Matrimonial Regimes in Quebec
Private International Law:
Where Are We Now?

Jeffrey TALPIS

SUMMARY

Despite a certain similarity amongst “matrimonial regimes” in civil law jurisdictions and “matrimonial property” in common law jurisdictions, the application of either “regime” in the jurisdiction of the other has been a constant source of confusion for courts and practitioners alike. For the last 15 years, since before the coming into force of the Civil Code of Quebec,¹ the problem has been compounded by a number of factors including: (i) the imperative application of the family patrimony rules under the domestic provisions of the Code, (ii) the definition of “matrimonial regimes” for the purposes of private international law, (iii) the interaction between unilateralism and the traditional or classical method, particularly when the court has to consider applying a foreign statute concerning the right of division of matrimonial property which, under its provisions, would not apply in the particular case, and (iv) changes occurring in a state’s matrimonial regime over time. Since it is obvious that conflict of laws in this field will continue to grow, the goals of this paper are to take stock of where we are now, and to anticipate where courts and legislators may take these issues in the future.

¹. The Civil Code of Quebec of January 1, 1994, L.Q. 1991, c. 64 is herein referred to as the C.C.Q. or simply as the “Code”.
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INTRODUCTION ......................................................... 185

CHAPTER ONE: APPLICABLE LAW .......................... 188

A. Reasons underlying the conflicts of law ............ 188

B. Determination of the applicable law .............. 193
   1. The principle of unity applies .................. 193
   2. Absence of designation of the applicable law
      (objective connection) ............................ 193
   3. Designation of law by marriage contract
      (subjective connection) ......................... 194
   4. Permanence of the connecting factor: immutability
      of the matrimonial regime ...................... 194
   5. Modification of the foreign law governing the
      matrimonial regime ............................... 195
   6. Autodetermination of foreign matrimonial property
      regimes ............................................. 197
   7. Effects of the matrimonial regime on third
      persons ............................................ 201

C. Scope of the law applicable to the matrimonial
   regime ................................................... 202
      1. In general ...................................... 202

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Revue du Barreau / Tome 63 / Automne 2003 183
2. Partition or sharing of assets ........................................ 203
   (a) Conflicts of law arising from equitable redistribution regimes ........................................ 204
   (b) Conflicts of law arising from Quebec's family patrimony rules ........................................ 210
   (c) Should, or could, both equitable redistribution and family patrimony rules apply? ........... 215

D. Using marriage contracts to prevent disputes on division of marital property ............... 218

CHAPTER TWO: THE UNIFORM LAW CONFERENCE OF CANADA'S MODEL ACT ON UNIFORM JURISDICTION AND CHOICE OF LAW IN DOMESTIC PROPERTY PROCEEDINGS ........................................ 220

A. The uniform act rules ............................................. 221
   1. Definitions and presumptions ..................................... 221
   2. Jurisdictional rules ............................................... 222
      (a) Territorial competence: definition and rules .......... 222
      (b) Discretion in the exercise of territorial competence ............................................. 223
      (c) Property located outside territory ...................... 223
   3. Choice of law rules ............................................... 224
      (a) Contract ........................................................ 224
      (b) Absence of contract ......................................... 224
         (i) Marriage and Community of Property ............. 225
         (ii) Choice of Law Rules: Proper Law of the Marriage .............................................. 225

B. Comments from the perspective of Quebec law ...................................................... 226

CONCLUSION ......................................................... 230
INTRODUCTION

“Family property law should be as simple and clear as possible. Ideally the division of assets should be governed by a simple body of legislation and the codes for choosing that legislation should be transparent and easy to understand.”

Legal rules relating to matrimonial regimes in the civil law and matrimonial property laws in the common jurisdictions are profoundly anchored in the historical and juridical traditions of each. As a result, conflicts of law and jurisdiction continue to play an important role in this field. Given that the number of situations in which foreign elements are present either at the beginning or end of the marital relationship are increasing dramatically, it comes as no surprise that practitioners are regularly called upon to advise prospective or actual spouses on the laws applicable to a variety of questions. Such advice on the applicable law includes whether property can be divided between the spouses, and in what proportions, the valuation of property for the purpose of determining compensation in lieu of property, and the determination of extinction of certain property rights in the context of situations such as a disposition of property, dissolution of the regime by divorce, death or modification thereof, bankruptcy, tax planning or other circumstances.

While the object of the present paper is to take a critical look at the current state of Quebec private international law relating to matrimonial regimes, a brief overview of some of the strategies used by litigators is useful.

When such matters become litigious, there is often a rush to the courthouse in the jurisdiction whose conflict of law rule will designate the desired law as applicable. This is the most common reason litigation takes place simultaneously in multiple fora. In

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3. Most disputes relating to matrimonial regimes arise on the occasion of divorce proceedings. Section 3(1) of the Divorce Act, R.S.C., 1985, c. 3 (2nd suppl.), as amended, confers jurisdiction upon the courts on the basis of the ordinary residence of either spouse for at least one year in the province prior to the commencement of proceedings. In order to consolidate the financial aspects of family
Davenport v. Dumas, for example, the wife instituted divorce proceedings in the State of Connecticut where she resided, knowing that the court would take jurisdiction and apply its own equitable redistribution rules. Shortly afterward, the husband instituted proceedings in Quebec, where he resided, knowing that the court would assume jurisdiction and apply the law of Quebec to the division of assets, the whole in accordance with Quebec conflict rules applicable to their matrimonial regime. Similar strategies are seen in Droit de la famille –2054. In that case, the husband instituted divorce proceedings in Algeria, where the courts had jurisdiction on the basis of the common nationality of the spouses as the court would apply its matrimonial regime of separation as to property. Subsequently, the wife took divorce proceedings in Quebec on the basis of her Quebec residence, so as to take advantage of the Quebec rules on the compensatory allowance, the family patrimony and the alimony provisions under the Divorce Act.

All of the artillery in the jurisdictional armoury may be used to jockey for the best position from which to do battle in litigation, including *lis pendens* to stay local proceedings, anti-suit injunctions to restrain foreign proceedings, *forum non conveniens* to

proceedings in the same jurisdiction, the Quebec legislator adopted the rule that, *inter alia*, the residence of either spouse may serve as a ground for jurisdiction to make a financial order on division of matrimonial property or on effects of marriage (arts. 3145, 3154 C.C.Q.). The place of celebration of the marriage, citizenship of parties, residence or domicile at the time of marriage, and choice of court (forum selection clause) or a change of residence after the commencement of the proceedings are all relevant. The quality of habitual residence, however, is particularly important: while habitual residence may be interrupted, it must be lawful. This suggests that the residence in Canada must be legal as well as factual, which requires a resident status in Canada. Furthermore, the court having jurisdiction under art. 3154 C.C.Q. may dispose of all issues relating to matrimonial regimes wherever the assets may be situated. Where there are assets in Quebec and abroad, the courts will favour reapportioning assets within the province where it is possible, to compensate for rights in property located outside the province. The court may also make other orders ensuring effectiveness of its judgment (arts. 3138, 3140 C.C.Q.).

4. (February 14, 1990), C.S. St-Francois, 450-04-000438-894, Peloquin, J.
5. [1999] R.J.Q. 1245 (C.S.). The same scenario arose in S.A. v. M.F.G. (Nov. 29, 2001), C.S. Montreal, 500-12-258532-013. Although the spouses were married under the Quebec matrimonial regime of the partnership of acquests and subject to Quebec’s family patrimony rules, the husband instituted divorce proceedings in Tunisia on the basis of their common Tunisian nationality, knowing that the courts would apply the matrimonial regime of separation as to property under Tunisian law. The wife countered with a divorce action in Quebec, seeking application of the regime of partnership of acquests and the family patrimony. When the husband responded with a motion to stay on the basis of *lis pendens* (art. 3137 C.C.Q.), the motion was denied.
send the case away or Mareva-type orders to enjoin spouses from disposing of their foreign assets, or force them to repatriate the assets to Quebec. The question remains, however, whether or not the general dispositions of Book Ten of the Code (arts. 3134 to 3140 C.C.Q.) apply where a proceeding in divorce has been instituted in Quebec. There is a sound argument for looking to Canadian jurisprudence on these issues, just as there is a sound argument to be made that these doctrines should apply since there exists no explicit rule in the Divorce Act prohibiting them. Since Quebec courts refer to art. 3135 C.C.Q. on the basis of the unoccupied field, it is contended that art. 3137 C.C.Q. (lis pendens) and the other general provisions should also apply.

6. There is an increasing trend in Quebec, as in other jurisdictions, to take into account the applicable law in the context of motions to decline jurisdiction under the doctrine of forum non conveniens. Although this is a disturbing trend, there are a few provisions in the Code on which grounds for jurisdiction depend on the applicable law. For example, jurisdiction based on the place of performance of the contract in Quebec or forum selection in art. 3148 C.C.Q. both depend upon the existence of a valid contract (although Quebec courts rarely entertain a discussion on the merits to determine whether the ground for jurisdiction exists, i.e whether there was a valid contract). For a critical opposition to this trend see S. GUILLEMAIN, A. PRUJINER and F. SABOURIN, "Les difficultés de l'introduction du forum non conveniens en droit québécois", (1995) 36 C. de droit 913 at 949, J. TALPIS and S. KATH, "The exceptional as commonplace in Quebec Forum Non Conveniens law: Cambior a case in Point", (2000) 34 R.J.T. 761 (hereinafter "The exceptional as commonplace."). The rules for recognition and enforcement of foreign judgments also play an important role in the ultimate determination of the applicable law because, where the foreign judgment is denied recognition, the court will not stay the local proceedings in divorce. See e.g. Droit de la famille – 2054 and S.A. v. M.F.G, supra, note 5. See also L.P. v. F.B., [2003] R.D.F. 121, J.E. 2003-280 (C.S.), at 129, Frappier J., where the court refused to recognize the foreign divorce and, in a later judgment, proceeded to partition the family patrimony (L.P. v. F.B. (3 October 2003), C.S. Saint-Hyacinthe, 750-12-011034-027, para. 244ff). See also G.M. v. M.A.F, (3 September 2003), C.A. Montreal, 500-09-1213174-032 the husband took divorce proceedings in Louisiana on September 4, 2002 seeking application of the community property rules in that State, after the wife took proceedings in Quebec on September 3, 2002. Despite the fact the Quebec proceedings were found to have been instituted first, curiously, the court recognized the Louisiana divorce judgment on the basis of the fact that the wife participated in the proceedings in Louisiana and did not contest the jurisdiction of their court insofar as the divorce itself and the partition of the community property. See also Droit de la famille – 3148, [2000] R.J.Q. 2339 (C.S.), where, after determining that the court should recognize the Russian divorce, it erroneously refused to pronounce upon the matrimonial regime and family patrimony five years after the divorce was rendered since it held in error that the law applicable to these questions was that of the domicile of the parties at the time of the divorce. Aside from confusing applicable law and jurisdiction, this is contrary to art. 3123 C.C.Q., which dictates that with respect to matrimonial regime, the applicable law is the domicile of the spouse at the time of their marriage.
CHAPTER ONE: APPLICABLE LAW

A. Reasons underlying the conflicts of law

The legal systems of the world today exhibit a marked diversity in the attitude they take to the effect of marriage on property rights and to the treatment of spousal claims for sharing of assets in kind or in value.

