Canada

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Canada is a bi-jurisdictional confederation, meaning that the federal government and the provinces operate within separate spheres of legislative competence, as defined by the constitution. Private law falls within the powers of the provinces. Certain matters, such as maritime, banking and patent law, fall within the federal sphere of power.[123] Canada is also a bi-juridical legal system with the common law applying in nine provinces and three territories, and the civil law prevailing in Quebec, Canada's second-most populous province.

Therefore, private law, including private international law, is governed by a civil legal tradition in Quebec and by common law principles in the other Canadian jurisdictions. The applicability and application of the UNIDROIT Principles in Canada reflect this dualism.

Applicability of the UNIDROIT Principles

There is no legislation at either the federal or provincial levels explicitly permitting parties to choose the UNIDROIT Principles as the governing law of their agreements. While it remains unclear whether Canadian courts would apply a choice of law provision prescribing the UNIDROIT Principles, arbitral tribunals sitting in Canada are likely to do so.

In any event, some commentators argue that, even if possible, drafters should not choose the UNIDROIT Principles to the complete exclusion of state law, since they do not offer a complete set of rules, thereby leaving some uncertainties that may give rise to disputes between the parties.[124]

Applicability in the judicial system

Common law jurisdictions

Rules governing choice of law in Canadian common law jurisdictions have been developed by case law. The leading authority, *Vita Food Products Inc v Unus Shipping Co Ltd*,[125] states that the proper law of a contract is the law that the parties intended to apply and sets three limits to the parties' autonomy

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123 See The Constitution Act, 1867, 30 & 31 Vict, c 3 s 91–92.

124 Alain Prujiner, 'Comment utiliser les Principes d'UNIDROIT dans la pratique contractuelle' (2002) 36 RJT 561, 567–570 (hereafter Prujiner).

125 [1939] 2 DLR 1 (PC) (hereafter *Vita Food*). This case is widely referred to in the doctrine and case law (see eg, *Douez v Facebook, Inc*, 2017 SCC 33, para 70; *Mohammadi v Safari*, 2017 ONSC 4696, para 36; *TFS RT Inc v Kenneth Dyck*, 2017 ONSC 2780, para 55; Janet Walker, *Castel and Walker: Canadian Conflict of Laws*, loose leaf (consulted on 30 July 2018) (vol 2, 6th edn, LexisNexis 2005) 31–5 and ff (hereafter Castel and Walker); Frédérique Sabourin, 'Le contrat sans loi en droit international privé canadien' (2006) 19:2 RQDI 35, 56 (hereafter Sabourin)).

with respect to choice of law:[126] the intention expressed must be legal;[127] it must be bona fide;[128] and, the choice must not go against public policy.[129]

That said, the law remains unsettled as to whether parties to a contract can agree to the application of a non-state law, such as the UNIDROIT Principles.

On the one hand, some commentators believe that 'parties cannot insulate their contract from all national legal systems by stipulating that it is to be governed exclusively by *lex mercatoria* or by some other transnational set of legal rules'.[130] This view is based on the common law principle that 'contracts are incapable of existing in a legal vacuum'[131] detached from any private law system that defines the parties' obligations. It is also said that, given the integrated nature of a contract, parties should not be able to subject their agreement 'simultaneously to two different systems, at least so far as the contract as a whole is concerned'.[132]

On the other hand, some authors argue that there is no logical prohibition against the parties agreeing to have certain issues be determined by non-state law, or to parties incorporating non-state rules into an agreement, barring any contradiction with the state law that governs the contract generally.[133]

Civil law jurisdiction – Quebec

As opposed to Canada's common law jurisdictions, private international law rules in Quebec are codified in the Civil Code of Quebec (CCQ).[134]

Several commentators have expressed the view that parties to a contract may supplement Quebec law by usage, including *lex mercatoria* or the UNIDROIT Principles,[135] although certain exceptions exist, for example, with respect to consumer and employment contracts.[136] For instance, in a recent decision where it confirmed that the hardship doctrine is not available in Quebec, the Supreme Court of Canada suggested that the parties can choose the UNIDROIT Principles. It indicated, among other things, that the 'decision to subordinate one or more contractual relationships to the

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126 *Vita Food* (n 125) 8.

