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A Canadian Perspective: Choice of Law and Choice of Forum

By Barry Leon and Graham Reynolds

I. Introduction

Canadian law with respect to choice of law and choice of forum favors party autonomy, particularly in international business-to-business contracting. In the contexts of these aspects of choice, only infrequently do Canadian courts act to limit party autonomy. This article focuses on party autonomy and the limits thereof in these contexts in the area of Canadian conflict of laws. Mandatory rules are discussed only to the extent that they are present in Canadian conflict of laws.

II. Choice of Law

A. Party Autonomy

In Canada, parties to a contract can choose the law that they want to govern their contract, subject to certain limits. The law governing a contractual dispute is sometimes described as the “proper law.” The seminal Canadian position on party autonomy in choice of law in contract is set out in *Vita Food Products Inc. v. Unus Shipping Co.*,¹ a 1939 decision of the Judicial Committee of the Privy Council (JCPC). *Vita Foods* wound its way to the JCPC through the courts of the Canadian province of Nova Scotia, where the case originated.

Vita Foods states that “by English law . . . the proper law of the contract ‘is the law which the parties intended to apply.’ That intention is objectively ascertained and if not expressed will be presumed from the terms of the contract and the relevant surrounding circumstances.”² Parties can expressly indicate which law is to govern the contract through a choice of law clause. Subject to certain limitations, this law will govern the contract.³

B. Limits on Party Autonomy

Vita Foods outlined three limits to party autonomy with respect to choice of law: the choice of law must be bona fide; the contract must be legal; and there must be no reason for avoiding the choice of law on the grounds of public policy. Each of these limitations is discussed below.

There are other limits to party autonomy in the context of choice of law, including the need for the express choice of law to have meaning, limitations on the proper law, limitations on the choice of law, and mandatory laws. These limitations on party autonomy are also discussed below.

1. Choice of law must be bona fide

A choice of law that appears to the court to make no commercial sense will be scrutinized under the bona fide limitation. *Nike Infomatic Systems Ltd. v. Avac Systems Ltd.*,⁴ citing *Dicey and Morris on the Conflict of Laws*,⁵ discusses the bona fide limitation on party autonomy, noting the following:

No court . . . will give effect to a choice of law (whether English or foreign) if the parties intended to apply it in order to evade the mandatory provisions of that legal system with which the contract has its most substantial connection and which, for this reason, the court would, in the absence of an express or implied choice of law, have applied.

2. Contract must be legal

Parties will not have their choice of law respected by the courts if the contract in which this choice is embedded is found to be illegal. Determining whether a contract is legal requires that it be evaluated against a set of legal standards. As noted in *Castel and Walker*, “this begs the question by what law the legality is to be tested”:⁶ the law of the place of contracting, the proper law, or the law of the place of performance?⁷

The fact that the contract is illegal in the place where the contract was made does not necessarily render it illegal.⁸ The determining factor is whether the contract is illegal under the proper law. A contract that is “illegal or whose performance is illegal by its proper law will not be treated as a legal contract in Canada.”⁹

The law regarding the validity of a contract that is illegal in its place of performance is unsettled. There is “considerable authority” to support the proposition that a contract lawful by its proper law but illegal in its place of performance is unenforceable.¹⁰ However, it is unclear “whether this is a rule of the conflict of laws or whether it reflects the fact that contracts which have been held unenforceable for this reason have also offended against local public policy, or have been invalid by their proper law.”¹¹

As long as the contract is legal under the proper law and the law of the place of performance, it is irrelevant whether it is legal under the law where a party is “resident or domiciled or of which he or she is a nation-

al, or where he or she has his or her place of business, provided the law of that place is not the proper law or the law of the place of performance.”¹² Finally, contracts are illegal in Canada if they are “illegal under a federal statute having extraterritorial effect, such as exchange control legislation, or other revenue laws . . .”¹³

3. Contract must not be contrary to public policy

Contracts are illegal in Canada if they, or parts of them, are contrary to concepts of public policy or morality. For example, it is very clear that a contract for slavery would be contrary to public policy. However, some less offensive contracts are moving targets. At one time gambling was considered contrary to Canadian public policy, and gambling contracts would not be enforced by Canadian courts. Canadian courts have held that gambling is no longer against the public policy of Canada.¹⁴ In *Boardwalk Regency Corp. v. Maalouf*, the Court of Appeal for the province of Ontario held that the enforcement of foreign default judgments regarding gambling debts is not contrary to public policy.¹⁵ Another topic that Canadian courts have considered is damage awards that go beyond compensatory damages. In *Old North State Brewing Co. v. Newlands Services Inc.*,¹⁶ the Court of Appeal for the province of British Columbia held that the enforcement of treble and punitive damage awards in Canada was not contrary to public policy.