In the past, common law jurisdictions regarded the property rights or claims of spouses for a division of property as unaffected by the fact of marriage. Each party was presumed to retain those assets which he or she brought to the marriage and to possess as separate property anything acquired in the course of the marriage. Recognizing, however, that the wealth accumulated by each spouse is likely to be the product of combined efforts, these systems now treat marriage as an economic partnership as well as a social one. It is now commonly assumed that both spouses contribute to the acquisition of marital wealth, whether that contribution comes from income earned outside the home or services provided in the home (i.e., child care or homemaking). Hence, as partners, both spouses are presumed to be entitled to share in the partnership assets at dissolution. Most jurisdictions now allow the courts faced with a dissolution of marriage or other triggering event to divide in an equitable manner all or certain property acquired by the spouses during their marriage and still owned by either at the time of divorce. Another goal of equitable redistribution schemes is to sever the economic ties of the spouses at the time of dissolution by using marital property awards to meet the financial needs of economically dependent spouses. This stands in contrast to the previous practice of granting post divorce transfers of income in the form of alimony.7

The court’s power to divide property in this way is generally known as “equitable redistribution” and is the dominant rule today in all common law states in the United States, in English law and other jurisdictions in the common law world.

For example in England, under the Matrimonial Causes Act of 1973,8 the court has absolute discretion over redistribution of

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assets since there are no guiding principles in the Act on how property should be allocated upon divorce. Until recently, the emphasis in English law concerning division of matrimonial assets was on the importance of needs and reasonable requirements of a spouse rather than on an arithmetic calculation. The former approach had become the practice in the majority of cases and the primary factor used concerning s. 25(2) of the Act. Typically, in cases where the assets exceeded those necessary to meet the needs of both spouses, the spouse, usually the wife, would receive considerably less than 50% of the matrimonial assets. Clearly, this approach was potentially discriminatory against women and failed to protect mothers not employed outside the home.

The landmark House of Lords decision *White (A.P.) v. White and the Motor Insurers Bureau* in 2000, however, marked a fundamental change in the relevant law since the 1970’s, holding that there should indeed be a presumption of an equal division of assets.9

The case of Mr. and Mrs. White involved a long marriage and children who were independent at the time of the divorce. The couple essentially functioned as a farming partnership in that both worked physically hard and made an equal contribution to both work and domestic activities. Their assets totalled approximately £4 million.

In the first instance, the case progressed on a conventional needs approach and Mrs. White was awarded £980,000, which was enough to satisfy her needs for housing and income from capital. In arguments before the Court of Appeal, it was pointed out that had Mrs. White been a business partner she would have received much more. The court emphasized a partnership model rather than a needs basis and awarded her £1.7 million, an amount less than half of the total due to the fact that Mr. White’s family contributed in the early years.

Both parties appealed the judgment. Mr. White claimed that the case should be resolved on a needs basis and that any change in the law should be made by Parliament. Mrs. White, on the other

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hand, claimed that the needs-based law was inappropriate and an equal division of the assets was in order.

The House of Lords upheld the Court of Appeal’s decision and in so doing ushered in a new direction of the law by declaring that needs-based law had not kept up with societal change. Presenting the Court’s opinion, Lord Nicholls stated that if, in their different spheres each contributed equally to the family then, in principle, it matters not which of them earned the money and built up the assets. There should be no bias in favour of either the money-earner or the caregiver. In this decision, the House of Lords also recognised that by being at home and looking after young children, a wife may forever lose the opportunity to acquire and develop her own money-earning qualifications and skills.10

Lord Nicholls stated as follows:

Sometimes having carried out the statutory exercise, the judge’s conclusion involves a more or less equal division of the available assets. More often this is not so. More often, having looked at all the circumstances, the judge’s decision means that one party will receive a bigger share than the other. Before reaching a firm decision and making an order along these lines, the judge would always be well advised to check his tentative views against the yardstick of equality of division.11

He went on to say that:

[...] as a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.12

10. Ibid., at 9.
11. Ibid. For an illustration of how the law in England is evolving, see Cowan v. Cowan, [2001] EWCA Civ 679 (May 14, 2001) (C.A.), where the English Court of Appeal held that the court’s duty when considering the division of matrimonial assets following a divorce is to impose a fair settlement according to the circumstances, within the context of the rules set down by the Act. Courts should be careful not to make assumptions based upon the sex of the parties or about the roles taken by them in the course of the marriage. The test of assessing the potential consequences of an equal division of assets serves as a useful check in avoiding sex-based discrimination, but no more. In cases involving large monetary claims, the judge should also be careful not to rely too heavily on tests concerning the reasonable requirements of the parties. Such tests must be considered with an eye to flexibility.
Similar equitable redistribution rules exist under the common law states of the United States. Under the laws of the State of Indiana, for instance, a court may, in the absence of an enforceable agreement to the contrary, divide the property of the spouses whether owned by either spouse before the marriage or acquired by either spouse in his or her own right after the marriage, in a “just and reasonable manner.” The law creates a presumption that an equal division of the marital property is just and reasonable. However, a party who presents relevant evidence may rebut this presumption. Such evidence may include: the relative contribution of each spouse to the acquisition of property, how each property was acquired, the economic circumstances of the parties, the conduct of the parties during the marriage, earnings or earning ability of the parties as related to a final division of property and a final determination of the property rights of the parties.

The common law provinces of Canada have all adopted statutes governing matrimonial property law which provide for a presumption of equal sharing or deferred sharing schemes with a discretionary power of adjustment for exceptional circumstances. Additionally, common law rights such as those arising pursuant to a constructive trust and a resulting trust, primarily based on claims of unjust enrichment, exist as complements to these regimes and are often employed by the courts.

The equitable redistribution laws in the United States and England or the deferred sharing statutes in the common law jurisdictions of Canada are not imperative. Although the parties can-
not always opt out of certain rights relating to an asset, they may and very often do create a “regime” functionally equivalent to a civil law matrimonial regime of separation as to property. Where the parties have received independent legal advice, have been provided full disclosure and are party to an agreement that is not totally unfair, the agreement has a good chance of being upheld.

The other approach to matrimonial regimes, found principally in the civil law world, is that of community of property, or partnership of acquests with each jurisdiction having its own version. This approach is seen in many civil law countries (e.g., Belgium, France, Hungary, Italy, Luxembourg, Netherlands, Portugal, Switzerland, Germany, Spain, Greece, Luxembourg) as well as in nine states in the United States (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin).

In Quebec, the legal regime is known as the partnership of acquests, although the parties may adopt other regimes by marriage contract. Under this regime, spousal assets are classified as either private property or acquests. During the marriage, the legal regime of partnership of acquests operates in the same manner as the conventional regime of separation as to property, except that a spouse may not give away his or her acquests without the consent of the other. Unlike the former legal regime of community of property, during the marriage no rights or interests vest in the other spouse’s acquests. At dissolution, the net value of the acquests of each is established and, subject to certain adjustments and compensations, is divided equally. The party owing the greater amount pays it to the other in money or by transfer of property. The Code also contains certain imperative provisions relating to the constitution and partition of certain specific assets known as “family patrimony,” the net value of which is divided equally regardless of the matrimonial regime selected or who owns the assets. However, the court has discretion to order an unequal division based on any number of factors.

15. Arts. 448 to 484 C.C.Q.
16. Art. 462 C.C.Q.
17. Art. 481 C.C.Q.
18. Arts. 414 et seq C.C.Q.
19. Art. 422 C.C.Q.
Most civil law jurisdictions allow the parties to opt out of the legal regime in whole or in part. Some jurisdictions impose the legal regime strictly.\textsuperscript{20}

It is reasonable to conclude that save for those jurisdictions governed by Islamic law, in which the legal regime is one of separation as to property, in the law of nearly all jurisdictions it is generally possible to find some mechanism for allowing a division of certain assets in varying degrees which can be employed in the absence of a contract.

Despite this point of commonality, however, the differences in the matrimonial property rules in different jurisdictions create a vast potential for conflicts of law, and practitioners are continually confronted with problems flowing from this diversity. While much of the uncertainty has been eliminated by the new Code, there are still a number of controversial issues, which have yet to be resolved. The central purpose of this paper is to examine these issues and discuss solutions.

B. Determination of the applicable law

1. The principle of unity applies

In Quebec, as in most civil law jurisdictions, a unified approach is taken to the conflict of law rules on matrimonial regimes. Hence, except where the parties choose to submit their “matrimonial regime” to different laws (arts. 3122 and 3111.3 C.C.Q.), or where the court faced with an exceptional situation implements a \textit{depeçage} (arts. 3112 and 3082 C.C.Q.), one law applies irrespective of the nature or location of the parties’ assets.

2. Absence of designation of the applicable law (objective connection)

Based on the principle of proximity, the Code, in art. 3123 C.C.Q., adopts a cascade of alternatives for designating the applicable law:

\begin{verbatim}
Art. 3123. The matrimonial or civil union regime of spouses who have not entered into matrimonial or civil union agreements is
\end{verbatim}

\textsuperscript{20} For example in Chili, Codigo Civil de Chili, art. 135. See also articles 13, 14ff of the Family Code of the Popular Republic of Bulgaria, adopted in 1968 (J.O. no. 23, 23 March, 1968); Articles 116 to 125 of the \textit{Civil Code} adopted in 1968 in U.S.S.R.
governed by the law of their country of domicile at the time of their marriage or civil union.

If the spouses are at that time domiciled in different countries, the applicable law is the law of their first common residence or, failing that, the law of their common nationality or, failing that, the law of the place of solemnization of their marriage or civil union.

The general provisions of Book Ten (Private International Law) of the Code also apply. Thus, pursuant to art. 3082 C.C.Q., the court may apply another law in exceptional cases.

