessity and the *Civil Code of Quebec*

29. Necessity jurisdiction and the general rules of direct jurisdiction are intrinsically linked with necessity jurisdiction functioning as a residual jurisdiction to be called in aid when the general rules are not applicable. To know when to invoke necessity jurisdiction, it is necessary to know when direct jurisdiction is not otherwise available. This requires a review of the rules of direct jurisdiction in Quebec private international law.

A. Forum of Necessity and Direct Jurisdiction in the *Civil Code of Quebec*

30. Direct jurisdiction of Quebec authorities is declared by the Civil Code, Book Ten, Title Three: "International Jurisdiction of Quebec Authorities." The general rule, per article 3134 and subject to "any special provisions," is that direct jurisdiction exists when the defendant is domiciled in Quebec.[60] This rule expresses the traditional rule of *actor sequitur forum rei* by which a plaintiff must follow the defendant to institute proceedings in the defendant's home forum; generally, it is the place in which the defendant's assets are located and therefore the logical place in which to satisfy a judgment against the defendant. Necessity jurisdiction is unnecessary when the defendant is domiciled in Quebec. Depending on the scope of other rules of direct jurisdiction, necessity jurisdiction may be critical when the defendant is not domiciled in Quebec.

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60. For the purposes of the Civil Code, the domicile of a natural person is "at the place of his principal establishment" (per article 75). The principal establishment is at the place to which a natural person is primordially attached in preference to all other places and is determined by a consideration of all the circumstances including place of residence, family connections, location of property, and place and nature of employment; it is the place of the "centre of gravity" of a person's interests. *Bonilla* c. *Dame Lefebvre*, [1964] B.R. 102, 105; C. Emanuelli, *Droit international privé québécois*, Montréal, Wilson & Lafleur, 2001, p. 48-49. The domicile of a legal person is at "at the place and address of its head office" (per article 307) which is the place designated in the application for incorporation. For example, *Loi sur les compagnies*, L.R.Q. ch. C-38, s. 7 and *An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons*, R.S.Q. ch. P-45, s. 10.

31. Title Three of Book Ten declares specific rules applicable to matters falling within the traditional classifications of (i) personal actions of an extrapatrimonial and family nature, (ii) personal actions of a patrimonial nature, and (iii) real and mixed actions. These rules express a specific connection of the object of the dispute with Quebec or add alternative grounds of jurisdiction based on the connection of the defendant to Quebec. Many of these rules express alternative bases of jurisdiction to broaden the range of matters subject to the jurisdiction of a Quebec authority in appropriate circumstances. What constitutes these appropriate circumstances reflects a legislative determination of a sufficient connection between the parties, the legal matter in dispute and the Quebec authority. For example, C.c.Q. article 3149 grounds jurisdiction in respect of consumers and workers who are either domiciled or resident in Quebec and declares this jurisdiction to exist notwithstanding renunciation of that jurisdiction in a consumer or employment contract.

32. For extrapatrimonial and family matters, direct jurisdiction exists whenever "one of the persons concerned" is domiciled in Quebec[61] — a rule which is broader than the general domicile of the defendant rule of C.c.Q. article 3134. In addition, specific rules declare jurisdiction in relation to custody matters when the child is domiciled in Quebec[62]; filiation, when either the child or a parent is domiciled in Quebec[63]; and adoption, when either the child or the plaintiff in the matter is domiciled in Quebec.[64] Jurisdiction is broadened to include both domicile and residence in Quebec in relation to support obligations,[65] the effects of marriage or civil union,[66] and separation from bed and board.[67] In relation to nullity of marriage and dissolution or nullity of a civil union, jurisdiction is broadened further by adding the solemnization of the marriage or civil union in Quebec to the domicile or residence of one of the spouses in Quebec as

61. C.c.Q., *supra*, note 1, article 3141.
62. *Id.*, article 3142.
63. *Id.*, article 3147 al. 1.
64. *Id.*, article 3147 al. 2.
65. *Id.*, article 3143.
66. *Id.*, article 3145.
67. *Id.*, article 3146.

alternative bases of jurisdiction.[68] For present purposes, the significance of these rules is that jurisdiction exists in relation to certain extrapatrimonial and family matters based on the connection with Quebec of the party seeking redress. In reality, it is the moving party (plaintiff) who institutes proceedings in Quebec and jurisdiction is grounded either on the domicile or residence of that party in Quebec or by a connection of the subject matter with Quebec (i.e. the domicile of the child in a custody matter, the solemnization of a marriage or civil union in Quebec). These favourable rules do not require an immediate connection of the responding party to Quebec (such as domicile or residence).

33. For personal actions of a patrimonial nature, the rules initially focus on the connection of the defendant to the Quebec forum. The general "domicile of the defendant" rule of article 3134 is broadened to include jurisdiction based on the residence of the defendant in Quebec.[69] For a legal person domiciled elsewhere than in Quebec but with a Quebec establishment, this "residence" rule is restricted to disputes arising from activities in Quebec.[70] The focus of the rules then shifts to the connection of the matter in dispute to Quebec. Thus, jurisdiction exists if "a fault was committed in Quebec, damage was suffered in Quebec, an injurious act occurred in Quebec or one of the obligations arising from a contract was to be performed in Quebec."[71] Jurisdiction also exists if the parties contractually agree to submit their dispute to a Quebec forum[72] or if the defendant submits to the jurisdiction.[73] To this point, jurisdiction rules in patrimonial matters focus on the connection of the defendant or of the matter in dispute to Quebec but, as noted above, Title Three also protects the vulnerable party in matters of employment,

68. *Id.*, article 3144.
69. *Id.*, article 3148(1).
70. *Id.*, article 3148(2).
71. *Id.*, article 3148(3).
72. *Id.*, article 3148(4).
73. *Id.*, article 3148(5). Jurisdiction on the basis of a conventional forum selection clause is reinforced by the express declaration that a Quebec authority has no jurisdiction if the parties agree to such a clause in favour of a foreign forum or in favour of an arbitrator but this exclusion of jurisdiction is waived if the defendant submits to the Quebec forum, see C.c.Q. article 3148 *in fine*.

consumer law, and insurance. A Quebec authority has jurisdiction in employment and consumer law disputes if the worker or consumer is domiciled or resident in Quebec and any waiver of jurisdiction is without effect.[74] In matters of insurance law, a Quebec forum has jurisdiction in eight situations : "where the holder, the insured or the beneficiary... is domiciled or resident in Quebec, the contract relates to an insurable interest situated in Quebec or the loss took place in Quebec."[75] As noted above, the legislator has chosen to protect the potentially vulnerable Quebec party seeking redress — a practical "forum of necessity" particularly when the relatively small financial value in dispute may serve to insulate the non-Quebec employer, vendor or insurer from suit in their home jurisdiction. At the same time, the exclusive jurisdiction of a Quebec authority in relation to damage arising from the use of raw materials of Quebec origin[76] is a self-benefiting forum of necessity to protect Quebec producers of raw materials from excessive or abusive suits by non-Quebec users of such materials. Again, the crucial impact would appear to be financial i.e. the potential burden of litigating outside of Quebec and the costs of exorbitant foreign awards.

34. For real actions, a Quebec authority exercises jurisdiction if the movable or immovable property is in Quebec.[77] For mixed actions concerning succession, jurisdiction exists if (i) the deceased was, at the time of death, domiciled in Quebec; (ii) a defendant is domiciled in Quebec; or (iii) if the testator chose Quebec law to govern the succession. In succession matters, jurisdiction also exists to make a ruling with respect to specific property, if that property is situated in Quebec.[78] For mixed actions concerning matrimonial or civil union regimes, a Quebec authority has jurisdiction if the reason for the dissolution of the regime is the death of one of the spouses and jurisdiction in relation to that succession already exists or if the matter in dispute is property in Quebec; in a residual category of "other cases," jurisdiction exists if one of the spouses is domiciled or resident in Quebec as of the date the

74. *Id.*, article 3149.
75. *Id.*, article 3150.
76. *Id.*, article 3151.
77. *Id.*, article 3152.
78. *Id.*, article 3153.

proceedings are instituted.[79] As with jurisdiction in relation to extrapatrimonial and family matters, jurisdiction rules for real and mixed actions express a connection between Quebec and the subject matter of the litigation or, in relation to matrimonial and civil union regimes matters, by extending the grounding of jurisdiction beyond the "domicile of the defendant rule" to include the residence or domicile of one of the spouses.

35. Having reviewed the usually applicable jurisdiction rules under Book Ten, Title Three, we can now turn attention to the exceptions to the application of those rules, particularly necessity jurisdiction. It is to be observed, however, that direct jurisdiction rules based on the connection of the moving party alone with Quebec or with the subject matter alone with Quebec are matters in relation to which a Quebec authority can grant an effective remedy; for example, in relation to nullity of marriage or a mixed action in relation to property situate in Quebec.

B. FORUM OF NECESSITY AND THE *CIVIL CODE OF QUEBEC*

36. Prior to enactment of the *Civil Code of Quebec*, direct jurisdiction rules were characterized as rules of public order. Accordingly, private parties could not manipulate the jurisdiction of a Quebec authority by means of a forum selection clause nor could a Quebec authority decline to exercise its jurisdiction once properly invoked.[80] With codification of private international law, direct jurisdiction rules have been fundamentally altered. The legislator recognized the liberty of contracting parties to pre-select the forum in which to adjudicate any dispute arising from their relationship[81] and permitted a Quebec authority to decline to exercise its jurisdiction when adjudication by another forum is more appropriate.[82] Though this is

79. *Id.*, article 3154.

80. *Aberman* v. *Solomon*, [1986] R.D.J. 385 (C.A.). Direct jurisdiction rules for the purposes of private international law were generally based on the rules which established the jurisdiction of Quebec courts in purely domestic matters, as expressed in the *Code of Civil Procedure*, *supra*, note 6, article 68 et seq. Note that C.C.P. article 68 is expressed "notwithstanding any agreement to the contrary."