4. Connection between the contract and the chosen law not required

Canadian law does not require a connection between the contract (e.g., its subject matter or parties) and the law selected to govern the contract.¹⁷ However, as noted in *Castel and Walker*, “if the parties choose a legal system with which the transaction has no connection at all, the *bona fides* of their choice may be in doubt and the courts may disregard it.”¹⁸

5. Choice of law must have meaning

If a court finds that the express choice of law is meaningless, it will disregard it, and will determine the proper law “according to other indications of the intentions of the parties.”¹⁹

6. Limitations on the proper law

Party autonomy is limited by restrictions on the capacity of the proper law to govern the entire contract. The proper law does not necessarily apply to every contractual term or every potentially disputable issue.²⁰ For instance, the parties may decide to allow certain terms to be governed by different laws, in a process called *depeçage*.²¹

The court may decide that the “objectively ascertained proper law varies according to the contractual

issue involved.”²² However, courts rarely choose to act in this manner and will not vary the proper law without good reason.²³

In addition, certain types of contractual issues, including issues relating to the formation of the contract, the formal validity of the contract, and the parties’ capacity to enter into the contract, are not “referable” to the governing law.²⁴ For example, issues of offer and acceptance are determined by the “‘putative proper law’ . . . the law that would be the proper law if the contract was validly created.”²⁵

In a similar manner, though compliance with the requirements of the proper law will generally suffice to allow the contract to be declared formally valid, “enforceability of the contract may depend upon compliance with certain rules prescribed by the forum . . .”²⁶

A party’s capacity to enter a commercial contract could be governed by three different laws: the law of the place of contracting; the law of the domicile of the parties (particularly in the case of corporate entities); and the proper law of the contract (the latter having the support of more recent Canadian case law).²⁷

7. Limitations on choice of law

Canadian courts will not give “extraterritorial effect to certain types of foreign statutes or judgments,” including foreign blocking legislation, foreign penal laws, foreign revenue laws or foreign public laws.²⁸ Furthermore, Canadian courts will not allow conflict of laws rules to be used to “evade local substantive rules of law otherwise applicable.”²⁹

8. Mandatory laws

Some Canadian statutes limit party autonomy by imposing mandatory laws or mandatory choice of law rules. These statutes can be grouped into four classes. The first class, exemplified by the *Bills of Exchange Act*,³⁰ provides “choice of law rules that must be applied when determining the proper law.”³¹ The statutes in the second class, in which the *Canada Shipping Act*³² is included, “limit the scope of their own application and provide choice of law rules for contractual issues covered by them, but leave unaffected the determination of the proper law in relation to issues outside the ambit of the statute.”³³ The third class “provides for the application of particular substantive laws,” if the proper law of the contract is the law of the place that enacted the statute.³⁴ Statutes belonging to the third class include the *Frustrated Contracts Act* (Ontario)³⁵ and the *Insurance Act* (Ontario).³⁶ A fourth class of statutes “prescribes rules for certain kinds of contracts regardless of the parties’ choice or the close connection the contract may have with another legal system.”³⁷ Statutes in this class include those implementing international agreements

for the harmonization of certain areas of the law³⁸—for example, the *Carriage by Air Act*³⁹ and the *Carriage of Goods by Water Act*.⁴⁰

In addition to these four classes of statutes, international agreements influence party autonomy by harmonizing laws, limiting choice or imposing mandatory laws and rules. Three examples of international agreements of this kind are the *Bretton Woods Agreement*,⁴¹ the 1980 *United Nations Convention on Contracts for the International Sale of Goods*,⁴² and the *Rome Convention*.⁴³

III. Choice of Forum

A. Party Autonomy

Party autonomy in the context of jurisdiction refers to the ability of contracting parties to choose the forum in which disputes arising from the contract will be adjudicated. This choice is executed through the vehicle of a forum selection clause.⁴⁴ Such a clause, often contained within international commercial contracts, confers “exclusive or concurrent jurisdiction on a particular court to resolve disputes arising out [of] the contract or in respect of legal relationships relating to the contract.”⁴⁵

In Canada, forum selection clauses are presumptively enforceable. Canadian courts tend to uphold agreements between parties to international contracts to resolve their disputes in a specific forum. The Canadian approach to the enforceability of forum selection clauses, while similar to that of most U.S. states,⁴⁶ differs from that of the European Union (EU). In Europe, the “Brussels and Lugano Conventions govern the enforceability of many international forum selection clauses involving one or more European parties.”⁴⁷ In Canada, as in the United States, forum selection clauses are not governed by conventions, but by the principles of the common law.

