Court Jurisdiction and Recognition in Multi-National Political Structures: Canada and the European Union

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I. INTRODUCTION—REPLACING WIDELY DIFFERENT JURISDICTION RULES WITH A UNIFORM SET OF STANDARDS

The rules for determining the jurisdiction of Canadian courts have been modernized and codified recently in several provinces. At the same time, the approach to court jurisdiction that has prevailed among European Union Countries since 1968 has been updated and extended to more states.

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In this article the author examines these systems in the context of actions involving commercial contracts (other than insurance or employment contracts or contracts involving rights in immovable property) and assesses the extent to which they represent fundamentally different views as to how to address the problems of recognition and enforcement of judgments of courts located in different jurisdictions. The article focuses on the Uniform Court Jurisdiction and Proceedings Transfer Act promulgated by the Uniform Law Conference of Canada, 2003 and the Lugano Convention, 2007.

In May 2009, the revised Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2007 (hereinafter, the “Convention”) was ratified by the European Community on behalf of its member States. Norway, Denmark and Switzerland ratified the Convention later in the year. This Convention embodies most of the provisions of the Lugano Convention of 1988, which in turn, extended the effect of the Brussels Convention of 1968 to European Free Trade Association states. A slightly modified version of the Brussels Convention was adopted as internal EU law in Brussels I (Council Regulation (EC) No 44/2001) passed on December 22, 2000 (entry into force March 1, 2002). While Brussels I Regulation and the Convention are separate documents, the structure of the Convention is based on the principles of Brussels I.

The Canadian Uniform Court Jurisdiction and Proceedings Transfer Act (hereinafter, the “Uniform Act”) was developed by the Uniform Law Conference of Canada, an intergovernmental body established to facilitate the uniformity of provincial and territorial legislation. The Uniform Act provides a uniform system for registration and enforcement on Canadian judgments. In this respect, it parallels Section 2 of the Lugano Convention.

There are three Protocols to the Convention that address a range of matters including interface between the Convention and Brussels I, transition, reservations, and the effect of other conventions to which a state bound by the Convention is a party.


4. In the following paragraphs, a reference to “province” includes a territory.
date, it has been enacted in only three Canadian provinces and one
territory;\textsuperscript{5} however, there is convincing evidence that its provisions
represent a consensus with respect to most aspects of inter-jurisdictional
recognition and enforcement of money judgments.\textsuperscript{7} Furthermore, the
approach of the Act reflects the "new" constitutionally prescribed non-
statutory conflict of laws rules of most other jurisdictions in Canada\textsuperscript{8}
relating to court jurisdiction\textsuperscript{9} and recognition of judgments.\textsuperscript{10} It is the

\begin{itemize}
\item[5.] Judgment recognition and enforcement is, for the most part, a matter within the
exclusive jurisdiction of Canadian provinces.
\item[6.] British Columbia, S.B.C. 2003, c. 28; Nova Scotia, S.N.S. 2003 (2nd Sess.), c. 2;
\item[7.] Law Reform Agencies in two additional provinces have recommended to their
legislatures adoption of the Uniform Act with some modifications. See \textit{Enforcement of
Judgments, Final Report\textemdash the Alberta Law Institute, No. 94 (2008) and \textit{Private
Court of Appeal has recently concluded that the Model Act, for the most part, represents
the present state of the common law in that province. See Van Breda v. Village Resorts
\item[8.] See generally \textit{Canadian Uniform Court Jurisdiction and Proceedings Transfer
Act}. While the Uniform Act was designed to be implemented in both common law
jurisdictions and Quebec (which has a civil law system), significant changes in policy and
drafting would be required for its implementation in that province. Book 10 of the
Quebec Civil Code contains detailed provisions dealing with jurisdiction. Article 3168
provides that, in respect of personal actions of a patrimonial nature, a court has
jurisdiction only where the defendant has his or her domicile or residence in Québec; the
defendant is a legal person not domiciled in Québec but has an establishment in Québec
and the dispute relates to its activities in Québec; the parties have by agreement submitted
to it all existing or future disputes between themselves arising out of a specified legal
relationship; or the defendant submits to its jurisdiction. While some aspects of the test
contained in Article 3168 parallel aspects of sections 3 and 10 of the Uniform Act, it is
quite conceivable that a factor indicating a "real and substantial connection" to another
province falls outside the list of factors set out in Article 3168. The refusal of a Quebec
court to recognize a judgment of the court of another Canadian jurisdiction in this context
may result in violation of the constitution principle set out in the Supreme Court
decisions in Morguard Trust v. De Savoye, 3 S.C.R. 1077 (1990) and Hunt v. T&N plc, 4
S.C.R. 289 (1993), which are treated as establishing a constitutionally based rule for
determining jurisdiction for the purposes of inter-provincial recognition of judgments.
See generally, Geneviève Saumier, \textit{The Recognition of Foreign Judgments in Quebec}, 81
CAN. BAR. REV. 677, 704 (2002).
\item[9.] The Uniform Act deals only with proceedings; it does not deal with common law
rules relating to territorial limits of remedies.
\item[10.] The Uniform Law Conference of Canada identified four main purposes for the
Act:
\begin{itemize}
\item[1.] to replace the widely different jurisdictional rules currently used in
Canadian courts with a uniform set of standards for determining jurisdiction;
\item[2.] to bring Canadian jurisdictional rules into line with the principles laid down
by the Supreme Court of Canada in Morguard Investments Ltd. v. De Savoye, 3
S.C.R. 1077 (1990), and Amchem Products Inc. v. British Columbia (Workers’
Compensation Board), 1 S.C.R. 897 (1993);
\item[3.] by providing uniform jurisdictional standards, to provide an essential
complement to the rule of nation-wide enforceability of judgments in the
uniform \textit{Enforcement of Canadian Judgments Act}; and
\end{itemize}
most recent Canadian statutory formulation of the recognition and enforcement principles. As such, it is an appropriate vehicle for comparing Canadian law with the Convention.\footnote{12}