81. C.c.Q., *supra*, note 1, article 3148(4) and *in fine*.

82. *Id.*, article 3135.

itself remarkable in a civil law system,[83] the legislator also conferred upon a Quebec authority the discretion to hear a matter, notwithstanding the absence of jurisdiction, when the dispute has a sufficient connection with Quebec and instituting a foreign proceeding is either impossible or unreasonable. This is the necessity jurisdiction of C.c.Q. article 3136.

37. Necessity jurisdiction is complementary to and completes the other rules of direct jurisdiction established in Book Ten, Title Three.[84] Given the comprehensiveness of the direct jurisdiction rules, the discretion conferred upon a Quebec authority — either to decline to exercise direct jurisdiction in favour of a foreign proceeding or to hear a dispute in the absence of direct jurisdiction when a foreign proceeding is impossible or unreasonable — functions as a safety valve in the pressurized world of international private relations. Disputes which are more appropriately heard in a forum other than Quebec should be heard in that other forum and the Quebec authority should decline jurisdiction. Disputes for which there is no other appropriate forum, and for which there is no jurisdiction in a Quebec authority, may still be heard in Quebec provided there is a sufficient connection with Quebec. The flexibility created by such discretion is intended to ensure that a legal dispute is heard in an appropriate forum in Quebec or elsewhere. The underlying question is whether the discretionary concept of *forum non conveniens* in article 3135 is mirrored in article 3136, the forum of necessity, as *forum conveniens*.

38. The 1977 draft Code provisions on private international law did not include an article on necessity jurisdiction.[85] Prepared by a committee chaired by Professor Jean-Gabriel

83. H. GAUDEMET-TALLON, *loc. cit.*, note 21.

84. *Commentaires du ministre de la Justice*, vol. 2, *op. cit.*, note 40.

85. CIVIL CODE REVISION OFFICE, *Draft Civil Code*, Vol. I, Montréal, Éditeur officiel du Québec, 1978, p. 603-05. See: CIVIL CODE REVISION OFFICE, *Commentaries*, Vol. II, Tome 2, Montréal, Éditeur officiel du Québec, 1978, p. 998-91. See also: CIVIL CODE REVISION OFFICE, *Report on Private International Law* (Report XXXII), Montréal, Éditeur officiel du Québec, 1975. The members of the Committee were J.-G. Castel (chair), E. Croteau, J.-G. Fréchette, E. Groffier-Atola, R. Lette with H.P. Glenn and J. Talpis as consultants, among others.

Castel and including amongst its members Professor Ethel Groffier, with Professors H. Patrick Glenn and Jeffrey Talpis as consultants, the draft sought to enhance the jurisdiction of Quebec authorities. In particular, the draft freed Quebec authorities from the strictures of article 68 of the *Code of Civil Procedure* which recognized jurisdiction in personal actions *inter alia* when the "whole cause of action" arose in Quebec. The committee draft deleted the word "whole" and broadened direct jurisdiction rules in relation to other matters such as custody, support and nullity of marriage. In many ways, the draft Code reflected existing jurisprudence coupled with well recognized and desired modifications. It was not a radical document.

39. The 1988 draft Bill[86] included an article on forum of necessity. This version required only the existence of a sufficient connection to permit a Quebec authority to hear the matter notwithstanding the absence of jurisdiction :

> Bien que le tribunal du Québec ne soit pas compétent à connaître d'un litige en vertu du présent Livre, il peut, néanmoins, entendre le litige si celui-ci présente un lien suffisant avec le Québec.

A committee of the Barreau du Québec, which included Professors Patrick Glenn and Ethel Groffier, recommended that the scope of the draft article be narrowed by inserting, after the word "néanmoins," the phrase : "si une procédure à l'étranger se révèle impossible ou si on ne peut raisonnablement exiger qu'elle y soit introduite."[87] The committee recommended that the article be identified as inspired by article 3 of the *Swiss Statute on Private International Law* enacted in 1987, subsequent to the earlier draft of the Quebec Code. The drafters accepted the committee recommendations and the new version appeared in Bill 125.[88] In its submission on this

86. *Avant-projet de loi portant réforme au Code civil du Québec, du droit de la preuve et de la prescription et du droit international privé*, Assemblée nationale, *Journal des débats*, 2e sess., 33e lég., Québec, 1988, vol. 30, number 46, p. 2333-34 (Sessional Paper No. 281, presented 16 June 1988 and referred to the Committee on Institutions for public hearings).

87. *Mémoire du Barreau du Québec sur l'avant-projet de loi portant réforme au Code Civil du Québec du Droit international privé*, mars 1989, p. 42.

88. 1re sess., 34e lég., Québec, 1990 (introduced 18 December 1990).

Bill, the Chambre des notaires lauded the proposed article as illustrating a positive aspect of the *forum non conveniens* doctrine and observed that the expanded jurisdiction conferred upon Quebec authorities by the new Code would result in only rare use of forum of necessity.[89]

40. Initial commentaries on the new private international law provisions gave only passing attention to the forum of necessity. The commentary of the Minister of Justice summarizes article 3136 and confirms the source of the article in the Swiss Statute of 1987.[90] The commentary offers no detailed analysis but notes that the article completes the intention to create, in Title Three, an exhaustive code regarding the international jurisdiction of Quebec authorities. In an early post-enactment analysis, Professor Glenn describes article 3136 as serving to avoid a denial of justice "et non pas simplement d'accommoder l'une des parties."[91] To illustrate its application, Professor Glenn mentions a refugee unable to litigate in the country from which he/she fled persecution and a matter subject to time constraints which could not be heard in a foreign forum with in the time available.[92]

41. In their commentary, Professors Jeffrey Talpis and J.G. Castel question whether "impossibility" of instituting foreign proceedings should be interpreted as legal or practical impossibility.[93] They describe legal impossibility as arising "where no foreign court has jurisdiction, or only the natural forum, or only

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89. CHAMBRE DES NOTAIRES, *Mémoire de la Chambre des notaires du Québec* Tome II, Montréal, Chambre des notaries, 1991, livre dix, p. 67.

90. *Commentaires du ministre de la Justice*, vol. 2, *op. cit.*, note 40.

91. H.P. GLENN, "Droit international privé" *in Textes réunis par le Barreau du Québec et la Chambre des notaires du Québec, La Réforme du Code Civil*, tome 3, *Priorités et hypothèques, preuve et prescription, publicité et droits, droit international privé, dispositions transitoires*, Sainte-Foy, Les Presses de l'Université Laval, 1993, p. 669, p. 745.

92. *Id.*, referring to A. BUCHER, *Droit international privé suisse*, tome II, *Personnes, famille, successions*, Bâle, Helbing & Lichtenhahn S.A., 1992, p. 34.

93. J.A. TALPIS, J.-G. CASTEL, "Interpreting the rules of private international law" *in La Réforme du Code Civil*, tome 3, *loc cit.*, note 91, para. 423. In a separate article on forum selection clauses, Professor Talpis noted the theoretical possibility that a Quebec authority could disregard the conventional choice of forum in favour of Quebec as a *forum conveniens* but considered that such would rarely occur because the conventional choice of forum represented the convenience of the parties. See: J.A. TALPIS, "Choice of Law and Forum Selection Clauses under the New *Civil Code of Quebec*", (1994) 96 *R. du N.* 183, p. 219, 220, 222. Consideration must also be given to C.c.Q. articles 3149 and 3150 which provide that a waiver of Quebec jurisdiction may not be maintained against a consumer, worker, and, in the insurance context, the holder, insured or beneficiary domiciled or resident in Quebec.

the court having a link to the issue, or only a court which has annulled a clause choosing the forum."[94] Talpis and Castel conclude in favour of a narrow interpretation in the sense of "a legal impossibility relating to the jurisdiction of the foreign court that has the closest connection with the issue."[95] They suggest practical impossibility arises when "a foreign court [has] jurisdiction, but the system is corrupt or the costs are too high."[96] In relation to the unreasonableness justification for necessity jurisdiction, Talpis and Castel consider it to arise when "there is a foreign court having jurisdiction, but the exercise of such jurisdiction is discretionary, or the defendant benefits from a certain immunity... a refugee who cannot act in the country he has fled... [or] [c]ases of superior force such as war."[97] It is to be observed that the distinctions made by Talpis and Castel are not mutually exclusive but overlap to an appreciable extent. In other early writings, Professors Groffier[98] and Castel[99] generally summarize the wording of article 3136 but Professor Castel characterizes article 3136 as illustrating "l'aspect positif de la doctrine du *forum non conveniens*" which serves to avoid a denial of justice in the circumstances established in the article.[100]

42. Of all the early commentary, Professor Gerald Goldstein expresses the most liberal interpretation of article 3136. Writing on the role of *forum non conveniens* in Quebec law, Professor Goldstein declares necessity jurisdiction as more "specifically codified" in article 3140 which permits a Quebec authority to take emergency measures to protect the person or property of a person present in Quebec.[101] Read together

94. *Ibid.* J.A. TALPIS, J.-G. CASTEL, "Interpreting the rules of private international law."

95. *Ibid.*

96. *Ibid.*

97. *Id.*, para. 424.

98. E. GROFFIER, "La réforme du droit international privé québécois", (1992) 52 *R. du B.* 607, p. 620.

99. J.-G. CASTEL, "Commentaire sur certaines dispositions du *Code civil du Québec* se rapportant au droit international privé", (1992) 119 *J. D. I.* 625, p. 656.