127 A contract will be deemed illegal in the rare case that a statute of the forum declares the choice of law invalid. Eg, some Canadian statutes impose mandatory laws or mandatory choice of law rules in areas such as banking, shipping and insurance (see eg, Bills of Exchange Act, RSC 1985, c B-4 s 9, 160; Insurance Act, RSO 1990, c I.8 s 123 (Ontario); see also *Agro Co of Canada Ltd v Regal Scout (Ship)*, 1983 FCJ 424, in which the choice of law was held invalid because it would potentially have the effect of reducing the parties' liability below the legal threshold). However, parties from different jurisdictions who choose a neutral law are likely to be found bona fide (see Castel and Walker (n 4) 31–3).

128 Although it is a factual issue, it has been suggested that choosing a law for the purpose of evading a mandatory rule of the law that objectively is most closely connected to the contract would be considered a mala fide intention (see *Nike Infomatic Systems Ltd v Avac Systems Ltd*, (1979) 8 BLR 196 (BC Sup Ct) 202–203; *Bank of Montreal v Snoxell*, 1982 AJ 1018 (Alta QB), para 10; Castel and Walker (n 4) 31–3).

129 Public policy is a very demanding standard; it 'turns on whether the foreign law is contrary to our [Canadian] view of basic morality' (Castel and Walker (n 4) 31–67 citing the definition of the public policy standard stated in the context of the enforcement of foreign judgments in *Beals v Saldanha*, 2003 SCC 72, para 71). We are not aware of any instances where foreign rule of contract law was found to offend Canadian public policy; a very clear example of a contract contrary to public policy would be a contract for slavery.

130 Castel and Walker (n 4) 31–37.

131 *Amin Rasheed Shipping Corp v Kuwait Insurance Co*, (1983) 2 All ER 884, 891 (Diplock L), cited by Castel and Walker (n 3) 31–37.

132 Castel and Walker (n 4) 31–37.

133 *Ibid.*

134 CQLR c CCQ-1991 (hereafter *CCQ*).

135 See Art 1426 and 1434 *CCQ*; Sabourin (n 4) 45–46; Elise Charpentier, 'L'émergence d'un ordre public…privé: une présentation des principes d'UNIDROIT' (2002) 36 RJT 355, 371 (hereafter Charpentier); Jeffrey A Talpis and Jean-Gabriel Castel, 'Le Code Civil du Québec Interprétation des règles du droit international privé' in Barreau du Québec, *La Réforme du Code Civil* (Presses de l'Université Laval 1993) 807, para 275.

136 In consumer contracts, any stipulation that is not an Act of the Parliament of Canada or of Quebec is prohibited, per Art 19 of the Quebec's Consumer Protection Act, CQLR c P-40.1. Art 3118 of the *CCQ* prohibits parties to an employment contract from choosing a law that results in depriving the worker of the protection afforded to him or her by the mandatory rules of the law of the state where the worker carries out his or her work.

doctrine of unforeseeability usually depends on the express will of parties who choose to be governed by, for example, the UNIDROIT Principles'.[137]

There is, however, a debate as to whether parties can, pursuant to Article 3111 of the CCQ, designate a non-state law to govern their contracts to the complete exclusion of Quebec law.[138] This provision, which was inspired in part by Article 3 of the *Rome Convention on the Law Applicable to Contractual Obligations 1980*,[139] provides that the applicable law of a contract is that expressly or impliedly chosen by the parties:

> '3111. A juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the act or whose designation may be inferred with certainty from the terms of the act.
>
> 'Where a juridical act contains no foreign element, it remains nevertheless subject to the mandatory provisions of the law of the State which would apply in the absence of a designation.
>
> 'The law may be expressly designated as applicable to the whole or to only part of a juridical act.'

