Unofficial English Translation of the Judgment of the Court

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| Ormuco inc. c. Ernst & Young | | | | | 2022 QCCA 405 |
| COURT OF APPEAL | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| REGISTRY OF | | | MONTREAL | | |
| No.: | 500-09-029625-217 | | | | |
| (500-17-112597-201) | | | | | |
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| DATE: | March 23, 2022 | | | | |
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| CORAM: | | THE HONOURABLE | | JACQUES J. LEVESQUE, J.A.  BENOÎT MOORE, J.A.  FRÉDÉRIC BACHAND, J.A. | |
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| ORMUCO INC. | | | | | |
| APPELLANT – defendant | | | | | |
| v. | | | | | |
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| ERNST & YOUNG LLP | | | | | |
| RESPONDENT – plaintiff | | | | | |
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| JUDGMENT | | | | | |
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1. The appellant appeals from a judgment of the Superior Court, District of Montreal (the Honourable Mark Phillips),[[1]](#footnote-1) dismissing its declinatory exception raising the Quebec authorities’ lack of jurisdiction to hear the action instituted by the respondent.
2. It is common ground that this action falls within the scope of the forum selection clauses in the contracts underlying the dispute. Both parties also admit that the purpose of these clauses is to confer exclusive jurisdiction on the courts of Ontario. In addition, neither party questions the primacy of the autonomy of the parties in situations involving conflicts of jurisdiction in the context of personal actions of a patrimonial nature.[[2]](#footnote-2)
3. The trial judge nevertheless dismissed the appellant’s declinatory exception for two reasons. First, he found that it was late, as the appellant did not comply with articles 166 and 491 C.C.P*.* Second — and in the alternative — he deemed it unfounded on the ground that even before raising its exception, the applicant had submitted to the jurisdiction of the Quebec authorities within the meaning of the second paragraph of article 3148 C.C.Q*.*
4. The appellant submits that the judge erred in dismissing its claim that any argument invoking the tardiness of a declinatory exception based on a forum selection clause is certain to fail. It is of the view that the effect of such a clause falls within the subject-matter jurisdiction of the Quebec authorities, which means that the passage of time cannot, on its own, make it inadmissible. The appellant adds the judge misinterpreted articles 166 and 491 C.C.P*.* and that he was incorrect to find that it had submitted to the jurisdiction of the Quebec authorities.
5. The respondent argues that the judge was correct to find that a forum selection clause has no effect on the subject-matter jurisdictionof the Quebec authorities, and, moreover, that a party may lose the benefit of such a clause if it does not raise it with sufficient diligence or if it submits to the jurisdiction of the Quebec authorities. The respondent adds that the judge committed no reviewable error in concluding that the declinatory exception was late, and in the alternative, that the appellant had submitted to the jurisdiction of the Quebec authorities.