100. *Ibid.*

101. G. GOLDSTEIN, "Canada (Quebec)" *in* J.J. FAWCETT (ed.), *Declining Jurisdiction in Private International Law*, Oxford, Clarendon Press, 1995, p. 155. Note that Professor Goldstein might also have included article 3138 which, notwithstanding a lack of jurisdiction over the dispute itself, permits a Quebec authority to order provisional or conservatory measures.

with C.c.Q. article 3140, Professor Goldstein goes slightly further than Professor Castel and unreservedly characterizes article 3136 as enshrining a *forum conveniens* approach to jurisdiction :

> These Articles can be seen as complementary powers giving exceptional jurisdiction to Quebecois courts... as a more appropriate forum — *forum conveniens* — than the one selected by the normal basis of jurisdiction.[102]

Professor Goldstein's endorsement of the *forum conveniens* approach to article 3136 would soon find itself tested in the courts.

43. Contemporary doctrinal understanding of article 3136 reflects the 1997 decision of the Quebec Court of Appeal in *Lamborghini (Canada) Inc.* c. *Automobili Lamborghini S.P.A.*[103] In 1993, Lamborghini (Italy) gave notice of termination of an agency agreement by which Lamborghini (Canada) exclusively sold the famous automobiles of that name in Canada. The agency agreement, in addition to permitting termination on notice, included a choice of law clause in favour of Italian law and a choice of forum clause in favour of the exclusive jurisdiction of the courts of Bologna. Desiring to continue its agency role, Lamborghini (Canada) took the position that the agreement could be terminated only for cause and that no such cause existed. Contrary to the forum selection clause of its contract, Lamborghini (Canada) commenced proceedings before the Superior Court in Montreal seeking an injunction and damages. By motion of declinatory exception, Lamborghini (Italy) argued that the court lacked jurisdiction because C.c.Q. article 3148 *in fine* gives effect to a contractual choice of forum clause. Before the Superior Court and subsequently before the Court of Appeal, Lamborghini (Canada) argued a broad interpretation of article 3136 as providing a forum of necessity, not in a strict sense, but rather in the sense of a *forum conveniens* in contradistinction to the concept of *forum non conveniens* recognized in C.c.Q. article 3135. Both Courts rejected this argument.

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102. *Ibid.*
103. [1997] R.J.Q. 58.

44. At first instance,[104] the hearing judge gave effect to the forum selection clause in the agency agreement. He noted that, whether the proceedings were held in Quebec or in Italy, one party or the other would bear additional costs for witness travel, local legal counsel and interpreters. Considering that the plaintiff claimed $4 million in damages, the first instance judge was clearly unimpressed with any argument based on financial considerations. Accordingly, the judge concluded that adjudication in Italy was not impossible so as to permit recourse to Quebec as a forum of necessity.

45. In the Court of Appeal, Lamborghini (Canada) developed its theme that the principle informing both articles 3135 and 3136 is that legal disputes should be resolved in the most appropriate forum. That is, that the factors relevant to determine whether a Quebec authority should decline to exercise jurisdiction on the basis of *forum non conveniens*[105] are equally applicable to determine whether to hear a matter in the absence of jurisdiction. In other words, that article 3136 serves to enact the concept of *forum conveniens*. The Court of Appeal dismissed the appeal and confirmed the declinatory exception.

46. Justice LeBel, for the Court, reasoned that the logic of the Civil Code assigns the primary role in issues of jurisdiction to the generally applicable rules established in Title Three. As an exception to those rules, the principle of *forum non conveniens* expressed in article 3135 serves a subsidiary role in the determination of jurisdiction and the judicial discretion associated with its exercise is circumscribed by those rules but remains flexible within those bounds.[106] As another exception from the generally applicable rules, article 3136

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104. *Lamborghini (Canada) inc.* c. *Automobili Lamborghini S.P.A.*, C.S. Montréal 500-05-013605-942, 1995-02-02, AZ-95021273, J.E. 95-718, Roland Tremblay.

105. This argument relied upon the factors discussed by Sopinka J. *in Amchem Products Inc.* v. *Worker's Compensation Board of British Columbia*, [1993] 1 S.C.R. 897. More recently, these factors have been reviewed *in Birdsall Inc.* v. *Any Event Inc.*, [1999] R.J.Q. 1344 (C.A.).

106. *Lamborghini (Canada) Inc.* v. *Automobili Lamborghini S.P.A.*, *supra*, note 103, p. 68.

must also be interpreted narrowly.[107] Thus, Justice LeBel rejected a *forum conveniens* approach to article 3136 :

> [...] cette disposition représente plutôt une exception étroite aux règles normales de compétence. Elle ne vise pas à permettre au tribunal québécois de s'approprier une compétence qu'il ne posséderait pas autrement. Elle veut régler certains problèmes d'accès à la justice, pour un plaideur qui se trouve dans le territoire québécois, lorsque le forum étranger normalement compétent lui est inaccessible pour des raisons exceptionnelles, comme une impossibilité en droit ou une impossibilité pratique, presque absolue. Ainsi, on peut penser à celles résultant de la rupture des relations diplomatiques ou commerciales avec un État étranger ou de la nécessité de la protection d'un réfugié politique, ou à l'existence d'un danger physique sérieux, si l'on entame un débat devant le tribunal étranger.
>
> [...]
>
> L'article 3136 C.c.Q. exprime une règle d'exception basée sur l'impossibilité démontrée d'avoir accès au tribunal étranger, dans un litige qui possède un lien suffisant avec le Québec. Les coûts et les inconvénients relatifs à un procès en Italie n'en justifient pas l'application. [108]

This brief excerpt presents many significant points. First, Justice LeBel states (in the second sentence) that article 3136 does not aim to permit a Quebec tribunal to exercise a jurisdiction that it does not otherwise possess. Yet, lack of jurisdiction according to Title Three is a prerequisite to the application of article 3135 which commences with the phrase "even though a Quebec authority has no jurisdiction." Second, the underlying purpose of article 3136 is identified with access to justice. Third, the critical foreign forum identified is that which would normally exercise jurisdiction to adjudicate the matter. Fourth, "impossibility" for the purposes of the article is interpreted to include both legal and practical impossibility. Fifth, the standard by which to evaluate whether instituting foreign proceedings is

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107. LeBel J.A. mentions that article 3136 might apply in the face of a forum selection clause (assuming that the conditions for its application are satisfied). *Id.*, p. 66 citing J.A. TALPIS, *loc. cit.*, note 93.

108. *Id.*, p. 68-69.

"impossible" is "nearly absolute" impossibility. Sixth, the examples of such impossible situations seemingly do not approach this "nearly absolute" standard i.e. that diplomatic or commercial relations have been broken with the foreign forum; the need to protect a political refugee; and the existence of a serious risk of physical harm should the party be required to litigate before the foreign tribunal. These examples reflect a practical impossibility far short of meeting a nearly absolute standard. It is also worth noting that the last two examples illustrate the same situation. Seventh, increased costs and inconvenience arising from foreign proceedings do not justify application of necessity jurisdiction. Eighth, and most significantly, Justice LeBel does not mention the alternative and much lower standard in article 3136; that is, situations in which instituting foreign proceedings should not reasonably be required.

47. Doubtless, the Court's analysis of article 3136 corresponds to the circumstances before it. Parties regularly engaged in international commerce are usually characterized as sophisticated parties. Not only do these parties generally have a reasonable degree of experience but the value of the mutual prestations is generally such as to warrant attention to detail and legal foresight of potential areas of conflict. In other words, to act on legal advice. It should not be unexpected that a court would demonstrate a restrained sympathy for the argument of a forum of necessity based on costs of litigation in one forum or another. In the business world, even of fast cars, litigation is generally considered a cost of doing business and factored into contract prices along with other factors of production such as labour and capital costs. In this context, and with a claim of $4 million, it is therefore not surprising that the Court in *Lamborghini* rejected the *forum conveniens* approach to interpretation of article 3136.

48. Post-*Lamborghini* doctrine has reflected the Court of Appeal's emphasis on the impossibility of instituting foreign proceedings. In their text, Professors Goldstein and Groffier carefully distinguish the more general *forum conveniens* approach, rejected by the Court of Appeal, from necessity jurisdiction critically linked to the risk of a denial of justice.[109]

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109. G. Goldstein, E. Groffier, *Droit international privé*, tome I, Cowansville, Les Éditions Yvon Blais, 1998, p. 320.

These authors suggest that article 3136 would properly apply to a custody dispute concerning a family resident in Quebec, but domiciled in a country to which they intend to return, when there is an immediate risk of serious harm to a child. In this example, the usual rule per article 3142, is that jurisdiction in relation to custody of a child is governed by the domicile of that child. Thus, per Professors Goldstein and Groffier, the exercise of article 3136 necessity jurisdiction would appear appropriate "mais il ne faut par oublier que, *pour que le for de nécessité puisse être appliqué, il faut démontrer que l'action à l'étranger se révèle impossible.*"[110] With respect, this example is somewhat misplaced. A Quebec authority has jurisdiction to take measures to protect a person present in Quebec in this very situation by virtue of C.c.Q. article 3140 — though the particular circumstances and the length of the time involved would influence the authority's decision whether or not to exercise this jurisdiction. Regardless, it is clear that Professors Goldstein and Groffier would limit necessity jurisdiction in this situation by requiring proof that foreign proceedings are impossible and not, in the words of the alternative standard of article 3136, that foreign proceedings should not reasonably be required. In another text on Quebec private international law, Professor Claude Emanuelli comments that the dual standards of article 3136, i.e. impossibility and unreasonableness, pose problems of interpretation.[111] As examples of its application, Professor Emanuelli offers a situation in which an otherwise competent foreign court is unable to exercise jurisdiction because of the occupation of the country by enemy forces or because of the collapse of the state apparatus of government.[112] Yet, both of these examples sound of the impossibility standard of article 3136.

49. This section examined forum of necessity in the context of the *Civil Code of Quebec* both generally, in its relationship to the usual jurisdiction rules of Title Three, and particularly,

110. *Id.*, p. 321 (emphasis added).