II. POLICIES IMPLEMENTED—FACILITATING COMMERCE BY ACHIEVING A HIGH LEVEL OF PREDICTABILITY IN ENFORCING

(4) to provide, for the first time, a mechanism by which the superior courts of Canada can transfer litigation to a more appropriate forum in or outside Canada, if the receiving court accepts such a transfer.

"To achieve the first three purposes, this Act would, for the first time in common law Canada, give the substantive rules of jurisdiction an express statutory form instead of leaving them implicit in each province's rules for service of process." However,

the current (non-statutory) rule, which (subject to arguments of \textit{forum non conveniens}) permits a court to take jurisdiction on the basis of the defendant's presence alone, without any other connection between the forum and the litigation, will therefore no longer apply. This change in the existing rule is proposed not only on the ground of fairness, but also because the existing rule is of doubtful constitutional validity, since a defendant's mere presence in a province is probably not enough to support the constitutional authority of a province to assert judicial jurisdiction over the defendant. . . .

Territorial competence will depend . . . on whether there is, substantively, a real and substantial connection between the enacting jurisdiction and the facts on which the proceeding in question is based. This provision would bring the law on jurisdiction into line with the concept of 'properly restrained jurisdiction' that the Supreme Court of Canada, in Morgan\-guard Investments Ltd. v. De Savoye, 3 S.C.R. 1077 (1990), held was a precondition for the recognition and enforcement of a default judgment throughout Canada. . . .

The present Act, if adopted, will ensure that all judgments will satisfy the Supreme Court's criterion of 'properly restrained jurisdiction', which the court laid down as the indispensable requirement for a judgment to be entitled to recognition at common law throughout Canada.


11. Reciprocal Enforcement of Judgments Acts were enacted in most provinces during the first part of the last century. \textit{E.g.}, S.S., 1996, c. R-3.1. These Acts provide for recognition and enforcement of judgments of reciprocating provinces, some states of the United States and a few countries. This legislation is subject to the more recent constitutional principles set out in \textit{Morguard Trust v. De Savoye and Hunt v. T&N plc}, supra note 8.

