THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

International Contracts Committee

WILLIAM P. JOHNSON, WILLEM DEN HERTOG, MARTIN AQUILINA, AND SAMUEL G. WIECZOREK*

I. Introduction

Important roles that any lawyer who counsels clients regarding contractual arrangements will play include to anticipate and allocate risk, to make clear the respective obligations of the parties, and to ensure that the writing (when there is one) reflects the actual bargain struck; in short, to facilitate greater certainty. But of course, no matter how effective the lawyer is or how comprehensive the writing is, certainty can be elusive. This is especially true in a cross-border arrangement, when the bodies of law that are potentially applicable are likely to be varied and unfamiliar. Indeed, in the context of cross-border contracts, when there is more than one jurisdiction whose domestic law might apply and there are international treaties that are potentially applicable, uncertainty can quickly follow.

In this article, the authors describe some of the international contract issues that arose and legal developments that occurred in 2018, focusing on both substantive and procedural questions concerning applicable law in a variety of multijurisdictional contractual contexts. Section II describes the continuing relevance in the United States of the United Nations Convention on Contracts for the International Sale of Goods (CISG),[1] an important treaty that governs cross-border sales transactions; Section III recounts the Private International Law (or conflicts of law) analysis by a Dutch court of a contract formation question involving the website General Conditions of an Irish company;[2] Section IV describes the Supreme Court of Canada's treatment of the relevance of the civil law principle of unforeseeability for an otherwise enforceable contract;[3] and Section V identifies notable developments with respect to franchising in the United States.

---

* The authors are William P. Johnson, Saint Louis University School of Law, St. Louis, Missouri (Sections I and II); Willem den Hertog, denhertog legal, The Hague, The Netherlands (Section III); Martin Aquilina (assisted by Marcela Souki), HazloLaw P.C., Ottawa, Ontario, Canada (Section IV); and Samuel G. Wieczorek, Cheng Cohen LLC, Chicago, Illinois (Section V). The article was edited by William P. Johnson.

1. *See* United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

2. *See* Hof's-Haag 23 januari 2018, RvdW 2018, m.nt. UDH (Ryanair / PR Aviation) (Neth).

3. *See* Churchill Falls (Labrador) Corp. v. Hydro-Quebec, [2018] S.C.R. 46 (Can.).

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

II. Continuing Relevance in the United States of the UN Convention on Contracts for the International Sale of Goods

This section provides an update on developments in 2018 that highlight the continuing relevance within the United States of the CISG.[4] Calendar year 2018 offered one relatively significant decision on the CISG by a US court.[5] It was a year that otherwise suggested a relative slowdown in development of the CISG as a relevant body of law for cross-border sales transactions involving US contracting parties.

On the one hand, in 2018 the CISG entered into force for three new states based on accessions that occurred in 2017: Cameroon, Costa Rica, and Fiji.[6] That continues a recent trend of steady growth and, in particular, of states in the Global South joining the convention.[7] However, interestingly, no new states acceded to the CISG during 2018, halting the trend of steady growth.[8] It remains to be seen whether 2018 is an outlier or the start of a new trend.

In addition, despite the fact that the CISG has been in force for the United States for thirty years and applies by its terms to an enormous volume of international trade in goods involving US buyers and sellers,[9] only four decisions by US courts in 2018 interpreted, analyzed, or ruled on application of the CISG.[10] There were three additional decisions by US courts that reproduced choice-of-law clauses that included express exclusion of the CISG, but those decisions did not engage in any analysis of the CISG or consider its potential application.[11]

---

4. *See* CISG, *supra* note 1.

5. Transmar Commodity Grp. Ltd. v. Cooperativa Agraria Indus. Naranjillo Ltda., 721 F. App'x 88 (2d Cir. 2018).

6. *See* U.N. Treaty Collection, Int'l Trade and Dev., Chapter X, CISG, Status as of 09-03-2019, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en (last visited Mar. 18, 2019).

7. *See id.*

8. *See id.* The five-year period immediately prior to 2018 saw an average of 2.2 state accessions per year. *See id.*

9. *See* William P. Johnson, *Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent*, 59 BUFFALO L. REV. 213, 213-14, 218-20 (2011).

10. Transmar Commodity Grp. Ltd. v. Cooperativa Agraria Indus. Naranjillo Ltda., 721 F. App'x. 88 (2d Cir. 2018) (vacating the order of the district court and ordering the district court to apply the CISG); Waterford Crossings Apartments v. Tipton, No. 3:18-0131, 2018 WL 1811554 (M.D. Tenn. Apr. 16, 2018) (concluding that the CISG is not applicable and remanding to state court); Target Corp. v. JJS Dev.s Ltd, No. 16-cv-1184, 2018 WL 809587 (D. Minn. Feb. 9, 2018) (concluding that the CISG does not apply); Fed. Nat'l Mortg. Ass'n v. Boldrini, No. 3:17-CV-2357, 2018 WL 4345279 (M.D. Pa. Jan. 9, 2018) (concluding that the CISG was not applicable and remanding to state court).

11. MD Distrib, Corp. v. Dutch Ophthalmic Research Ctr. Int'l B.V., 322 F. Supp. 3d 272 (D.P.R. July 23, 2018); Graphic Sys., Inc. v. Avanti Comput. Sys. Ltd., No. 17-4647 (MJD/HB), 2018 WL 1277007 (D. Minn. Mar. 12, 2018); SRS Techs., LLC v. Nat'l Minority Trucking Ass'n, Inc., No. 17-13207, 2018 WL 925847 (E.D. Mich. Feb. 16, 2018).