111. C. EMANUELLI, *op. cit.*, note 60, p. 74, footnote 45. In conversation, Professor Emanuelli notes the obligation of an occupying power to permit existing tribunals to continue to function, particularly in relation to criminal offences per the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, art. 64. See : International Committee of the Red Cross, *The Geneva Conventions of August 12, 1949*, Geneva, I.C.R.C., 1987, p. 177.

112. *Id.*, p. 74.

as understood in doctrine and as interpreted by the Court of Appeal in *Lamborghini*. This examination reveals that necessity jurisdiction received cursory analysis in the initial commentary and that subsequent commentary reflects the "impossibility" interpretation of *Lamborghini*. This is not to suggest that commentators have not been informative but that their attention has, perhaps, been directed at other concerns in Quebec private international law with the result that article 3136 invites particular attention and analysis.

III. Forum of Necessity and Article 3136

50. C.c.Q. article 3136 is as follows :

> 3136. Bien qu'une autorité québécoise ne soit pas compétente pour connaître d'un litige, elle peut, néanmoins, si une action à l'étranger se révèle impossible ou si on ne peut exiger qu'elle y soit introduite, entendre le litige si celui-ci présente un lien suffisant avec le Québec.
>
> 3136. Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.

It is immediately apparent that article 3136 establishes three conditions to its application, the burden of proof of which rests with the moving party. These conditions are : (i) that there is no jurisdiction in a Quebec authority; (ii) that the "dispute" have "a sufficient connection with Quebec"; and (iii) that "proceedings cannot possibly be instituted outside Quebec or... cannot reasonably be required." The French and English versions are not identical in their expression. The "reasonably" qualification expressed in the English version is absent from the French version of the article but it may be accepted as implicit. A person is expected to act as a reasonable person in the circumstances[113] so if instituting foreign proceedings should not be required, it can only be because it is unreasonable to expect the person to do so.

113. C.c.Q., *supra*, note 1, articles 6 and 7.

51. Obviously, whether a Quebec authority does or does not have jurisdiction to hear a dispute is governed by the rules expressed in Title Three. If jurisdiction exists, article 3136 has no application. If jurisdiction does not exist, analysis must proceed to the other conditions. Given the wide scope of the jurisdiction rules declared in Title Three, recourse to article 3136 will be infrequent.

52. The three conditions expressed in article 3136 also provide the four analytical points upon which interpretation and application of that article revolves : (i) sufficiency of the connection of the dispute with Quebec; (ii) the proceedings outside Quebec; (iii) instituting proceedings outside Quebec is impossible; and (iv) instituting proceedings outside Quebec should not reasonably be required. Each of these elements will be now be discussed.

A. SUFFICIENT CONNECTION WITH QUEBEC

53. In comparison with related articles, the "sufficient" connection requirement is a less onerous standard than the "substantial connection" required of foreign authorities when applying the mirrored rules of jurisdiction to the recognition of foreign decisions.[114] The "sufficient" standard would seem to permit a wider margin of appreciation in the authority asked to find article 3136 applicable. It may also be significant in hard cases that article 3136, unlike its neighbour article 3135,[115] is not expressed as a jurisdiction to be exercised "exceptionally." Such a qualification may, however, be implicit in the qualitative words "impossible" and not "reasonably" (in the English language version) modifying the institution of foreign proceedings.

54. Sufficiency of the connection of a legal dispute with Quebec is not left to the whim or caprice of a Quebec authority in the exercise of an unfettered discretion. In *Morguard Investments* v.

114. *Id.*, article 3164.

115. C.c.Q. article 3135 states that a Quebec authority "may exceptionally" decline jurisdiction. See J. TALPIS, S.L. KATH, "The Exceptional as Commonplace in Quebec *Forum Non Conveniens* Law : *Cambior*, a Case in Point", (2000) 34 *R.J.T.* 761, p. 837.

De Savoye,[116] the Supreme Court of Canada established a "real and substantial connection" requirement as a control on the exercise of direct jurisdiction by Canadian courts. In *Hunt* v. *T&N PLC*,[117] the Court declared this requirement to be constitutionally mandated. More recently, in *Spar Aerospace Ltée* v. *American Mobile Satellite Corp.*,[118] the Court considered whether that standard constitutes an additional criterion against which to assess the exercise of jurisdiction by Quebec courts and determined that it does not. The reasoning of Justice LeBel, for a unanimous Court, is quite straightforward. The "real and substantial connection" standard is already present in the choices made by the legislator when enacting the jurisdiction rules of the *Civil Code of Quebec* and need not, therefore, be applied as a separate criterion.[119]

55. What constitutes a "sufficient connection" depends upon the circumstances of the legal dispute but a constant in all such cases is the presence of the moving party in Quebec. It is that party who, as applicant or plaintiff, elects to institute proceedings in Quebec and to seek a remedy before a Quebec authority. It is implicit that jurisdiction under Title Three will be lacking either in relation to the defendant or, if the defendant is present in Quebec, in relation to the subject matter of the legal dispute. Presence of the defendant in Quebec is not always a connection of domicile or habitual residence, it may also be a lesser presence such as occurs with a temporary visit. Mere presence alone does not attract the exercise of jurisdiction under Title Three. Even assuming sufficient connection of the defendant with Quebec, such as the defendant's domicile under article 3134, there may be a lack of subject matter jurisdiction. For example, putting aside consideration of the *Hague Convention on the Civil Aspects of Child Abduction*[120] and assuming that the situation is not one of emergency within the meaning of article 3140, a custody application before a Quebec

116. *Morguard Investments* v. *De Savoye*, *supra*, note 5.
117. [1993] 4 S.C.R. 289.
118. [2002] 4 S.C.R. 205.
119. *Id.*, para. 55.
120. Enacted as *Law on the Civil Aspects of International and Interprovincial Child Abduction*, R.S.Q., c. A-23.01

authority concerning a child not domiciled in Quebec should be dismissed for lack jurisdiction because article 3142 grounds jurisdiction on the connection of the domicile of the child in Quebec. In these circumstances, necessity jurisdiction under article 3136 may be appropriate. It is also of note that article 3136 refers not to a sufficient connection of the defendant to Quebec but of the "dispute." The "dispute" entails consideration of the parties to the dispute, the subject matter of the dispute and of the implications, ramifications or influences of that dispute in Quebec. Obviously, an authority such as a court seeks to provide effective remedies and should decline to act if to do so would result in a mere *brutum fulmen*.

56. The "sufficient connection" requirement has not attracted detailed attention by commentators on Quebec private international law. The possible connections are legion. Yet, analysis must begin, as noted above, with the Supreme Court of Canada's decision in *Morguard* in which the Court applied the principle of "order and fairness" to establish that "permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties."[121] The essential issue is whether the presence of the moving party within Quebec is itself a real and substantial connection to justify necessity jurisdiction. The answer must clearly be in the negative. Something more is required. At minimum, presence of the moving party must be combined with a connection of the matter in dispute with Quebec such that a Quebec authority can order an effective remedy. This connection is well illustrated by the Swiss marriage decisions in which the Swiss authorities granted a remedy effective to resolve the matter in dispute (exemption from the delay period for remarriage) in Switzerland. It is also illustrated by Quebec decisions in which a court took jurisdiction to consider, but then rejected, a motion for injunctive relief to prevent a non-domiciliary from obtaining an abortion in Quebec[122] and in which a court granted a motion by an immediate family member for a declaration of death of a person domiciled in Thailand.[123] Obviously, the presence of

121. *Morguard Investments* v. *De Savoye*, *supra*, note 5, para. 51.
122. *Thériault* c. *Gauvreau*, [1996] R.J.Q. 2328 (C.S.) (G. Blanchet, J.C.S.).
123. *Vincent Hion Kou* c. *Lang Fang*, [1999] R.L. 10 (C.S.) (Tellier, J.C.S.).

the moving party coupled with the presence of the responding party and the possibility of an effective remedy reinforces the efficacy of necessity jurisdiction and provides a sufficient connection with Quebec. Presence of the moving party alone absent an effective remedy would be unlikely to satisfy the sufficient connection requirement. If the value inspiring article 3136 is access to justice and avoiding a denial of justice, as interests of public order in Quebec, then the stronger the connection of the parties and the action to Quebec the more intense the public order interest in exercising necessity jurisdiction.[124]

57. Practical considerations are not without significance. It can be anticipated that, in many instances, the defendant will not appear and defend the legal dispute. The Quebec authority must be cautious that necessity jurisdiction combined with the absence of proof of foreign law does not become a cover for forum shopping. Article 2809 permits judicial notice to be taken of the laws of Canadian provinces and territories and of the laws of a foreign state subject to the condition that the foreign law is pleaded. It further permits a court to require proof by expert testimony or the certificate of a juriconsult and to apply the law of Quebec when the foreign law is not pleaded or not established to the satisfaction of the court. In applying these rules, care must be taken to ensure that these rules are not manipulated to the unjustified advantage of the moving party and to the distinct disadvantage of the defendant.

B. PROCEEDINGS OUTSIDE QUEBEC

58. What meaning is to be attributed to the phrase "proceedings outside Quebec" in article 3136? It could be given a narrow interpretation to refer to curial or administrative proceedings outside Quebec consistent with the jurisdiction rules of Title Three. In this approach, the rules of Title Three identify the particular foreign forum or fora in which instituting proceedings must be either impossible or unreasonable. Such an interpretation has the advantage of identifying the appropriate

124. S. Othenin-Girard, *loc. cit.*, note 55, p. 273.

foreign forum or fora within the limits of Book Ten itself. It is consistent with article 3164 which declares the rules of international jurisdiction of Quebec authorities applicable to foreign authorities, subject to a "substantial connection" limitation and, for a moving party, it is cost effective.