3. Designation of law by marriage contract (subjective connection)

In Quebec, as in most other jurisdictions, couples may enter into marital property agreements. These agreements are referred to in Quebec as “marriage contracts”, and in common law jurisdictions as “domestic contracts” or “pre-nuptial agreements.” Applying the fundamental codal policy of party autonomy, the future spouses have the power to select the law which will govern their matrimonial regime whether or not the chosen law has a connection to the parties or to their present or intended residence, though this is rarely seen in practice.

Furthermore, as mentioned above, nothing precludes a couple from submitting severable aspects of their regime to different laws (art. 3111.3 C.C.Q.). In the absence of an express choice of law, an implicit choice is possible so long as it can be inferred from the terms of the contract. Where designation of the applicable law is neither express nor tacit, however, the law of the state having the closest connection with the matters governed by the matrimonial regime will apply (art. 3112 C.C.Q.).

4. Permanence of the connecting factor: immutability of the matrimonial regime

In spite of the many advantages favouring the principle of mutability\(^1\) the opposing principle of immutability of the regime was chosen by the legislator with the advent of the new Code. This

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is all the more surprising given that the principle of immutability had been abandoned for some time under the domestic rules. Be that as it may, under this principle, subsequent changes of domicile, habitual residence or the common nationality of the spouses (depending on which nexus determined the applicable law), are legally irrelevant to the law applicable to the couple's matrimonial regime.

In exceptional circumstances, a court could require a change in the applicable law (art. 3082 C.C.Q.). The court could, for instance require that a different law apply if, at the time of the solemnization of the marriage, only a remote connection existed to the country whose law is applicable and there existed a much closer connection to the jurisdiction of another state. Additionally, the parties themselves could designate another law to govern their matrimonial regime under the circumstances set forth in art. 3124 C.C.Q.

There can be no doubt that the rigidity of the principle of immutability is the source of recurring problems, such as those arising in the handling of changes in the law governing foreign matrimonial regimes, the question of how to interpret spatially localized foreign matrimonial regimes and the scope of issues to be governed by the rule on matrimonial regimes. Adopting the principle of mutability of the legal matrimonial regime would have eliminated the first two problems in most cases, and led to an honest characterization of certain patrimonial effects of marriage.

5. Modification of the foreign law governing the matrimonial regime

In cases where the matrimonial regime of the spouses is governed by a foreign law, the laws of most jurisdictions adhering to the principle of immutability apply the transitory provisions of the foreign law. Since the trend has been to move from a separation of property regime or its functional equivalent to a community, or partnership of acquests regime or to rules providing for equitable redistribution of assets, the laws usually have retro-

22. It must be noted that these problems are not necessarily limited to matrimonial regimes, and that they apply to all situations where a foreign law is applicable.
spective effect. This means that they usually apply to spouses married prior to the coming into force of the new legislation as well as to those married afterwards. However, under Quebec law, where the rules under the foreign matrimonial regime have a retrospective effect, our courts will apply the transitory provisions as long as the spouses were still domiciled in that jurisdiction at the time the rules came into effect and will not apply the provisions where the spouses had, at the time the new rules came into force, already established their domicile elsewhere. This is an application of the more general doctrine of the “petrification” of the legal situation, which dictates application of the new law, including its transitory provisions, where there exists a close connection between the situation and the foreign legal order at the moment when the new law comes into force. Where there has been a change in circumstances between the time the rights were originally created and the moment when the new law comes into force the newer doctrine, which can be referred to as “relative mutability,” is operative since it now possesses codal authority under art. 3082 C.C.Q.

Although the doctrine of “petrification” is simple enough to apply when changes have occurred in the foreign law governing the matrimonial regime, it often leads to an unjust solution where the spouses had acquired a new domicile prior to the progressive changes in the law governing their matrimonial regime since it cannot be presumed that the parties will be governed by the modern rules of the laws in force in their new domicile. This is one of


the unfortunate consequences of the principle of immutability, since the problem does not arise, or arises differently, under either the doctrine of full mutability which has been adopted in the new Swiss code and in the common law provinces and territories of Canada, and under the doctrine of partial mutability generally adhered to in the United States, for moveable property and under the Hague Convention of March 14th, 1978 on the Law Applicable to Matrimonial Property Regimes.

I submit that where there has been no change in the localization of any of the connecting factors or other circumstances, the application of the foreign transitory rules and the specific foreign law should be determined by the objectives upon which the conflict rule is based. In some situations, the foreign law as it was at the time of litigation should apply while in others, the law applicable at the time the right was created should apply.

6. Autodetermination of foreign matrimonial property regimes

There are an increasing number of statutes, both foreign and domestic, which proclaim that the law of the enacting state shall apply only to transactions, events or persons having certain connections with the enacting state. These inward-looking provisions delineating the scope of application of the statutes create legal headaches for parties, courts and doctrine alike as it involves coordinating the unilateral and multilateral approaches.

Nonetheless, the use of these unilateral rules in substantive statutes is likely to increase in the future. Whether because of increased protectionism, economic competition amongst states, or other reasons, there is today a greater tendency for legislators to

28. See F.K. JUENGER, “Marital Property and Conflict of Laws: A Tale of Two Countries”, (1981) Col. Law Rev. at 1061, for an analysis of problems created when, for example, spouse migrate from a “separation as to property” state in the north-east to a “community property” state in the southwest upon retirement.
29. Article 11, in force in France, Netherlands and Luxembourg.
specify whether a statute is to apply to cases with certain enumerated connections with their state than to enter into the “dismal swamp”31 of the conflict of laws.

Assume for instance that the law of a common law province governing the matrimonial regime of the spouses by virtue of art. 3123 C.C.Q., includes a statutory rule allowing judicial discretion to divide property upon divorce, replacing the previous regime of separate as to property. Let us also assume that the spouses are not able to meet the geographical limitations required under the foreign matrimonial property statutory regime. Should the court apply the statute, ignoring the geographical limitations, or take such limitations into account and apply what remains under that law?

Sometimes there is a “fall-back” solution. Let us assume, for instance, that pursuant to arts. 3123 and 3080 C.C.Q., the spouses are governed by the internal law of the State of California. Section 760 of California’s Family Code32 provides that all property, wherever situated and without regard to which spouse acquired the property during the marriage while they were domiciled in California, is community property. How would a Quebec court partition property acquired after the couple moved to the province of Quebec? California law still applies, and fortunately s. 760 is backed up by other legislation which adopts the concept of “quasi-community”: property which would have been community if acquired while the parties were domiciled in California, but which was acquired while they were domiciled in another state is treated as if it were community property.33

Leaving aside the possibility of a fall-back solution, the general problem with matrimonial property statutes which attempt to specify the scope of application in advance can be illustrated with another example. Assume that the spouses were domiciled and resident in New Brunswick at the time of their marriage in


1997. Pursuant to art. 3123 C.C.Q., the law of New Brunswick governs their matrimonial regime, which is now found in the *Matrimonial Property Act*. Under the terms of s. 44(1) of the Act, the statute applies either where the last common residence of the spouses was New Brunswick, or where one of the spouses maintained his or her residence in New Brunswick. In a proceeding before a Quebec court between spouses now residing in Quebec, a Quebec judge will have to decide whether or not to take into consideration Section 44 (1 of the New Brunswick statute). In the affirmative, the Act will not apply.

Given that Quebec law has generally rejected and now expressly rejects the concept of *renvoi* (art. 3080 C.C.Q.), to the extent that the “self-localizing rule” constitutes a conflict rule (albeit unilateral), it should be ignored and the substantive dispositions of the foreign law should be applied, notwithstanding the expressed intent of the foreign legislator.

I first reflected upon the problem of whether or not a Quebec court should take into account the self-localizing rule under a foreign statute in a broader study of unilateralism in 1983. Admitting that the self-localizing rule was not the kind of broad and bilateral conflict rule that, under Quebec law, should be ignored due to the rejection of *renvoi*, I nevertheless likened it to a unilateral conflict rule and argued that the court should not take it into account. This provided for a more just solution in most cases than taking the self-localizing rule into account, since the new law is presumably superior to the old. In a case comment on *Palmer v. Mulligan* co-authored with Professor Gérald Goldstein, we took the same position, i.e., that the court should disregard the geographical or personal limitation of the foreign law and apply the internal rule rather than recognize the limitation and disregard the rule.

Subsequently, upon resorting to a strict, legal-technical-analysis, and influenced by the views expressed by both Professor

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34. *Matrimonial Property Act*, S.N.B. 1980, c. 9, section 44(1)(a) and (b).
36. Ibid.
Goldstein in his treatise with Professor Groffier\(^{39}\) and in a commentary with Professor J.-G. Castel on the new Code,\(^{40}\) I revised my opinion. I now adhere to the view that the self-localizing rule is part and parcel of foreign internal law and should be taken into account. This will result either in application of the foreign statute (or foreign law in absence of the statute), or in application of another law if art. 3082 C.C.Q. can be invoked, with the understanding that this is not accomplished by renvoi. Unfortunately, while perhaps more theoretically sound, in practice this approach will often result in an unjust situation. The task to find a just solution is daunting.

The jurisprudence in Quebec both supports\(^{41}\) and opposes\(^{42}\) taking the self-localizing rule into consideration. The Honourable Justice Marie-Christine Laberge adopted my original position, and that of Professor Goldstein’s, in *H. (J.S.) v. F. (B.B.)*.\(^{43}\) In that case, Laberge J. disregarded a limitation in an Indiana statute which the court deemed applicable as the law governing the matrimonial regime of the spouses and which provided that the equitable redistribution could only be ordered where at least one of the spouses resided in Indiana for at least six months prior to the commencement of divorce proceedings. She endorsed our view by repeating our statement that:

Il nous apparaît que le rejet du renvoi signifie qu’on ne devrait pas tenir compte d’une règle unilatérale d’applicabilité ou « Localiser » une loi étrangère.\(^{44}\)

There is no question that this approach will usually result in a more just result.\(^{45}\) The technically correct solution, to apply the

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\(^{42}\) Supra, note 13.

\(^{43}\) Ibid., at para. 176.

\(^{44}\) Ibid., at para. 176.

\(^{45}\) Another illustration of the unfairness of the rule occurred in a U.S. Court of Appeals decision in *California Cooler Inc. v. Fred Briggs Distributing Co., Inc.*, unpublished decision, docket no. 92-35016 (8 November 1993), cited as 2 F.3d 1156 (9th Cir. 1993), which affirmed the judgment of a Montana court which had to determine whether or not a California statute, protective of franchisees
self-localizing rule as “internal” law would have meant that the spouses were separate as to property throughout their married life, contrary to the laws in all of the common law jurisdictions and in the province of Quebec, where they were either domiciled or resident.

