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PILAGG in Practice: Two Examples of Concrete Steps

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Reconceptualising private international law as an instrument for global governance presents numerous challenges.[1] Whereas the historical and theoretical pedigree of the field may offer avenues for a new breed of private international law, the current state of positive law presents serious obstacles for even a moderate reassessment of the means and ends available. The idea that transnational activity and behaviour that has escaped the regulatory reach of state law can be accessed through a newly configured private international law presents an attractive alternative to the typical call for the development of international regimes. The disadvantage of the latter, beyond the lack of practical success, is the sacrificing of legitimate local priorities on the altar of globalization. Private international law imagined in a global governance mode underscores the field's function in allocating state authority over transnational activity, taming the recognized effects of globalization rather than succumbing to them.

The first serious obstacle to this transformation of private international law lies in the current conception of the field. From the perspective of most western state legal systems, private international law is essentially domestic law, either an autonomous branch or one tied to various branches of private law or procedural law. In this sense, each state determines for itself how to deal with transnational activity (be it economic or personal): whether to give effect to party autonomy in international commercial contracts, whether to recognize foreign adoptions by same-sex partners, whether to respect foreign banking secrecy laws, etc. Such a stance is inherently paradoxical, of course, since the treatment of transnational activity cannot, by definition, have exclusively internal effects. The very object of private international law's attention implies legal externalities, in the sense of a spill over effect, whether real or potential, into other jurisdictions and other state laws. A foreign adoption not recognized locally does not cease to have effect in its place of origin or in other states that would or will recognize it. Forcing disclosure of banking information against a prohibition in force where the information is held effectively disables the foreign prohibition. The same could be said of giving effect to a choice of law clause between foreign commercial parties whose home jurisdiction would not do the same.

Two responses to this paradox are readily apparent. One is for states to agree on the allocation of authority such that any eventual externalities are accepted in advance. For example, if states agree that the capacity to adopt is governed by the law of the adopter's domicile, the fact that some foreign adoptions will not be recognized in other contracting states will be admitted. The Hague Conference on Private International Law has had some success with this type of response on a global level[2] while the European Union has also been able to devise regional solutions to the

* McGill University.

[1] On Private international law as global governance see the seminal text by H. Muir-Watt, "Private International Law Beyond the Schism" (2011) 2(3) Transnational Legal Theory 347 [*Muir-Watt*].

[2] See generally www.hcch.net, and its successful record in the area of international family law including custody, adoption and protection of children.

conundrum of domestic rules to govern transnational legal relations.[3] But agreements of this type are only partial and address circumscribed questions over which consensus can be reached. Without minimizing these initiatives, they do not reflect an overarching methodological or theoretical renewal in terms of regulating what Muir-Watt calls "the transnational exercise of private power".[4] A second potential response, therefore, is to reimagine how transborder economic actors can be subject to regulation or at least to scrutiny by democratic or other legitimate sources of oversight, and to do so without calling for the creation of a formal supranational institution either to create applicable norms or be charged with their enforcement. Indeed, as the project of private international law as global governance has suggested, the objective is not to claim the field occupied by public international law in its traditional form, but rather to harness the theories and methods of private international law to meet the challenges exacerbated by globalisation in the past few decades.

The purpose of this contribution is to look for some indicia of movement in private international law that could be interpreted as furthering the broad aims of the private international law as global governance project. The objective is to consider concrete examples of proposed changes to private international law that may be explained or understood as contributing to that objective.

The two specific examples examined are quite distinct in source and in nature. The first relates to jurisdiction over civil claims brought against corporations for wrongs committed outside their home jurisdiction. Two actual cases brought before courts in Quebec (Canada) illustrate the challenge faced by foreign plaintiffs seeking recourse against multinational corporations. The twin discretionary tools of *forum non conveniens* and *forum necessitatis* can we wielded by corporate defendants to avoid accountability even in legitimate and appropriate fora, leaving aggrieved victims with no real access to justice. A set of jurisdictional guidelines recently adopted by the International Law Association proposes to tailor these discretions to the particularity of these civil claims for breaches of what amount to fundamental human rights. By stretching or narrowing existing jurisdictional rules and practices, the ILA Guidelines would move private international law in the direction of greater global governance. The two Quebec cases usefully illustrate how the ILA Guidelines would function in practice to achieve a result more consonant with the global governance project.

The second example comes from the realm of choice of law, the other classical branch of private international law. This example also relies on a recently developed proposal from an established institution to suggest a similar move towards greater awareness of the global governance potential of private international law. Looking to the proposed Hague Principles on Choice of Law in International Commercial Contracts, this paper will suggest that the extension of party autonomy to designate non-state rules to govern contract disputes brought before state courts can be interpreted as a turn toward global governance. While this may seem paradoxical, given how party autonomy is rather seen to defy governance opportunities, the argument posits that this new opening will challenge the current monopoly enjoyed

[3] The plethora of regulations in the private international law field is ready evidence of this. For an up-to-date and concise review see M. Bogdan, *Concise Introduction to EU Private International Law*, 2nd ed. (Europa Law Publishing, 2012).
[4] Muir-Watt, *supra* note 1.

by international arbitration, which in itself would be a step in the direction of greater global governance over transnational economic actors.

1. Jurisdiction and the potential for PILAGG

Looking closely at two Quebec decisions involving foreign corporate activities reveals the extent to which current approaches to jurisdiction in private international law can allow transnational actors to avoid accountability or to limit their exposure in what they may perceive to be high risk jurisdictions in terms of likely liability.