12. A comparison between the approach of the Lugano Convention and that of recent Canadian statutory measures would be incomplete without reference to the Uniform Enforcement of Foreign Judgments Act, which provides a structure for the recognition and enforcement of non-Canadian judgments. However, since the Lugano Convention leaves recognition of judgments from non-Convention states to the domestic conflict-of-laws rules of each state party to the Convention, such a comparison is not possible without examining the recognition rules of all such states. The author of this article has made no attempt to do this. However, see generally Charles Platto and William Horton, \textit{Enforcement of Foreign Judgment Worldwide} (Graham & Trotman and International Bar Assn. 2nd ed. 1993).
JUDGMENTS AMONGST SUB-UNITS

Both systems have been designed to function in the context of political structures, the European Union (plus Norway and Switzerland), on the one hand, and Canada, on the other, which have subunits—states or provinces—with constitutional power with respect to recognition and enforcement of money judgments. The public policy that both the Convention and the Uniform Act were designed to implement is the facilitation of commercial relationships between persons in different states or provinces by providing a high level of predictability that a judgment obtained in one such state or province will be recognized and enforced in another state or province. It has been observed that the Lugano Convention, reflecting the commercial policies of the European Union, ensures that there is "free movement of judgments to secure adequate legal protection of individuals and enterprises" by providing a structure through which countries can "trust each others' legal systems and judiciaries." The commentary to the Uniform Act includes in the list of purposes of the Act the replacement of "widely different jurisdictional rules currently used in Canadian courts with a uniform set of standards for determining jurisdiction" and, "by providing uniform jurisdictional standards, to provide an essential complement to the rule of nation-wide enforceability of judgments in the uniform Enforcement of Canadian Judgments Act."

III. SPECIFIC OBJECTIVES—IMPLEMENTING UNIFORM STANDARDS FOR JURISDICTIONS AND RECOGNITION OF JUDGMENTS

Rules of law that address jurisdiction can be seen as having two objectives. One of these (hereinafter, "objective one") is to prescribe clear, consistent tests under which it can be determined which court(s) has jurisdiction to address a dispute or grant a declaratory judgment. The principal purpose of this objective is to tell plaintiffs where they must bring their actions for judgments that will be recognized by other political units bound by the system, and to tell defendants where they can be expected to defend actions against them.

Features characteristic of systems designed to implement this objective include specific, limited tests for jurisdiction and power given to courts of one political unit to refuse to enforce a judgment of a court of another political unit that took jurisdiction on an impermissible basis. In its purest form, objective one precludes forum shopping and the

13. Id. at 153.
14. Id.
15. Introductory Comments, supra note 10, at comments 0.1(1) and (3).
possibility of conflicting decisions dealing with the same dispute between the same parties. Furthermore, it precludes the possibility that a court will decline jurisdiction on the basis that a court of another political unit is a more appropriate forum to address a proceeding.

The second objective (hereinafter, “objective two”) has a different focus. It is to provide rules for identifying those fora, the judgments of which will be recognized by other political units bound by the system. The objective is not to provide a high level of predictability as to the jurisdiction in which an action will be heard. Its primary focus is on recognition and enforcement. It is designed to implement a “full faith and credit system” similar to the one that is constitutionally prescribed in the United States.  

A judgment of a court that took jurisdiction on the basis of one of a number of specific criteria must be recognized and enforced in all other political units that have adopted the same criteria. The jurisdiction of a court that issues a judgment in one political unit cannot be questioned when that judgment is being enforced in another. Under this approach, the plaintiff may choose any one of the available fora in which to bring its action with the assurance that, under normal circumstances, a judgment obtained will be recognized and enforced in all other political units that participate in the system. Endemic to this approach is the potential for forum shopping by the plaintiffs and a possible logistical advantage for a plaintiff who decides to bring an action in a forum that entails significant cost and inconvenience for a defendant. However, abuse of this feature of the system can be controlled through collateral mechanisms such as power given to a court to refuse to hear a case (a forum non conveniens ruling) or to transfer it to a court of another political unit that is a more appropriate forum.

In the following paragraphs of this article, the author describes the extent to which the Convention and the Uniform Act fulfill the objectives described above. The focus is on the non-specific rules of the Convention and Uniform Act dealing with court jurisdiction in cases involving proceedings arising out of contractual relationships.


17. For example, the Uniform Enforcement of Canadian Judgments and Decrees Act, s. 6(3) provides that when a judgment of another Canadian court is tendered for registration as the judgment of the enforcing court, the court “shall not make an order staying or limiting the enforcement of a registered Canadian judgment solely on the grounds that (i) the judge or tribunal that made the judgment lacked jurisdiction over the subject-matter of the proceedings that led to the judgment or over the party against whom the enforcement is sought under the principles of private international law or (ii) the domestic law of the province or territory where the judgment was made.”

