Staying Proceedings under the Civil Code of Quebec

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The decision of the Supreme Court of Canada in *R.S. v P.R.*, 2019 SCC 49 (available here) could be of interest to those who work with codified provisions on staying proceedings. It involves interpreting the language of several such provisions in the Civil Code of Quebec. Art. 3135 is the general provision for a stay of proceedings, but on its wording and as interpreted by the courts it is "exceptional" and so the hurdle for a stay is high. In contrast, Art. 3137 is a specific provision for a stay of proceedings based on *lis pendens* (proceedings underway elsewhere) and if it applies it does not have the same exceptional nature. This decision concerns Art. 3137 and how it should be interpreted.

P.R. (the husband) filed for divorce in Belgium. R.S. (the wife) filed for divorce three days later in Quebec. The husband sought to stay the Quebec proceedings on the basis of *lis pendens*. [para. 2] The motions judge refused a stay but the Quebec Court of Appeal reversed and granted a stay. The Supreme Court of Canada (6-1) reversed and restored the original refusal of a stay. The upshot is that the wife is allowed to proceed with divorce proceedings in Quebec.

The dispute was protracted largely because the husband, under Belgian law, purported to revoke all gifts he had given to the wife during their marriage. [paras. 2 and 13] These were worth more than $33 million. This is legal under Belgian law though not free from controversy [para. 59].

Art. 3137 provides "On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same subject is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority."

One of the central issues for the court was whether a Belgian decision could be recognized in Quebec. Because a Belgian court would give effect to the revocation of the gifts in its decision, Justice Abella did not think so. She held that "foreign

judgments which annihilate not only countless international instruments regarding the equality of spouses and the protection of a vulnerable one, but also the very philosophical underpinnings of the provisions in the [Civil Code of Quebec] contradict those conceptions and will not be recognized in Quebec." [para 142] In her view no Belgian decision accepting the revocation of the gifts on these facts could be recognized in Quebec: refusal under Art. 3155(5) – "the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations" – was inevitable. On this view, Art. 3137 did not apply and so there was no basis for a stay.

In contrast, Justice Gascon, joined by four other judges, held that a Belgian decision could be recognized in Quebec. The threshold is low, requiring only the possibility or plausibility of recognition. [para. 48] The focus is not on the specific provisions of any rule that the foreign court might apply in reaching its decision but on the outcome or decision itself. [para. 56] He held that "the husband was required to show only that there was a possibility that the eventual Belgian decision would not be manifestly inconsistent with public order as understood in international relations." [para. 57] He listed several possible outcomes by which the Belgian court might render a decision that could be recognized in Quebec, including the prospect that a Belgian court might not give effect to the revocation of the gifts on the basis that the law so allowing is unconstitutional. [paras. 58-63]

On Justice Gascon's reasoning, Art. 3137 did apply, making a stay available. However, the provision is discretionary, expressly using the word "may". [para. 67] Justice Gascon considered that the motions judge's decision to not grant a stay based on this discretion was not unreasonable and so should not have been disturbed by the Court of Appeal. [para. 80]

Unlike the other six judges, Justice Brown thought that a stay should be granted. In his dissent, he expressed concern about the motions judge's reasoning. He held that the motions judge had, in interpreting the conditions that trigger Art. 3137, made "overriding" errors that justified appellate intervention. [para. 162] He also held that the motions judge had not truly exercised the discretion under Art. 3137. [para. 169] Accordingly he was prepared to exercise it afresh and held (agreeing with the Quebec Court of Appeal) that the Quebec proceedings should be stayed. The factors favoured proceedings in Belgium, especially the concern that any Quebec judgment would not be recognized in Belgium because the Belgian proceedings had started first. [para. 186]

It appears that one of the key reasons for the split between Justice Gascon and Justice Brown is that the former focused on the substantial assets in Quebec, which would of course be subject to a Quebec divorce decision [para. 91], whereas the latter focused on the substantial assets in Belgium that would be unaffected by a Quebec divorce decision [para. 187]. This goes to the exercise of the discretion to ignore the *lis pendens* and refuse a stay. One of the relevant factors for this is whether the court's eventual judgment would be recognized by the forum first seized. It is easy to appreciate that this factor does not matter if that judgment does not need to be recognized there at all to be effective and, in contrast, that it is vital if it must be. [para. 90] The facts position this case somewhere in between the ends of this spectrum.

The split between Justice Gascon and Justice Abella in part is based on their understanding of Belgian law. Justice Abella repeatedly noted that there is no evidence – Belgian law being a matter of fact in a Canadian court – that a Belgian court would do anything other than give effect to the revocation. [paras. 117-21] In contrast, Justice Gascon held there was at least some evidence going the other way [para. 59] and in addition he was prepared to rely on the possibility that certain arguments might be successfully advanced. [paras. 61-62]

Many of the issues in this case arise specifically because of the separate treatment under Quebec law of *lis pendens*. The analysis at common law could have been quite different, all conducted under the rubric of the doctrine of *forum non conveniens*. Parallel proceedings would have been one of the factors considered in the analysis. But the common law has been prepared to reject according much if any weight to first-in-time proceedings based only on relatively short differences in timing (in this case, three days). Indeed, Justice Gascon noted the tension caused by strict application of first-in-time rules, either when staying proceedings or deciding whether to recognize a foreign judgment. [para. 89]

One small point might be worth a final comment. In developing the proper interpretation of Art. 3137 the judges stressed that if successfully invoked by the defendant it leads to a stay of proceedings, which is less final and so less prejudicial to the plaintiff than an outright dismissal of the proceeding. A proceeding so stayed could, if justice demanded, be reactivated. This is contrasted with the general provision in Art. 3135. [paras. 72-73 and 179] However, that provision, while not using the word "stay", uses the phrase "decline jurisdiction". The judges treated it is as a given that this means the

proceedings are dismissed and at an end. But is it not at least arguable that to decline jurisdiction the court must first have jurisdiction, and that the declining amounts to a stay of that jurisdiction and not a dismissal? The court could have explained the basis for its position on this issue somewhat more fulsomely.