The earliest case, *Cambior*,[5] dates back to an environmental disaster that occurred in 1995, at a gold mine in Guyana. The mine was operated by Omai Gold Mines, a Guyanese corporation, majority-owned and largely controlled by the Quebec corporate defendant. According to the claim, following a collapse of the dam on the tailing pond, over 2 billion litres of contaminated water flowed into two rivers, one of which was a primary source of fresh water and a major means of transportation.[6] The Guyanese government established a commission to enquire into the cause of the spill. The commission's conclusion was that negligence in the construction of the dam was to blame. It also considered that Omai Gold Mines was responsible for the damage caused since the major contaminant involved was cyanide, a component used in the mining operations.[7]

Instituting a claim against Cambior in Quebec had two significant procedural advantages: (i) as Cambior was a Quebec corporation, jurisdiction over it was easily established under Quebec's private international law rules; in addition, (ii) the claim could be framed as a class action, thereby allowing the 23,000 affected Guyanese to sue collectively, represented by a public interest group acting on their behalf.[8] In contrast, two potentially important obstacles stood in the claimants' way. They had chosen to sue Cambior, the majority shareholder of the party primarily responsible for the spill. To succeed in this claim, the plaintiff would have to convince the court to "pierce the corporate veil" or that Cambior was directly involved in decisions concerning the operation of the mine and therefore directly liable for the consequences of any negligence in those operations. The second obstacle was closely tied to the jurisdictional issue. While there was no doubt that Cambior was subject to the jurisdiction of the Quebec court given its domicile in the province, the defendant was in a position to invoke the *forum non conveniens* discretion of the court given the numerous and significant connections between the case and Guyana. A decision to dismiss the case on jurisdictional grounds would release the court from

[5] *Cambior v. Recherches internationales Québec*, J.E. 98-1905 (Sup. Ct.), [1998] Q.J. (Quicklaw) No. 2544 (Superior Court). The case was not reported in official journals. For a detailed consideration of the case see J.A. Talpis & S.L. Kath, "The Exceptional as Commonplace in Quebec *Forum Non Conveniens* Law: *Cambior*, a Case in Point" (2000) 34 Revue Juridique Thémis 761.

[6] Report of Commission of Inquiry into Discharge of Cyanide and Other Noxious Substances into the Omai and Essequibo Rivers, 5 January 1996, p. 55, written and published by the Commission of Inquiry, as cited in Talpis & Kath, *ibid*. at p. 818-9.

[7] *Ibid*.

[8] "Recherches Internationales Québec" was created for that purpose; a web search of the group suggests that this was a single purpose public interest group since no other activity is discernible.

having to decide the liability issue altogether, including whether Cambior could be held responsible for the actions of Omai Gold Mine in Guyana.

The defendant's appeal to the court's discretion over the exercise of its otherwise established international jurisdiction in the case was straightforward. Indeed, besides the location of the defendant's seat in Quebec, it did appear that virtually all of the elements connected to the case, including the parties directly involved, were situated in Guyana where the negligence had allegedly occurred, where all of the damage had been suffered, and where any reparation would have to take place. Moreover, under Quebec's choice of law rules, the law of Guyana would likely have governed the substance of the claim. Still, the jurisdictional basis in Quebec was not artificial or trivial; after all, the principle *forum actoris* is one of the cornerstones of the law of international jurisdiction across legal systems. A defendant sued at home cannot honestly complain of surprise or unfairness.

Still, in those jurisdictions where *forum non conveniens* is available to challenge the exercise of jurisdiction by an otherwise competent court, a legitimate connection to the defendant is typically not sufficient to defeat a request to decline jurisdiction if another forum is more appropriate. The key is then what elements go to determining the appropriateness of the defendant's preferred alternative foreign court.

Historically, Quebec courts had no discretion to decline jurisdiction where it was established under the applicable rules of the Code of Civil Procedure.[9] Since 1994, however, with the coming into force of a new code, the doctrine of *forum non conveniens* was introduced within a complete reform of private international law, comprehensively codified in the Civil Code of Quebec. The Code prescribes a series of jurisdictional bases, grounded largely on connections with the defendant or with the action, to which was added a new discretion to decline that jurisdiction "on application by a party". In such a case, Article 3135 C.C.Q. provides that a Quebec court can accede to a request to decline jurisdiction "if it considers that the authorities of another country are in a better position to decide". The Civil Code does not prescribe any further criteria for making that evaluation. Courts in the province have thus been required to elaborate a methodology to address the exercise of their jurisdictional discretion.

To assist courts in the interpretation and application of Article 3135 C.C.Q., counsel in Quebec initially resorted to referring to judicial decisions from Canadian common law provinces, notably a seminal Supreme Court of Canada decision from 1993.[10] The Canadian common law version was largely borrowed from English law,[11] where the

[9] See generally G. Saumier, "*Forum Non Conveniens*: Where are we Now?" (2000) 12 Supreme Court Law Review 121; republished in *Ruled by Law* (Markham, Ont.: Butterworths, 2003).

[10] *Amchem Products Inc. v. C.-B.*, [1993] 1 S.C.R. 897. For a discussion see G. Saumier, "Judicial Jurisdiction in International Cases: The Supreme Court's Unfinished Business" (1995) 18 Dalhousie Law Journal 448.

[11] The Supreme Court of Canada crafted its own version, simplifying the inquiry and jettisoning some of the procedural particularities that had evolved in the English courts. For example, the contours of the doctrine under English law evolved within the context of the rules of court that required an ex parte leave application to serve a defendant abroad. It was essentially only where the defendant was served in England that the *forum non conveniens* doctrine applied and could be invoked by that defendant to defeat what was otherwise a strong basis for jurisdiction "as of right". Canadian common law provinces had largely abandoned the leave requirement, such that the doctrine could be invoked whatever the basis on which the defendant was brought before the court. Moreover, in reviewing the doctrine's

doctrine had traditionally involved identifying "the forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice".[12] This language continues to be relevant in the Canadian common law provinces and has in fact been included in recent legislation on international jurisdiction in those provinces that have moved to a statutory model.[13] Still, the criteria used to assess appropriateness are largely based on concrete factual connections between the proceeding and the jurisdictions involved, in addition to juridical elements such as the applicable law and any potential difficulties relating to recognition and enforcement of an eventual judgement. Rarely is the "ends of justice" considered to involve broader questions of access to justice or necessity, except perhaps in the evaluation of any juridical advantage said to accrue to one of the parties in only one of the competing jurisdictions. Courts have considered that remedies exclusively available in one forum or longer limitation periods are relevant to the evaluation of a forum's appropriateness under the rubric of "juridical advantage"[14] which could be of assistance to foreign plaintiffs seeking to proceed in a Canadian province perceived to be procedurally or substantively more attractive than their home jurisdiction.