According to the traditional view, the words 'law of the state' in the second paragraph prohibit parties from choosing a non-state law rather than Quebec law.[140]

However, some commentators argue that inasmuch as the first paragraph of Article 3111 of the CCQ does not specify that the designated 'law' must be a state law, and considering the considerable deference shown by Quebec contract law to the autonomy of the parties, courts should give a liberal interpretation to a choice of law made by the parties.[141]

This uncertainty has yet to be resolved by the courts of Quebec.

Applicability before arbitral tribunals

Unlike courts, arbitral tribunals sitting in Canada are likely to enforce the parties' choice of the UNIDROIT Principles.[142] This is due to the fact that an arbitrator's mandate derives not from law, but from a private agreement, giving the parties full autonomy to choose the law that will govern their relationship.[143]

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137 *Churchill Falls (Labrador) Corp v Hydro-Québec*, 2018 SCC 46, para 97 (see also para 87) (hereafter *Churchill Falls* (SCC)).

138 See Gérald Goldstein, *Droit international privé* (vol 1, Yvon Blais 2011) 482 (hereafter Goldstein); Gérald Goldstein and Ethel Groffier, *Droit International Privé* (vol 2, Yvon Blais 2003) 486 (hereafter Goldstein and Groffier); Sabourin (n 4) 45–48.

139 See *Commentaires du ministre de la Justice: Le Code civil du Québec* (vol 2, Publications du Québec 1993); Goldstein (n 17) 475–476.

140 See Goldstein and Groffier (n 17) 482. See also Fabien Gélinas, 'Codes, silence et harmonie' (2005) 46 C de D 941, 954 (hereafter Gélinas).

141 See Jeffrey Talpis, 'Retour vers le futur: application en droit québécois des principes d'Unidroit au lieu d'une loi nationale' in *Les principes d'UNIDROIT et les contrats internationaux: aspects pratiques: les Journées Maximilien-Caron* 609, 620 (hereafter Talpis); H. Patrick Glenn, 'Droit international privé' in Barreau du Québec, *La Réforme du Code Civil* (Presses de l'Université Laval 1993) 713, para 44.

142 See Castel and Walker (n 4) 31–19; Charpentier (n 14) 371; Pierre J. Dalphond, 'Commentary on article 620 CCP' in Luc Chamberland (ed), *Le Grand Collectif: Code de Procédure Civil* (vol 2, 3rd edn, Yvon Blais 2018) 2746. See generally Michael Joachim Bonell, 'The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of International Sales Law' (2002) 36 RJT 335, 353.That said, some Quebec authors, expressing a minority view, have doubts on whether such a choice could be done at the exclusion of state law, specifically public order provisions, as courts may not enforce arbitral awards rendered in contravention of such provisions (see Sabourin (n 4) 42; Talpis (n 20) 617–618; see generally Prujiner (n 3) 570–572). In any event, the parties should not choose the UNIDROIT Principles to the complete exclusion of state law (see Prujiner (n 3) 567–570).

143 See Castel and Walker (n 4) 31–19.

Common law provinces have adopted the UNCITRAL Model Law on International Commercial Arbitration ('Model Law'),[144] which provides that arbitral tribunals 'shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute'.[145] Although the Quebec legislature has not integrated the Model Law into its legislation, it is reflected in the province's Code of Civil Procedure,[146] specifically Article 620's reference to 'rules of law'.[147]

The commentaries accompanying the Model Law explain that by referring to the choice of 'rules of law' instead of 'law', the Model Law gives the parties the freedom to agree on rules that have not been incorporated into any national legal system.[148] Therefore, international commercial arbitration rules in both the common law provinces and Quebec should allow parties to choose the UNIDROIT Principles as the governing law of their agreement.[149]

Additionally, Canadian international commercial arbitration centres' rules of procedures contain similar broad provisions that should accommodate parties' choice of non-state law.[150]

Application of the UNIDROIT Principles in Canada

By the courts

We have not been able to identify a case where a Canadian court has applied the UNIDROIT Principles.