59. A second, and somewhat related, interpretation is that "proceedings outside Quebec" refers to proceedings which may result in a decision which satisfies the rules for recognition of foreign decisions in Quebec. This interpretation presents article 3136 as a logical complement to C.c.Q. article 3137 which permits a Quebec authority to issue a stay in a situation of *litispendens*; that is, an action "between the same parties, based on the same facts and having the same object is pending before a foreign authority." The advantage for the moving party is that some of the specific indirect jurisdiction rules which follow article 3164 in Title Four, Chapter II are expressed more narrowly than when applied to Quebec authorities as direct jurisdiction rules. For example, in a personal action of a patrimonial nature, article 3148 declares a Quebec authority to have jurisdiction when the defendant is either domiciled or resident in Quebec but article 3168 limits the jurisdiction of a foreign authority to a defendant domiciled in that country. Residence of the defendant is not a basis of jurisdiction if the decision of a foreign authority is to be recognized in Quebec. This second interpretation, while advantageous to the moving party, is not justified by either the underlying purpose or the language of article 3136. If the underlying purpose is to avoid a denial of justice and to ensure access to justice, that purpose is satisfied if the moving party has access to a forum in which to pursue the legal claim. It is no part of that purpose that the foreign decision be recognized in Quebec; logically, satisfaction of the dispute may be achieved in the foreign proceedings or in some other country in which that decision may be recognized and the claim satisfied. Thus, this second interpretation is too narrow.

60. A third interpretation is that "proceedings outside Quebec" means in any forum with a relevant legal connection with the parties and the matter in dispute. When considering whether a legal connection is relevant, a Quebec authority will doubtless consider the jurisdiction rules of Title Three

but may also consider other traditional rules. For example, a proposed defendant may be known to own property within a country where direct jurisdiction is grounded on the seizure of movable property within its territory regardless of whether the matter in dispute is connected to that property. In such a situation, a Quebec authority might conclude that foreign proceedings may be instituted in that country. This would be a highly unusual occurrence. This third interpretation has the advantage of restricting the scope of application of article 3136 but presents a potential disadvantage to the moving party by requiring a determination of the possibility or reasonableness of proceedings in a larger number of foreign fora. An increase in costs will result from additional legal research and expense. This interpretation takes the moving party beyond the scope of Book Ten and beyond its expression of private international law rules as a codified whole.

61. A fourth interpretation is that "proceedings outside Quebec" refers to a consideration of each and every possible forum. In other words, that there is no forum anywhere in the world in which proceedings could be instituted or in which proceedings can reasonably be required. This interpretation has been dismissed as "absurd."[125] It could not have been the intention of the legislator to impose such a burden on a party seeking, of necessity, to invoke the aid of a Quebec authority.

62. It would appear that the first interpretation is the most consistent with the underlying values of private international law and with the object of codifying that law. Thus, a moving party seeking to invoke the necessity jurisdiction of article 3136 should satisfy a Quebec authority that instituting proceedings before the foreign authority or authorities, identified by the normally applicable jurisdiction rules of Title Three, is either impossible or unreasonable. This interpretation seemingly has the approval of the Quebec Court of Appeal in *Lamborghini*[126] and is not inconsistent with the view of Professors Talpis and Castel who referred to the "foreign court with the

125. *Id.*, p. 270 : "Il serait absurde d'exiger du demandeur la preuve diabolique de l'impossibilité d'ouvrir action dans tous les États du globe."

126. *Lamborghini (Canada) Inc.* c. *Automobili Lamborghini S.P.A.*, *supra*, note 103, p. 68 where LeBel J.A. referred to "le forum étranger normalement compétent lui est inaccessible pour des raisons exceptionnelles".

closest connection,"[127] if it is accepted that the rules expressed in Title Three reflect the legislator's choice of the closest connection. This interpretation is not necessarily inconsistent with article 3 of the Swiss Statute as applied in Swiss jurisprudence. In some instances discussed above, the Swiss court seemingly considered potential fora with relevant connections to the parties and the dispute. In no instance did the Swiss court identify the appropriate foreign fora by express application of the jurisdiction rules of the Swiss Statute. However, an important structural difference between the Swiss Statute and Book Ten supports the first interpretation. It will be recalled that the Swiss Statute includes three elements in respect of each substantive area of private international law : unilateral rules governing the jurisdiction of a Swiss authority, the choice of law rule, and rules governing the recognition of a foreign decision. Significantly, Book Ten declares its unilateral rules of direct jurisdiction applicable as, in effect, bilateral rules governing the jurisdiction of foreign authorities, subject to the condition in article 3164 that the dispute be "substantially connected" to that foreign country.

63. Having satisfied the burden of proof that jurisdiction does not otherwise exist in a Quebec authority and that the dispute is sufficiently connected with Quebec and having identified the relevant foreign fora, there remains one final hurdle for the moving party to satisfy. It must be demonstrated that instituting foreign proceedings is either impossible or should not reasonably be required.

C. INSTITUTING PROCEEDINGS OUTSIDE QUEBEC IS IMPOSSIBLE

64. "Impossible" can refer to impossible in law, in fact, or both. On first impression, the juxtaposition of "cannot possibly" with "cannot unreasonably" in article 3136 might be construed as presenting two distinct standards; one legal, the other factual. So construed, "cannot possibly" refers to circumstances in which instituting proceedings outside Quebec

127. J.A. TALPIS, J.-G. CASTEL, *loc. cit.*, note 93.

are legally impossible (for example, when the particular claim is unknown to the law of the other country) and "cannot reasonably" refers to circumstances in which, on the facts, it is not reasonable to require proceedings to be instituted (for example, the situation of the political refugee). An overlap of meaning is thus avoided. While attractive for its clarity, this construction is not well founded.

65. Unless specifically qualified, "impossible" is generally interpreted to include both legal and factual impossibility[128] and, depending on the context, to include both absolute and relative impossibility. Absolute impossibility is objective, in the sense that the desired result cannot be achieved regardless of the capacities of the person concerned; relative impossibility is subjective, in the sense that the desired result can be achieved but only by means beyond the capacity of the person concerned or at an unacceptable cost.[129] The word "impossible," or some variant of the root thereof, appears more than thirty-five times in the Civil Code. In some instances it is qualified e.g. C.c.Q. article 2904 states that prescription will not run against persons when it is "impossible in fact" for them to have acted. In most instances, however, the word "impossible" is unqualified e.g. C.c.Q. article 1194 refers to a change in either servient or dominant land which renders exercise of a servitude "impossible." In other instances, as in article 3136, the legislator combines "impossible" with a phrase akin to "cannot reasonably be required" which invites a legal/factual distinction e.g. in C.c.Q. article 1294, circumstances may render the pursuit of the purpose of a trust "impossible or too onerous" ("impossible ou trop onéreuse"); in C.c.Q. article 1834, a change in circumstances may result in a charge stipulated in a gift to become "impossible or too burdensome" ("impossible ou trop onéreuse"); and in C.c.Q. article 2870, a witness statement may be received in evidence if it is "impossible for the declarant to appear as a witness,

128. G. Cornu, *Vocabulaire juridique*, Paris, Presses universitaires de France, 1987, p. 450; *Dictionnaire de droit privé*, Cowansville, Les Éditions Yvon Blais, 1991.

129. For example, the American Law Institute, *Restatement of the Law, Contracts*, §454 defined "impossibility" as "not only strict impossibility but impracticality because of extreme and unreasonable difficulty, expense, injury or loss involved." The *Restatement of the Law, Contracts 2d*, §261 has abandoned the "impossibility" terminology in favour of "impracticality."

or that it is unreasonable to require him to do so" ("impossible... ou déraisonnable de l'exiger"). In these instances, "impossible" is interpreted to include both legal and factual impossibility. Consistent with this approach, the Court of Appeal in *Lamborghini* considered article 3136 to include both types of impossibility when it referred to "une impossibilité en droit ou une impossibilité pratique, presque absolue".[130] Practical impossibility is so closely associated with the alternative standard of reasonableness that it will be discussed under that heading in the next section of this essay. The focus of this section is legal impossibility.

66. Applied to "proceedings... instituted outside Quebec" in article 3136, legal impossibility may result from a variety of factors : an incapacity in the moving or responding party, an immunity enjoyed by the proposed defendant, a complete defence or exoneration under the governing substantive law, a procedural defect under the law of the potential foreign forum, or, as suggested by Professor Emanuelli, non-existence of an appropriate foreign authority because of juridical upheaval arising from state succession.[131] Logically, forum of necessity jurisdiction is not intended by the legislator as a means to promote forum shopping so an incapacity, immunity or defence under the appropriate foreign law should be respected if it is not "manifestly inconsistent with public order."[132] For example, the incapacity of the moving party under a foreign law due to discrimination should not be respected. If foreign proceedings "cannot possibly be instituted" because under the foreign law the moving party lacks capacity due to her status as a female spouse or because of a religious or other personal status, that incapacity should not prevent the exercise of necessity jurisdiction by a Quebec authority. As an extreme example, consider an individual who escapes from a country where a form of personal servitude is enforced by law and who now seeks to institute a personal action of a patrimonial nature against his former master who, though not domiciled and not resident in Quebec,

130. *Lamborghini (Canada) Inc.* c. *Automobili Lamborghini S.P.A.*, *supra*, note 103, p. 68.

131. C. EMANUELLI, *op. cit*, note 60, p. 74.

132. Article 3081.

has movable assets in Quebec. Similar public order concerns may be determinative when legal impossibility exists because of an immunity enjoyed by the defendant, perhaps as holder of a public office in the foreign forum[133] or as a result of a general amnesty granted to persons who engaged in torture; an exoneration under the proper foreign substantive law because of a particular and discriminatory fault requirement; and a procedural requirement of a fiat or permission from a government or religious official before instituting proceedings for personal injury. All such legal "impossibilities" should be tested against public order concerns.