Interestingly, references to the "ends of justice" or to "juridical advantage" do not appear to have survived the transplant of the doctrine or its judicial interpretation in Quebec. One reason for this may be the particular condition of exceptionality included in article 3135 C.C.Q. that has no obvious counterpart in the common law doctrine. In the common law provinces, the party seeking the stay must demonstrate that the alternative forum is "clearly more appropriate" while in Quebec that same party will have to argue that the case is sufficiently "exceptional" to justify the exercise of the court's discretion to decline to hear the dispute. While the former condition involves a weighing exercise, the latter calls for a restrictive interpretation of the discretion, militating against a declaration that the Quebec court is *forum non conveniens*. While the exceptionality condition was largely ignored in the early days of the new Code, the Supreme Court of Canada underscored its importance in its first case dealing with article 3135 C.C.Q. and since then success on a *forum non conveniens* application has indeed become exceptional in Quebec.[15]

Another explanation for the lack of reference to the "ends of justice" may be the existence of article 3136 C.C.Q. (which will be discussed more fully below) that introduced a jurisdiction of necessity into Quebec private international law. This free-standing jurisdictional basis specifies that it is available "where proceedings cannot possibly be instituted outside Quebec" or where that "cannot reasonably be

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applicability under Canadian common law, the Supreme Court insisted on the requirement of "appropriateness". See Saumier, *ibid.*

[12] See Saumier, *ibid*.

[13] The *Court Jurisdiction and Proceedings Transfer Act* – elaborated by the Uniform Law Conference of Canada – is currently in force in British Columbia, Saskatchewan and Nova Scotia, and introduces the jurisdictional discretion in the following terms: "After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding." For a presentation and discussion of the CJPTA see V. Black et al., *Statutory Jurisdiction: An Analysis of the CJPTA* (Toronto: Carswell, 2012).

[14] See Black et al., *ibid*. at 211-12.

[15] The case was *Spar Aerospace Ltd. v. Amercian Mobile Satellite Corp.*, [2002] 4 S.C.R. 205. For an earlier complaint about Quebec courts' enthusiasm for their new found discretion, see Talpis & Kath, *supra* note 5. For the current state of the doctrine in Quebec law see G. Saumier, "Le *forum non conveniens* au Québec : bilan d'une transplantation" *in* S. Guillemard, ed. *Mélanges en l'honneur du professeur Alain Prujiner* (Cowansville, Qc.: Éditions Yvon Blais, 2011) 345.

required",[16] as long as there is "a sufficient connection with Quebec". If serious challenges associated with undertaking proceedings abroad can justify granting jurisdiction to a Quebec court, it seems obvious that similar considerations would strongly militate *against* declaring a court to be *forum non conveniens* where the court is otherwise competent under a different jurisdictional basis. The principle underlying article 3136 C.C.Q. is obviously to prevent a denial of justice, a fundamental principle that should be understood to inform the interpretation of all of the rules governing international jurisdiction in the Civil Code of Quebec.

None of these considerations were of assistance to the plaintiffs in the *Cambior* case. Given that jurisdiction over the local defendant rested on traditional grounds (domicile of the defendant in the province), there was no need for the plaintiff to establish the conditions for *forum necessitatis* prescribed by article 3136 C.C.Q. Still, because the plaintiff did wish to raise concerns about access to justice generally and the integrity of the judicial system in Guyana in particular,[17] it was left to do so as a response to the defendant's claim that the Quebec court was *forum non conveniens*.

The access to justice dimension of the case related most specifically to the availability of the class action procedure in the Quebec courts. As noted by the judge himself, "the class action recourse is a particularly useful remedy in cases of environmental damage"[18]. Compared to the representative action available in Guyana, the Quebec procedure, with the possibility of ordering collective recovery without proof of individual damages, was recognized as being far superior.[19] Still, the court considered that the plaintiffs had engaged in forum shopping, holding that the Guyanese victims had "no legitimate claim to the advantages of the Quebec forum and its class action legislation".[20] The court expressly rejected the claim that a defendant's home jurisdiction carries determinative weight in a *forum non conveniens* assessment.[21] While this may be defensible, it does not easily lead to the conclusion that such a forum is illegitimate. The connection of Cambior to Quebec was not fortuitous or trivial – the company was founded in the province, had its headquarters in the oldest gold mining area of the province, and its executive offices in Montreal.

To claim that a suit against Cambior in Quebec for an accident that occurred at a mine owned by the company involved condemnable forum shopping suggests that tort claims brought by foreign victims injured abroad should suffer the same fate, making Quebec defendants immune from class actions for any incident occurring outside the borders of the province.

A second much more recent case reveals the obstacles faced by plaintiffs seeking to invoke the *forum necessitatis* jurisdiction and the extent to which judicial discretion can again serve to shield corporate defendants from accountability for alleged wrongs committed at the foreign site of their business activities. In *Anvil Mining Ltd.*

[16] The French version is slightly different, referring to the fact that "on ne peut exiger [qu'une procédure] soit introduite [à l'étranger]". No court has yet had to consider this potential linguistic divergence.
[17] *Cambior* at 37.
[18] *Ibid.* at 76.
[19] *Ibid.* at 71.
[20] *Ibid.* at 79.
[21] *Ibid.* at 45.

v. ACCI,[22] the plaintiff group was composed of persons who had suffered damage as the result of events that took place in October 2004 in the town of Kilwa in the Democratic Republic of Congo. The plaintiffs claimed that the defendant, Anvil Mining, had provided logistical and transportation assistance to the DRC army-lead repression of an uprising in the town.[23] According to the UN mission in the DRC (MONUC)[24], the government action caused the death of 70 to 80 civilians and destruction of homes and property.[25]

Following pressure from MONUC, seven members of the DRC military and three Anvil managers were tried for war crimes before a military tribunal in 2007. Civil victims sought to participate in the proceedings, seeking compensation for their losses. Only two of the military accused were eventually found guilty of murder and the civil claims were dismissed. The proceedings were severely criticized by then UN High Commissioner for Human Rights Louise Arbour, who noted significant violations of procedural and substantive justice.[26]

The civilian victims then turned their attention to Australia, where Anvil Mining has its headquarters. They sought to institute a class action but were ultimately unable to secure legal representation to do so. This aspect of the case is of great significance to the Quebec Court of Appeal's assessment of the jurisdiction of necessity claim. According to the trial judgment, the plaintiffs alleged that the lawyers hired to represent them in Australia saw their mandate challenged by the defendant and their attempts to interview victims thwarted by the DRC government. Following death threats against the victims' Congolese counsel, the Australian lawyers decided to withdraw from the case. Despite efforts by NGOs in Australia, no substitute law firm was found to pursue the case.[27] A few years later, the plaintiffs looked towards Quebec as an alternative forum for the litigation.