The most significant decision was a decision by the Second Circuit.[12] The *Transmar Commodity Group Ltd.* decision is a summary order that involved a dispute arising out of six nearly identical contracts for the sale of cocoa butter over a period of six months.[13] The seller, Cooperativa Agraria Industrial Naranjillo Ltda. (Naranjillo), had its place of business in Peru.[14] The buyer, Transmar Commodity Group Ltd. (Transmar), had its place of business in the United States.[15] The dispute arose when Naranjillo allegedly defaulted on its obligation to deliver the cocoa butter, and the dispute went to arbitration.[16]

The arbitration panel found that Naranjillo was in default, and it ordered Naranjillo to pay Transmar more than USD $2.6 million.[17] That award was subsequently vacated by the US District Court for the Southern District of New York on the basis that the parties had not actually agreed to arbitrate their disputes.[18] The district court reached its conclusion by applying domestic New York law.[19] That was error, because the contracts were governed by the CISG.[20]

The Second Circuit noted in its reasoning that the CISG is different than New York domestic sales law (i.e., Article 2 of the UCC) "in several important respects."[21] The court identified Article 8(3) of the CISG and its requirement that courts consider extrinsic evidence to determine the expectations of the parties, as well as Article 9(2) of the CISG, which causes usages to be part of the agreement between the parties under certain circumstances.[22] The Second Circuit vacated the order of the district court and remanded the case with instructions that the court below consider Articles 8(3) and 9(2) of the CISG in its analysis.[23]

Thus, *Transmar Commodity Group* confirms the general understanding that a different kind of analysis is contemplated by Article 8(3)[24] and Article 9(2)[25] of the CISG, in both cases, relative to Article 2 of the Uniform Commercial Code. In addition, it highlights the need to remember that the CISG applies

12. *See Transmar*, 721 Fed. App'x. 88. This decision is significant in part, simply because it is a decision of a US federal appellate court, and there is not a large amount of case law of such courts.

13. *See id.* at 89.

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.* at 90.

22. *See id.*

23. *See id.*

24. *See* Johnson, *supra* note 8, at 266-69.

25. *See* William P. Johnson, *The Hierarchy That Wasn't There: Elevating 'Usage' to its Rightful Position For Contracts Governed by the CISG*, 32 NORTHWESTERN J. INT'L L. & BUS. 263, 269-70 (2012).

automatically by its terms, displacing domestic sales law, when it is not effectively excluded by the parties under Article 6.

While there are no other significant substantive decisions of US courts pertaining to the CISG during 2018, there are two additional noteworthy items. The first additional item is one court's application of Article 10 of the CISG.[26] In *Target Corp.*, the court arguably misunderstood application of Article 10, paying attention only to one part of the article. The case involved a dispute arising from multiple agreements entered into by Target Corporation (Target) and JJS Developments LTD (ERS) for the sale by Target and purchase by ERS of television sets and other non-TV electronics for recycling or other disposition.[27] Target terminated one of the agreements and brought a claim against ERS when ERS did not pay the amount due upon termination.[28] ERS brought counterclaims, and Target filed a motion for summary judgment.[29]

The parties disagreed regarding applicable law, disputing the location of the relevant ERS place of business for determining whether the CISG applied.[30] Target's place of business was in the United States; ERS had its principal place of business in Canada but also opened a facility in Indianapolis to facilitate performance under the agreement.[31] Recognizing that ERS had more than one place of business, the court cited Article 10 of the CISG, which provides direction for determining which place of business is relevant for the purpose of determining the applicability of the CISG.[32] Article 10 provides that when a party has more than one place of business, "the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract."[33]

In its analysis, the court acknowledged that the contracts identify a Canadian address as the principal place of business for ERS but reasoned that ERS acknowledged that it opened a facility in Indianapolis to accommodate Target's product volume.[34] The court concluded that "ERS's place of business for the purposes of ERS's contracts with Target is in the United States. The CISG does not apply."[35]

The court appears to have been focused on the first part of Article 10, which provides that the relevant place of business is the place of business

26. *See* Target Corp. v. JJS Dev.s Ltd, No. 16-cv-1184, 2018 WL 809587, at *1 (D. Minn. Feb. 9, 2018).
27. *See id.* at *1.
28. *See id.* at *1, *3.
29. *See id.* *1.
30. *See id.* at *3.
31. *See id.*
32. *See id.* at *3.
33. *Id.* (quoting CISG, 1489 U.N.T.S. 3, art. 10(a)).
34. *See id.* at *4.
35. *Id.*

with the closest relationship to the performance of the contract.[36] However, the second part of Article 10 requires that analysis to be done considering what was known or contemplated by the parties at the time the contract was negotiated or finalized.[37] Thus, what happens after the contract is finalized – including development of a new facility – is only relevant for Article 10 if it was contemplated by the parties before or at the time of entry into the contract. Practitioners should be aware that other courts might engage in analysis of Article 10 in ways that differ from the analysis in the *Target Corp.* decision.