**I. Applicable legal framework**

1. **The nature of the lack of jurisdiction arising from a forum selection clause**
2. The first issue that must be addressed is the nature of the lack of jurisdiction arising from a forum selection clause designating the courts of a foreign jurisdiction. If it is a lack of subject-matter jurisdiction, as the appellant claims, it must be concluded that the judge erred in dismissing its declinatory exception on the basis of the passage of time, because “[l]ack of subject-matter jurisdiction may be raised at any stage of the proceeding*/[l]’absence de compétence d’attribution peut être soulevée à tout moment de l’instance*” (article 167, para. 2 C.C.P*.*).
3. At the outset, it is important to properly distinguish the three types of adjudicative jurisdiction that are now recognized in Quebec private law.
4. The first is international jurisdiction, which concerns the question of whether the plaintiff may institute proceedings in Quebec. Conceptually, this question must be answered first, because it essentially asks whether, with respect to a particular dispute, the plaintiff has access to the Quebec civil justice system. The answer is obvious when the dispute is entirely local, but that is not the case when it presents one or several foreign elements. The rules of international jurisdiction, set out in articles 3134 *et seq*. C.C.Q*.*, specify the circumstances in which the dispute’s connection to Quebec is sufficient to permit the plaintiff to submit a matter to a Quebec authority. Moreover, it should be noted that the specific nature of this type of jurisdiction is also recognized in the *Code of Civil Procedure*,[[3]](#footnote-3) although only since 2016.
5. Once it is established that the plaintiff may institute proceedings in Quebec, the next question is, among the various Quebec authorities (Superior Court, Court of Québec, Administrative Housing Tribunal, etc.), which may hear the dispute. This question is addressed by subject-matter jurisdiction, also known as material jurisdiction or jurisdiction *ratione materiae*. The rules related to subject-matter jurisdiction are set out not only in articles 29 *et seq*. C.C.P*.*, but also in certain provisions of specific statutes.[[4]](#footnote-4) They are rules of public order, which is readily understandable given that they concern the powers and responsibilities of state bodies.[[5]](#footnote-5) That is why the lack of subject-matter jurisdiction of a decision-making body may be raised at any stage of the proceeding by the parties or by the decision-making body in question on its own initiative.[[6]](#footnote-6)
6. Once the Quebec authority to which the plaintiff may refer the matter has been identified, the next question is in which judicial district may — or must — the plaintiff institute its action (Québec, Montreal, Terrebonne, Gaspé, etc.). This is the question addressed by territorial jurisdiction (or jurisdiction *ratione personae*), set out in articles 40 *et seq*. C.C.P*.*
7. A forum selection clause has effect first and foremost[[7]](#footnote-7) with respect to international jurisdiction, because it expresses the will of the parties in regard to their ability to access the civil justice system of one or more jurisdictions. When the clause seeks to confer exclusive jurisdiction on the Quebec authorities, it reflects the parties’ agreement to refer to the civil justice system of Quebec, and no other, for a ruling on any dispute that falls within its scope of application. When the clause seeks to confer exclusive jurisdiction on the courts of another jurisdiction, it instead reflects the parties’ wishes to prohibit the use of the Quebec civil justice system.
8. The fact that forum selection clauses are concerned with international jurisdiction is clear from article 3148 C.C.Q*.*, and, especially from the fact that this provision falls under the title of Book Ten precisely called “[i]nternational jurisdiction of Québec authorities*/[d]e la compétence internationale des autorités du Québec*”:

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| **3148.** In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases:  …  (4) the parties have by agreement submitted to them the present or future disputes between themselves arising out of a specific legal relationship;  …  However, Québec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authorities. | **3148.** Dans les actions personnelles à caractère patrimonial, les autorités québécoises sont compétentes dans les cas suivants:  […]  4° Les parties, par convention, leur ont soumis les litiges nés ou à naître entre elles à l’occasion d’un rapport de droit déterminé;  […]  Cependant, les autorités québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d’un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le défendeur n’ait reconnu la compétence des autorités québécoises.  [Emphasis added.] |

1. In light of the legislative evolution over the past 25 years, the case law finding that forum selection clauses are concerned with territorial jurisdiction[[8]](#footnote-8) should be considered obsolete. While that theory may have been justified at a time where the legislature recognized only two types of jurisdiction — subject matter and territorial — it is no longer adapted to a time where there is no longer any doubt as to the [translation] “autonomous status”[[9]](#footnote-9) of international jurisdiction.
2. The case law finding that forum selection clauses are instead concerned with subject-matter jurisdiction must also be set aside. Of course, that characterization was sometimes accepted even after the coming into force of the *Civil Code of Québec*.[[10]](#footnote-10) However, the case law was never truly settled in this regard.[[11]](#footnote-11) In addition, that view of the effect of forum selection clause raises serious conceptual and theoretical difficulties that the commentary has quite effectively pointed out.[[12]](#footnote-12)
3. In short, forum selection clauses designating the courts of a foreign jurisdiction affect the international jurisdiction of the Quebec authorities, not their subject-matter jurisdiction or their territorial jurisdiction.
4. **The legal framework governing declinatory exceptions invoking a forum selection clause**
5. Finding that forum selection clauses affect international jurisdiction has significant consequences on the legal framework applicable to declinatory exceptions invoking them.
6. First — and as the trial judge correctly noted — such exceptions are subject to article 491 C.C.P*.* The legislature states in the first paragraph of that article that “[a]n application urging a Quebec court to decline international jurisdiction … is made in the same way as any preliminary exception/*[l]a demande pour que le tribunal québécois décline sa competence internationale … est proposée … comme tout moyen préliminaire*”. Then, in the second paragraph, the legislature adds that when ruling on its international jurisdiction, the court must consider the guiding principles of procedure set out in articles 17 to 24 C.C.P*.*
7. Let us examine each of these factors in greater detail.