Unlike in *Cambior*, the connection of the case to Quebec was rather tenuous in *Anvil Mining*. While the company has its headquarters in Perth (Australia), it was incorporated under the laws of the then Northwest Territories (Canada).[28] Anvil Mining's only activity was the exploitation of a copper mine in DRC, located just over 50 kilometres from Kilwa where the events of 2004 transpired. In 2005, however, the company opened a small office in Montreal (Quebec), used by its vice-president for corporate affairs. The facts indicate that this vice-president was involved in managing the fallout from the 2004 events in the DRC.[29]

Quebec's court have jurisdiction over a foreign corporation if it has an establishment in the province and "the dispute relates to its activities in Quebec" (art. 3148 (2) C.C.Q.). The trial judge held that the two conditions prescribed by art. 3148 C.C.Q. were met. The first condition, that Anvil Mining have an establishment in Quebec,

[22] 2012 QCCA 117, overturning 2011 QCCS 1966. Application for leave to appeal to the Supreme Court of Canada sought 26 March 2012.
[23] *Anvil Mining* at para. 26.
[24] United Nations Organization Mission in the Democratic Republic of Congo, established by resolution 79 of 30 november 1999; renamed UN Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO) in 2010.
[25] *Anvil Mining* at para. 25.
[26] *Anvil Mining* at paras 30 & 33.
[27] *Anvil Mining*, 2011 QCCS 1966 at para. 34.
[28] It has recently been acquired for $1.3 billion by Minmetals Resources Ltd, a Chinese company headquartered in Australia.
[29] *Anvil Mining*, 2012 QCCA 117 at para. 86.

was indisputable. The second condition, however, required further consideration as it had given rise to doctrinal and jurisprudential debate. According to one view, supported by several doctrinal writers, the article linked "its activities" to the Quebec establishment, thereby requiring that the dispute be related to the establishment's activities in Quebec in order to found jurisdiction. Another view, preferred by the Court of Appeal in a 2009 decision,[30] rather connected "its activities" to the foreign corporation, thereby disconnecting any necessary link between the local establishment and the activities at the root of the dispute.

Relying on the second broader interpretation, the trial judge held that because Anvil Mining's only business was its copper mine in the DRC, its vice-president's activities were necessarily also connected with the mine and therefore the dispute was related to the activities of the defendant Anvil Mining in Quebec.[31] The trial judge relied on another appellate decision to hold that the establishment in Quebec need not have existed at the time the dispute arose, so long as it was in existence at the time the proceedings were instituted.[32] At the trial level, therefore, the defendant failed in its attempt to challenge the Quebec court's jurisdiction. This did not foreclose a request that the court nevertheless exercise its discretion to decline that jurisdiction on the basis of *forum non conveniens*. The defendant carried the burden of proving the existence of an alternative more appropriate court to hear the case. This it failed to do to the court's satisfaction, the trial judge holding that neither Australia nor the DRC were demonstrated to be more appropriate.[33] Finally, he added that if he declined to exercise his jurisdiction under art. 3135 C.C.Q., it appeared that the plaintiffs would have no other jurisdictional option for their civil claim, hinting at what his conclusion under *forum necessitates* would have been had he been required to rule on that point.[34]

The Quebec Court of Appeal reversed the trial judge on virtually all counts. On the application of art. 3148(2) to the facts as alleged, the Court of Appeal held that there were no activities in Quebec that were connected to the dispute and that the trial judge had failed to support his opposite conclusion with reference to any specific facts.[35] Having concluded that jurisdiction under art. 3148(2) C.C.Q. was not established, the Court of Appeal was obliged to consider the alternative argument that it could hear the case as a *forum necessitatis* under art. 3136 C.C.Q.[36]

The Court of Appeal had to go back to 1996 for jurisprudential discussion of jurisdiction under art. 3136 C.C.Q. That reference was to a commercial case where the plaintiff's reliance on *forum necessitatis* was easily dismissed as improper given the nature of the special jurisdictional rule.[37] Still, in the earlier case, the appellate court had outlined the origin of the rule in Swiss law and the fact that it was meant to prevent a denial of justice.[38] In *Anvil Mining*, the Court reiterated that the plaintiff

[30] *Interinvest (Bermuda) Ltd. v. Herzog*, 2009 QCCA 1428.
[31] *Anvil Mining*, 2011 QCCS 1966 at para. 29.
[32] *Ibid.* at para. 16, citing *Rees v. Convergia*, 2005 QCCA 353.
[33] *Ibid.* at para. 38.
[34] *Ibid.* at para. 39.
[35] *Ibid.* at para. 91.
[36] *Ibid.* at para. 96. In addition, the Court did not have to consider the *forum non conveniens* point in response to the art. 3148(2) C.C.Q. claim since the former is available only where the Court has jurisdiction.
[37] *Lamborghini (Canada) Inc. v. Automobile Lamborghini S.P.A.*, [1997] R.J.Q. 58 (C.A.).
[38] *Anvil Mining*, at para. 98.

carries the burden of proving the existence of the exceptional circumstances justifying jurisdiction under art. 3136 C.C.Q.[39] The Court's assessment of the facts and evidence confirms the heavy burden weighing on plaintiffs seeking to invoke *forum necessitatis*.