The second additional item is a reminder of the role that the CISG plays in connection with removal to federal court of a claim brought in state court. Namely, when a dispute arises from a transaction between a US party and a non-US party, there usually will be a statutory basis for jurisdiction in federal courts, even though federal courts are courts of limited jurisdiction, because one basis for jurisdiction arises when the claim involves a federal question, and any claim that arises under a treaty – including the CISG – will involve a federal question.[38] If the federal district courts have original jurisdiction, then even if one party files a claim in state court, the other party can remove the claim to federal court.[39]

In two cases in 2018, defendants attempted to use the CISG to remove a state action to federal court.[40] Both cases involved pro se defendants located in the United States who had state law claims brought against them in state court by US plaintiffs, and there was no suggestion of any sale of goods.[41]

In *Federal National Mortgage Association v. Boldrini*, a state mortgage foreclosure case was pending against the defendant, Antonello Boldrini, in state court in Maryland, and Boldrini filed notice of removal to avoid foreclosure by "asserting various defenses which he alleges exist under" the CISG.[42] The court stated that Boldrini's "invocation of the court's federal question jurisdiction . . . misconstrues the nature of that removal jurisdiction" and concluded that the plaintiff's "well-pleaded complaint does not reveal that a federal question [under the CISG] is presented on the face of that well-pleaded complaint."[43]

Additionally, in *Waterford Crossings Apartments*, LaTosha Nichole Tipton (Tipton) removed to federal court a case brought in state court in Tennessee in which Waterford Crossings Apartments sought a detainer warrant against

36. *See* CISG, 1489 U.N.T.S. 3, art. 10.

37. *See id.*

38. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1441 (2011).

39. *Id.*

40. Waterford Crossings Apartments v. Tipton, No. 3:18-0131, 2018 WL 1811554 (M.D. Tenn. Apr. 16, 2018); Fed. Nat'l Mortg. Ass'n v. Boldrini, No. 3:17-CV-2357, 2018 WL 4345279 (M.D. Pa. Jan. 9, 2018).

41. *See* Waterford, 2018 WL 1811554, at *1; *see* Fed. Nat'l, 2018 WL 4345279, at *1.

42. *See* Fed. Nat'l, 2018 WL 4345279, at *1.

43. *Id.* at *4.

her in connection with an apartment lease contract.[44] Tipton's notice of removal argued that the federal court had original jurisdiction because of the CISG.[45] The court described Tipton's contention that there was federal question jurisdiction as "nonsensical."[46]

While the CISG did not help these two defendants, international contracts lawyers should be mindful of the ability to remove a claim that arises under the CISG to federal court, at least when the claim actually does arise under the CISG.

III. Dutch Court of Appeal Interprets Irish Law

On January 23, 2018, the Hague Court of Appeal rendered a decision[47] that is quite interesting from the viewpoint of Private International Law (PIL), the system decision-makers use to determine which law is applicable to contractual (and non-contractual) relationships between parties in different jurisdictions.[48] In this case, the court also answered interesting questions on Dutch copyright law and the European Database Directive.[49] In this summary of the case, however, only the contractual aspects and their PIL implications are described.

A. The Dispute

The parties to the case were Ryanair, the well-known Irish low-cost airline, and a Dutch company called PR Aviation.[50] The issue involved PR Aviation's practice of engaging in "screen-scraping," or collecting data from Ryanair's website for its own commercial purposes, including, among other purposes, comparing prices with the prices of other airlines and acting as an intermediary in booking Ryanair flights.[51]

Ryanair asserted three causes of action: (1) infringement of "database rights protection" under the Dutch Database Act (*Databankenwet*), the implementation into Dutch law of the European Database Directive; (2) copyright infringement under the Dutch Copyright Act (*Auteurswet*); and (3) breach of the Ryanair website General Conditions (General Conditions), which, according to Ryanair, prohibited PR Aviation's screen-scraping activities.[52] Ryanair construed this as malperformance under a contract

44. *See* Waterford, 2018 WL 1811554, at *1.
45. *Id.*
46. *Id.* at *2.
47. Hof's-Haag 23 januari 2018, RvdW 2018, m.nt. UDH (Ryanair / PR Aviation) (Neth). .
48. PIL is known as Conflict of Laws in the US legal tradition. For more information, *see* Robert. L. Brown & Alan S. Gutterman, *Private International Law*, 1 Cal. Transactions Forms—Bus. Transactions § 7:57 (Mar. 2019).
49. *See* Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, 1996 O.J. (L 77) 20.
50. *See* PR Aviation, ECLI:NL:GHDHA:2018:61, ¶ 1.
51. *See id.* ¶ 4.
52. *See id.*

between the parties that arose, according to Ryanair, when PR Aviation accepted the General Conditions. PR Aviation disputed having accepted them.

Ryanair started litigation before the Utrecht District Court in May 2008 to compel PR Aviation to cease and desist from screen-scraping and to pay damages.[53] The Utrecht District Court denied the claims based on the Database Act, but granted them almost entirely based on the Copyright Act.[54] The court reserved judgment on breach of the General Conditions.

After that decision was rendered by the district court, the case then went (i) to the Amsterdam Court of Appeal, which in March 2012 denied all claims;[55] (ii) to the Dutch Supreme Court, or *Hoge Raad* (*HR*), which in January 2014 certified a prejudicial question to the European Court of Justice (ECJ);[56] (iii) to the ECJ, which in January 2015 provided an answer to the HR's question concerning the Database Directive;[57] and (iv) back to the HR again for a final decision in March 2016, when the HR concluded that the claims based on database rights and copyright were rightfully denied, but the claims based on contract must be examined by the Hague Court of Appeal.[58] That led to the decision rendered in 2018 by the Hague Court of Appeal that is the subject of this section.

B. Case Following Referral to the Hague Court of Appeal

When the case was referred to the Hague Court of Appeal, all claims based on intellectual property rights had been dismissed.[59] Thus the only claims before the Hague Court of Appeal (the "Court of Appeal") were those based on the contract that Ryanair claimed was established when PR Aviation accepted the Ryanair website's General Conditions. PR Aviation disputed having accepted these General Conditions. Ryanair also asserted a claim based on tort (*onrechtmatige daad*[60]), but this was denied by the Court of Appeal, mostly on formal grounds.[61]

To determine whether PR Aviation accepted Ryanair's General Conditions, the Court of Appeal first had to determine the jurisdiction whose law would apply. To do so, the Court of Appeal had to factually

53. *See id.* ¶ 4.