### **Reference to the provisions of the *Code of Civil Procedure* on preliminary exceptions**

1. The first factor is a reference to the provisions of the *Code of Civil Procedure* on preliminary exceptions, articles 166 to 169. The last two articles — 168 and 169 C.C.P*.* — are not relevant, as they address issues that have nothing to do with the jurisdiction of the court seized. The two provisions that warrant comment are therefore articles 166 and 167 C.C.P*.*
2. In article 166 C.C.P*.*, the legislature states that preliminary exceptions must be “disclose[d] … in writing to the other party in sufficient time/*dénonc[és] par écrit à l’autre partie en temps utile*” (article 166, para. 1 C.C.P*.*). This obligation of diligence incumbent on any party that raises such an exception is set out as follows in the second paragraph:

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| The party must do so before the time limit for filing the case protocol or on the date specified in the case protocol, or at least three days before the date set by the court for the case management conference on the case protocol, or, if no case protocol is required, at least three days before the originating application is to be presented before the court. If an exception to dismiss an application or a defence is raised, the three-day time limit is extended to 10 days. | Elle doit le faire avant la date prévue pour le dépôt du protocole de l’instance ou à la date prévue au protocole ou au plus tard trois jours avant la date fixée par le tribunal pour la tenue de la conférence de gestion sur le protocole. Si aucun protocole n’est requis, elle doit le faire au moins trois jours avant la présentation au tribunal de la demande introductive d’instance. Lorsque l’irrecevabilité de la demande ou de la défense est invoquée, ces délais de trois jours sont portés à 10 jours. |

This obligation of diligence is attenuated in the third paragraph of article 166 C.C.P*.*, in which the legislature adds that preliminary exceptions may be presented at another time in cases determined by law or “with the authorization of the court if serious reasons so warrant/*avec l’autorisation du tribunal si des motifs sérieux le justifient*”.

1. Let us now consider article 167 C.C.P*.*, which deals specifically with declinatory exceptions. The first paragraph provides that the party invoking the lack of jurisdiction of the court seized may ask that the application be referred to the competent court, or, failing that, that it be dismissed. It should be noted that this option is not available when the exception raises the court’s lack of international jurisdiction, because a Quebec authority cannot, strictly speaking, refer a case to a foreign court. The finding that it lacks international jurisdiction will therefore lead to the dismissal of the application. The second paragraph of article 167 C.C.P*.* is not relevant in matters of international jurisdiction, as its scope is limited to exceptions raising the lack of subject-matter jurisdiction of the court seized.
2. It is therefore clear from article 491 C.C.P*.* and article 166 C.C.P*.* that preliminary exceptions raising the lack of international jurisdiction of the court seized must be raised promptly, subject to the two exceptions set out in the third paragraph of article 166 C.C.P*.* Those exceptions may apply, for example, in the event that the declinatory exception raised by the defendant is based on public order considerations. That is not the case here, however, as the preliminary exception is based solely on the will of the parties. Lack of international jurisdiction resulting from a forum selection clause is clearly not based on public order.
3. The preceding analysis leads to the conclusion, at least *a priori*, that declinatory exceptions invoking a forum selection clause exclusively designating the courts of a foreign jurisdiction are governed by the second paragraph of article 166 C.C.P*.*