First, the Court cites the defendant's witness to the effect that the victims had an additional appeal available in the DRC. The plaintiffs' references to documentary evidence pointing to the unsatisfactory state of the judicial system in the DRC is given short shrift, the Court merely referring to "reports from NGOs" that it noted were limited to criticism of military courts, not civil courts. Second, in discussing the situation in Australia, the Court summarily dismisses the plaintiffs' arguments: (i) in relation to claimed interference by state authorities in the DRC, the Court notes that there is no evidence that similar interference would not plague proceedings in Quebec (an odd reason to either force the parties to Australia or to exclude them from Quebec); (ii) it holds that there is no evidence of steps taken to secure new legal counsel in Australia despite contrary findings in the trial judgment.[40] Finally, the Court simply states, with no further elaboration, that there is no sufficient connection to Quebec, as required by art. 3136 C.C.Q., without any reference to the long discussion undertaken with respect to art. 3142 C.C.Q., including the defendant's own admission that it has an establishment in the province.[41] Adding insult to injury, the Court of Appeal concludes its judgment by expressing sympathy for the victims and admiration for the engagement of the plaintiff NGOs; moreover, it deems it "regrettable" that citizens would have such difficulty obtaining justice.[42]

Considering that *forum necessitatis* is meant to permit the exercise of jurisdiction in circumstances which do not normally allow for it, the decision in *Anvil Mining* signals a very narrow opening for plaintiffs. International jurisdiction under Quebec private international law is quite generous, allowing plaintiffs to seize local courts based on connections with either the defendant or the cause of action. Courts in Quebec have even allowed plaintiffs injured abroad but who continue to suffer losses in Quebec to sue unrelated defendants in the province.[43] *Anvil Mining* presented one of the few factual scenarios where the usual jurisdictional grounds were not available while also presenting a concrete connection to the defendant in the form of an office and executive officer located in the province. To suggest that this is not a "sufficient connection" to the province contemplated by article 3136 C.C.Q. virtually eliminates the relevance of that provision. Moreover, to summarily dismiss the plaintiffs' non-trivial claims that suing in the DRC or Australia -- places where the plaintiffs had

[39] It is somewhat ironic that the Court states that art. 3136 C.C.Q. prescribes a condition of "exceptionality" given that the article does not actually use that language, contrary to art. 3135 C.C.Q., which does specify its "exceptional" character, a fact that for years was ignored by Quebec courts in their apparent enthusiasm for their new-found jurisdictional discretion. See on this very point Talpis & Kath, *supra* note 5.

[40] *Anvil Mining*, at paras 101-102.

[41] *Ibid.* at para. 73. The Court of Appeal had refused to rule on the timing issue when it discussed jurisdiction under 3148(2), holding that it was not necessary to decide the point given its other conclusions. *Ibid.* at para. 78.

[42] In the original French version: « Il est regrettable de constater que des citoyens ont autant de difficulté à obtenir justice; malgré toute la sympathie que l'on doit éprouver pour les victimes et l'admiration que suscite l'engagements des ONG à l'intérieur de l'ACCI, je suis d'avis que la législation ne permet pas de reconnaître que le Québec a compétence pour entendre ce recours collectif ». *Ibid.* at para. 104.

[43] See for example *Hoteles Decameron Jamaica Ltd. v. D'Amour*s, 2007 QCCA 418 (CanLII), [2007] R.J.Q. 550, 2007 QCCA 418.

undertaken or sought to undertake proceedings – was either impossible or unreasonable, the two options available under art. 3136 C.C.Q., again sets the bar so high as to make success under that provision virtually unimaginable.

For the Court to then, almost apologetically, state that its conclusion is mandated by Quebec law is surprising indeed. Its decision on *forum necessitatis* was as informed by its consideration of the facts and evidence than by the law itself. The Court did not even refer to the twin options of impossibility or reasonableness for the application of art. 3136 C.C.Q., and it erroneously referred to an express condition of exceptionality that is not found in the provision, nor did the Court explain how its evaluation of the connecting factors for purposes of art. 3148(2) should be determinative of the "sufficient connection" requirement under art. 3136 C.C.Q. If the Supreme Court of Canada grants leave to appeal, these points will undoubtedly be raised by counsel for the various parties and interveners,[44] and they deserve to be addressed.

In a fourteen-year period, therefore, Quebec courts have had two opportunities to give access to foreign victims of alleged serious corporate wrongdoing causing physical, moral and economic harm to a significant group of people. The factual scenarios were vastly different, as were the defendants' connections to the province. The jurisdictional bases relied on were at the two extremes of jurisdictional law and practice in western legal systems (defendant's domicile and *forum necessitatis*). And yet, in both cases, Quebec judges exercised their discretion to send the victims away, to grant the corporate defendants a reprieve from public accountability let alone potential reparation. In both cases the facts were capable of supporting a conclusion of jurisdiction whether on traditional (domicile) or exceptional (necessity) grounds. In one case the trial court chose to grant a discretionary remedy (*forum non conveniens*) and in another the appellate court chose to impose a virtually impossible standard for another discretionary remedy (*forum necessitatis*). While two cases are insufficient to establish a trend, the fact that cases of this type are few and far between means that courts have few opportunities to revisit their interpretations. Unless the Supreme Court of Canada agrees to hear the appeal in *Anvil Mining* and reviews its interpretation of *forum necessitatis,* the existence of these two cases can only discourage future plaintiffs facing similar circumstances from seeking access to Quebec courts.

These two cases also suggest that generic jurisdictional rules, even those generous in appearance, can nevertheless shield corporations from accountability for transborder transgressions, in jurisdictions that could legitimately hear claims against them. For private international law to play a global governance role in this area, jurisdictional rules in such cases will have to change if courts interpreting and applying existing rules are unwilling or unable to adapt them to the particular circumstances of transborder corporate wrongs.