54. *See* Hof's-Haag 23 januari 2018, RvdW 2018, m.nt. UDH (Ryanair / PR Aviation) (Neth) ¶ 4.

55. *See id.* ¶¶ 7-9. Full case can be found at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:61 (in Dutch).

56. *See id.* ¶¶ 10-12.

57. *See id.* ¶ 13. Full case can be found at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0030&from$^{N}_{L}$.

58. *See id.* ¶ 14. Full case can be found at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2016:390 (in Dutch).

59. *See* Hof's-Haag 23 januari 2018, RvdW 2018, m.nt. UDH (Ryanair / PR Aviation) (Neth) ¶ 15.

60. Art. 6:162 BW (Neth.).

61. *See PR Aviation*, ¶ 15.

establish what period was relevant and how the claimed acceptance occurred (if at all), that is, by "*browse-wrapping*" (continuing to browse after having been alerted to the existence of general conditions) or by "*click-wrapping*" (actively clicking or ticking an "*accept*" button or box).[62] According to the Court of Appeal, the latter method more readily leads to acceptance (and therefore contract formation) than the former.

The Court of Appeal found that the relevant period was 2004 through August 11, 2010.[63] As to the method of possible acceptance, the Court of Appeal found, partly on formal grounds due to unfortunate litigation by Ryanair, that in the relevant period Ryanair employed the browse-wrapping method.

The General Conditions originally contained a choice-of-law clause choosing English law (2004 – early 2009) and later choosing Irish law (early 2009 – August 11, 2011).[64] It turned out that since April 1, 2009, the parties had concentrated on the potential applicability of Irish law alone, and had more or less forgotten about English law.[65] At a hearing before the Court of Appeal, the parties' attorneys declared that the "parties did not wish to complicate the matter" and that they were willing to assume that English law on this matter was the same as Irish law.[66] The Court of Appeal interpreted this to mean that insofar as the Court of Appeal finds English law to be applicable, the parties (retroactively) made a choice for Irish law (article 3, sections 1 and 2, Rome I Regulation).[67]

The Court of Appeal had to determine the applicable law by applying the rules of the Rome I Regulation, as well as the preceding Rome Convention[68] for the period ending December 17, 2009.[69] Fortunately, at least as was applicable in this instance, the Court of Appeal found that both are largely the same.

Both follow the *bootstrap principle*. That is, they both stipulate that the validity of the choice of law provision must be decided by the law applicable if the choice of law were valid. Thus, the Court of Appeal turns to Irish law.[70]

The parties each presented learned opinions by Irish barristers on Irish law in this respect. Although the Court of Appeal stressed that according to

62. *See id.* ¶ 28.

63. *See id.* ¶ 29.

64. *See* Hof's-Haag 23 januari 2018, RvdW 2018, m.nt. UDH (Ryanair / PR Aviation) (Neth) ¶ 54.

65. *See id.* ¶ 55.

66. *See id.*

67. *See id.*; *see also* Council Regulation 593/2008, of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 2009 O.J. (L 177) 6 (EC).

68. *See* Council Convention On The Law Applicable To Contractual Obligations, 1980 O.J. (L 226) 1 (EEC).

69. *See* Hof's-Haag 23 januari 2018, RvdW 2018, m.nt. UDH (Ryanair / PR Aviation) (Neth) ¶ 44.

70. *See id.* ¶¶ 59-60.

Dutch law the contents of foreign law had to be applied by the Court of Appeal *ex officio* and were not facts requiring proof, the Court of Appeal still felt it was necessary to discuss the parties' submissions on this matter.[71]

First the Court of Appeal considered four Irish decisions submitted by Ryanair. After careful consideration, the Court of Appeal found that three of these decisions did not concern choice of law at all, but rather choice of jurisdiction, to which different rules apply. The fourth was given in an interlocutory application that has no binding authority.

The Court of Appeal then turned to general principles of Irish law. After discussing general principles of Irish contract law concerning contract formation (offer, acceptance, consideration and intention to create legal obligations), the Court of Appeal focused on the question whether PR Aviation could be said, through the principle of *browse-wrapping*, to have accepted the choice-of-law clause in the General Conditions.[72]

The Court of Appeal applied the *objective principle*.[73] It quoted Professor Clark in his handbook on Irish contract law: "A person may be bound by his conduct if, objectively speaking, that person conducts himself or herself in such a way that the conduct would indicate to a reasonable person that he or she intends to be bound."[74]

It then found that PR Aviation cannot be said to have accepted the choice of law in the General Conditions through *browse-wrapping*:

> PR Aviation visited the website, through automated means, to collect data that were freely and free of charge available to anyone and were not legally protected by any right, neither by database right, copyright or otherwise. Where these legally unprotectable data are published and are freely and free of charge made available to anyone on a public website, a reasonable person will not consider that PR Aviation, merely by visiting the website and/or collecting those data, wanted to be bound by the conditions of use that prohibit collecting and using those data, nor to be bound by the choice of law contained therein.[75]

Thus, Irish law is not applicable to a possible contract between Ryanair and PR Aviation through the choice-of-law clause in the General Conditions.

In a somewhat surprising twist the Court of Appeal then found that under general applicable law rules as laid down in the Rome Convention and the Rome I Regulation, the applicable law to a contract between parties, if it must be deemed to have been reached is, ironically, *Irish law*, as the law of the party performing the characteristic performance (Article 4 of the Rome

71. *See id.* ¶ 60.
72. *See id.* ¶ 74.
73. *See id.* ¶ 77.
74. *See id.*
75. *See id.* ¶ 79.