In a limited number of cases, Quebec courts have turned to the UNIDROIT Principles for some guidance in the interpretation of Quebec law. For example, in rejecting the applicability of the theory of hardship in Quebec law, the Quebec Court of Appeal turned to the UNIDROIT Principles, indicating that they may shed light on the path for the case law to follow in civil law jurisdictions such as Quebec.[151] The Supreme Court of Canada also discussed these principles in confirming this ruling.[152] In another case, the Quebec Court of Appeal likewise referred to Article 1.8 of the UNIDROIT Principles on inconsistent behaviour.[153]

Courts in the rest of Canada have not engaged in such an exercise. They are more likely to look to the American Law Institute's Restatement (Second) of Contracts and Uniform Commercial Code for interpretative guidance.[154]

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144 See, eg, International Commercial Arbitration Act, RSBC 1996, c.233 (British Columbia) (hereafter *BCICAA*); International Commercial Arbitration Act, *2017*, SO 2017, c 2, Sched 5 (Ontario) (hereafter *OICAA*); International Commercial Arbitration Act, RSA 2000 c I–5 (Alberta). See also John E C Brierley, 'Canadian Acceptance of International Commercial Arbitration' (1988) 40 Me L Rev 286, 291–293.

145 Model Law, Art 28.

146 CQLR c C–25.01 (hereafter *CCP*).

147 Art 620 *CCP* has at its source Art 28 of the Model Law, as explained in *Commentaires de la Ministre de la Justice: Code de procédure civile, c.25.01* (Wilson & Lafleur 2015) 450–451. See also Martin J Valasek and Stéphanie Bachand, 'Chapter 5: Arbitrage International' in *LegisPratique: Guide de l'arbitrage* (LexisNexis 2014), paras 5–19.

148 See *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (UN 2012) 121.

149 See, eg, *BCICAA* (n 23) s 28(1); *OICAA* (n 23) s 28(1); art 651 *CCP*.

150 See, eg, British Columbia International Commercial Arbitration Centre, *International Commercial Arbitration Rules of Procedure* s 30(1); Canadian Commercial Arbitration Centre, *International Arbitration Rules* s 24; Alternative Dispute Resolution Chambers, *Arbitration Rules* s 1.1(6); International Centre for Dispute Resolution Canada, *Canadian Dispute Resolution Procedures* s 31.

151 *Churchill Falls (Labrador) Corporation Ltd v Hydro-Québec*, 2016 QCCA 1229, para 150, confirmed by *Churchill Falls* (SCC) (n 16).

152 *Churchill Falls* (SCC) (n 16), para 88–91, 97, 110, 113.

153 See *Hydro-Québec v Construction Kiewit cie*, 2014 QCCA 947, para 92 (fn 41).

154 See, eg, *Bhasin v Hrynew*, 2014 SCC 71, para 82–84; *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9, para 12.

Perhaps one of the reasons why Quebec jurists are more inclined to seek guidance from the UNIDROIT Principles is the involvement of some prominent Quebec scholars in their development. For example, Anne-Marie Trahan, a retired judge of the Superior Court of Quebec, was part of UNIDROIT's governing council from 1998 to 2008. Professor Paul-André Crépeau was part of the UNIDROIT working group from 1994 to 2010. Both have produced doctrinal writings on the UNIDROIT Principles that may have fostered their consideration.[155]

In 1996, a Canadian author theorised about why the UNIDROIT Principles have sparked a keener interest in jurisdictions with civil codes than those without.[156] He suggested that because Canadian common law is predominantly judge-made, an instrument such as the UNIDROIT Principles will only be persuasive to 'the extent to which it resonates with courts, practitioners, and law professors'.[157] Furthermore, he noted that contract law in Canada has reached a high degree of maturity and acceptance in the business community, leaving little room for broadly gauged changes. For these reasons, he predicted that the UNIDROIT Principles' impact in the common law world would only be gradual and incremental. Twenty years later, it seems that this view still holds.

By arbitral tribunals

Arbitral awards, which are usually confidential, may only become public if challenged before the courts. The principal arbitration organisations[158] in Canada do not publish arbitral decisions, making it difficult to assess how arbitral tribunals have been applying the UNIDROIT Principles.