One concrete avenue for change has been proposed by the International Law Association. Through the work of a comity focussed on transnational civil litigation for human rights violations, the ILA has recently endorsed a set of guidelines that respond to the type of jurisdictional challenge faced by the plaintiffs in the two

[44] Two parties have requested leave to intervene: Essex Business & Human Rights Project and Human Rights Clinic. See Docket 34733 on the court's website at www.scc-csc.gc.ca. (accessed 3 September 2012).

Quebec cases discussed above.[45] The guidelines innovate cautiously, building on existing jurisdictional bases with a specific view to ensuring "a fair and efficient resolution" of the disputes. The effect of the rules is essentially to maximize access to designated courts for plaintiffs in an effort to increase corporate accountability, particularly in a corporation's home jurisdiction.

To this end, the ILA Guidelines underline the legitimacy of a corporate defendant's home jurisdiction for civil suits concerning that corporation's foreign activity.[46] The Guidelines go beyond this traditional view in three important manners: First, through the mechanism of "connected claims" and "related defendants", second by their treatment of the *forum non conveniens* doctrine and third by including a *forum necessitatis* provision.

Seeking to prevent the dispersal of claims or the avoidance of accountability due to complex corporate structure arrangements, the Guidelines propose that jurisdiction over a home defendant extend to all other defendants "in respect of closely connected claims".[47] Such claims are those that involve "related defendants" and whose determination within a single jurisdiction can be efficiently conducted. The notion of "related defendants" includes membership in a common corporate group, effective control, directing another defendant to engage in the impugned activity or concerted participation by defendants in the impugned activity. The objective is obviously to allow plaintiffs to identify a guaranteed jurisdictional option (one of the "related defendant's" home jurisdiction) and then to join into the same proceedings those defendants who are connected either concretely to the impugned activity itself or more formally through the corporate structure. This should ensure that jurisdiction can, for example, be established at the home jurisdiction of a parent company when its foreign subsidiary is alleged to have engaged in wrongful behaviour elsewhere. The jurisdictional rule has no implications for substantive liability, which will depend on the applicable law[48] and its rules regarding corporate liability, piercing of the corporate veil, etc. The objective is to provide a predictable and appropriate forum for the resolution of the dispute given its nature and its transborder dimensions not to predetermine the issue of liability.

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[45] The *Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations*, adopted at the 75th Conference of the Association held in Sofia, Bulgaria in August 2012. Available at http://www.ila-hq.org/en/committees/index.cfm/cid/1021 - in the Committee Documents section (accessed 3 September 2012).

[46] *Ibid*. at article 2.1.

[47] 2.2. Connected claims
2.2(1) The courts of the State where one of a number of defendants is domiciled shall have jurisdiction over all of the defendants in respect of closely connected claims.
2.2(2) Claims are closely connected in the sense of paragraph 2.2(1) if:
(a) it is efficient to hear and determine them together; and
(b) the defendants are related.
2.2(3) Defendants are related in the sense of paragraph 2.2(2)(b), in particular if at the time the cause of action arose:
(a) they formed part of the same corporate group;
(b) one defendant controlled another defendant;
(c) one defendant directed the litigious acts of another defendant; or
(d) they took part in a concerted manner in the activity giving rise to the cause of action.

[48] The Guidelines do not put forward a specific choice of law rule for these disputes. Instead it directs courts to apply their own choice of law rules, circumscribed by certain conditions regarding the substantive content of the eventually designated law. See
Guidelines, article 3.

In addition to this broad jurisdictional basis as it relates to related parties and connected claims, the Guidelines also address the question of judicial discretion in the exercise of international jurisdiction. As the case in *Cambior* shows, where *forum non conveniens* is available, it is capable of defeating jurisdiction even in the defendant's home jurisdiction. The advantages of predictability and certainty associated with the defendant corporation's home jurisdiction accrue to both parties to this type of litigation, while the benefits of judicial discretion to decline jurisdiction are granted only to the corporate defendant. Considering the nature of the claims involved and the important accountability concerns raised by this type of litigation, it is not exorbitant to hold corporate defendants to stand suit in their home jurisdiction. Moreover, given that many jurisdictions do not allow courts to decline jurisdiction at all, plaintiffs will not be tempted to select those jurisdictions merely to avoid the risk associated with choosing a potentially more appropriate jurisdiction where the doctrine is available. Given the broad jurisdictional rule regarding related parties discussed above, the Guidelines' exclusion of *forum non conveniens* before a defendant's home jurisdiction[49] is justified and arguably fairer to all parties, not only the plaintiff.

Finally, the Guidelines have proposed that courts could accept jurisdiction in civil litigation for human rights violations on the basis of necessity, "to avert a denial of justice".[50] Similar to the provision involved in the *Anvil Mining* case, the Guidelines specify that "a sufficient connection" must exist between the court seized and the dispute. In addition, the court must conclude that "no other court is available" or "the claimant cannot reasonably be expected to seize another court". While it was argued previously that the facts in *Anvil Mining* should have met the Quebec standard for jurisdiction of necessity, the additional framework set out in the Guidelines would have assisted the court in arriving at that conclusion. This framework involves inviting the court to take "account of reliable public sources of information", thereby potentially mitigating strict or narrow rules of evidence in the forum. In addition, the Guidelines provide examples of what constitutes a "sufficient connection", including "some activity of the defendant",[51] which would certainly have applied in the *Anvil Mining* case.

The impact of the proposed ILA Guidelines is evident when they are applied to the concrete cases that have come before the Quebec courts. In both *Cambior* and *Anvil Mining*, the result under the ILA Guidelines would likely have been different: in *Cambior* certainly, because of the exclusion of *forum non conveniens* in the defendant corporation's home jurisdiction; in *Anvil Mining*, probably, due to additional criteria for the application of the *forum necessitatis* jurisdictional basis that on the facts would have favoured a positive determination. In so far as these cases involved alleged corporate wrongdoing in foreign jurisdictions less likely to provide access to justice to the plaintiffs, the slight modifications to jurisdictional rules envisaged by the ILA Guidelines can be understood as promising greater opportunities for public scrutiny of transborder corporate behaviour and in that sense, contribute to global governance through private international law.