Convention) or the law of the service provider (Article 4 of the Rome I Convention).

C. Conclusion

Given the Court of Appeal's reasoning in denying that PR Aviation had accepted the choice-of-law clause in the General Conditions, according to Irish law, it is no surprise that it concluded that PR Aviation also had not accepted the other articles of the General Conditions, notably those forbidding it to indulge in *screen-scraping*. Ryanair's claims were therefore denied.[76]

This decision is a wonderful Dutch example of the application of PIL rules. The author leaves it to the Irish legal community to determine whether it constitutes a precedent that is binding on Irish courts.

IV. The (In)existence of the Doctrine of Unforeseeability in Québec's Civil Law System

In the very recently decided *Churchill Falls (Labrador) Corp. v. Hydro-Québec*,[77] the Supreme Court of Canada (the "SCC") considered whether the doctrine of unforeseeability applies to contracts entered into under Québec's civil law system. The SCC attempted to clarify the application of what is known in many jurisdictions as the concept of "hardship," ruling that, although the Civil Code of Québec may allow the renegotiation of contractual obligations in cases of hardship resulting from unforeseen events, hardship cannot be broadened to encapsulate the doctrine of unforeseeability.[78] Moreover, the SCC rejected the existence of the right to renegotiate terms of contracts on the grounds of good faith and equity alone, because allowing the renegotiation of a contract on such grounds would also result in a broadening of the scope of those principles to include the doctrine of unforeseeability.

A. The Case

In 1969, Churchill Falls (Labrador) Corp. entered into an agreement with Hydro-Québec for the construction and operation of a hydroelectric plant. According to the agreement, which had a duration of 65 years, Hydro-Québec would be responsible for installing power lines to carry electricity into the province and would purchase most of the electricity produced by Churchill Falls, whether it needed it or not. On the other hand, Hydro-Québec negotiated and obtained the right to purchase electricity at fixed prices for the entire term of the contract. But shortly after the execution of the contract, the price of electricity rose sharply due to an increased demand

76. *See id.* ¶ 99.
77. Churchill Falls (Labrador) Corp. v. Hydro-Quebec, [2018] S.C.R. 46 (Can.).
78. *See id.* ¶¶ 88-92, 99

in the market. Churchill Falls was consequently saddled with an agreement to sell electricity to Hydro-Québec at prices far below market rates.[79]

Considering the drastic change of circumstances, Churchill Falls sought to obtain an order compelling the renegotiation of the contract on the basis that its terms had become unfair and that a draconian rise in the price of electricity was unforeseen at the time the parties entered into the contract. Churchill Falls based its plea on the doctrine of unforeseeability, as well as the concepts of good faith and equity.[80]

In *Churchill Falls*, the SCC accepted Hydro-Québec's position that the appellant's argument regarding the unforeseeability of the changes in the price of electricity was nothing other than an attempt to import into Québec law the doctrine of unforeseeability. Yet, this doctrine, or "théorie de l'imprévision" as it is known in French law,[81] according to which parties ought to be excused from performing contractual obligations the performance of which has become excessively onerous due to unforeseen events, does not apply in Québec.[82] The legislature's decision not to turn unforeseeability into a stand-alone legal rule must be respected.[83]

French courts have traditionally and quite consistently rejected demands to renegotiate contracts in the face of hardship. It is therefore surprising for such an argument to be put forward.

The SCC also refused to apply "equity"[84] to grant an order for the renegotiation of the contract, explaining that by doing so, the court would be indirectly introducing the doctrine of unforeseeability in Québec law.[85] The SCC explained that equity would only potentially apply if there was a situation of inequality or vulnerability in regard to one of the parties, which was not the case.[86] The SCC also stressed that equity applies to "imperfect" contracts.[87] Here, however, the contract could not be considered imperfect, as all the necessary elements of a contract were present when the agreement

79. *See id.* ¶ 3.

80. *See id.* ¶¶ 4-5.

81. Quebec's legal system takes its origins from French law and it is thus not unheard of for a litigant to invoke it to clarify or supplement Québec law.

82. *See id.* ¶¶ 92-3, 105-06.

83. *See id.* ¶ 105.

84. When Quebec courts refer to equity (*équité*), they are not referring to the set of rules that originated in England in the middle ages. In French law, as well as in Quebec law, "*équité*" refers to judicial fairness rather than to a legal system with its own rules, which can only be applied through indirect means such as statutory interpretation. In French law, "*équité*" is often applied where a party has abused its rights. *See generally*, Anne-Francois Debruche, *What is Equity? Of Comparative Law, Time Travel and Judicial Cultures*, 39 ERUDIT REVUE GÉNÉRALE DE DROIT 203 (2009), https://www.erudit.org/fr/revues/rgd/2009-v39-n1-rgd01547/1026985ar.pdf (last visited Mar. 18, 2019) (explaining the French view of equity and contrasting it with the English view).

85. Churchill Falls (Labrador) Corp. v. Hydro-Quebec, [2018] S.C.R. 46, ¶¶ 94-5, 106, 109 (Can.).

86. *See id.* ¶ 109.

87. *See id.* ¶ 179.

was drafted and executed and its wording aligned perfectly with the parties' intentions and expectations.