By practitioners

Although the use of *lex mercatoria* is a reality in international commercial contracts,[159] the UNIDROIT Principles are seldom used by Canadian lawyers when negotiating international commercial contracts. Instead, more circumscribed expressions of the *lex mercatoria*, specific to discrete matters, such as the International Chamber of Commerce's Incoterms and the Uniform Customs and Practice for Documentary Credits, are more widely used by contract drafters.[160]

That said, albeit scarcely used, the UNIDROIT Principles are sometimes referred to by lawyers in their submissions before Quebec courts for interpretive purposes, when the applicable principle of domestic law is unclear.

Future outlook for the UNIDROIT Principles

The fact that the UNIDROIT Principles are rarely considered in Canada does not mean that they are irrelevant for Canadian lawyers and it is possible that, in the future, reference to the UNIDROIT Principles will gain traction.

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155 See Anne-Marie Trahan, 'Les Principes d'UNIDROIT relatifs aux contrats du commerce international' (2002) 36 RJT 623; Paul-André Crépeau, *The UNIDROIT Principles and the Civil Code of Québec: Shared Values?* (Thomson Reuters 1998).

156 Jacob S Ziegle, 'The UNIDROIT Contract Principles, CISG and National Law' (paper delivered at the seminar on the UNIDROIT Principles in Valencia, Venezuela (6–9 November 1996)).

157 *Ibid*, 7.

158 See, eg, Arbitration Place, the ADR Institute of Canada, and the British Columbia International Commercial Arbitration Centre.

159 Goldstein and Groffier (n 17) 488–489.

160 *Ibid*, 487; Gélinas (n 19) 950.

First, certain civil law doctrinal authorities in Quebec refer to the UNIDROIT Principles, for instance with regards to the concepts of gross disparity,[161] good faith,[162] nullity of the contract,[163] revocation,[164] threat,[165] usages,[166] restitution,[167] hardship[168] or for the principles governing the interpretation of contracts[169] and price determination.[170] These authorities are frequently relied on by practitioners and courts in Quebec, which may foster the incremental use of the UNIDROIT Principles.

A second source of change may come from legal education. A handful of law school professors, for instance in the field of contracts, make reference to the UNIDROIT Principles in their curricula, as an aspirational set of rules used for comparative purposes.[171] In a Quebec law review, an author likewise advocated the reliance on sources such as the UNIDROIT Principles to teach comparative law.[172] Projects such as the annual Willem C Vis International Commercial Arbitration Moot competition also offer an opportunity for students to gain exposure to UNIDROIT Principles.

In other words, although reference to the UNIDROIT Principles remains rare in Canada, there is an emerging awareness of the Principles in the legal community, especially in Quebec.

161 Jean-Louis Baudouin and Pierre-Gabriel Jobin, *Les Obligations* (7th edn by Pierre-Gabriel Jobin and Nathalie Vézina, Yvon Blais 2013), para 131 (hereafter Baudouin and Jobin); Didier Luelles and Benoît Moore, *Droit des Obligations* (3rd edn, Thémis 2018), para 907 (hereafter Luelles and Moore).

162 See Baudouin and Jobin (n 40), para 138; Luelles and Moore (n 40), para 1975.

163 *Ibid*, para 1108.

164 *Ibid*, para 314, 317.1.

165 *Ibid*, para 762.

166 *Ibid*, para 1514, 1520.

167 *Ibid*, para 1251, 1255, 1295.

168 *Ibid*, para 2239-2239.1.

169 *Ibid*, para 1644; Baudouin and Jobin (n 40), paras 415, 419.

170 Luelles and Moore (n 40), para 1049.15.

171 See, eg, Rosalie Jukier, *Reading and Class Schedule: Contractual Obligations* (McGill University 2016).

172 See Thomas Kadner Graziano, 'Comment enseigner le droit comparé? Une proposition' (2013) 43 RDUS 61, 79, 82.