What is needed is a new approach – one which respects the situation and solutions contemplated by the parties and thus reasonably fulfills their expectations. In fact, this is likely what inspired Laberge J. in *H. (J.S.) v. F. (B.B.)*. In some matters, such as in matrimonial regimes, the court could interpret the self-localizing rule as not being imperative. In other words, a foreign court on this basis could still apply the statute if that is what the parties contemplated. Alternatively a court could invoke art. 3082 C.C.Q. to apply another law if the situation and circumstances warrant it.

Where possible, and within the limits of party autonomy, the parties should avoid the controversy and designate the substantive dispositions of the law instead of the law of the state, in order to avoid the geographical and personal limitations to the application of dispositions of the law or statute that they wish to govern them.

### 7. Effects of the matrimonial regime on third persons

As a general rule, the law so determined applies both to the relations between spouses as well as to third parties, even though they have no knowledge that one or both of the spouses with whom they are dealing is, or are, governed by a foreign matrimonial regime.\(^46\) In the absence of a designation of applicable law, however, a court could under art. 3082 C.C.Q. decide that with respect to the particular relationship involving the third party and one or both of the spouses, another law should apply. This could be the case where, for example, a transaction was concluded between a

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\(^46\) This is the rule under art. 9 of the Hague Convention of March 14, 1978 on the Law Applicable to Matrimonial Regimes, as adopted by the Thirteenth Session in October 1976, published on the internet at: http://www.hcch.net/e/conventions/text25e.html.
third party in State A where the spouses and the third party are now domiciled. However, to implement such a partial depeçage there should be, in addition to good faith, a preponderance of factors which dictate shifting to a law that was contemplated by the third party. This possibility, albeit remote, exists in practice since there is no obligation imposed upon spouses to publish a notice of their matrimonial regime. The only requirement is that there be a notice of the matrimonial regime or change of a regime (arts. 441, 442 C.C.Q.) published at the request of a notary receiving a marriage contract in which the parties have adopted or modified their matrimonial regime.

C. Scope of the law applicable to the matrimonial regime

1. In General

In Quebec private international law, as in the laws of most if not all civil law jurisdictions, a broad scope has traditionally been given to the law governing matrimonial regimes including the following issues and questions:

- The conditions for establishing a matrimonial regime (e.g., marriage, civil union);

- The composition of the patrimony and characterization of assets;

- The organization of the rights, powers and obligations of spouses under the various regimes (e.g. separation as to property, partnership of acquests, community of property or equivalent institutions);

- The opposability of the regime to third parties, and requirements of publicity and sanctions related to the requirements of publication;

- The right of a spouse to have an act of the other spouse annulled, where he or she has exceeded the powers granted by the matrimonial regime;

– Whether there exist any property rights or claims which one spouse may derive against the other spouse as a result of the acquisition by either spouse of property prior to or during their marriage;

– Whether the property rights or claims arise as a matter of law or whether they depend upon judicial discretion or both;

– The causes of dissolution of the regime (e.g., death, modification of regime, judgment of divorce, separation as to bed and board, nullity of the marriage, prolonged absence of a spouse);

– Whether the right to obtain a division of assets or to make a claim may be made on the dissolution of the marriage by death and if so at whether it is transmissible in favour of the heirs of the deceased spouse;

– The moment in time when the effects of the dissolution of the regime are to be determined (immediate or retroactive to the date when the couple ceased to live together)48;

– The rules governing the liquidation of the regime, the consequence of the misappropriation or concealment of assets, partition, its incidents, including the valuation of property and its effects;

– The validity and the enforceability of a conventional renunciation of a division of assets prior to the dissolution of the regime.

2. **Partition or sharing of assets**

Prior to the mid-eighties, when Quebec courts were confronted with traditional “regimes” under a foreign law such as a community of property, partnership of acquests or separation as to property, application of the matrimonial property law was relatively simple. For instance, when the common law jurisdictions did not provide for any rights of spouses to a share in the assets of the other upon divorce, they were considered to be “separate as to

48. In G. GOLDSTEIN and E. GROFFIER, *Droit International privé*, Vol. II, supra, note 25 at 927, the authors state as follows: “Dans le cas de l’article 466 C.C.Q. si les conjoints peuvent demander au tribunal que les effets de la dissolution du régime de la société d’acquêts remontent à la date de la cessation de la vie commune, on cherche à éviter certaines conséquences patrimoniales néfastes à l’un d’entre eux, rendues possibles par la séparation de fait. Il s’agit donc d’un intérêt de fond, lié au régime matrimonial et non d’une incidence procédurale.”
property, as under Quebec’s conventional separation as to property regime.

However, once the common law jurisdictions introduced equitable redistribution and eliminated the functionally equivalent separation as to property regime, Quebec courts began to be confronted with an increasing number of requests by spouses to redistribute assets in an equitable manner pursuant to the laws of an applicable common law jurisdiction, qua regime, even though the concept of “matrimonial regime” was, and still is, officially unknown in the common law and the concept of equitable redistribution is officially unknown in Quebec law.

Similar problems have arisen since 1990, when Quebec courts began to encounter an increasing number of requests to apply the imperative family patrimony rules of Quebec law to spouses married under a foreign matrimonial regime.

In my opinion, conflicts of law arising either from equitable redistribution laws in a common law jurisdiction or from equitable partition of certain assets such as the family patrimony assets in Quebec, should be governed by the law applicable to the “matrimonial regime.” The following paragraphs will take a closer look at these questions, first by examining each separately, then by exploring whether they both may apply.

(a) Conflicts of law arising from equitable redistribution regimes

Back in the mid-seventies, Professor Waters and I argued that from an international perspective, judicial discretion to redistribute assets of spouses is an integral part of the matrimonial regime of a foreign common law system. Nevertheless, in the early cases, the courts refused to exercise the discretion under the lex causae, either by characterizing judicial discretion as “procedural” or by refusing to give effect to retroactive changes in the foreign matrimonial regime (where the spouses had established their domicile elsewhere at the time the new law empowering a

52. Charpentier v. Smith-Doiron, supra, note 49.
court to exercise judicial discretion to redistribute assets came into force). This is what occurred in Palmer v. Mulligan,53 where the spouses were married under the functionally equivalent regime of separation as to property pursuant to the laws of Saskatchewan, their domicile at the time of marriage. After the spouses acquired a Quebec domicile, the Saskatchewan law was modified allowing the court under the Matrimonial Property Act to redistribute assets of the spouses on divorce. Although the Quebec Court of Appeal refused to apply the new legislation because the spouses were no longer domiciled in Saskatchewan at the time of the coming into force of the new Act, in a seminal obiter dicta, the Honourable Justice Louis LeBel (presently of the Supreme Court of Canada) left no doubt as to how such a question should be characterized:

Une législation comme le Matrimonial Property Act intervient à la fois en cas de dissolution judiciaire (articles 21 et 22) et de décès (article 30). Elle permet une intervention judiciaire dans le régime légal ou conventionnel des parties. Elles autorisent le juge à modifier, à l'intérieur de certaines règles, la répartition des biens entre les conjoints, comme par exemple de partager le domicile conjugal entre les époux.

Le régime matrimonial devient alors un ensemble de règles juridiques complexes qui fait place à l'intervention d'une discrétion judiciaire encadrée par les dispositions législatives pertinentes. Dans l'analyse de la notion de régime matrimonial on ne peut faire abstraction de cette possibilité d'intervention judiciaire qui en devient une des composantes essentielles.

La notion de régime matrimonial, en raison de l'évolution législative, comprend désormais une possibilité d'intervention judiciaire pour modifier la répartition des biens des conjoints lors de la dissolution du mariage. Dans la mesure où l'on applique la législation étrangère ou celle d'une autre province, on doit tenir compte de cette législation comme partie du régime matrimonial.54

The jurisprudence following Palmer v. Mulligan expanded this already large scope matters to be governed by the category of matrimonial regimes.55

53. Supra, note 24.
54. Ibid., note 24 at 254.
Once the new Code came into force in 1994 and the legislator adopted a conflict of law rule in art. 3089 C.C.Q. governing effects of marriage, it remained to be seen whether the characterization of equitable redistribution as matrimonial regime would still be retained.

Two recent cases, both rendered by the Quebec Superior Court in 2001, have dealt with the issue: *C.B. v. H.O.*,\textsuperscript{56} decided by the Honourable Justice John Gomery and *H. (J.S.) v. F. (B.B.)*\textsuperscript{57} decided by the Honourable Justice Marie-Christine Laberge. Both Justice Gomery in *C.B. v. H.O.*\textsuperscript{58} and Justice Laberge in *H. (J.S.) v. F. (B.B.)*\textsuperscript{59} affirm that the principle established by Mr. Justice LeBel in *Palmer v. Mulligan* is still valid, from which it follows that equitable redistribution laws in a common law jurisdiction must be part and parcel of a foreign matrimonial regime under Quebec private international law.\textsuperscript{60}

In *C.B. v. H.O.*, since the court accepted the parties’ admission that the legal regime in England was separation as to property (which it was before 1973), not as it is now under the *Matrimonial Causes Act*, the court did not have to decide whether or not to apply the equitable redistribution rules under the Act.

In *H. (J.S.) v. F. (B.B.)*, having determined that the law governing the matrimonial regime of the parties was that in force under the laws of Indiana, the court accepted the proof of the expert witness that it was the equitable redistribution law in force in Indiana that constituted their matrimonial regime, even though the institution of “matrimonial regime” is unknown under that law:

> En vertu de la loi de l’Indiana qui régit le régime matrimonial des parties, le tribunal devra diviser les biens qui ont été acquis avant la séparation des parties.\textsuperscript{61}

\textsuperscript{57} Supra, note 13.
\textsuperscript{58} Supra, note 56, at 26, 27.
\textsuperscript{59} Supra, note 13, para. 139 at 1277. Later in the decision, Laberge J. states “La décision de la cour d’appel dans *Palmer c. Mulligan* reste donc d’actualité en droit international privé avec les adaptations nécessaires que l’adoption du patrimoine familial et sa catégorisation dans les effets du mariage imposent.” Ibid. at para. 150.
\textsuperscript{60} Although the Courts in both *C.B. v. H.O.* and *H. (J.S.) v. F. (B.B.)* were of the view that the family patrimony rules applied to the spouses having their domicile in Quebec.
\textsuperscript{61} Supra, note 13, para. 219 at 1285.
La loi de l’Indiana impose de partager « in a just and reasonable manner ». Il y a présomption que le partage moitié-moitié sera juste et raisonnable. Cette présomption peut toutefois être repoussée notamment par la preuve de la dilapidation des biens.62

C.B. v. H.O. was heard on Appeal63 and the judgment was rendered subsequent to the Superior Court decision in H. (J.S.) v. F. (B.B.). In obiter dicta, André Brossard J.64 expressed the opinion that since art. 3089 C.C.Q. aims precisely at, “les effets, droits et obligations qui résultent du seul fait du mariage, indépendamment de la nature du régime matrimonial,” and that these effects, rights and obligations include, “entre autres, au Québec, le patrimoine familial, la prestation compensatoire, les obligations alimentaires, [et] la somme globale,”65 Palmer v. Mulligan should no longer be applied. It followed, according to Brossard J., that the equitable redistribution rules have nothing to do with matrimonial regime and any similar rules must be governed by the conflict rule relating to effects of marriage.