Questions regarding the enforceability of forum selection clauses arise when a party commences court proceedings not in the chosen forum. As noted in *Castel and Walker*:

No problem arises if both parties submit to litigation in the selected court and that court has jurisdiction over the subject matter of the dispute. The question whether a forum selection clause is enforceable outside the chosen court arises if one of the parties to the agreement commences a proceeding in another court in violation of its provisions.⁴⁸

Canadian courts, under their “inherent or statutory jurisdiction,” have power to “stay a court proceeding begun in the province in breach of an agreement to sub-

mit to the exclusive jurisdiction of the court to which the parties would not otherwise be subject.”⁴⁹ Proceedings will be stayed unless the plaintiff can satisfy the court that there are “strong reasons from the point of view of convenience and the interests of justice” for allowing the lawsuit to proceed. The plaintiff’s burden is not simply to upset a delicate balance. The forum selection clause “will be enforced unless the balance of convenience strongly favors the opposite conclusion.”⁵⁰

This is the position in the common law jurisdictions in Canada. Under the Quebec Civil Code, a Quebec court must decline jurisdiction where the parties have selected a court in another jurisdiction as the exclusive forum for the resolution of their dispute.⁵¹

The following “strong cause” test, initially set out in 1969 in *The Eleftheria*, was affirmed by the Supreme Court of Canada in 2003 in a case known as *The Canmar Fortune*:

- (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.
- (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
- (3) The burden of proving such strong cause is on the plaintiffs.
- (4) In exercising its discretion the Court should take into account all the circumstances of the particular case.
- (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded:
 - (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.
 - (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.
 - (c) With what country either party is connected, and how closely.
 - (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
 - (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar

not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.⁵²

B. Limits on Party Autonomy

1. Public policy/unconscionability

As noted in *Fairfield v. Low*, a stay will not be granted if the agreement “offends public policy or was the product of grossly uneven bargaining positions.”⁵³ *Cas-tel and Walker* states that

exclusive jurisdiction agreements made in a commercial setting will generally be given greater deference unless they involve a small business that was not capable of negotiating a feasible dispute resolution clause; and those involving consumers, workers and other individuals who may not be of equal bargaining power will be subject to greater scrutiny.⁵⁴

Thus, party autonomy is limited on principles similar to the doctrine of unconscionability. The choice of jurisdiction expressed in a forum selection clause will not be given effect if the decision is revealed to have been made unilaterally or achieved through oppressive measures. However, as the Supreme Court of Canada noted in *Canmar Fortune*, “parties should be held to their bargain.”⁵⁵ If the parties are sophisticated and of equal bargaining power, the forum selection clause will generally be upheld.

2. Jurisdiction in Canadian courts

Party autonomy is limited through the application of principles of jurisdiction. If a Canadian court decides that, for some reason (such as the subject matter of the dispute), the forum named in the forum selection clause—whether a forum outside Canada or another Canadian province or territory—does not have jurisdiction to hear the dispute, it will decline to stay the lawsuit.

(a) Canada: federal jurisdiction

In considering questions of court jurisdiction, it should be noted that Canada is a federal state, with twelve common law jurisdictions (nine provinces and three territories) and one civil law jurisdiction (Quebec). Each of these jurisdictions administers its own superior court system, with judges appointed by the federal government. These courts have inherent jurisdiction.

There is also a federal court system with limited statutory jurisdiction. Certain areas of federal law and certain types of claims, such as maritime law and patents, must (or may) be determined by the Federal Court of Canada or the Tax Court of Canada. However,

the federal court has no diversity of jurisdiction or pendant or ancillary jurisdiction. The ultimate court for appeals from all these courts is the Supreme Court of Canada.