67. Legal impossibility not raising public order concerns are unlikely to trigger necessity jurisdiction. The legal impossibility may arise because of the availability of a complete defence under the substantive governing the matter in issue or may result from a procedural requirement under the law of the foreign forum. For example, if proceedings are prescribed by the expiry of the applicable prescriptive period or if the cause of action is unknown to the governing foreign law, it cannot have been the intention of the legislator to place a moving party in a better position than that provided by the foreign law (assuming no public order concerns). As noted above, even if a Quebec authority hears a matter on the basis of necessity jurisdiction, the governing law is not necessarily the substantive law of Quebec but is determined by application of the applicable choice of law rules. In relation to prescription, C.c.Q. article 3131 declares that it is governed by the law applicable to the merits of the dispute i.e. the substantive law, so it is difficult to comprehend how impossibility under that law could justify necessity jurisdiction. The situation would be different if the foreign prescription period expires after proceedings are instituted in Quebec and proceedings have not been instituted in the foreign forum.[134] In that circumstance, there is no alternative to the Quebec forum of necessity.

68. In Quebec jurisprudence, the *Lamborghini* standard of legal and practical impossibility in article 3136 has been followed, particularly in the commercial law context. As is evident

133. Consider *R.* v. *Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, [1998] 4 All E.R. 897 (H.L.).

134. E.g. *Gotch* v. *Ramirez et al.*, *supra*, note 16.

from the commercial law decisions summarized in the jurisprudence review (see Part IV below), article 3136 has received rather cursory analysis. Doubtless this is due to the failure of the moving party to demonstrate that instituting proceedings elsewhere is impossible. Twice since its decision in *Lamborghini*, the Court of Appeal has reaffirmed a narrow interpretation of article 3136 which focusses solely on the criterion of impossibility in commercial cases without regard, at least expressly, to the more general criterion of whether non-Quebec proceedings should not be required to be instituted.[135] Other decisions reflect that approach. Whether Quebec authorities will apply this approach in a personal action of a patrimonial nature involving an unsophisticated plaintiff with a financially less substantial claim (but more important in relative terms) must await that litigation. Assuming that other conditions are satisfied in such a situation, there is no logical reason not to exercise necessity jurisdiction to prevent a denial of justice.

69. It is common both in the jurisprudence and in doctrine to illustrate the impossibility standard by the example of a political refugee who risks persecution if he or she returns to the forum of origin to institute proceedings. This is clearly not impossibility in law because it is open to the refugee to return to institute proceedings. Rather, the refugee example illustrates impossibility in fact when tested against the standard of unacceptable cost. It is not reasonable to require a political refugee to institute proceedings in a forum where his/her physical integrity is at risk of harm.

D. INSTITUTING PROCEEDINGS OUTSIDE QUEBEC SHOULD NOT REASONABLY BE REQUIRED

70. The alternative standard in article 3136 is that instituting proceedings outside Quebec should not reasonably be required. Implicit in this standard is that proceedings outside Quebec can be instituted, in the sense that there is no legal impediment to doing so, but should not be required for some reason connected to the proceedings themselves, to the moving party, or to the

135. *Conserviera S.p.A. & S.A.C.I. S.R.L. & Giaguaro S.P.A.* c. *Paesana Import-Export Inc. et al.*, REJB 2001-24853 (C.A.) and *JS Finance Canada inc.* c. *JS Holding sa et Banque Cantonale de Genève*, REJB 1999-12408 (C.A.).

desired result. Logically, it would seem that foreign proceedings should not reasonably be required if there is some defect in the foreign proceedings; for example, evidence that a decision would not be forthcoming within a reasonable time or that justice would not be administered by the foreign authority perhaps because of corruption[136] or an ideological imperative.[137] Foreign proceedings should not be required if the remedy sought is specific to domestic purposes in Quebec and an effective decision can be achieved by the Quebec authority alone. Authorities are loathe to waste resources on a dispute which cannot be effectively resolved so if a decision by a Quebec authority would be ineffective, instituting foreign proceedings is not unreasonable. Foreign proceedings should not be required if an unacceptable risk to a moving party is involved — the classic political refugee example. Finally, at least in a non-commercial context, foreign proceedings should not be required when the moving party is financially unable to institute such proceedings. Instituting foreign proceedings can be a burden beyond the financial means of a moving party and effectively constitute a denial of access to justice as the responding party is insulated from proceedings.

71. Considering that personal actions of an extrapatrimonial and family law nature are generally more fruitful sources of judicial sympathy for unsophisticated parties, it might be expected that a Quebec authority would apply article 3136 more liberally in such matters. Indeed, such an approach is clearly evident in the jurisprudence before the decision in *Lamborghini*. Following the Court of Appeal's narrow interpretation of article 3136, it might be expected that the more liberal tendency would be restrained. That has not proven to be true. In one post-*Lamborghini* decision,[138] a court exercised necessity jurisdiction to grant custody of children not domiciled in Quebec but with close family ties in Quebec. The applicant mother had returned to Quebec, where her family resided, from Thailand where she had been living with her husband and children while her husband worked in that

136. J.A. Talpis, J.-G. Castel, *supra*, note 93 (text, *supra*, note 96).

137. As might occur if the parties had agreed to an exclusive forum selection clause in favour of the courts of a capitalist country which subsequently installed a Marxist government and judicial system.

138. *N. (H.H.)* c. *Ng. (O.X.)*, REJB. 2002-32589 (C.S.) (M.-C. Laberge, J.C.S.).

country. The court held that it would not be reasonable to require the mother to institute custody proceedings in Ontario, the place where the children had been born and raised and which was the former, and perhaps existing, domicile of the father. In a second custody decision, the court invoked necessity jurisdiction to reinforce its jurisdiction grounded in the submission of the respondent.[139] In a third,[140] the Court of Appeal, on its own motion, permitted a mother to argue necessity jurisdiction in a custody application when a coup d'état intervened in the country in which custody proceedings were under appeal.

72. Patrimonial actions are less likely to attract application of the reasonableness standard; yet, it should not automatically be excluded. Assuming that the other conditions of article 3136 are satisfied, there is no reason in principle why a patrimonial action by a person in Quebec should not be subject to necessity jurisdiction when instituting proceedings elsewhere is unreasonable. This is most likely to arise in relation to costs of proceedings. While there is as yet no precedent in Quebec jurisprudence, the House of Lords decision in *Connelly* v. *R.T.Z. Corp.*[141] is a striking affirmation of the role of civil legal aid as a factor in necessity jurisdiction — availability of civil legal aid in one forum but not in another can be a decisive factor in ensuring access to justice. By analogy, costs of litigation can be similarly decisive.

73. The area least conducive to necessity jurisdiction is undoubtedly that of real and mixed actions. The rules of direct jurisdiction in Title Three are broad enough to include most imaginable situations in which a Quebec authority can grant an effective remedy. For actions involving real rights in movable and immovable property situated outside Quebec, a Quebec authority is even less likely to exercise necessity jurisdiction because of the traditional territorial basis of jurisdiction in relation to such matters and the general lack of ability to grant an effective remedy with extra-territorial effect.

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139. *B. (C.)* c. *Z. (F.)*, REJB 1998-07770 (C.S.) (Carol Cohen, J.C.S.).
140. *L.F.* c. *N.T.*, REJB 2001-22144 (C.A.).
141. *Supra*, note 18.

IV. Forum of Necessity and Quebec Jurisprudence

A. Necessity Jurisdiction and International Commercial Law

74. As might be anticipated, litigation of a commercial nature is not conducive to a forum of necessity argument. In three decisions, all rather undeveloped in terms of presenting a reasoned basis for necessity jurisdiction, courts rejected application of article 3136 when the plaintiff failed to establish the impossibility of instituting foreign proceedings; in a fourth decision, the court relied on the underlying denial of justice value.

(i) In *Dobexco Foods International Inc.* c. *Van Barneveld Gouda BV*,[142] the plaintiff claimed $118,900 damages for loss of profits (and loss of future profits due to loss of customers) arising from the delivery in the United States of frozen berries which were not fit for their intended purpose. Dobexco, a company with an extensive import-export business, purchased the berries from the defendant Dutch corporation. In an action before the Superior Court in Montreal, the plaintiff unsuccessfully argued a number of bases of jurisdiction including article 3136. After quoting from *Lamborghini*, the judge held the plaintiff failed to demonstrate the "impossibility" of instituting proceedings in the Netherlands.

(ii) The Court of Appeal came to a similar application of article 3136 in *Conserviera S.p.A. & S.A.C.I. S.R.L. & Giaguaro S.P.A.* c. *Paesana Import-Export Inc. et al.*[143] In this case, tomatoes were shipped from Italy to Montreal with the purchase subsidized by the European Union — the subsidy being the underlying motive for the fraudulent transaction. Once delivered in Montreal, the tomatoes were transported to the United States market and payment made by an endorsed third party cheque which, of course, did not clear when deposited by the plaintiff vendor. The defendants had allegedly used a Quebec company, Paesana Import-Export Inc., as a

142. REJB 1997-00521 (Wilbrod Claude Décarie, J.C.S.).

143. REJB 2001-24853 (C.A.) (Paul-Arthur Gendreau, Jacques Chamberland and François Pelletier, JJ.C.A.).

"front" to act as the purchaser and to provide the vendor with fraudulent Canadian customs certificates and the payment cheque. In reality, Paesana was a "shell" company under the direction of an individual resident in the United States. Not having been paid for its tomatoes, the plaintiff instituted proceedings before the Superior Court in Montreal against Paesana, as well as various United States individuals and a corporate entity, claiming the $4.9 million purchase price plus damages of $1.8 million (including the $1.2 million subsidy which the vendor repaid to the European Community). The foreign defendants challenged the jurisdiction of the court. Reversing the Superior Court on this point, the Court of Appeal held that jurisdiction properly lay in relation to the United States resident who served as the operating mind of the Quebec company (its alter ego) — acts done in the company name in Quebec were the acts of the United States resident done in Quebec such as to ground jurisdiction under C.c.Q. article 3148 (3). However, the Court held that the plaintiff had failed to establish jurisdiction over the other individual defendants and rejected necessity jurisdiction because of the lack of evidence that it would be "impossible" or even difficult to institute proceedings in the United States. The Court of Appeal did not refer to its earlier decision in *Lamborghini*.