While Brossard J.’s views remain obiter dicta since no proof was made of the equitable redistribution law in England, with respect his opinion is not in conformity with a proper characterization of the issue from a cosmopolitan perspective requisite under the traditional method in force in Quebec. Should this doctrine be followed, and I hope it will not, Quebec law will have reincarnated the legend of separation as to property as the legal regime in the common law jurisdictions simply because such jurisdictions choose to deal with division of assets differently than Quebec domestic law.

It is useful at this point to comment on another aspect of this case, one which has consequences reaching far beyond the characterization of equitable redistribution laws.

C.B. v. H.O. involved English law, which the parties admitted to be what everyone knew it was not, a legal regime of separation as to property. Neither party chose to make proof of the

62. Ibid., para. 221 at 1285.
64. Ibid.
65. Ibid., at para. 62.
equitable redistribution rules in English law. Since Gomery J. knew very well what constituted the true state of English law, he could have required the parties to prove English law as it is, not as it was. Alternatively, he could have taken judicial notice of the law since foreign law was alleged (art. 2809 C.C.Q.). Refusing to endorse the “conspiracy of silence” or the ignorance of the lawyers, however, Gomery J. took the position that no proof of the foreign law had been made whereupon he applied the legal regime in Quebec of partnership of acquests under Quebec law in lieu thereof under art. 2809 C.C.Q.

The Court of Appeal took Gomery J.’s approach in C.B. v. H.O. to task and overruled him on this point, holding that, in essence, the parties are masters of the case, that foreign law is a fact, and if admitted, it is proven. To make matters worse, Brossard J.A. took the view that Gomery J. should have applied the civil law equivalent of the foreign law of separation as to property, which no longer exists, because that was what was admitted by the parties as constituting the foreign law.

As one can see, the case raises an important issue on proof of foreign law. The Court of Appeal’s decision seems to stand for the proposition that foreign law is a fact because it is proven as a fact. If the parties agree that the regime under law of England is one of a separation as to property, this admission constitutes proof of foreign law, which must be applied by the Court. Gomery J. was obviously uncomfortable with this view and with the admission by the parties of what is clearly an “incorrect” statement of the foreign law. However, to be consistent with this view, Gomery J. could have taken the option suggested above instead of simply applying a partnership of acquests.

Be that as it may, the Court of Appeal’s decision stands for the proposition that foreign law can be proven as a fact, is a fact, and if admitted, constitutes proof of foreign law even if it is clearly

66. “Most common law jurisdictions have adopted some sort of legislation dealing with what is usually described as ‘matrimonial property’ and its division between the spouses in the event of marriage breakdown, but the court does not know the details of such legislation in effect in England, now or at the time the parties were married, nor does it know when such legislation was adopted or how it has been interpreted by English Courts.” Gomery J., C.B. v. H.O., supra, note 56, at 23, 24.
67. Supra, note 56.
68. Supra, note 63.
an incorrect statement of the law. If parties can ignore foreign law by not pleading it, they can admit an incorrect content thereof and this constitutes proof thereof. This surely does not correspond to the legislator’s intent in adopting art. 2809 C.C.Q. Under Quebec law, foreign law is not just a fact to be proven, but rather a mixture of law and fact, and admission of foreign law should not constitute proof of the foreign law.

The preceding diversion on proof of foreign law does not deny the fact that, despite the obiter dicta of Brossard J.A. in H.O. v. C.B., Palmer v. Mulligan is still good law, at least with respect to equitable redistribution. Equitable redistribution laws are part of the law applicable to a matrimonial regime. They are substantive rules even though they involve a court’s discretion, and a Quebec judge should exercise this discretion as would the judge of the lex causae.

While this is an encouraging development, courts applying the foreign equitable redistribution rules might have to take into account criteria which under its own conflict rules are governed by another law. For example, when applying the equitable redistribution rules, qua regime, courts should take into account the needs and means of the spouses (alimentary support) as this factor is often included amongst other criteria in equitable redistribution laws. Where a claim is also made for support, and where this is governed by another law, for instance, the lex fori, the court in determining should take into account what it has decided in applying the law governing the regime. In any event, this last approach constitutes the usual practice in Quebec.

Although Quebec courts have not yet been confronted with the need to determine whether a foreign order equitably redistributing assets is a judgment as to “matrimonial property” or as to “support,” such a problem was submitted to the Court of Justice of the European Communities in 1997 in Boogaard v. Laumen. In Boogaard, the European Court of Justice was called upon to determine whether a decision of the High Court of England of July 25, 1990, which ordered the ex-husband to pay a global sum to his ex-wife was of an alimentary nature, governed by the Brussels-

Lugano Conventions\textsuperscript{70} or whether it was a matter of matrimonial regimes, excluded as such from the Convention. Acknowledging that an English court has the discretion to determine alimentary obligations as well as rights under a matrimonial regime, the court indicated that the judge must clearly distinguish between the aspects of the decision relating to each matter. According to the Court, where the sums given are to ensure the needs and support of a spouse considering the means of the other party, the decision has an alimentary character. Where, on the other hand, the sum awarded simply concerns the partition of assets, the decision concerns matrimonial regimes. Based on this rather simplistic ground for making the distinction, the court decided that the English decision was alimentary in nature. In my opinion, by ordering the husband to pay to his ex-wife the enormous sum of \£875,000, in part by transferring to her a valuable painting and immovable property, the Court essentially ignored the contractual regime of separation as to property and redistributed the assets by means of a questionable characterization.

While the Boogaard decision seems problematic, it illustrates an unfortunate trend whereby courts, under the guise of "functional" characterization, disregard the classical, method of characterization according to the "nature" of the legal question, when they anticipate that they will not otherwise be pleased with the result.

\textit{(b) Conflicts of law arising from Quebec's family patrimony rules}

In light of the traditionally large scope given to the rule on "matrimonial regimes" in Quebec private international law, as reaffirmed by the Court of Appeal in \textit{Palmer} and subsequent decisions, one would have thought that Quebec jurists and courts would characterize conflicts of law arising from the constitution and partition of the family patrimony as matters of matrimonial regime. To this day, however, doctrine remains divided as to the basis for the application of the rules, although practitioners and courts now favour application of the rules to the extent that the conflict rule concerning "effects of marriage" (art. 3089 C.C.Q.) attributes legislative competence to Quebec law \textit{(infra)}.

Currently, there are two approaches. The first consists of identifying the rules as being of necessary application (art. 3076 C.C.Q.). While defensible given the socio-economic interests sought to be advanced by the rules, this method is generally rejected in doctrine\textsuperscript{71} and more recently in the jurisprudence. In \textit{G.B. c. C.C.},\textsuperscript{72} the Quebec Court of Appeal held that even though the family patrimony rules are imperative and of public order, they do not meet the standard of a vital interest, i.e., that all couples in Quebec live juridically under the veil of the family patrimony.

The other approach is the traditional method, which requires characterizing the legal question raised by the potential application of the family patrimony rules. Two schools of thought are advanced and they concern either “matrimonial regime” or “effects of marriage.” While the former submits all aspects of sharing or redistribution of some or all assets of the spouses to the law governing the matrimonial regime, the latter, pursuant to art. 3089 C.C.Q., requires application of the rules to the extent Quebec law is applicable under the cascade of criteria therein set forth.

The thesis favoring the “effects” theory looks principally to the text of art. 3089 C.C.Q. which mirrors the domestic characterization, the commentary of the Minister of Justice,\textsuperscript{73} the discussions in the parliamentary commissions,\textsuperscript{74} the social policy upon which the institution of family patrimony is founded, the location of the domestic rules in the Code, the imperative nature of the rules and the resort to a “functional” basis for characterization which does not take into account the nature of the legal question.\textsuperscript{75}


\textsuperscript{73} Bill 125, C.C.Q. Detailed comments on the draft, Book Ten of Private International Law, arts. 3053, 3144 (first draft).

\textsuperscript{74} \textit{Journal des Débats}, Commissions parlementaires, Sous-commission des institutions, 34e Législature, première session, 28 novembre, 1991, at 1094.