That the circumstances that prevailed at the time a contract was concluded have now changed is insufficient to argue that the contract is imperfect. If this approach were to be followed, for a contract to be perfect, the provisions in the agreement would have to cover all possible unforeseeable situations capable of causing any sort of imbalance, which is something virtually impossible – and unreasonable – to accomplish. The argument that parties cannot consent to something that they are not aware of because it is unforeseen at the moment of the execution of the contract therefore did not prevail. If that argument were to be accepted, it would open the floodgate to the reopening of several contracts on the basis that the parties could not have agreed to different conditions imposed by a change in circumstances, and that it is therefore unfair for them to be bound by their agreements.[88]

B. Canada's Approach to Good Faith

Canada's provinces that have adopted a common law system—namely, all provinces other than Québec—have denied the existence of a stand-alone duty of good faith in its contract law system for years.[89] Although the principle of good faith has been explicitly recognized in the law of Québec since 1994,[90] it cannot be used to temper the principles of the binding force of contracts and autonomy of will.[91] Nonetheless, the SCC recognized that if unforeseeable events cause hardship to a party who can prove that it did not accept to bear the unforeseen risks inherent to the bargain when it concluded the contract, the principle of good faith might give rise to a right to renegotiate the contract. Here, however, Hydro-Québec's refusal to renegotiate the contract did not constitute a breach of that duty and did not amount to a disruption of the contract's equilibrium.[92] The SCC found

88. *See id.* ¶ 109.

89. This approach was altered in 2014 in the SCC's landmark decision *Bhasin v. Hrynew*, 2014 SCC 71, in which the court found that there is a duty to act honestly, not capriciously and arbitrarily, in the performance of contractual obligations. Nonetheless, it is hard to argue that the application of such good faith duty has been broadly accepted in common law provinces and the courts of Ontario and Saskatchewan have rejected plaintiffs' attempts to establish a breach of a duty of good faith implying that *Bhasin* didn't provide any significant changes to the law. *See* James Hardy, *Did Bhasin Honestly Change Canadian Contract Law?*, Thornton Grout Finnigan Oct. 20, 2017, http://www.tgf.ca/resources/publications/publication/did-bhasin-honestly-change-canadian-contract-law (last visited Mar. 18, 2019).

90. *See* Civil Code of Québec, S.Q. 1991, c 64, arts 6-7 (Can.). Article 6: "Every person is bound to exercise his civil rights in accordance with the requirements of good faith."; article 7: "No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith."

91. Churchill Falls (Labrador) Corp. v. Hydro-Quebec, [2018] S.C.R. 46, ¶ 13 (Can.).

92. *See id.* ¶¶ 118-19.

Hydro-Québec's conduct to be neither unreasonable nor aimed at maliciously preventing the performance of the contract by Churchill Falls.[93]

In the end, the SCC refused to recognize a right to renegotiate the contract on the basis of hardship because the contract between Churchill Falls and Hydro-Québec was of such nature as to imply that Churchill Falls accepted the unforeseen risks related to the fluctuation of the prices of electricity when it agreed to sell it for a fixed rate to Hydro-Québec in return for certain guarantees.[94]

On an a contrario reading of the case, it would be possible to rely on the duty of good faith to force a renegotiation of the terms of a contract when unforeseen events cause hardship to a contracting party that the party clearly purported not to accept.

C. Conclusion

In this writer's view, the SCC's approach to the sanctity of contracts is cause for concern. Indeed, the SCC's willingness to analyze the contract to ascertain what the SCC refers to as the contract's "paradigm," that is, the way the parties have allocated the risks and benefits between them, as well as its efforts to qualify the contract as transactional rather than relational,[95] appears to leave the door open for the imposition of a disguised doctrine of unforeseeability. Justice Rowe's dissenting opinion only increases the possibility of this occurring in the future.[96] Thus, when the agreement is considered relational or when the contract's paradigm is not clear or is deemed not to establish a proper equilibrium between the parties (as determined ex post facto by a court), it now appears open, in the face of a change of circumstances, for an aggrieved party to petition a court to have the contract renegotiated. With deference, by penning a multi-faceted analysis of hardship, the SCC has rendered quite a disservice to those placing their trust in a contract governed by the law of Québec.

V. Franchising in the United States

With two notable exceptions, franchising in the United States remained fairly status quo during the 2018 calendar year. The two biggest developments surrounded employment issues. First, the joint-employer issue continued to evolve in 2018, with the pendulum seemingly swinging back toward the more traditional view that franchisors are not joint employers of

93. *See id.* ¶ 119.

94. *See id.* ¶¶ 54, 80, 124.

95. *See* Churchill Falls (Labrador) Corp. v. Hydro-Quebec, [2018] S.C.R. 46, ¶ 59 (Can.). The theory of relational contracts, developed by American legal scholars, prioritizes the preservation of the loyalty between the parties rather than the strict performance of contractual obligations. For more information. *See* Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089 (Sept. 1981).

96. *See* Churchill Falls (Labrador) Corp. v. Hydro-Quebec, [2018] S.C.R. 46, ¶ 140-90 (Can.).

their franchisees' employees.[97] Second, so-called "no-poach" provisions in franchise agreements have come under heavy scrutiny and attack, both by regulators and by employees in 2018.[98] Those two developments, together with a third matter currently percolating at the Federal Trade Commission, are the subject of this Section.