Although each Canadian jurisdiction determines its own approach to certain procedural aspects of jurisdictional matters, their approaches to determining the existence of jurisdiction and forum contests are similar. Supreme Court of Canada decisions⁵⁶ establish the approach to be taken across Canada.⁵⁷

(b) Two-step approach

When a jurisdictional contest arises, the Canadian court first determines whether it has jurisdiction. The court then determines whether it is the most appropriate forum to determine the dispute (*forum conveniens*).

(c) Three ways to assert jurisdiction

There are three ways in which jurisdiction may be asserted in Canadian courts against foreign defendants: (i) presence-based jurisdiction; (ii) consent-based jurisdiction; and (iii) assumed jurisdiction.

Presence-based jurisdiction permits jurisdiction over a foreign defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over a foreign defendant who consents to the forum, whether by voluntary submission, attornment or prior agreement. Assumed jurisdiction is initiated by service of the court’s process on a foreign defendant (*service ex juris*). This process is governed by the procedural rules of each Canadian court system. In many of those court systems, service outside the jurisdiction is with leave—that is, the court must authorize service to be made outside the jurisdiction. Some Canadian jurisdictions have relaxed the rules for service outside the jurisdiction to permit service as of right in many circumstances, with an offsetting right of the foreign defendant to challenge the plaintiff’s choice on the basis of *forum non conveniens*.⁵⁸ Once served, a foreign defendant may assert that the Canadian court lacks jurisdiction to hear the dispute.

Since 1990, the “constitutional requirements of order and fairness have permitted courts to exercise jurisdiction over matters with a real and substantial connection to the forum.” As noted by the Court of Appeal for Ontario in *Muscutt v. Courcelles*, it is

not possible to reduce the real and substantial connection test to a fixed formula. A considerable measure of judgment is required in assessing whether the real and substantial connection test has been met on the facts of a given case. Flexibility is therefore important.⁵⁹

However, as “clarity and certainty” are also important, the Court of Appeal for Ontario has set out eight factors to be considered in determining whether a “real and substantial connection” exists between the forum and the parties:

- The connection between the forum and the plaintiff’s claim.
- The connection between the forum and the defendant.
- Unfairness to the defendant in assuming jurisdiction.
- Unfairness to the plaintiff in not assuming jurisdiction.
- The involvement of other parties to the suit.
- The court’s willingness to recognize and enforce an extraprovincial judgment rendered on the same jurisdictional basis.
- Whether the case is interprovincial or international in nature.
- Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.⁶⁰

3. *Forum non conveniens*

Forum non conveniens may be another limitation to party autonomy in the context of choice of forum. The *forum non conveniens* doctrine allows the court to decline to exercise its jurisdiction on the ground that there is another more appropriate forum that may entertain the dispute. Thus the parties’ choice of forum could be overturned in favor of what the court considers to be a more appropriate forum. The *forum non conveniens* analysis in cases where the parties have selected a forum for their disputes is somewhat different, as described above in the section dealing with *The Canmar Fortune*.

In *Amchem Products Inc. v. British Columbia (Workers’ Compensation Board)*, Sopinka J., drawing from the House of Lords’ decision in *Spiliada Maritime Corp. v. Cansulex*,⁶¹ described the Canadian test of *forum non conveniens* as follows:

In my view the overriding consideration which must guide the Court in exercising its discretion . . . must . . . be the existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice.⁶²

Similarly, in *Frymer v. Brettschneider*, relying on the judgment of Sopinka J. in *Amchem*, Arbour J.A. (as she then was) for the majority articulated the test as follows:

*In all cases, the test is whether there clearly is a more appropriate jurisdiction than the domestic forum chosen by the plaintiff in which the case should be tried. The choice of the appropriate forum is designed to ensure that the action is tried in the jurisdiction that has the closest connection with the action and the parties. All factors pertinent to making this determination must be considered.*⁶³

The determination of the most appropriate forum is discretionary, and focuses on the specific facts of the parties and the case.⁶⁴ Accordingly, Canadian courts have developed a number of factors to guide them in their disposition of convenient forum disputes. These factors include the following:

- The location where the contract in dispute was signed.
- The applicable law of the contract.
- The location in which the majority of witnesses reside.
- The location of key witnesses.
- The location where the bulk of the evidence will come from.
- The jurisdiction in which the factual matters arose.
- The residence or place of business of the parties.
- Loss of juridical advantage.
- Contractual provisions that specify applicable law or jurisdiction.
- The avoidance of a multiplicity of proceedings.
- Geographical factors suggesting the natural forum.⁶⁵

