

ESSENTIALS OF  
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# CONFLICT OF LAWS

SECOND EDITION

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ary jurisdictional issues, which delays moving the dispute forward and addressing the merits.

In light of these criticisms, it is possible to support a very different approach. Rather than striving to have a dispute heard in the best possible forum, it may be more efficient to instead have it heard in an acceptable forum. Beyond that, stays of proceedings should be based not on relative appropriateness but rather on the timing of when proceedings are started. This is, in oversimplified terms, the approach adopted as between the member states of the European Union.<sup>13</sup> That approach has its own problems, especially those stemming from basing priority on timing, but it does avoid many of the problems with *forum non conveniens*.

It would also be possible to narrow, rather than abandon, the doctrine so that it would apply only in cases involving jurisdiction agreements or parallel proceedings elsewhere. Arguably these are the situations that generate the greatest pressures for a stay of proceedings, so the doctrine is essential to address them. However, it would be relatively easy for a defendant to commence parallel proceedings in a foreign forum so as to access even this more limited version of the doctrine, so this might not amount to much of an improvement in practice.

The current trend in Canada remains highly supportive of *forum non conveniens*. Statutory reforms on the issue of jurisdiction in several provinces chose to codify rather than alter the doctrine, so that it continues to operate as it did under the common law.<sup>14</sup> The best response to the argument that the doctrine is too vague and flexible and so encourages wasteful preliminary motions is to analyze the decided cases. As this chapter will explain, the principles in the cases applying the doctrine provide significant guidance as to which factors will have the most weight in particular disputes, allowing for reasonable predictability of outcome and guarding against arbitrary decisions.

## D. PROCESS ISSUES

### 1) Relationship to Taking Jurisdiction

It is not uncommon for lawyers and judges to confuse the issue of jurisdiction and the doctrine of *forum non conveniens*. This confusion can lead to

13 See EC, Commission Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ, L 351/1 (known as the “Recast Brussels I Regulation”).

14 See, for example, the analysis of s 11 of the CJPTA (BC), above note 8, in *Teck Cominco Metals Ltd v Lloyd’s Underwriters*, 2009 SCC 11 at para 22, affg (2007), 67 BCLR (4th) 101 (CA) [*Teck Cominco*].

unclear decisions staying proceedings for lack of jurisdiction or dismissing proceedings because another forum is more appropriate.<sup>15</sup> One cause of this confusion is the structure and the wording of the various provincial statutes and rules of court dealing with these issues. Another is that defendants frequently raise both issues together, challenging a proceeding both for lack of jurisdiction and on the basis of *forum non conveniens*.

It must first be determined that the court has jurisdiction in the proceeding, and then, if it does, the court must consider whether it should use its discretion to stay its jurisdiction. The Supreme Court of Canada made reference to the distinction between jurisdiction and *forum non conveniens* in *Tolofson v Jensen* when it stated:

[the real and substantial connection] test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest. In addition, through the doctrine of *forum non conveniens* a court may refuse to exercise jurisdiction where, under the rule elaborated in *Amchem* . . . there is a more convenient or appropriate forum elsewhere.<sup>16</sup>

In *Muscutt v Courcelles*, the Court of Appeal for Ontario made it clear that a two-stage approach is necessary.<sup>17</sup> In that case, Sharpe JA quoted from the Ontario Divisional Court's decision granting leave to appeal in *Lemmex v Bernard*:<sup>18</sup>

[T]he question of whether Ontario has jurisdiction to hear these actions is a different question from whether this court should decline to exercise its jurisdiction because another forum is the more convenient forum. Using other terminology, the concept of jurisdiction *simpliciter* is different from that of *forum non conveniens*. The second question of whether Ontario should decline to exercise jurisdiction because another forum is the more convenient forum only needs to be considered once an Ontario court has determined that it has jurisdiction to hear the action.<sup>19</sup>

15 See Cheryl Dusten & Stephen GA Pitel, "The Right Answers to Ontario's Jurisdictional Questions: Dismiss, Stay or Set Service Aside" (2005) 30 *Advocates' Quarterly* 297.

16 [1994] 3 SCR 1022 at 1049. See also *GreCon Dimter Inc v JR Normand Inc*, [2005] 2 SCR 401 at para 58.

17 (2002), 60 OR (3d) 20 (CA) [*Muscutt*]. See also *Coutu v Gauthier (Estate)* (2006), 296 NBR (2d) 34 at paras 52–55 (CA) [*Coutu*]; *Bouch v Penny (Litigation Guardian of)*, 2009 NSCA 80 at paras 29–30 [*Penny*].

18 (2000), 51 OR (3d) 164 (Div Ct).