A. Joint-Employer Issue Continues to be in Flux

1. *Developments from the NLRB*

On September 14, 2018, the National Labor Relations Board (NLRB) published a Notice of Proposed Rulemaking in the Federal Register regarding its joint-employer standard.[99] Under the proposed rule, "an employer may be found to be a joint employer of another employer's employees only if the two employers share or codetermine the employee's essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction."[100] As the NLRB explains, "a putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine."[101]

This new standard, if adopted, would reverse the standard introduced by the NLRB in the *Browning-Ferris* case in August of 2015, which established that a company could be deemed a joint employer even if its "control" over the essential working conditions of another business's employees was indirect, limited, and routine or contractually reserved but never exercised.[102]

As of the time of this writing, these are merely proposed rules and do not yet formally reverse the *Browning-Ferris* standard. The publication of the proposed rules commenced a 60-day comment period (which the NLBR has extended to December 13, 2018),[103] during which the public may submit comments to the NLRB regarding the proposed rules. If this new standard is adopted, it should bring clarity that franchisors – at least under typical circumstances – are not joint employers with their franchisees of the

97. *See, e.g.*, *In re* Domino's Pizza Inc., No. 16-CV-2492 (AJN)(KNF), 2018 WL 4757944 (S.D.N.Y. Sept. 30, 2018).

98. *See, e.g.*, Press Release, Illinois Attorney General, Attorney General Madigan Announces Investigation of No-Poach Agreements at National Fast Food Franchises (July 9, 2018), http://www.illinoisattorneygeneral.gov/pressroom/2018_07/20180709.html (last visited Mar. 18, 2019).

99. The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46681-01 (proposed Sept. 14, 2018) (to be codified 29 C.F.R. ch. 1).

100. *Id.* at 46681.

101. *Id.*

102. Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186 (Aug. 27, 2015).

103. Press Release, Office of Public Affairs of National Labor Relations Board, NLRB Extends Time for Submitting Comments on Proposed Joint-Employer Rulemaking (Oct. 30, 2018), https://www.nlrb.gov/news-outreach/news-story/nlrb-extends-time-submitting-comments-proposed-joint-employer-rulemaking (last visited Mar. 18, 2019).

franchisees' employees under the federal laws within the NLRB's purview. It also remains to be seen whether other federal agencies (particularly the United States Department of Labor and the Occupational Safety and Health Administration) follow suit after having previously changed their standards to align with the NLRB's position.

2. *Case Law Developments on the Joint-Employer Issue*

From a caselaw perspective, the decisions have been interesting in their interpretations of joint employment, not only under related federal statutes, but also under various states' employment laws. For example, on September 30, 2018, the United States District Court for the Southern District of New York granted summary judgment in favor of the franchisor of the Domino's Pizza franchise system, holding that the franchisor is not a joint employer of its franchisees' employees for purposes of the Fair Labor Standards Act and the New York Labor Law.[104]

In making its decision, the court examined four "formal control factors," namely "whether the alleged employer: (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[105] The court found that the plaintiffs had failed to satisfy any of these four factors, and thus moved to an analysis of "functional control factors" to determine whether the franchisor was a joint employer.[106]

Under the "functional control factors," the court examines:

> (1) whether the alleged employers' premises and equipment were used for the plaintiffs' work; (2) whether the subcontractors had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which [the] plaintiffs performed a discrete line job that was integral to the alleged employers' process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the alleged employers or their agents supervised [the] plaintiffs' work; and (6) whether [the] plaintiffs worked exclusively or predominantly for the alleged employers.[107]

The court found that the second, third, and sixth factors did not really apply to the franchisor-franchisee context and that the plaintiffs did not satisfy the remaining factors. As such, the franchisor was not a joint

104. *See In re* Domino's Pizza Inc., No. 16-CV-2492 (AJN)(KNF), 2018 WL 4757944, at *10 (S.D.N.Y. Sept. 30, 2018).

105. *Id.* at *5 (citing Irizarry v. Catsimatidis, 722 F.3d 99, 105 (2d Cir. 2013)).

106. *Id.* at *7.

107. *Id.* (citing Olvera v. Bareburger Group LLC, 73 F. Supp. 3d 201, 205-06 (S.D.N.Y. 2014)).

employer of the plaintiff franchisees under a theory of "functional control."[108]

Overall, these developments indicate that the joint-employer issue in 2019 will continue to be a developing topic, but that the trend seems to be toward finding that in a standard franchisor-franchisee relationship, franchisors are not joint employers with their franchisees.

B. No-Poach Provisions in Franchise Agreement Face Scrutiny

In 2018, the issue of "no-poach" provisions in franchise agreements gained increased visibility, resulting in various states' attorneys general commencing investigative proceedings and, in some cases, filing lawsuits against certain franchisors,[109] and the plaintiffs' bar filing class-action lawsuits on behalf of franchisee employees based on these provisions in franchise agreements.

In general, a "no-poach" provision prohibits franchisees from soliciting or hiring the employees of the franchisor or other franchisees.[110] Traditionally, franchisors included these provisions to protect franchisees so that the franchisor and its franchisees do not expend time, effort, and money to train an employee only to have another franchisee "poach" that employee. The franchisee employees are not parties to those agreements and are often unaware of the existence of those no-poach provisions.

In January 2018, the Attorney General of Washington State began investigating no-poach provisions among fast-food franchisors on the basis that those provisions violated the state's antitrust laws.[111] Then, in July 2018, attorneys general from 10 states and the District of Columbia sent a letter to eight national fast-food franchisors[112] requesting information from those franchisors on their use of no-poach provisions that restricted workers' ability to seek a job with another franchisee in the same franchise system.[113] The letter indicated the attorneys general were concerned that:

---

108. *Id.* at *8–9.

109. *See* Press Release, Washington State Office of the Attorney General, AG Ferguson Announces Major Milestones in Initiative to Eliminate No-Poach Clauses Nationwide, Files Lawsuit Against Jersey Mike's (Oct. 15, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-major-milestones-initiative-eliminate-no-poach-clauses (last visited Mar. 18, 2019).