The application of the *forum non conveniens* doctrine requires the court to examine the balance of convenience with respect to the specific parties and the specific case. Determining the convenient forum is a factual inquiry, and as such, the list of factors described above is not exhaustive.⁶⁶

For example, some courts have given greater weight to choice of law provisions when deciding these types of motions. Justice Adams in the court of first instance in *Frymer*⁶⁷ considered a number of factors relevant to determining the proper forum for resolving a trust dispute. In deciding that the province of Ontario was not the convenient forum, he emphasized the choice of law provision in the agreements between the parties, which provided that Florida law was to govern

the contractual relationship. In addition, he noted generally that choice of law provisions, where all other factors are equal, also determine the *forum conveniens* for the trial.⁶⁸

(a) Standard of proof

While the standard of proof remains that applicable in civil cases, “the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff.”⁶⁹ The Court of Appeal for Ontario reiterated this elevated civil standard in *Mutual Life Assurance Co. of Canada v. Peat Marwick*.⁷⁰ In this case, the Court stated that for the motion to stay an action to succeed on the basis of *forum non conveniens*, there must be a clear preponderance in favor of the proposed substituted jurisdiction.⁷¹

(b) Burden of proof

Typically, where the defendant is served within the jurisdiction, the burden of proof will rest with the moving party. Accordingly, the defendant will be required to prove that another forum is clearly more appropriate than the forum selected by the plaintiff. However, the Ontario Court of Appeal has held that where the plaintiff serves the defendant *ex juris*, the burden will be on the plaintiff to establish that Ontario is the appropriate forum.⁷²

4. Contrary to public international law principles

Although public international law principles are rarely (if ever) a practical limitation, a Canadian court would not exercise jurisdiction if doing so would be contrary to public international law principles that are part of the law of Canada.⁷³

5. Statutes implementing international conventions

Canadian jurisdiction may be excluded or limited in the context of an international convention and the statute implementing it.⁷⁴ The Canadian *Carriage by Air Act*, implementing the Warsaw Convention, is one example. As noted in *Castel and Walker*, “an action for damages against a carrier by air arising out of international carriage may be brought at the option of the plaintiff in the territory of one of the high contracting parties to the Warsaw Convention, before the court having jurisdiction where the carrier is ordinarily resident or has its principal place of business or has an establishment by which the contract of carriage was made, or before the court having jurisdiction at the place of destination of the flight.”⁷⁵

The Canadian *Marine Liability Act*⁷⁶ is another statute implementing an international convention that limits Canadian jurisdiction. The *Marine Liability Act* implements the Hamburg Rules. Section 45 of the Act

notes that “the Hamburg Rules have the force of law in Canada in respect of contracts for the carriage of goods by water between different states as described in Article 2 of those Rules.”⁷⁷ Furthermore, the Act notes that “the Hamburg Rules also apply in respect of contracts for the carriage of goods by water from one place in Canada to another place in Canada, either directly or by way of a place outside Canada, unless the contract stipulates that those Rules do not apply.”⁷⁸

IV. Conclusion

Canadian law with respect to choice of law and choice of forum favors party autonomy, particularly in international business-to-business contracting.

Parties to a commercial contract are free to choose both the law that they want to govern their contract and the forum in which they want to adjudicate their disputes, subject only to a discrete number of limitations on the parties’ autonomy to choose. As a practical matter, these limitations seldom hinder international commercial contracts in ways that would surprise contracting businesses. Most forum disputes arise not where the parties have made a clear choice in their contract, but where they have implicitly left it to the courts to determine jurisdiction on the basis of, first, whether there is a real and substantial connection and, second, whether the forum selected by the plaintiff is the convenient forum (or whether there is clearly a more appropriate forum).

In the contexts of choice of law and choice of forum, only infrequently do Canadian courts act to limit party autonomy. This is good news for international businesses that encounter Canada’s jurisdiction—whether for the adjudication of their disputes or the enforcement of judgments obtained elsewhere. Canadian courts see an essential need for contracting parties to abide by their agreements, and these courts will honor most choices that parties make regarding choice of law and choice of forum. This respect for the choices of contracting parties, coupled with the tendency of Canadian courts to give increased deference to the determinations of courts of jurisdictions with essentially fair judicial systems, fits well with the increasing internationalization of Canada’s economy and Canada’s consequent interest in promoting efficient international commercial dealings.