19 *Ibid* at para 19, cited in *Muscutt*, above note 17 at para 43. See also *Club Resorts*, above note 1 at para 101: "a clear distinction must be drawn between the existence and the exercise of jurisdiction."

## C. THE CHOICE OF LAW PROCESS

The traditional choice of law process uses a series of rules, each of which links a legal category or issue with a particular system of law by means of a connecting factor.<sup>16</sup> For example, one such rule could be that claims in tort are governed by the law of the place where the tort was committed. In this example, tort is the legal category or issue and the connecting factor is the place of the tort. To apply the rule, we identify the place of the tort and that place, as the connecting factor, leads us to the applicable law. This rule covers only tort, and so we would need a separate rule for other legal categories or issues such as contract, unjust enrichment, the transfer of property, trusts, and so on.

One hallmark of the traditional process is that it chooses the applicable law without focusing on the content of that law or on the result it will reach when applied. An Ontario court could use the rule in the example above to identify Texas law as the law applicable to a tort claim without first knowing anything about that law. In this sense the choice of law process operates at one step removed from the resolution of the underlying dispute.

As we will see, the selection of the connecting factor is critical in formulating a choice of law rule. There are many possible connecting factors. Some are relatively certain and predictable. These include a person's domicile or habitual residence and the place where a specific act occurs, such as the commission of a tort or the making of a contract. These sorts of connecting factors have a relatively narrow focus. They are quite specific and can therefore be described as rigid connecting factors. Other connecting factors have a broader focus and are thought to be more flexible. These include the "proper law" of a contract, ascertained by weighing several factual connections to various legal systems. One of the core debates in choice of law is how rigid or how flexible the connecting factor should be for a particular rule.

Most choice of law rules use a single connecting factor, whether rigid or flexible. However, it is possible to have a choice of law rule that uses multiple connecting factors. For example, a rule could provide that the formal validity of a contract is governed by either the law of the place of contracting or the proper law of the contract. If each connecting factor pointed to a different legal system, the contract would need to be formally valid only under one of the two. For another example, a rule could provide that claims in tort are governed by both the law of the place where the tort occurred and by the law of the forum.

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<sup>16</sup> See von Savigny, above note 8 at 27, 89, and 148-51.

commentators have proposed that the characterization should be done not with reference to the law of the forum but instead with reference to the law that would end up governing the claim, often called the *lex causae*. Under this approach, the Ontario court would characterize the claim as German law would. In this example, the likely result is that Ontario would then not have a choice of law rule for that legal category and would need to formulate one.

The idea that characterization should be done according to the *lex causae*, the law which the choice of law rule is itself trying to identify, has been widely criticized as entirely circular. The plaintiff cannot simply assert a claim under German law and then insist the choice of law process follow German characterization; the point of the choice of law process is to see whether there is any basis for looking to German law rather than the law of the forum to resolve the dispute. In addition, *lex causae* characterization breaks down if there are two possibly applicable foreign legal systems, for example German law and Austrian law, and they each characterize the cause of action or issue differently, leaving no answer to the question of which is to be preferred.<sup>31</sup>

As a result, the common law characterizes using the law of the forum. However, some modifications are made to attempt to better address these more difficult cases. First, if the claim is unknown to the law of the forum, it is characterized as its closest functional equivalent under that law. For example, German law recognizes contracts of inheritance. There is no directly comparable legal institution in Ontario law, but using a functional analysis it seems likely that the closest analogy would be to a will and the law of succession rather than to contract law.<sup>32</sup>

Second, there is some limited willingness to adjust the forum legal system's domestic divisions to better align with international norms. Kahn-Freund and others call this approach one using the "enlightened" law of the forum.<sup>33</sup> The leading example of this is in the choice of law rules on property. As will be explained in Chapter 16, while the common law generally distinguishes between real and personal property, most other legal systems instead distinguish between immovable

31 Rogerson, above note 22 at 270; Kahn-Freund, above note 2 at 372. Forsyth addresses additional problems with *lex causae* characterization such as those of cumulation and gap: above note 22 at 152.