(iii) In *JS Finance Canada inc.* c. *JS Holding sa et Banque Cantonale de Genève*,[144] the Court of Appeal reaffirmed the impossibility standard of article 3136.[145] After various procedural steps, including a motion for disclosure of documents, the defendant challenged the court's jurisdiction. The Court of Appeal held that, notwithstanding the forum selection clause in favour of Swiss courts, the defendant had submitted to the jurisdiction of the Quebec authority, per C.c.Q. article 3148 (5). Though unnecessary to analyze article 3136 because

144. REJB 1999-12408.

145. Other examples are *MCL Communication inc.* c. *United Communication inc.*, J.E. 96-721 (C.S.) (Y. Alain, J.C.S.) which held that, though it may be more expensive, the plaintiff had not proved it to be "impossible" to institute proceedings in Ontario and the contractual forum selection clause in favour of Ontario courts should be respected and *Bern* c. *Bern*, [1995] R.D.J. 510 (C.A.) which held article 3136 inapplicable where the situs of the shares in issue and the head office of the company was in Ontario and proceedings had already been instituted in that forum.

of the conclusion on the jurisdiction issue, the Court of Appeal addressed the *a fortiori* reasoning of the first instance judge who had considered article 3136 necessity jurisdiction relevant because of the inconveniences of foreign proceedings. The Court of Appeal, per Judge Thibault, rejected any consideration of the financial convenience of the parties :

> Suivant l'arrêt de notre Cour dans *Lamborghini (Canada) inc.* c. *Automobili Lamborghini S.P.A.*, l'article 3136 C.c.Q. exprime une règle d'exception basée sur l'impossibilité d'avoir accès à un tribunal étranger. Les coûts ou les inconvénients reliés à un procès à l'étranger n'en justifient pas l'application.

(iv) Rather than the impossibility or reasonableness standards of article 3136, one Superior Court decision invoked denial of justice as the critical analytical factor. In *2736349 Canada inc. c. Rogers Cantel inc.*,[146] the plaintiff provided service and support to its customers using the Cantel cellular communications network. Contrary to its contract with the defendant Cantel, which included both a choice of law clause as well as a choice of forum clause in favour of Ontario law and courts, the plaintiff instituted proceedings in the Superior Court. The judge granted the defendant's motion of irrecevability on the basis of article 3148 *in fine* and held Quebec authorities to be without jurisdiction. The judge dismissed the plaintiff's argument that article 3136 should permit a hearing before a Quebec authority when the factors considered under article 3135, *forum non conveniens*, favour the Quebec rather than a foreign hearing. After quoting extensively from *Lamborghini*, which had dismissed a similar argument, the judge concluded rather emphatically :

> Le for créé par l'art. 3136 C.c.Q. est un for subsidiaire, mais il s'agit d'éviter un déni de justice et non pas simplement d'accommoder l'une des parties. En l'espèce, forcer la demanderesse à poursuivre la défenderesse en Ontario ne résultera pas en un déni de justice!

75. Necessity jurisdiction jurisprudence in the commercial context reflects a lack of any detailed analysis of article 3136.

146. REJB 1998-06854 (C.S.) (A. Derek Guthrie, J.C.S.).

Necessity appears to have been invoked by the plaintiff as a feint-hope argument or to support other considerations. The proper case has not yet arisen in which to consider the impossibility and unreasonableness standards of article 3136 in the international commercial context.[147]

B. NECESSITY JURISDICTION AND ACTIONS OF A NONPATRIMONIAL NATURE

76. Seven decisions considered article 3136 in non-patrimonial actions. In five decisions, the court applied article 3136 either as the primary basis of jurisdiction or as subsidiary support for jurisdiction otherwise established. Only two decisions reject the application of necessity jurisdiction.

(i) In *N. (H.H.)* c. *Ng. (O.X.)*[148] the court exercised necessity jurisdiction to order custody of children brought into Quebec from elsewhere. The couple had married in Quebec but resided in Toronto where the husband was employed and where they conceived and raised their two children. Later, the husband received a two-year job posting to Thailand and the family moved there. Following an apparent breakdown in the marital relationship, the children and their mother departed Thailand for Quebec to stay with relatives. The court held that it lacked jurisdiction because the children were not domiciled in Quebec (domicile being the basis of jurisdiction in custody matters per C.c.Q. article 3142) but applied necessity jurisdiction per article 3136 to grant the custody order :

> En effet, il faut reconnaître que les parties n'ont plus de liens avec l'Ontario et que la situation a plus de liens avec le Québec. L'intimée déclare qu'elle y a son domicile. À tout le moins, elle réside au Québec depuis son retour. La famille des deux parties y habite et elles sont omniprésentes dans leur vie.

147. In addition to the cases discussed, article 3136 is given en passant mention in : *Banque Toronto-Dominion* c. *Cloutier*, [1994] R.J.Q. 386 (C.S.); *Copaco Holdings Inc.* c. *Lévesque, Beaubien, Geffrion inc.*, J.E. 95-165 (C.S.); *Ronald J. Fox, faisant affaires sous le nom de Aero Stock* c. *DDH Aviation inc., et al*, R.E.J.B. 2001-27707 (C.S.); and *Worthington Corporation* c. *Atlas Turner inc.*, *supra*, note 12.

148. REJB 2002-32589 (C.S.) (M.-C. Laberge, J.C.S.).

> On ne peut exiger dans les circonstances qu'une action soit entendue en Ontario. Le tribunal québécois peut donc entendre le litige en vertu de l'art. 3136 C.c.Q.[149]

This appears a practical and intuitive application of article 3136. The court did not analyze the article nor the requisite circumstances of the applicant.

(ii) In *Vincent Hion Kou* c. *Lang Fang*,[150] the applicant applied, pursuant to C.c.Q. article 92, for a declaration of the death of his father who had been kidnapped in Cambodia in 1979. The father had been considered "disappeared" since the kidnapping and the evidence disclosed a high probability that he had been killed. The Superior Court lacked jurisdiction because the father died domiciled in Cambodia and the applicant did not attempt to prove otherwise. Without analysis, Judge Tellier invoked article 3136 to grant the application but did so without evidence that proceedings in Cambodia were either impossible or unreasonable. It is unstated, but implicit, that the applicant is a resident of Quebec and likely domiciled in Quebec. The decision is also silent as to the place of residence or domicile of the applicant's mother, the mis en cause, and whether the father owned property in Quebec. The underlying purpose of the application is not explained.

(iii) The Court of Appeal invoked *Lamborghini* and article 3136, of its own motion, in *L.F.* c. *N.T.*[151] A couple, both with French nationality, married in Ivory Coast where they resided and where both were domiciled. Many years later, the wife commenced an action for divorce and custody of their two children in both Ivory Coast and in Quebec, where the wife had remained after arriving with the children on a visit. Later, the children returned to Ivory Coast. In Quebec, the court granted an order of divorce but held that the proper forum in which to determine issues of custody and access was in Ivory Coast, the place of the children's domicile. While proceedings were on appeal in Ivory Coast, the wife brought the children to Quebec and instituted an action for custody. The Superior Court accepted the husband's challenge to its

149. *Id.*, para. 108-109.
150. *Supra*, note 123.
151. REJB 2001-22144.

jurisdiction and, on appeal, the Court of Appeal would have confirmed that ruling except for one factor, a coup d'état had occurred in Ivory Coast after the decision of the Superior Court and before the hearing in the Court of Appeal. The Court, per Judge Otis, took judicial notice of the political and institutional instability in Ivory Coast as a result of the coup and granted the appellant an opportunity to present evidence to justify invoking article 3136. Judge Otis summarized the nature of the required evidence :

> Si, évidemment, les institutions judiciaires sont paralysées ou, encore, si leur action est compromise par la précarité politique sévissant dans le pays, on pourra certainement parler d'impossibilité d'agir. D'autre part, si les insurrections violentes se poursuivent — comme l'indique la procureure de l'appelante — le juge saisi de la requête appréciera s'il y a un risque manifeste et sérieux à forcer le retour des enfants au lieu de leur résidence habituelle. Conséquemment, si l'appelante veut invoquer l'impossibilité d'agir, l'urgence ou les inconvénients sérieux reliés au retour des enfants en Côte d'Ivoire, elle devra introduire une requête en Cour supérieure afin d'en faire la démonstration.[152]

(iv) In *B. (C.)* c. *Z. (F.)*,[153] the Superior Court invoked article 3136 as subsidiary justification for its jurisdiction in a custody matter concerning children relocated with their mother to Brazil. When he learned of the move, the father in Quebec instituted an application for custody. The mother responded with an application for retroactive approval of the move to Brazil and for revised child support. At the hearing, counsel for the mother unsuccessfully challenged the jurisdiction of the Court because of the children's new domicile in Brazil. The Court held the mother had tacitly renounced a jurisdictional challenge because her motion had been made after the expiration of the period permitted by the *Code of Civil Procedure*. Referring to article 3136 to support his exercise of jurisdiction, Judge Cohen stated :

> This Court must at all times be concerned with the best interests of the children. In this case, that both parents have

152. *Id.*, para. 38.
153. REJB 1998-07770 (C.S.) (Carol Cohen, J.C.S.).

> asked that this Court decide as to the future domicile and residence of these children. To decline jurisdiction at this point, when the Court is already seized of the matter, only to send it, ostensibly, to a Court in Brazil for a ruling at some time in the future, would add uncertainty to the lives of these children, something which both parents purport to oppose.[154]

It is to be observed that this is certainly not a necessity jurisdiction case because jurisdiction existed independently of article 3136. Judge Cohen's comment linking necessity jurisdiction with the best interests of the children is in marked contrast to the impossibility approach of the Court of Appeal.