Of course the ILA Guidelines are just that. They are proposed by a non-governmental organization as a meaningful response to a problem perceived to be in

[49] Guidelines, article 2.5.
[50] Guidelines, article 2.3.
[51] Guidelines, article 2.3(2) and 2.3(3).

need of a solution. In the preamble to the Resolution adopting the Guidelines, these are said to be commended to the attention of:

> **(1)** National courts and law reform agencies, with a view to facilitating the progressive development of the law on this subject;
> **(2)** Organisations concerned with international legal co-operation, with a view to considering measures at the international level of mutual co-operation in the field of transnational human rights violations;
> **(3)** The [OHCHR] Working Group on the issue of human rights and transnational corporations and other business enterprises.

If the proposed rules are not necessarily original,[52] they have the distinct advantage of being presented in a formal document, elaborated and debated by a group of jurists from diverse backgrounds and jurisdictions,[53] and adopted by a respected international law association at an open meeting. Focussing attention on this kind of private international law development can serve the PILAGG project by demonstrating how theoretical aspirations can translate into concrete manifestations.

2. Choice of law and the potential for PILAGG

Private international law could also play a greater global governance role by addressing the opportunities for transnational operators to avoid the reach of state regulation. These opportunities are given in part by way of choice of law and choice of jurisdiction rules that allow transnational actors to choose the law governing their transactions and their preferred dispute resolution method. While the degree of party autonomy granted varies across jurisdictions,[54] some private international law regimes are very generous indeed, granting parties' significant freedom to select both the law and forum that will provide the legal backdrop for their transnational activities. The example of Quebec is again illustrative of this approach.

Under Quebec law, parties to an international transaction are entitled to select any law to govern their legal relation.[55] The only limitations are internationally mandatory rules of the forum and public policy. [56] Even these limitations, however, may fail should the parties also provide for litigation in a foreign jurisdiction which will likely have regard for its mandatory rules but not those of other jurisdictions that may have either a close connection to the transaction or to the parties.[57]

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[52] Many jurists have criticized the current jurisdictional models and made various proposals to address the challenges facing plaintiffs seeking recourse against multinational or transborder corporations. For an early example see U. Baxi, "Mass Torts, Multinational Enterprise Liability and Private International Law" (1999) 276 Rec. des cours 317; for something more recent, see B.S. Wray & R. Raffaelli, "False Extraterritoriality? Municipal and Multinational Jurisdiction over Transnational Corporations" (2010) 6 Human Rights and International Legal Discourse 108 (proposing a functional approach to jurisdiction based on a "benefits and burden" principle, borrowing from developments in international criminal law).

[53] The author was a member of the committee and participated in the elaboration of the guidelines.

[54] See G. Saumier, "Designating the Unidroit Principles in International Litigation", Uniform Law Review (forthcoming).

[55] Article 3111 Civil Code of Quebec.

[56] Articles 3076 and 3081 C.C.Q.

[57] In fact, article 3079 C.C.Q. gives a Quebec court jurisdiction to consider the application of such foreign mandatory rules, mirrored on the language of art. 7(2) of the 1980 Rome Convention on the law applicable to contractual obligations, now reformulated with a narrower scope in the new Rome I Regulation (Regulation EC no 593/2008 on the law applicable to contractual obligations).

A more serious potential erosion to the application of mandatory state law in the face of party autonomy is the combination of a choice of law clause with an arbitration clause rather than a forum selection clause. Arbitration clauses are widely recognized and enforced as a result of broad adhesion to the international regimes instituted by the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards and the more recent UNCITRAL Model Arbitration Law. As private adjudicators designated by the parties, international commercial arbitrators are not typically held to defend the substantive public policy of any particular state.[58] The most liberal arbitral theory supports some obligation to uphold international or transnational public policy, but the content of this notion remains very narrow and rather vague.[59] The common confidentiality of international commercial arbitration also shields parties opting for it from the public scrutiny of judicial proceedings. Both of these factors combine to suggest that international arbitration may act as an obstacle to global governance. But because states are supporting this mechanism, its use by transnational actors can hardly be called illegitimate.

One option to breaking this impasse may rest with private international law. The traditional claimed benefits of arbitration -- faster, cheaper, better justice -- are difficult to maintain in the face of mounting costs, delays and increasing juridicization of arbitration. Beyond the confidentiality advantage of international commercial arbitration over litigation, one other remaining advantage of arbitration may still be the greater party autonomy accorded to parties with respect to the applicable law. Indeed, parties who choose arbitration to resolve their disputes are generally also entitled to have their contractual relationship governed by rules coming from sources other than state law.[60] Conversely, parties who resort to court adjudication are universally limited to the application of State law whether designated by them in a choice of law clause or as otherwise identified by the court hearing the dispute.[61]

The scant empirical evidence that exists suggests that parties to international commercial contracts are not taking advantage of this broader party autonomy within the arbitral context.[62] And yet, the trend in state arbitration statutes and private institutional arbitration rules continues to be in favour of such an expansion of the choice of law options available to parties who opt for arbitration. This confirms the assumption that this combination is potentially attractive to commercial parties engaged in the world market. And while it may well correspond to those parties' interests, it may also be considered to further reduce the reach of state regulation over international business activities. From a global governance perspective, then, the combination of arbitration and non-state law can be viewed with scepticism. How can private international law respond to this particular challenge?

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[58] Although there are differing views on this; see the discussion in E. Gaillard, *Aspects philosophiques du droit de l'arbitrage international*, 2008 at pp. 162 and ff.
[59] *Ibid.*
[60] See Saumier, *supra* note 54.
[61] *Ibid.*
[62] See P.L. Fitzgerald, "The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States" (2008) 27 J.L. & Com. 1 and F. Dasser, "Mouse or Monster? Some Facts and Figures on the Lex Mercatoria" *in* R. Zimmermann, ed. *Globalisierung Und Entstaatlichung Des Rechts* (2008) 129.