Endnotes

1. [1939] 2 D.L.R. 1 (J.C.P.C.) [*Vita Foods*].
2. *Id.* at 8.
3. Janet Walker, CASTEL & WALKER: CANADIAN CONFLICT OF LAWS, 6th ed., looseleaf (Markham: LexisNexis Canada Inc., 2005) [CASTEL & WALKER]. This is Canada’s leading text on conflict of laws. The authors extend their appreciation to Professor Walker for her guidance in the preparation of this paper.

4. (1980), 105 D.L.R. (3d) 455 at 459 (B.C.S.C.).
5. J.H.C. Morris, ed., DICEY AND MORRIS ON THE CONFLICT OF LAWS, 9th ed. (London: Stevens, 1973).
6. CASTEL & WALKER, note 3 *supra*, at 31-9.
7. *Avenue Properties Ltd. v. First City Development Corp.* (1986), 32 D.L.R. (4th) 40 (B.C.C.A.), *rev'g* (1985), 65 B.C.L.R. 301 (S.C.) (domestic statute tentatively construed as overriding law selected by the parties); *Agro Co. of Canada Ltd. v. The "Regal Scout"* (1983), 148 D.L.R. (3d) 412 (F.C.T.D.).
8. *Vita Foods*, note 1 *supra*.
9. *Etlar v. Kertesz* (1960), 26 D.L.R. (2d) 209 (Ont. C.A.); cited in CASTEL AND WALKER.
10. CASTEL & WALKER, note 3 *supra*, at 31-61.
11. *Id.*
12. *Id.*
13. *Id.* at 31-62.
14. *G.N.L.V. Corp. v. Wan* (1991), 30 A.C.W.S. (3d) 1132 (B.C.S.C.).
15. CASTEL & WALKER, note 3 *supra*, at 14-32; *Boardwalk Regency Corp. v. Maalouf*, [1992] O.J. No. 26, 88 D.L.R. (4th) 612 (Ont. C.A.).
16. [1998] B.C.J. No. 2474 (B.C.C.A.).
17. *Vita Foods*, note 1 *supra*.
18. CASTEL & WALKER, note 3 *supra*, at 31-3.
19. *Id.*
20. *Id.* at 31-51.
21. This example, however, reflects not a restriction but a manifestation of party autonomy.
22. CASTEL & WALKER, note 3 *supra*, at 31-51.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 31-52.
28. *Id.* at 8-1.
29. *Id.* at 8-14.
30. R.S.C. 1985, c. B-4 as am.
31. CASTEL & WALKER, note 3 *supra*, at 31-54.
32. R.S.C. 1985, c. S-9 as am.
33. CASTEL & WALKER, note 3 *supra*, at 31-55
34. CASTEL & WALKER, note 3 *supra*, at 31-55
35. R.S.O. 1990, c. F.34, s. 2.
36. R.S.O. 1990, c. I.8 as am., ss. 122-23.
37. CASTEL & WALKER, note 3 *supra*, at 31-56.
38. *Id.*
39. R.S.C. 1985, c. C-26.
40. S.C. 1993, c. 21.
41. *Bretton Woods and Related Agreements Act*, R.S.C. 1985, c. B-7 as am.
42. Final Act, Vienna, 11 April 1980, C.T.S 1992/2.
43. (1980), 29 Int. Leg. Mat. 1492, as cited in CASTEL & WALKER, note 3 *supra*, at 31-57.
44. Alternatively, the parties may include an arbitration clause in their contract. Canada is a party to the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) and the UNCITRAL Model Law on International Commercial Arbitration (1985) has been adopted (with few changes) in every Canadian jurisdiction.
45. CASTEL & WALKER, note 3 *supra*, at 13-55.
46. From Gary B. Born, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS (Boston: Kluwer Law International, 1999) at 91.
47. *Id.* at 90.
48. CASTEL & WALKER, note 3 *supra*, at 13-55.
49. *Id.* at 13-55.
50. *Id.* at 13-55.
51. *GreCon Dimter Inc. v. J.R. Normand Inc.*, [2005] S.C.C. 46.
52. *Z.I. Pompey Industries v. ECU-Line N.V.*, [2003] 1 S.C.R. 450 [*Canmar Fortune*].
53. CASTEL & WALKER, note 3 *supra*, at 13-56, citing *Fairfield v. Low*, 71 O.R. (2d) 599 (H.C.J.).
54. *Id.* at 13-57.
55. *Id.* at 13-57, citing *Canmar Fortune*, note 52 *supra*.
56. Important Supreme Court of Canada decisions are referred to later in this paper.
57. Quebec has incorporated the common law doctrine of *forum non conveniens* by virtue of Article 3135 of the Quebec Civil Code, and Quebec courts make reference to common law Supreme Court decisions in interpreting the Article.
58. Some Canadian jurisdictions require leave of the court for all service outside the jurisdiction and restrict the types of cases for which leave can be applied. Others allow service outside the jurisdiction without leave in certain types of cases. Still others allow service without leave in any case, as long as the defendant is in Canada or the United States.
59. (2002), 213 D.L.R. (4th) 577 at 603 (Ont. C.A.).
60. *Id.* at 604-610; Janet Walker, *Beyond Real and Substantial Connection: The Muscutt Quintet* in T. Archibald & M. Cochrane, eds., THE ANNUAL REVIEW OF CIVIL JUSTICE, 2d ed. (Toronto: Thomson, 2003).
61. [1987] A.C. 460 (H.L.).
62. *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at 919 [*Amchem*], quoting with approval *Antares Shipping Corp. v. The Ship "Capricorn"*, [1977] 2 S.C.R. 422 at 448 per Ritchie J.
63. *Frymer v. Brettschneider* (1994), 19 O.R. (3d) 60 at 79 [emphasis added] (C.A.) [*Frymer*].
64. *Id.* at 66, per Weiler J. in partial dissent, but not on this point.
65. *Eastern Power Ltd. v. Azienda Comunale Energia and Ambiente*, [1999] O.J. No. 3275 at paras. 19-20 (C.A.).
66. *Duncan (Litigation Guardian of) v. Neptunia Corp.* (2001), 53 O.R. (3d) 754 at 778 (S.C.J.).
67. (1993), 10 O.R. (3d) 157 (Gen. Div.), *aff'd*, note 63 *supra*. Both the majority and the dissenting opinions in the Ontario Court of Appeal decision agreed with Adams J.'s analysis of the relevant factors in determining the appropriate forum, irrespective of where the burden of proof lay (which was the issue on which the Court split).
68. *Id.* at 182, citing with approval *Jones v. Ontario White Star Products Ltd.* (1979), 15 C.P.C. 144 at 147 (Ont. H.C.). See also *Abaxial Associates v. Environmental One Corp.*, [1998] O.J. No. 3056 (Gen. Div.) at para. 14 (Master), wherein Master Peppiatt agreed with Adams J. that where all other matters were equal, choice of law provisions determined the *forum conveniens* for the trial. However, Master Peppiatt was unable to apply this principle in *Abaxial Associates*, since there was a dispute about whether an oral or a written contract governed the relationship between the parties.