(v) The Superior Court in *Thériault* c. *Gauvreau*,[155] invoked article 3136 as subsidiary support for its exercise of jurisdiction. A New Brunswick applicant sought injunctive relief to prevent his co-habiting spouse from obtaining an abortion in Quebec. Notwithstanding the New Brunswick domicile of both parties, the Superior Court held it had jurisdiction to consider the application based on the combination of C.c.Q. articles 3136, 3138 and 3140; that is, as a forum of necessity, as a forum making provision or conservatory orders without jurisdiction on the merits, and as a forum for the protection of a person present in Quebec in a case of emergency or serious inconvenience. In this matter, article 3136 played a truly subsidiary role as articles 3138 and 3140 certainly justified the taking of jurisdiction. In this case, knowledge of the result on the merits, probably influenced the Court on the jurisdictional issue. The Court applied the reasoning of the Supreme Court of Canada in *Tremblay* c. *Daigle*,[156] to dismiss the application on the basis that the partner enjoyed no right which could be protected by the Court. The Court need not have referred to article 3136 to justify its jurisdiction but the presence of the parties in Quebec and the urgency of the matter certainly influenced the Court to consider the matter under that article.

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154. *Id.*, para. 7.
155. [1996] R.J.Q. 2328 (C.S.) (G. Blanchet, J.C.S.).
156. [1989] 2 S.C.R. 530.

(vi) In *Droit de la famille — 2904*,[157] the Superior Court considered a motion for modification of custody and enhanced access to a child residing in Toronto for the previous two and one half years pursuant to lawful custody. In this situation, the Court held the child domiciled in Ontario and, therefore, the Court to be without jurisdiction. Judge Chaput rejected the argued application of article 3136 because earlier proceedings in Ontario had already addressed similar issues between the parties and because he did not find a sufficient connection to Quebec. Though he did not find the exercise of necessity jurisdiction appropriate in the circumstances of the case, Judge Chaput expressed support for a broad interpretation of article 3136 which would apply the article if justice cannot be rendered in another forum or for any other reason of necessity.[158] This decision pre-dated *Lamborghini*.

(vii) In *L. (C.D.)* c. *D. (T.E.)*,[159] the same Superior Court judge who exercised necessity jurisdiction five years earlier in *N. (H.H.)* c. *Ng. (O.X.)*, applied the narrow *Lamborghini* approach to decline jurisdiction in relation to the custody of children domiciled in Alberta. The applicant mother had recently moved to Quebec prior to bringing her application but unfortunately died after the date of the hearing but before the court released its decision. Her mother, the children's maternal grandmother, initially sought to continue the application but later withdrew. Two of the children had returned to reside with the father in Alberta and another judge had ordered the third child returned to the father's care. Judge Laberge held the domicile of the children to be in Alberta and identified the outstanding issue as pertaining to access visits by the children with their maternal grandmother pursuant to C.c.Q. article 611. Referring to but not identifying *Lamborghini*, Judge Laberge applied a narrow interpretation of article 3136 :

> Le procureur de la demanderesse avait proposé l'utilisation de cet article pour disposer du litige. Outre l'interprétation

157. [1995] R.D.F. 140, [1995] R.J.Q. 107 (C.S.) (P. Chaput, J.C.S.).

158. *Id.*, R.J.Q. 112.

159. REJB 1997-00453; (C.S.) (M.-C. Laberge, J.C.S.); reported as *Droit de la famille — 2669*, [1997] R.D.F. 331.

> restreinte donnée à l'article 3136 dans les Commentaires du ministre de la Justice, la Cour d'appel a indiqué récemment qu'il s'agit là d'une exception étroite aux règles normales de compétence lesquelles ne visent pas à permettre au tribunal québécois de s'approprier une compétence qu'il ne posséderait pas autrement.[160]

The decision also affirms that C.c.Q. article 33, which declares the best interests of the child principle, is not itself a source of jurisdiction where none exists, but informs the manner in which a Quebec authority should exercise its jurisdiction. In this case, the return of the children to Alberta and the death of their mother, a resident of Quebec, undermined the sufficiency of the connection with Quebec for the purpose of article 3136. Judge Laberge's approach to article 3136 may have been different if, as in *N. (H.H.)* c. *Ng. (O.X.)*, the children were physically present in Quebec.

77. The jurisprudence in relation to non-patrimonial matters reveals that a Quebec authority applied article 3136 to exercise necessity jurisdiction only when the authority could order an effective remedy. This is well illustrated by *Vincent Hion Kou* c. *Lang Fang* in which the declaration of death would operate in Quebec law for whatever purposes the family, resident in Quebec, desired. Similarly, the children in *N. (H.H.)* c. *Ng. (O.X.)* were physically present within the territorial jurisdiction of the court and, on the evidence, they were not merely sojourning for a brief time with their relatives. This was a family in transition and both the applicant and the children were in Quebec; the legal dispute centred in Quebec and a custody order would be effective, at least within Quebec. As noted, custody jurisdiction is grounded on the domicile of the child in Quebec (article 3142). It is to be expected that the applicant will likely be domiciled and/or resident in Quebec but, as in *Droit de la famille — 2904*, that the children (if not residing with the applicant) are with the other parent outside Quebec or, if domiciled elsewhere, have been relocated to Quebec. In such circumstances, the domicile of the children may have changed consistent with that of the custodial parent or the previous circumstances may be such

160. *Id.*, para. 33. *Lamborghini* is cited in a footnote to this paragraph.

as to create a sufficient connection with Quebec to justify the invocation of article 3136. That proceedings have been instituted elsewhere prior to the arrival of the children in Quebec should, given the definitional nature of this element, be decisive. In *N. (H.H.)* c. *Ng. (O.X.)*, no proceedings had been instituted elsewhere (except in Thailand, where the husband now claimed to have established his domicile; an assertion questioned by the court) and, in *L.F.* c. *N.T.*, only a fortuitous coup opened the opportunity for the applicant to argue necessity jurisdiction.

78. The jurisprudence confirms the expectation that necessity jurisdiction is more likely to be successfully invoked in non-commercial matters. Yet, as with the commercial jurisprudence, the non-patrimonial jurisprudence reflects an almost intuitive application of article 3136 without detailed analysis.

CONCLUSION

79. Forum of necessity jurisdiction in article 3136 is an exception to the generally applicable rules of direct jurisdiction in the *Civil Code of Quebec*. As such, it is to be interpreted restrictively in the sense that its constituent definitional elements are to be clearly satisfied. Yet, it should also be interpreted liberally in recognition of the underlying dual objective of the legislator to ensure access to justice and to avoid a denial of justice. The liberal interpretation is reflected in the family law and non-patrimionial jurisprudence in which the seized authority, whether in Quebec or elsewhere, has assumed jurisdiction to provide an effective remedy as required in the circumstances. There is no reason in principle why this liberality should not apply to other areas of legal dispute. In international commercial matters, however, necessity jurisdiction is less likely because adjudication of disputes is accepted as a cost of doing business and sophisticated actors should anticipate the need of an appropriate forum in which to adjudicate. Paper never refused to take ink.

80. Article 3136 complements and completes the codification of the general rules of direct jurisdiction in the Civil Code. It acts as the counterpart to the discretionary authority conferred

on a Quebec authority by article 3135 to decline to exercise its jurisdiction, exceptionally, when the dispute is more appropriately heard in another forum. Article 3136 confers upon a Quebec authority a discretion to hear a dispute, even absent jurisdiction, when foreign proceedings are not realistically available in the fora identified by the generally applicable jurisdiction rules. This discretion is controlled by the definitional elements of article 3136 but has been further circumscribed by an unduly narrow interpretation by the Court of Appeal in *Lamborghini*. Article 3136 is not an invitation to a Quebec authority to wreck havoc on the international legal order by exercising jurisdiction unreasonably. The legislator does not intend that a Quebec authority be the forum to the world. The critical factor, as argued in this essay, is that necessity jurisdiction implies the correlative element that the legal dispute be subject to an effective remedy in the Quebec forum. Availability of an effective remedy is what makes the exercise of necessity jurisdiction reasonable and the requirement that foreign proceedings be instituted, unreasonable. The remedy factor is ignored, or at least unexpressed, in both doctrine and jurisprudence. Perhaps, it is considered too obvious or implicit. But, it is a factor which also serves to limit the exercise of necessity jurisdiction.

81. A party seeking to invoke necessity jurisdiction should not bear the burden of proof that proceedings cannot or should not be instituted in any other forum of the world. The legislator, in article 3164, declared the unilateral rules of direct jurisdiction of a Quebec authority to be bilateral rules applicable to a foreign authority subject to the condition that the legal dispute be substantially connected with the foreign forum. It is those rules which identify the appropriate fora in which proceedings might be instituted for the purposes of article 3136. The definitional requirement that instituting foreign proceedings be impossible includes both legal and factual impossibility. Legal impossibility could not be intended as a means to promote forum shopping to avoid a total defence under the proper law which governs a legal dispute. A legitimate defence under the governing law, which presents no public order concerns in Quebec, must be respected and given effect. Factual impossibility is closely connected with

the alternative standard in article 3136 that proceedings outside Quebec should not reasonably be required. This standard and the further requirement that there be a sufficient connection with Quebec both implicitly identify the availability of an effective remedy as a further definitional element for the exercise of necessity jurisdiction.

82. Article 3136 has not received detailed attention in either doctrine or jurisprudence. Yet, it is a model for enactment in countries seeking to modernize their rules of private international law and calls for critical analysis. This essay has been directed to that end. The future of article 3136, and its escape from the constraint of *Lamborghini*, awaits future parties in need and jurists with wisdom to respond to that necessity.

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