### **Impact of the guiding principles of procedure**

1. What about the guiding principles of procedure, which must be taken into consideration in accordance with the second paragraph of article 491 C.C.P*.*?
2. The appellant faults the judge for not having sufficiently considered the principle of proportionality (article 18 C.C.P*.*), the requirements of the proper administration of justice (article 9 C.C.P*.*), the principle of the autonomy of the parties, and the principle that the rules of procedure are designed to bring out the substantive law and ensure that it is carried out (article 25 C.C.P*.*). In addition, the appellant claims that the judge omitted to assign sufficient weight to *GreCon*,[[13]](#footnote-13) in which the Supreme Court noted the importance of the autonomy of the parties in matters of international jurisdiction and stated that a statutory provision should not be interpreted as limiting the effectiveness of a forum selection clause in the absence of clear legislative intent.
3. According to the appellant, these factors of analysis are such that article 166 C.C.P*.* should not be interpreted as having any impact whatsoever on the effectiveness of forum selection clauses. Concretely, it follows that failure to comply with the time limits set out in the second paragraph of article 166 C.C.P*.* should not automatically result in the inadmissibility of a declinatory exception invoking such a clause. It is at most a relevant factor in the analysis of whether the party raising the exception submitted to the international jurisdiction of the Quebec authorities.
4. The appellant’s argument is original and serious. Upon reflection, however, the Court is of the view that it cannot be accepted.
5. The appellant is correct to emphasize the importance of respecting the choice made by the parties when they have agreed to a forum selection clause. As the Supreme Court noted in *GreCon*, ensuring the primacy of the autonomy of the parties in such a context is essential to support and promote international commercial relations:[[14]](#footnote-14)

It should also be noted that respecting the autonomy of the parties makes it possible to implement the broader principle of achieving legal certainty in international transactions. The parties generally give effect to their intention to exclude a dispute from an authority’s jurisdiction by means of an arbitration clause or a choice of forum clause. These clauses foster certainty and foreseeability in international commercial relations, because they enable the parties to provide in advance for the forum to which they will submit their dispute. This Court has often stressed the importance of such clauses and the need to encourage them, because they provide international commercial relations with the stability and foreseeability required for purposes of the critical components of private international law, namely order and fairness. This shows how deferring to the contracting parties’ intention ensures the implementation of this policy of legal certainty that is an inherent feature of private international law. To recognize the usefulness and effectiveness of choice of forum clauses and arbitration clauses is therefore consistent with the general principles of private international law.

[Citations omitted.]

1. The appellant is wrong, however, when it claims that applying the provisions of the second paragraph of article 166 C.C.P*.* to declinatory exceptions based on forum selection clauses would have the effect of hindering their effectiveness to the point of thwarting the philosophy that emerges from contemporary case law, which is quite favourable to the autonomy of the parties.
2. When stating — in *GreCon* — that the law must not be interpreted as limiting the effectiveness of a forum selection clause in the absence of clearly expressed legislative intent, the Supreme Court was contemplating the provisions respecting international jurisdiction, such as articles 3139, 3149, and 3151 C.C.Q*.* But the provisions establishing the time limits within which declinatory exceptions must be presented are of a completely different nature, as they are in no way intended to govern international jurisdiction. Far from reflecting the legislature’s intention to specify the scope of the adjudicative jurisdiction of the Quebec authorities, they are of a strictly procedural nature and respond to imperatives related to the duty to cooperate, to transparency in the use of procedure and to the proportionate use of the limited resources of the civil justice system. Moreover, it is relevant to mention that in the analogous context of arbitration clauses, the legislature — which is very favourable to the use of that private dispute resolution method[[15]](#footnote-15) — did not hesitate to impose a rather strict obligation of diligence on the party seeking to have the case referred to an arbitral tribunal: 45 days in domestic arbitration matters and 90 days in international arbitration matters (article 622, para. 2 C.C.P*.*).
3. In short, it must therefore be concluded that the provisions of the second paragraph of article 166 C.C.P*.* remain fully applicable when the declinatory exception is based on a forum selection clause.