32 See Kahn-Freund, above note 2 at 376.

33 *Ibid* at 373–77; Forsyth, above note 22 at 153–54. Kurt Lipstein is a leading advocate of this approach: see his "Characterization" in Kurt Lipstein, ed, *International Encyclopedia of Comparative Law*, vol 3, above note 15 at 5–7; and also Kurt Lipstein, *Principles of the Conflict of Laws, National and International* (The Hague: Martinus Nijhoff, 1981) at 96–97.

might be, for example, to preserve the reasonable expectations of the parties and the security of commercial transactions. With both states having an interest in having their rule applied, this method would fall back on the law of the forum. Of greater interest, consider the analysis if the facts of the case remained the same but the legal systems were reversed, so that it was the law of Maine that contained the prohibition. Now the court could well conclude that Maine had no interest in having its rule applied to a woman in Massachusetts.<sup>46</sup>

*Babcock v Jackson* is a famous American conflict of laws case that illustrates both rule selection and interest analysis.<sup>47</sup> The plaintiff was a passenger in the defendant's car. Both parties were from New York. They drove to Ontario for a weekend visit, where they were involved in a single-vehicle accident. The plaintiff sued the defendant in New York and the court had to consider whether the claim was governed by the law of New York or the law of Ontario. Ontario law at that time included a statutory prohibition on guest passengers—people who had not paid the driver for the transport—suing the driver of the vehicle.

The court noted that the traditional choice of law rule for tort was to apply the law of the place of the tort, which was Ontario. However, instead of using that rule to determine the legal system that would govern the dispute, the court directly examined the two competing rules. It held that New York had a strong interest in having its law applied so that the injured plaintiff could receive compensation. It also held that Ontario had no interest in having its law applied. The court stated that the policy underlying the Ontario statute, which it took as being to protect insurance companies from fraudulent claims concocted by drivers and passengers, was not concerned with protecting New York insurers. Accordingly, the court did not apply the Ontario statute.

Several American states have adopted rule selection or interest analysis as their choice of law process.<sup>48</sup> But Canadian courts have generally not followed suit, and with good reason. Both of these approaches have a pronounced bias in favour of applying the law of the forum, which runs counter to comity and the principle of proximity. Rule selection leaves it open for courts to choose what they perceive to be the “better” law, which, given their high degree of familiarity with the law of the forum, is likely to be that law.<sup>49</sup> In *Clark v Clark* the court openly observed that

46 Currie, *Selected Essays*, above note 44 at 108–9.

47 191 NE2d 279 (NY 1963) [*Babcock*].

48 See Symeon C Symeonides, “Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey” (2015) 63 *American Journal of Comparative Law* 299.

49 JHC Morris, “Law and Reason Triumphant or How Not to Review a Restatement” (1973) 21 *American Journal of Comparative Law* 322 at 324.

## D. PARTIES

A common preliminary issue in litigation is the status, standing, or capacity of either the plaintiff to commence proceedings or the defendant to be sued. This is in no way primarily a conflicts issue: it arises often in domestic litigation and is considered in detail in the civil procedure literature. Each jurisdiction has to determine rules for claims by or against individuals under a certain age, individuals with a mental illness, partnerships, trusts, unincorporated associations, and the like.<sup>32</sup>

In conflicts cases, the general rule is that issues concerning a party's status are governed by the law of the forum, on the basis that these are issues of procedure, not of substance.<sup>33</sup> Even if the dispute will be resolved using a foreign law, that law cannot, by virtue of being the applicable law, give to the plaintiff a status he, she, or it otherwise lacks under the law of the forum. For example, for an individual to sue in Ontario independently in his or her own name, he or she must be eighteen years old.<sup>34</sup> It is not relevant that he or she is sixteen years old and is resident or domiciled in a country where that is a sufficient age to so sue. The forum's requirement governs.

However, this rule would cause significant problems if strictly applied to non-natural persons. For example, for a corporation to sue in Ontario, must it meet Ontario's requirements for a valid corporation in terms of share structure, number of directors, and so on? In practice this would mean a large number of foreign corporations would lack status to sue in Ontario. Each jurisdiction can allow non-natural persons such as corporations, partnerships, and trusts to be created in slightly different ways. Strict insistence on the law of the forum for status questions would be a major barrier to cross-border litigation.

Accordingly, the status of non-natural persons is governed by the law of the person's "home" jurisdiction, such as the place of incorporation for a corporation. If the person has the status to sue or be sued under that law, that will be accepted by the forum. In *International Association of*

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eds, *The New Ontario Limitations Regime: Exposition and Analysis* (Toronto: Ontario Bar Association, 2005) at 110.

32 See, for example, Ontario Rules, above note 1, rr 7–10.

33 *Regas Ltd v Plotkins*, [1961] SCR 566 at 571–72; *International Association of Science and Technology for Development v Hamza* (1995), 28 Alta LR (3d) 125 at para 9 (CA) [IASTD].

34 See Ontario Rules, above note 1, r 1.03(1), which defines "disability" to include being a minor; and r 7.01(1), which requires those under a disability to use a litigation guardian; see also the *Age of Majority and Accountability Act*, RSO 1990, c A.7, s 1, which sets the age of majority at eighteen.