\textsuperscript{75} The following sources support the “effects” theory: \textit{J.P. SENECAL, Le partage du Patrimoine familial et les autres réformes du projet de loi 146} (Montréal: Wilson & Lafleur, 1989) at 13, 27; E. GROFFIER, \textit{La réforme du droit international privé québécois: supplément au Précis de droit international privé québécois},
The “regime” thesis, of which I am probably the principal proponent, insists upon the need to characterize conflicts from an international perspective and in accordance with the true “nature” of the legal question, which essentially is a matter of division of certain assets. It rejects the “functional” characterization of the family patrimony issue as an effect of marriage as nothing short of an escape device, or gimmick, to encourage a healthy homeward trend (as if the matrimonial regime was not an effect of marriage). As for the argument concerning the social goal of the legislation, this is an issue more correctly connected with the identification of the rules as laws of necessary application. With respect to the imperative nature of the rules, there are many jurisdictions which have utilized imperative matrimonial regimes in the past and there exist a few countries which still follow this approach today (e.g. Chile, Argentina). Although the text of art. 3089 C.C.Q. and the Parliamentary debates do not favour this doctrine, I submit that it is still an open question.76 Private international law scholars in Quebec and abroad have also defended this thesis.77 As Professor Ernest Caparros concludes in a recently published seminal article:

Ainsi, en accord avec la qualification proposée par les professeurs Burman, Pineau, Talpis et Glenn, et puisque le patrimoine familial

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77. M. McCAULEY, “La planification financière et successorale depuis l’entrée en vigueur des règles sur le patrimoine familial”, in Le partage du patrimoine familial et ses conséquences juridiques (Cowansville: Éditions Yvon Blais, 1990 at 65; D. BURMAN and J. PINEAU, Le patrimoine familial (Montréal: Thémis,
est un régime matrimonial, il sera plutôt régi par l'article 3123 puisque: “Le régime matrimonial des époux qui se sont mariés sans passer de conventions matrimoniales est régi par la loi de leur domicile au moment du mariage”. En effet, le texte de l'article 3089 ne vise, parmi les effets du mariage, que ceux qui ne relèvent pas du régime matrimonial. La confusion vient peut-être du fait que les régimes matrimoniaux, tout régime matrimonial, est aussi un effet du mariage, car il n'existe qu'entre gens mariés et normalement à compter du mariage, mais on a toujours distingué entre les “effets du mariage”, *stricto sensu*, comme ils viennent d'être décrits (qui eux sont assujettis à la règle de conflit de l'article 3089), et le régime matrimonial qui vise le fonctionnement patrimonial de la famille. C’est dans cette catégorie que doit se situer le patrimoine familial et c’est alors l’article 3123 qui établit la règle de conflit applicable.78

Furthermore, there is an issue conveniently ignored by the proponents of the “effects” theory, which casts doubts upon its utility. When the law governing the “effects” of marriage changes, for instance, where the spouses acquire a new domicile, a dynamic conflict (conflit mobile) will often emerge. Successive laws then apply to the “patrimonial effects of the marriage”, such as family patrimony, equitable redistribution and similar rules, since according to this doctrine they are not “effects” of the matrimonial regime. It simply does not follow that this dynamic conflict should be resolved automatically in favour of the *lex causae*, for instance, the law of the domicile of the spouses, either at the time where the effect is invoked79 or at the time when the effects are *en cause*.80 As such, nothing in the Code leads to the conclusion that, where Quebec law is applicable pursuant to art. 3089 C.C.Q. (for


*Revue du Barreau /Tome 63/Automne 2003* 213
instance, where the spouses had their last domicile in Quebec), the only “effects” of the marriage applicable to spouses are those to be found in the Code and that they apply retroactively to the date of marriage. While in exceptional circumstances, pursuant to article 3082 of the Code a court could resolve the problem in this way I agree with Professors Goldstein and Groffier that a distributive application of successive laws is more equitable and responds best to the interests of the parties.81

As such, under the “effects” theory, the system of partial mutability applies, by virtue of which the law applicable to the “effects” at the time of marriage under article 3089 C.C.Q. applies to the effects until the change in the localization of the connecting factor, for instance domicile, occurs. Subsequently the “effects” under the law of their newly acquired domicile apply. Property acquired by the spouses while domiciled in a certain jurisdiction would be subject to partition pursuant to any family patrimony or equitable redistribution type laws in force in that state. This is referred to as the “wagon” solution:82 Spouses carry with them as many laws which would have governed the effects of their marriage. For each of the corresponding periods, liquidation of the “patrimonial effects” takes place according to different principles. Trying to ensure a cohesive solution is a complex operation, but one which flows necessarily from this doctrine!

This situation was present in H. (J.S.) v. F. (B.B.).83 The court in that case, however, circumvented the complexities involved in applying successive laws governing “effects” in the following way. First, it decided that notwithstanding the subsequent changes of residence, the parties had not changed their domicile in Indiana from the date they were married in 1981 until they acquired a Quebec domicile 17 years later. Having determined that the spouses had established a domicile in Quebec in 1998, the problem of the application of successive laws was resolved by deciding that the only “effects” of marriage to be considered were those of the last domicile. With respect, I think the court erred: while I disagree with the characterization of the family patrimony

83. Supra, note 13.
as an effect of marriage, if one ascribes to that position, then one must apply the successive laws governing “effects.” As a result of the court’s determination of the domiciles of the spouses, the patrimonial “effects” under Indiana law as distinct from “regime” effects should have been taken into account, as well as those governed by Quebec law.

In spite of my continued plea for acceptance of the “regime” thesis, it cannot be disputed that Quebec courts have in most reported cases applied the family patrimony rules to spouses who were domiciled in Quebec at the time of the marriage breakdown, usually giving lip-service to the “effects” theory. In some cases, it made a difference,84 while in others the question was never argued,85 or the parties admitted that the rules applied,86 or the law applicable to the regime also coincided with the law applicable to the effects of the marriage.87 In any event, there are few cases endorsing the “regime theory.”88

(c) Should, or could, both equitable redistribution and family patrimony rules apply?

On the occasion of a divorce in Quebec, what can parties expect when the foreign law applicable to the matrimonial regime provides for equitable redistribution and they are domiciled in Quebec? For example, if the parties were domiciled in Florida at the time of their marriage and in Quebec at the time of their divorce, should a Quebec court apply both the Florida law on equitable redistribution and the Quebec family patrimony rules?

84. For example: G.B. v. C.C., [2001] R.J.Q. 1435 (C.A.); Droit de la famille – 2210, [1995] R.D.F. 569 (C.S.), [1995] R.J.Q. 1513; Droit de la famille – 3271 (28 January 1999), Saint-François, 450-12-018179-970, Toth J. In H. (J.S.) v. F. (B.B.), supra, note 13, and in C.B. v. H.O., supra, note 56, the court adopts the “effects” thesis and applies the family patrimony to spouses domiciled in Quebec at the dissolution of their marriage, although the marriage itself was governed by a foreign matrimonial regime; however, the rationale in both decisions is mitigated by the court recognizing that the equitable redistribution rules of a foreign matrimonial regime still apply.
85. Droit de la famille – 2054, supra, note 5, where in an ex parte decision, Benard J. applies the family patrimony rules to Algerian spouses who were domiciled in and lived in Algeria for over 25 years of their married life, and where the wife had later established her domicile in Quebec.
86. For example see C.B. v. H.O., [2000] R.D.F. 293 (s.c.), supra, note 56.
Using the doctrine set forth by the Honourable Justice Brossard of the Court of Appeal, the legal matrimonial regime in Florida would be interpreted as what everyone knows it is not – a separation as to property. Since equitable redistribution rules and family patrimony rules are effects of marriage, it follows that property acquired by either or both of the spouses while they were domiciled in Florida will be governed by Florida's equitable redistribution law and by Quebec's family patrimony rules with respect to property acquired from the time they established their domicile in Quebec. Furthermore, the right to opt out of any scheme of partition under either the laws of Florida or Quebec, with respect to assets acquired while domiciled in such jurisdiction, will be determined by the law of that jurisdiction. For practitioners and courts alike, this solution is a legal nightmare.

Another possibility would be for the court to apply the equitable redistribution law, of Florida, qua regime and then for assets acquired while domiciled in Quebec, the family property rules, qua effects. This is precisely the position that some judges are now taking. Both Gomery J. in C.B. v. H.O., and Laberge J. in H. (J.S.) v. F. (B.B.) affirm that Palmer v. Mulligan is still good law, and adopt a broad interpretation of matrimonial regime. Nonetheless, they still apply the Quebec family patrimony rules where the spouses were domiciled in Quebec at the time of the proceedings. In essence, they are mirroring the domestic law in an international context. The equitable rules under the regime and the Quebec on family patrimony rules can co-exist, even though governed by different systems of law.

According to Gomery J. in C.B. v. H.O.:

If a person domiciled at the time of his or her marriage in Quebec is entitled to make claims based upon the matrimonial regime such as partnership of acquests, what is to prevent a person domiciled elsewhere at the time of marriage from making multiple claims in the same way?

In H. (J.S.) v. F. (B.B.), Laberge J. states:

(154) Le régime de partage prévu dans une loi étrangère reste donc pour les personnes qu'elle vise un régime matrimonial. Mais les régimes matrimoniaux quels qu'ils soient ne sont plus immuables.

89. Supra, note 63.
90. Supra, note 56, at 302.
Lorsqu'elles deviennent domiciliées au Québec, leur régime matrimonial est modifié par les dispositions qui s’appliquent à tous les époux domiciliés au Québec et auxquelles les régimes matrimoniaux ne peuvent déroger.

L’établissement d’un domicile au Québec a donc pour conséquence d’assujettir des étrangers au patrimoine familial québécois quant au partage de certains biens faisant partie de leur régime matrimonial.91

Subject to the fact that, as discussed above, there is no authority in law or in principle for applying retrospectively the law of the domicile at the time of the proceedings for “effects,” one must nevertheless compliment Justices Gomery and Laberge for their recognition that equitable redistribution or deferred sharing schemes are the functional equivalent of matrimonial regimes in the civil law as chief Justice Lebel had opined in 1985 in *Palmer v. Mulligan*. Be that as it may, from a theoretical point of view, it makes no sense whatsoever to follow *Palmer v. Mulligan* in adopting a broad international definition of matrimonial regimes and then proceed to apply Quebec’s family patrimony rules resulting in the application of different laws to govern the same legal question—partition of assets of spouses. It also goes without saying that the application of multiple laws is a legal nightmare for practitioners both in the planning stage and when litigation occurs.

In my opinion, Laberge J. in *H. (J.S.) v. F. (B.B.*) appears to have stopped short of providing the correct solution when she states:

On aurait pu, dans le présent cas, procéder tout simplement au partage suivant la loi de l’Indiana. En effet, en présumant équitable le partage de tous les biens par moitié en tenant compte de certains critères pondérateurs, la législation de l’Indiana satisfait aux objectifs du partage du patrimoine familial québécois. L’exercice aurait cependant peu de rigueur.92

With respect, the Honourable Justice Laberge should have done what she had suggested was possible and applied the equitable redistribution rules of Indiana, rather than Quebec’s family patrimony rules, as the law governing the matrimonial regime.93

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92. Ibid. at para. 180.
93. Assuming that it was correct to disregard the statutory limitation of the Indiana Act.
The laws of almost all common law jurisdictions now have equitable solutions with respect to the dissolution of a marriage. When one considers the two general purposes served by equitable redistribution schemes, there is clearly no need to impose family patrimony rules in an international situation for parties who have moved to Quebec. More generally, there is no need to have different laws governing the partition of “matrimonial property.”

D. Using marriage contracts to prevent disputes on division of marital property

Due to the continued support of the “effects” doctrine in whole or in part, it is next to impossible under Quebec law for spouses to determine in advance the law that will govern all of their financial rights and responsibilities toward one another in the event of a subsequent dissolution of their marriage. Even though it is possible to designate a law applicable to the regime, it is not currently possible to designate the law applicable to the effects of marriage. Nevertheless, the recent decision rendered by the Supreme Court of Canada in Hartshorne v. Hartshorne94 is a step in the right direction, in supporting the thesis of this paper.