110. *See* Press Release, Illinois Attorney General, Attorney General Madigan Announces Investigation of No-Poach Agreements at National Fast Food Franchises (July 9, 2018), http://www.illinoisattorneygeneral.gov/pressroom/2018_07/20180709.html (last visited Mar. 18, 2019).

111. *See* AG Ferguson, *supra* note 109.

112. The fast-food franchisors were Arby's, Burger King, Dunkin' Donuts, Five Guys Burgers and Fries, Little Caesars, Panera Bread, Popeyes Louisiana Kitchen and Wendy's. *See* AG Madigan, *supra* note 110.

113. *See id.*

> By limiting potential job opportunities, these [no-poach] agreements may restrict employees' ability to improve their earning potential and the economic security of their families. These provisions also deprive other franchisees of the opportunity to benefit from the skills of workers covered by a No Poach Agreement whom they would otherwise wish to hire. When taken in the aggregate and replicated across our States, the economic consequences of these restrictions may be significant.[114]

Cited in the letter was a Princeton University study conducted in July, 2017, that found that 80 percent of 156 quick-service restaurant franchise contracts analyzed in the study contained no-poach provisions.[115]

Arising out of these investigations, as of October 15, 2018, the Washington State Attorney General has entered into binding "assurances of discontinuance" with 30 franchisors, requiring them to remove no-poach provisions from both their existing franchise agreements nationwide and the forms of franchise agreement they were then using with new franchisees nationwide.[116] Of these 30 franchisors, the majority are within the restaurant industry, but the Washington attorney general has also entered into assurances of discontinuance with franchisors in the fitness, auto-repair, and convenience-store industries.[117]

Sensing an opportunity to capitalize on these franchisors entering into the assurances of discontinuance, employees of various fast-food franchisees have begun filing follow-on class-action lawsuits against franchisors (and sometimes their franchisees) alleging violation of antitrust statutes by franchisors and franchisees who have entered into franchise agreements that contain no-poach provisions.[118]

In addition to the investigations conducted by the state attorneys general and the resulting follow-on class-action lawsuits, US Senators Cory Booker and Elizabeth Warren have been active in trying to eliminate no-poach provisions.[119] In early 2018, Senators Booker and Warren introduced a Senate bill, *The End Employer Collusion Act*, which would ban no-poach agreements between franchisors and franchisees.[120] As of this writing, the bill has been referred to the Committee on Health, Education, Labor, and Pensions, but has not proceeded any further. Perhaps sensing that their bill

---

114. *See* Letter from 11 Attorneys General to 8 Fast-Food Franchisors Regarding Request for Information Regarding Franchise Agreements (July 9, 2018), https://ag.ny.gov/sites/default/files/npnh_letter_redacted.pdf (last visited Mar. 19, 2019).

115. *Id.* (citing Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* (IZA Institute Of Labor Economics Discussion Paper No. 11672, 2018), http://ftp.iza.org/dp11672.pdf.).

116. *See* AG Ferguson, *supra* note 109.

117. *See id.*

118. *See, e.g.*, Ogden v. Little Caesar's Enterprises, Inc., No. 2:18-cv-12792, 2018 WL 7164263 (E.D. Mich. Oct. 26, 2018).

119. *See* End Employer Collusion Act, S.2480, 115th Cong. (2018).

120. *See id.*

was unlikely to pass under the current administration, on July 12, 2018, Senators Booker and Warren sent a letter to nearly 100 large franchisor CEOs (1) requesting information regarding their no-poach practices and (2) urging them to eliminate from their franchise agreements "any language that imposes limits on worker mobility."[121]

Suffice it to say, based on this increased governmental scrutiny, no-poach provisions will continue to be a significant topic in US-based franchising in 2019. However, the trend appears to be away from their usage, particularly in the quick-service restaurant industry.

C. FTC Scheduled to Review Franchise Rule

There is one last issue hovering over the franchising industry in the United States, namely, the Federal Trade Commission's scheduled review of its rules governing franchising.[122] In the United States, the amended FTC Franchise Rule (the "FTC Franchise Rule") governs the offer and sale of franchises on a nationwide basis.[123] The FTC is required to review the FTC Franchise Rule every 10 years and, in 2018, the FTC is scheduled to initiate a review of, and solicit public comments on, the current FTC Franchise Rule.[124] As of the end of 2018, the FTC had not yet issued any further statements on the scope of its review of the current FTC Franchise Rule. However, it is reasonable to expect that this issue will take center stage in the US franchising industry in 2019, particularly if the FTC makes a move to discontinue the FTC Franchise Rule or to make any significant changes to the current FTC Franchise Rule. As such, franchisors that conduct business in the United States should monitor this issue and be ready to implement any changes that may arise from a potential rewrite of the FTC Franchise Rule.

121. Letter from Sen. Cory A. Booker and Sen. Elizabeth Warren to Nearly 100 Large Franchise CEOs (July 12, 2018), https://www.warren.senate.gov/imo/media/doc/No%20poach%20letter%20generic.pdf (last visited Mar. 18, 2019).

122. *See generally* Federal Trade Commission, Retrospective Review of FTC Rules and Guides, https://www.ftc.gov/enforcement/rules/retrospective-review-ftc-rules-guides (last visited Mar. 18, 2019).

123. *See* 16 C.F.R. § 436.2 (2007). Certain states also have state-specific laws that govern the offer and sale of franchises and that may supplement the amended FTC Franchise Rule.

124. *See* Press Release, FTC Announces Regulatory Review Schedule (Feb. 14, 2018), https://www.ftc.gov/news-events/press-releases/2018/02/ftc-announces-regulatory-review-schedule (last visited Mar. 19, 2019).