**II. Application to the facts of this case**

1. These details of the applicable legal framework having been outlined, it is now necessary to apply it to the circumstances of this case.
2. **Did the trial judge commit a reviewable error in finding that the appellant’s declinatory exception was late?**
3. The first issue to decide is whether the judge committed a reviewable error in finding that the appellant’s declinatory exception was late.
4. First, the judge found that the appellant had to raise its declinatory exception by September 30, 2020, the date on which the case protocol was to be filed, but that it did not do so until January 2021. In view of the provisions of the second paragraph of article 166 C.C.P*.* and the elements in the file, that conclusion contains no error of fact or law that would justify the intervention of this Court.
5. As for the judge’s refusal to authorize the appellant to raise its declinatory exception after the time limit set out in the second paragraph of article 166 C.C.P*.*, his finding that the appellant did not establish, nor even allege, “serious reasons/*motifs sérieux*” within the meaning of the third paragraph of article 166 also contains no reviewable error.
6. In short, there is no reason to intervene in the judge’s finding regarding the tardiness of the appellant’s declinatory exception.
7. **Did the trial judge commit a reviewable error in finding that the appellant submitted to the jurisdiction of the Quebec authorities?**
8. Although the preceding conclusion is sufficient to decide the appeal, it is worth adding a few words on the judge’s *obiter dictum* finding that the appellant submitted to the jurisdiction of the Quebec authorities.
9. Because that finding is one of mixed fact and law, it calls for deference.[[16]](#footnote-16) That being so, and with respect, the Court is of the view that the judge’s analysis contains an error that would have justified its intervention had the issue of submission to the jurisdiction of the Quebec authorities been determinative.
10. Between the filing of its originating application and the filing of its notice disclosing its declinatory exception, the only steps the appellant accomplished in the proceedings was filing its representation statement — in which it in fact took care to reserve its right to contest the jurisdiction of the Superior Court — and the filing of a notice of substitution of counsel. It did not participate in this case in any other way. Of course, its counsel had certain discussions with counsel for the respondent for the purpose of preparing a case protocol, without ever discussing the international jurisdiction of the Quebec authorities. Those discussions were inconclusive, however, and counsel for the appellant took care to specify that their submissions were conditional on their client’s approval.
11. In the circumstances, the Court finds that the judge could not have reasonably found that the appellant had *clearly* submitted to the jurisdiction of the Quebec authorities.[[17]](#footnote-17)

**FOR THESE REASONS, THE COURT:**

1. **DISMISSES** the appeal, with legal costs.

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| Mtre Lev Alexeev | | |
| Mtre Élise Veillette | | |
| CABINET D’AVOCATS NOVALEX | | |
| Counsel for the appellant | | |
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| Mtre Antoine Van Audenrode | | |
| Mtre Neil Gary Oberman | | |
| SPIEGEL, SOHMER | | |
| Counsel for the respondent | | |
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| Date of hearing: | January 28, 2022 | |