Where the parties have chosen a foreign law to govern their regime, by virtue of which the parties may renounce any partition or equitable redistribution, enforceability will depend upon the law applicable to these matters and public policy. Given the controversy in Quebec on this question, there is no guarantee that the choice of law and renunciation made pursuant thereto will be respected where the parties are domiciled in Quebec at the time of the dissolution of their marriage.

It is therefore important that legal counsel advise the parties of this uncertainty. In choosing a law under which the parties may opt out of any partition, the following clause may serve as a useful preface to the designation of applicable law.

To the extent permitted by the law or laws applicable under the applicable conflict rule of law of any court of a State having jurisdiction over the parties, the parties by these presents expressly desig-

94. The recent Supreme Court of Canada decision in Hartshorne v. Hartshorne, (2004) SCC 22, reinforces the central role of party autonomy in planning for the dissolution of marriage. The decision is supportive of the author’s thesis that all partitions of matrimonial property should be submitted to the law chosen expressly or implicitly by the spouses.
nate the internal law of the State of Texas to govern their matrimonial regime and the validity and interpretation of this contract.

The parties could also provide for alternative provisions should a court not respect their choices. To avoid disputes, the contract should respect the imperative conditions and stipulations required under any law which might be applicable given the intentions of the parties. Should one of the jurisdictions be a common law jurisdiction, the parties who wish to ensure effectiveness of the contract should, at the very least, obtain independent legal advice and be as fully aware as possible of each other’s financial situation.

Finally, problems are sometimes encountered in common law jurisdictions in connection with the enforcement of marriage contracts executed before Latin-model notaries in civil law jurisdictions. Firstly, judges in common law systems usually refuse to acknowledge that the regime of separation as to property under a civil law system is the functional equivalent of a renunciation to a division of assets. Secondly, common law courts do not comprehend the role of the notary in civil law jurisdictions who can, and should, give independent legal advice to both parties. Parties domiciled in Quebec who plan to move to a common law jurisdiction should take certain measures to avoid these problems. The marriage contract should, for example, explain in detail the meaning of the chosen matrimonial regime according to the law of the jurisdiction concerned (e.g., what exactly is meant by the term “separation as to property” in the jurisdiction whose law is being followed). Furthermore, even though the document is received by

95. Hartshorne v. Hartshorne, ibid., reinforces the Court’s refusal in recent years to tamper with marriage contracts. The Respondent wife had been given independent legal advice to the effect that a court would easily find the contract at issue unfair and that such contract would not stand up in court. Respondent’s lawyer had strongly recommended that her client should not sign the agreement in its present form. In a 6 to 3 ruling, the Supreme Court granted the appeal, concluding that the future spouses knew what they were doing when they signed the deal. According to the Honourable Mr. Justice Bastarache, “...in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of their marriage, courts should be reluctant to second guess their initiative and arrangement, particularly where independent legal advice has been given”, ibid., at para. 67. Although this case originated in British Columbia, the underlying foundation supports the thesis presented in the present paper that the courts should endeavor to enforce that regime or set of rules which the parties understood, at the time of the marriage, would govern their matrimonial matters.
a Quebec notary who, by law, must explain the rights and obligations to both parties in an impartial manner, each party should also have obtained additional independent advice and a clause stipulating this requirement should be included in the contract.

CHAPTER TWO: THE UNIFORM LAW CONFERENCE OF CANADA’S MODEL ACT ON UNIFORM JURISDICTION AND CHOICE OF LAW IN DOMESTIC PROPERTY PROCEEDINGS

The goal behind the creation of the Uniform Act was laudable. In a detailed review and explanation of the proposed legislation, the British Columbia Law Institute captures well the spirit of the Act’s intent in the following statement (quoted also at the outset of this paper):

Family property law should be as simple and clear as possible. Ideally the division of assets should be governed by a simple body of legislation and the codes for choosing that legislation should be transparent and easy to understand.

The formal purpose of the Act is stated in a preliminary comment in the draft:

This legislation sets out uniform principles to decide (a) when a court has jurisdiction to hear a dispute that concerns domestic property, (b) when a court that has jurisdiction should decline it, and (c) the selection of the territory whose law is to govern the disputes. The legislation applies where the dispute involves more than one Canadian territory as well as where it involves Canadian and non-Canadian territories.

Unfortunately, the highly desirable goal of harmonization and simplification of rules which gave rise to the Act is not at all,

96. At its annual meeting in 1997, the Uniform Law Conference of Canada, adopted a uniform Model Act setting out jurisdiction and choice of law rules for what is referred to as “domestic property proceedings.” In that the Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act [hereinafter Uniform Act or, simply the Act] represents a legislative attempt to harmonize and simplify various rules relating to matrimonial property, a close and critical review of the key provisions of the Uniform Act is in order. The Uniform Act was published by the Uniform Law Conference of Canada in the proceedings of its 1997 Conference. The full text of the Act is provided on the Uniform Law Conference of Canada website at http://www.ulcc.ca/en/us/ (choose “Jurisdiction and Choice of Law in Domestic Property Proceedings”).

97. Supra, note 1.
in my opinion, well-served by the final version of the *Uniform Act*. The primary purpose of this Chapter is to explain why this is so. Hence, after providing a brief outline of those provisions of the *Uniform Act* which are most relevant to the topic of the present paper, I will present a detailed critique of these provisions.

A. The *Uniform Act* rules

1. Definitions and presumptions

The Act sets forth various definitions and presumptions in section X.1 (1).

Firstly, it states that:

“regime of community of property” means any regime of domestic property which is imposed by law and which

(a) determines the extent to which each spouse has rights in and over all or certain of the domestic property owned by the other spouse during the marriage, and

(b) provides for the sharing of domestic property on the break up or termination of their marriage and includes a regime of partnership of acquests, but does not include

(c) a regime of separate property, or

(d) a regime under which rights in or with respect to domestic property are deferred until, or after, the occurrence of an event signifying the break up or termination of the marriage.

“domestic property” means real property or personal property wherever located owned by the plaintiff or defendant separately or as co-owners acquired by them before or during their marriage,

“domestic property proceeding” means a proceeding brought in connection with an application for (a) a division of, (b) compensation in lieu of, or for foregoing, rights in, or (c) a declaration as to rights in domestic property,

“marriage” includes any relationship involving cohabitation that is recognized under the law of the territory selected under the internal law of the territory selected under ss. X.6, X.7 or X8 that governs domestic property rights on the break up or termination of the relationship,
Section X.1 (2) stipulates that “parties do not have a common habitual residence in a territory while they live separate and apart in the territory.”

2. Jurisdictional rules

Sections X.2 to X.5 deal with jurisdiction and are patterned after the *Uniform Court Jurisdiction and Proceedings Transfer Act* (hereinafter *UCJPTA*). The *UCJPTA* provides comprehensive rules for determining when the courts of a province or territory may take jurisdiction over a particular proceeding. They attempt to provide criteria which the courts should follow in order for the full faith and credit principle to apply in the Canadian context for international jurisdiction. Section X.3 deals with territorial competence rules and is based on *UCJPTA*, s. 3. Section X.5 is based on *UCJPTA*, s. 11, and restates the doctrine of *forum non conveniens*. Section X.9 incorporates the techniques routinely used by Canadian courts for arriving at a fair division of property when some of the domestic property is located outside Canada.

(a) Territorial competence: definition and rules

Section X.2 states that

the territorial competence of the Court in a domestic property proceeding is to be determined solely by reference to this part.

And section X.3 states that,

The Court has territorial competence in a domestic property proceeding that is brought against a defendant only if

(a) the defendant has instigated another proceeding in the court to which the domestic property proceeding is a counterclaim;

(b) during the course of the domestic property proceeding the defendant submits to the court’s jurisdiction;

(c) there is an agreement between the plaintiff and the defendant to the effect that the court has jurisdiction in the domestic property proceeding;

(d) either the defendant or the plaintiff is habitually resident in [enacting province or territory] at the time of the commencement of the domestic property proceeding, or

(e) there is a real and substantial connection between [enacting province or territory] and the facts on which the domestic property proceeding against the defendant is based.

(b) Discretion in the exercise of territorial competence

As mentioned above, s. X.5 is patterned on the UCJPTA s. 11 and restates the doctrine of forum non conveniens.

X.5 (1) After considering the interests of the parties to a domestic property proceeding and the ends of justice, the Court may decline to exercise its territorial competence in the domestic property proceeding on the ground that the court of another state is a more appropriate forum in which to try the domestic property proceeding.

(2) The Court, in deciding the question of whether it or a court outside [enacting province or territory] is the more appropriate forum in which to try a domestic property proceeding, must consider the circumstances relevant to the domestic property proceeding, including

(a) the comparative convenience and expense for the parties to the domestic property proceeding and for their witnesses, in litigating in the Court or in any alternative forum;

(b) the law to be applied to issues in the domestic property proceeding;

(c) the desirability of avoiding a multiplicity of legal proceedings;

(d) the desirability of avoiding conflicting decisions in different courts;

(e) the enforcement of an eventual judgment; and

(f) the fair and efficient working of the Canadian legal system as a whole.

(c) Property Located Outside Territory

The Act in section X.9 allows the court to effectively deal with the situation where property is located outside its territory. It provides:
X.9 (1) A court with territorial competence to entertain a proceeding relating to domestic property may dispose of all issues relating to ownership and division of the domestic property.

(2) Where the court has territorial competence to entertain a proceeding relating to domestic property, some of which is located outside (enacting province or territory), the court may

(a) reapportion entitlement to domestic property within (enacting province or territory) to compensate for rights in domestic property located outside (enacting province or territory),

(b) order the party who has legal title to domestic property located outside (enacting province or territory) to pay compensation to the other party in lieu of division,

(c) make an order in connection with the domestic property located outside of (enacting province or territory) that is enforceable against the party that owns the domestic property, including an order preserving the domestic property, respecting possession of the domestic property or requiring the owner to convey or charge all or part of the owner’s interest in it to the other party, or

(d) if the internal law of the territory in which the domestic property is located allows for the recognition and enforcement of an order for non-monetary relief made by a court of another territory, make an order for non-monetary relief.