One possibility is to loosen the monopoly of State law in the court litigation context. It is indeed inconsistent that legislators are prepared to admit the application of non-state law in the arbitral context but not in the judicial context. After all, both are adjudicatory mechanisms of dispute resolution whose results are binding on the parties and enforceable against the losing parties' assets.[63] The main difference is the private consensual nature of arbitration compared to the public obligatory nature of litigation. Given that party autonomy operates in both with regard to the applicable law, the distinct natures of the two regimes appear unrelated to the limitation on the designation of non-state law in the court setting.

Of course there is much expressed scepticism in the literature concerning the very existence of non-state norms, the appropriateness of their designation by parties, the legitimacy of their application by adjudicatory bodies, etc.[64] These critiques, however well founded they may be, fail to explain why legislators and other norm creators continue to admit and indeed support the designation of non-state rules by parties opting for arbitration. The monopoly over non-state law enjoyed by arbitration should be understood as an obstacle to global governance even if its exercise in practice is currently negligible.

For private international law to begin to play a global governance role, then, the treatment of non-state rules ought to be reconsidered. More precisely, courts should be recognized as capable of understanding and giving effect to references to non-state law as the law governing an international transaction. By admitting that non-state law may well offer answers equivalent to state law for the purpose of resolving international commercial disputes, legislators would provide a valuable global governance tools to courts. Admittedly, allowing the designation of non-state law by parties admits the normative value of these rules. This in turn may provide the necessary impetus for taking into account such non-state rules even where the parties have not expressly designated them.[65] It may also invite courts to consider providing remedies for the breach of non-state norms to which the parties have implicitly or explicitly submitted themselves. But perhaps more importantly, it could help the development of judicial means of assessing the validity or legitimacy of the myriad of non-state sources of normativity directed at commercial activity on a global scale.[66]

The example of standard setting provides a vivid illustration of the potential normative effect of non-state rules.[67] In the forestry sector alone, the elaboration of standards for sustainable development by non-state actors has been labelled an "emerging legal system".[68] More broadly, the Unidroit Principles for International Commercial Contracts provide a largely comprehensive code for the regulation of transborder contractual relations whose parties seek a neutral non-state governing

[63] This is even more so regarding arbitral awards given the widespread adoption of the New York Convention, which is in force in 147 States to date.
[64] See for example R. Michaels, "The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism" (2005) 51 Wayne Law Review 1209.
[65] See Muir-Watt, *supra* note 1 at 417-418.
[66] *Ibid*. at 392 and 409.
[67] *Ibid.*
[68] E. Meidinger, "Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems" *in* C. Brütsch & D. Lehmkuhl, eds, *Law and Legalization in Transnational Relations* (Oxford and New York: Routledge, 2007) 121 at 139.

law.[69] As it stands, however, choice of law rules in private international law systems across jurisdictions do not recognize the validity or bindingness of a choice of law clause designating non state law. Moreover, because of their nature and form, many of these sources do not lend themselves to being applied by courts under the guise of implied terms or even as trade usages.

At present, the limitation on party autonomy in choice of law that excludes references to non-state law is prevalent. Previous attempts to alter the *status quo* have failed, confirming how entrenched this position continues to be.[70] But the appeal of this revision to arbitration's monopoly over non-state law as governing law continues to attract adherents when the opportunity to do so is available. This is evident in the latest attempt to develop a multilateral instrument for choice of law in international contracts, recently undertaken by the Hague Conference on Private International Law.[71]

In that forum, a consensus among jurists from various jurisdictions emerged according to which the distinction between arbitration and court litigation was no longer tenable as regards the designation of non-state law.[72] As a result, the draft Principles on Choice of Law in International Commercial Contracts includes a provision specifying that parties are entitled to designated "rules of law" to govern their contract.[73] The report from the Working Group specifies that "[t]he draft Hague Principles do not limit the parties to designating the law of a State; rather they allow for parties to select not only State laws but also 'rules of law'".[74] The report makes clear that this operates both in arbitral and court proceedings.[75] While the draft Principles have not been formally adopted by the Governing Council of the Hague Conference, the process is progressing to the next stage, suggesting that the move away from the *status quo* with regard to non-state law is not a fundamental obstacle to the adoption of the proposed principles.[76]

Conclusion

[69] See the text available at www.unidroit.org.
[70] See for example the failure to allow for the designation of "rules of law" in the final version of the Rome I Regulation despite an earlier proposal to that effect: *Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I),* COM(2005) 650 final, Brussels, 15.12.2005.
[71] See the official documents at www.hcch.net under the rubric "Choice of Law in International Contracts".
[72] For a discussion of this process, see L. Gama & G. Saumier, "Non-State Law in the (Proposed) Hague Principles on Choice of Law in International Contracts" *in* D.P. Fernandez Arroyo & J.J. Obando Peralta, eds., El Derecho Internacional Privado en los Procesos de Integracion Regional (Editorial Juridica Continental, 2011) 41.
[73] Article 2.1. A contract is governed by the law chosen by the parties. In these Principles a reference to law includes rules of law.
[74] "Policy Document Regarding Hague Principles on Choice of Law in International Commercial Contracts" included as Annex III of *Choice of Law in International Contracts: Development Process of The Draft Instrument and Future Planning*, Prel. Doc. No 4, January 2012, Hague Conference on Private International Law (available at www.hcch.net) at para. 16.
[75] *Ibid.*
[76] The next meeting will take during the week of November 12th, 2012.

Ambitious as the project to reimagine private international law in terms of global governance may appear even to its supporters,[77] there is evidence that jurists involved in targeted multilateral projects are working in that direction. Two examples presented here are consistent with the global governance project and suggest that through small variations on current rules or methods, private international law can provide means by which actors in international markets could more easily be called upon to account for their actions outside their home country or held to soft law standards that they voluntarily submit to, all within a public forum. Admittedly, the "small" variations betray what traditionalists could describe as fundamental shifts in private international law. Eliminating judicial discretion in some jurisdictions where *forum non conveniens* is an entrenched aspect of court jurisdiction and eliminating the monopoly of state law before courts are not trivial proposals. Yet, by working within the existing parameters of private international law, the proposals are indicative of the potential for openness to a global governance transformation of private international law.

[77] Muir-Watt*, supra* note 1 at 427 ("The program may look ambitious if not utopian").