1. *Ernst & Young c. Ormuco inc.*, 2021 QCCS 2543. [↑](#footnote-ref-1)
2. *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46 at para. 20 *et seq*. [↑](#footnote-ref-2)
3. See article 491 C.C.P. [↑](#footnote-ref-3)
4. See e.g., section 28 of the *Act respecting the Administrative Housing Tribunal*, CQLR, c. T-15.01. [↑](#footnote-ref-4)
5. Sylvette Guillemard, “Les problèmes de qualification de la compétence internationale des tribunaux québécois : la solution réside dans l’alliance du *Code de procédure civile* et du *Code civil du Québec*” (2019) 60 C. de D. 219 at 227. [↑](#footnote-ref-5)
6. Article 167, para. 2 C.C.P*.* [↑](#footnote-ref-6)
7. [translation] “First and foremost” because the wording of some clauses may raise questions as to their potential impact on other types of adjudicative jurisdiction (e.g., [translation] “disputes arising from or related to this contract fall under the exclusive jurisdiction of the Tribunal de grande instance de Paris”). That is not the situation for the clauses at issue in this case, which refer only to the Ontario courts. [↑](#footnote-ref-7)
8. See e.g., *Importations Cimel Ltée c. Pier Augé Produits de Beauté*, J.E. 87-1187, 1987 CanLII 1165 (C.A.) at para. 22. [↑](#footnote-ref-8)
9. H. Patrick Glenn, “Droit international privé” in Barreau du Québec et Chambre des notaires du Québec, *La réforme du Code civil, t. 3, Priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires* (Sainte-Foy, Qc.: Presses de l’Université Laval, 1993) 669 at 743 (No. 71). On the specific nature of international jurisdiction, see also Gérald Goldstein & Ethel Groffier, *Droit international privé, t. I, Théorie générale* (Cowansville, Qc.: Yvon Blais, 1998) at 299–301 (No. 126); *Shamji c. Tajdin*, 2006 QCCA 314 at para. 20; *Droit de la famille — 211290*, 2021 QCCA 1123 at para. 33. [↑](#footnote-ref-9)
10. See e.g., *171486 Canada Inc. c. Rogers Cantel Inc.*, [1995] R.D.J. 91, 1994 CanLII 3644 (QC CS.); *Sony Music Canada Inc. c. Kardiak Productions Inc.*, J.E. 97-1395, 1997 CanLII 10719 (QC CA.); *Forest Fibers Inc. c. CSAV Norasia Container Lines Ltd.*, 2007 QCCS 4794. [↑](#footnote-ref-10)
11. See e.g., *Shamji c. Tajdin*, 2006 QCCA 314, in which, after noting the presence in the file of a forum selection clause exclusively designating the Congolese courts, the Court found that the defendant’s declinatory exception was related to the international jurisdiction — not the territorial jurisdiction — of the Quebec authorities. [↑](#footnote-ref-11)
12. See especially Sylvette Guillemard, “Les problèmes de qualification de la compétence internationale des tribunaux québécois : la solution réside dans l’alliance du *Code de procédure civile* et du *Code civil du Québec*” (2019) 60 C. de D. 219. See also Gérald Goldstein & Ethel Groffier, *Droit international privé*, *t. I, Théorie générale* (Cowansville, Qc.: Yvon Blais, 1998) at 300 (No. 126); Geneviève Saumier & Jeffrey Bagg, “Forum Selection Clauses Before Canadian Courts: A Tale of Two (or Three?) Solitudes” (2013) 46 U.B.C. L. Rev.439 at 451 and 453, rejecting the position that forum selection clauses affect subject-matter jurisdiction. [↑](#footnote-ref-12)
13. *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46. [↑](#footnote-ref-13)
14. *Ibid.* at para. 22. See also *Douez v. Facebook, Inc.*, 2017 SCC 33 at para. 31. [↑](#footnote-ref-14)
15. See e.g., *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17 at para. 38, with respect to the “trend in the case law and legislation, which has been, for several decades, to accept and even encourage the use of civil and commercial arbitration, particularly in modern western legal systems, both common law and civil law”. On the legislative evolution in Quebec, see in particular John E.C. Brierley, “Une nouvelle loi pour le Québec en matière d’arbitrage” (1987) 47 R. du B. 259; Alain Prujiner, “Les nouvelles règles de l’arbitrage au Québec” [1987] Rev. arb.425. [↑](#footnote-ref-15)
16. *Hydro-Québec v. Matta*, 2020 SCC 37 at para. 33. [↑](#footnote-ref-16)
17. See *Barer v. Knight Brothers LLC*, 2019 SCC 13 at para. 52, where the Supreme Court emphasized the fact that only clear submission to the international jurisdiction of the Quebec authorities meets the requirements of article 3148 *in fine* C.C.Q*.* See also *Groupe SNC-Lavalin inc. c. Siegrist*, 2020 QCCA 1004 at para. 113; *Chandler c. Volkswagen Aktiengesellschaft*, 2022 QCCA 272 at para. 37. [↑](#footnote-ref-17)