3. Choice of law rules

(a) Contract

Section X.6 sets forth the only choice of law rule governing a marriage contract:

X.6 (1) If the plaintiff and defendant entered into a contract, either before the formation of, or during their marriage, that specifies how domestic property is to be divided in the event of the break up or termination of their marriage, their rights in domestic property are determined by the contract.

(2) The contract referred to in subsection (1) is enforceable subject to the internal law of the territory determined in accordance with section 8.

(b) Absence of contract

There are two separate conflict rules applicable in the absence of a contract.
(i)  Marriage and Community of Property

Section X.7 sets forth the first conflict of laws rule under the heading “Marriage and Community of Property.” It states:

X.7 Subject to section X.6, if the internal law of the territory in which the plaintiff and defendant first had a common habitual residence during their marriage provides that some or all of their domestic property is held in a regime of community of property, then regardless of change of residence, their rights in the domestic property that is subject to the regime of community of property on the break up or termination of their marriage are determined by the internal law of that territory.

The rule is supposed to accommodate the conflict between the civil law policy of immutability, which looks to the beginning of the relationship and the common law policy of mutability which looks to the end of the relationship.

(ii)  Choice of law Rules: Proper Law of the Marriage

Section X.8 states the second conflict of laws rule, under the heading “Choice of law Rules: Proper Law of the Marriage.” It states:

X.8 (1) Subject to sections 6 and 7, substantive rights of the plaintiff and defendant in a domestic property proceeding are determined by the internal law of the territory where the parties had their last common habitual residence.

(2) If the territory selected by the application of subsection (1) is located outside Canada and is not the territory most closely associated with the marriage, the substantive rights of the plaintiff and defendant in a domestic property proceeding are determined by the internal law of the territory that is most closely connected with the marriage.

(3) If there is no place where the parties had a common habitual residence, substantive rights of the plaintiff and defendant in a domestic property proceeding are determined by the internal law of the territory where the plaintiff has habitually resided.

As a result, absent a contract (section X.6) and a community property regime (section X.7) this section of the Act adopts the principle of the mutability of the matrimonial regime for all domestic property and ipso facto the family patrimony rules of...
Quebec, if Quebec were to be the last common habitual residence of the spouses.

**B. Comments from the perspective of Quebec law**

From the perspective of Quebec law, the Uniform Act contains some very positive elements, such as the expanded definition of marriage, which allows for the application of Quebec’s civil union, as well as foreign institutions that would be characterized as such under its conflict of law rule (article 3190 C.C.Q).\(^{99}\) Other useful aspects of the Act include its endorsement of the expression “regime” to describe the deferred sharing schemes in the common law provinces, submission by forum selection clause for matrimonial regimes, and the integration of the current techniques to ensure that the location of assets outside the enacting province or territory does not frustrate the objectives of the Act, to ensure a complete resolution of the issues. All of these elements are in line with the international character of the Code.

Notwithstanding these positive elements, however, there are numerous reasons why the Act cannot be said to be an improvement upon what is needed in Quebec.\(^{100}\)

First, insofar as the Territorial Competence Rules are concerned, although s. X.3, paragraphs (a) and (d) correspond to Quebec law and are satisfactory and paragraphs (b) and (c) actually constitute an improvement on Quebec law since the latter does not provide for submission to jurisdiction, there is no respect for a forum selection clause which has the effect of choosing the courts of a foreign jurisdiction. In my opinion, this is a serious omission.\(^{101}\) Additionally, even though the Quebec rules are based on a real and substantial connection with the forum, the notion’s materialization in the Act (s. X.3 (e)), while acceptable in an interprovincial context as a constitutional imperative, is not pertinent in an international context in Quebec. The Supreme Court of Canada recently made this clear in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*\(^{102}\)

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100. And in my opinion in the other Canadian Provinces and Territories as well.


Concerning the Act’s provisions relating to forum non conveniens (s. X.5), the provisions increase uncertainty, despite the inclusion of certain criteria indicated in the Act, and this is not favourable to the interests of the parties. A better solution would have been to exclude the doctrine in certain situations and, where it applies, to follow an exceptional forum non conveniens doctrine of the kind which has generally been followed by the Quebec courts since Spar Aerospace.103

Second, the Act proceeds on the basis of the understanding that all of these issues are only pertinent in the context of litigation. Terms such as “plaintiff” and “defendant” are employed throughout rather than neutral expressions such as “spouse” or “spouses.”

Third, the “domestic property” giving rise to rights under the Act’s flawed definition of community of property, which targets property owned by a spouse and, inter alia, immovable acquired prior to marriage and partnership of acquests which is included in the regime of community of property (and which targets, inter alia, all property acquired before marriage) illustrates a complete lack of understanding and comprehension of both regimes in Quebec law.104 Be that as it may, aside from the property affected, except for certain incidents of the Quebec partnership of acquests regime (e.g. necessity of consent of a spouse for the other to dispose of his or her acquests inter vivos by gratuitous title, art. 462 C.C.Q., that a conventional change of regime is also a triggering event for partition of the acquests), that which is described and defined in s. X.1(1)(d) as being excluded from the regime of partnership of acquests is, in essence, the Quebec regime of partnership of acquests. Since the Act provides for a separate rule, presumably to accommodate Quebec law, it could have simply provided that if the law of the first habitual residence is in Quebec, then in absence of a contract, that law applies.

Fourth, the Uniform Act attempts to address Quebec’s interests by adopting in s. X.7 its policy of the permanence or immuta-

103. Ibid. See also: J. TALPIS and S. KATH, “The Exceptional as Commonplace”, supra, note 6.
104. This distortion of Quebec law is not diminished by the comment to the definitions section, which provides: “Once this Part is placed in the context of domestic property legislation of the enacting province or territory, which will have its own set of definitions, many of the definitions may be unnecessary or require fine tuning.”
bility of the matrimonial regime and application of the law of the habitual residence at the beginning of the relationship, but only where the first common habitual residence is in the province of Quebec and domestic property is held under a regime of community as to property. In all other cases, the Act adopts in s. X.8 the principle of mutability, i.e., the law of the last habitual residence. In spite of my disagreement with Quebec’s policy on immutability, it is certainly not limited to cases where the first habitual residence is in the province of Quebec. The permanence of the connection for matrimonial regimes is a bilateral, not unilateral, matter in these conflicts.

Fifth, s. X.8 (2) provides for the situation where the last habitual residence is located outside Canada, and is not the territory most closely associated with marriage, in which case the applicable law is that which is most closely associated with marriage. I see no reason to make separate rules depending upon whether the habitual residence is within or outside of Canada. If the place of the last habitual residence is pertinent, and I agree that it is, then why should it not be relevant when it is located outside of Canada?

Sixth, s. X.8 (3) concerns the situation in which the parties had never established a habitual residence, in which case the law of the last habitual residence of the plaintiff applies. In my opinion, this rule is unfair, leads to forum shopping, and is inferior to the rule in the Code (art. 3123 C.C.Q.).

Seventh, I also disagree with the definition that requires parties to be living under the same roof in the territory to have a common habitual residence therein. Choice of law is predicated on the closest connection of the spouses to the state, not to each other. As such, whether or not the parties live under the same roof should not be a pertinent consideration in determining the applicable law.105

105. In the common law jurisdictions, the phrase “common habitual residence” has been interpreted to mean “the place where the spouses most recently lived together as husband and wife and participated together in everyday family life.” Pershadsingh v. Pershadsingh (1987), 9 R.F.L. (3d) 359, 361 (Ont. H.C.); Adam v. Adam (1994), 7 R.F.L. (4th) 63, 67 (Ont. Gen. Div.), confirmed on appeal (1996) 65 A.C.W.S. (3d) 756 (Ont. C.A.). This phrase is intended to reach cohabitation as well. Section X.1(2) of the Act confirms the same intent.
Eight, there is no provision permitting the parties to designate a law to govern their “matrimonial regime,” i.e., the issues within the scope of the Act. This important tool for preventing disputes as to the applicable law and for ensuring predictability should have been included in the Act. Its omission is, in my opinion a serious flaw, especially given that the Act allows for a choice of court agreement, albeit only to the court of the province or territory seized of the matter (S.X.3.(c)). As a result, the conflict rules in each province or territory will determine not only the validity of the contract but the validity of a choice of law agreement to govern “the domestic property proceeding” or “matrimonial regime” and the applicable law in the absence of choice. To the extent that the law applicable to a contract allows for the division of domestic property, then pursuant to s. X.6 (2), enforceability of the contract will still be subject to the provisions of a law unknown to the parties when they enter into the contract, i.e., the law of the parties’ last common habitual residence, which might allow a court to inquire into the fairness of the contract. Where Quebec law governs the contract, any agreement relating to the partition of the family patrimony assets which are “domestic property” will be null under the “regime” thesis and equally null, or unenforceable, under the Act or “effects” theory if the spouses had their last common habitual residence in Quebec.

Ninth, nothing in the Uniform Act addresses the problem, discussed above, of the spatially localized rules of a foreign designated “internal law.” How will a court of one province deal with the geographic or other conditions found in another provincial or foreign law which must be met before it is deemed applicable?

Lastly and most significantly, as a result of the combined application of ss X.6, X.7 and X.8, the Uniform Act fails in its quest to adopt simple uniform rules allowing for a division of assets to be governed by a single body of law, and is no better than current Quebec law in this regard.

For all of the above reasons, this Act cannot be said to constitute an improvement upon the law in force in Quebec.

A far more interesting uniform law is the Hague Convention of March 14, 1978, on the Law Applicable to Matrimonial Property Regimes, mentioned above, which came into force on September 1, 1992, but which the committee found unacceptable for Canada,
without reasons. It is, in my opinion, an excellent Convention which should be given serious consideration by the Canadian authorities. In particular, the Convention contains very good solutions for many of the problems discussed in this paper. For example, it attributes an important role to party autonomy, avoids local, narrow characterizations, includes a rule for the effect of the matrimonial regime on third persons and adopts the principle of immutability of matrimonial regimes at the outset, together with mutability where the spouses have resided in a new jurisdiction for at least 10 years, and finally ensures that in most cases one law will apply to a division of the assets.

CONCLUSION

Quebec courts have responded to the international outlook in Book Ten of the Code in commercial matters through the rejection of the homeward trend, that is, through a more liberal recognition of foreign judgments. It is time now to apply the same approach to matrimonial property in an international context. Aside from the rules under Islamic law, there is always some mechanism in the law of each country which is available to provide for a fair sharing of assets and if not, escape devices can be used in exceptional circumstances. In the increasingly globalized world in which we live and have our families, courts should follow the legislative directive to the effect that the application of Quebec law is neither always necessary nor appropriate.