Only the latter contract contained the choice of law clause. See also *Polar Hardware Manufacturing Co. v. Zafir*, [1983] O.J. No. 1357 (H.C.J.) [*Polar*], where in finding that the cause of action was more closely connected to Ontario than Illinois, the Court stated, at para. 14:

The parties in their agreement have stipulated that it is to be interpreted in accordance with the law of Ontario. It is implicit in that stipulation that they acknowledge the courts of Ontario as the most appropriate juridical authority to apply that law to the agreement. That would appear to be common sense. They did not specifically attorn to the forum of Ontario but they reasonably expected that the law of Ontario would govern their activities. They therefore implied that those activities would have a close link with Ontario.

However, *Polar* must be treated with caution, since the case applies the former *forum non conveniens* test, which required that the applicant show something vexatious or oppressive in the plaintiff's choice of forum. The Court made the statement quoted above in concluding that Ontario was the natural (i.e., obvious) forum for the plaintiff's action and therefore there could be nothing vexatious or oppressive about the plaintiff's choice.

69. *Amchem*, note 62 *supra*, at 921.

70. [1998] O.J. No. 5119 (C.A.).

71. *Id.* at para. 5.

72. *Frymer*, note 63 *supra*, at 84-85; *ABB Power Generation Inc. v. CSX Transportation*, [1996] O.J. No. 952 (Gen. Div) at para. 21.

73. *CASTEL & WALKER*, note 3 *supra*, at 11-3.

74. *Id.* at 11-4.

75. *Id.*

76. *Marine Liability Act*, S.C. 2001, c. 6.

77. *Id.* at s. 45(1).

78. *Id.* at s. 45(2).

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