Courthouse and Recognition

It has been recognized by the author that there exists a substantial body of jurisprudence dealing with provisions of the Convention (or its predecessors, the Brussels Convention and former Lugano Convention) that bears on the interpretation and application of these provisions. By the same token, there are decisions of Canadian courts dealing with provisions of the Uniform Act and the common-law concept of "real and substantial connection." However, extensive analysis of this jurisprudence has not been included in this article.

IV. Overview

It is clear that the approach of the Convention is to implement both objectives one and two described above, while that of the Uniform Act is to implement primarily objective two. The Uniform Act addresses objective one to the extent necessary to facilitate objective two. The Convention has been designed to provide much greater certainty and, consequently, uniformity, through the prescription of two factors on which jurisdiction and recognition are based: domicile of the defendant and place of contractual performance. Article 2 § 1 provides that an action against persons domiciled in a state bound by the Convention shall be brought in the courts of that state. Article 5 § 1 permits an action relating to a contract in the state where the contract was performed or was to be performed.

The Uniform Act is less restrictive in this respect and, consequently, offers a lower level of predictability. Section 3 provides for the actions that do not fall within the commercial classification such as actions in tort (art. 5 § 3); actions for restitution for criminal acts (art. 5 § 4); actions against settlers, trustees or beneficiaries under trusts (art. 5 § 6); actions relating to consumer contracts (art. 5 § 4) and employment contracts (art. 5 § 5). The Convention provides special rules for actions relating to insurance (art. 5 § 3); actions involving claims to rights in rem to immovable property, including tenancies of immovable property (art. 22 § 1); actions relating to the constitutional aspect of legal person (art. 22 § 2); actions involving the validity of an entry in a public registry (art. 22 § 3) and proceedings concerning intellectual-property rights (art. 22 § 4).

The Uniform Act contains special rules applicable to actions involving arrest of vessels (§ 5), proprietary or possessory rights in property (§ 9(a)), a trust (§ 9(d)), restitutionary obligations (§ 9(f)), tort (§ 9(h)), determination of personal status (§ 9(j)) and recover taxes (§ 9(l)).

19. The companion Uniform Enforcement of Canadian Judgments Act provides a uniform system for registration and enforcement on Canadian judgments. Under this legislation, a judgment of a court of another Canadian province or territory must be registered and enforced in another Canadian province or territory.

20. Both systems recognize the jurisdiction of a court: (i) designated in a forum-selection agreement between the parties; (ii) to which the defendant has submitted; and (iii) in counterclaim proceedings against a plaintiff in another action brought before the court. See Lugano Convention art. 6 § 3, art. 23, art. 24; Uniform Act §§ 4(a)-(c).

21. Lugano Convention, supra note 23, art. 2 § 1.

22. Id. at art. 5 § 1.
“territorial competence” of a court (jurisdiction to hear an action and render judgment, also referred to as jurisdiction *simpliciter*\(^2\)) if the defendant is ordinarily resident in the province or territory of the court at the time of commencement of the proceedings that led to the judgment or if there is “a real and substantial connection” between the province or territory of the court and the facts on which the proceedings against the person were based.\(^2\) Section 10 of the Act sets out a non-exhaustive list of factors that, if established, give rise to a presumption that a real and substantial connection exists between the case and the forum. This provision is examined later in this article.

V. *IN PERSONAM* JURISDICTION

Both the Convention and the Uniform Act provide for court jurisdiction based on personal factors associated with the defendant. As noted above, Article 2 of the Convention provides that, subject to specified exceptions, actions against a person must be brought in the jurisdiction in which the person is domiciled. However, the Convention contains no definition of “domicile” in cases involving defendants who are natural persons. The matter is left to the internal law of the forum state (Article 59). The result is the potential for forum shopping where there is a difference in approach taken under the law of states as to what constitutes domicile. Article 6(1) provides a special rule applicable in situations where there are two or more defendants with separate domiciles. In such a case, the action may be brought in any one of the domiciles so long as the claims are “so closely connected that it is expedient to hear and determine them together.” Since this determination is made by the forum court, the certainty of the domicile rule is diminished.

Where the defendant is a “company or other legal person or association of natural or legal persons,” alternatives are provided. Article 60 provides that when this type of defendant is involved, the person is deemed to be domiciled in a state where the defendant has its “statutory seat,”\(^2\) central administration or principal place of business. If one of these is a state bound by the Convention, the Convention

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23. See Uniform Act § 3. This term denotes jurisdiction other than “subject-matter competence,” which relates to restrictions on the court’s authority such as the nature of the dispute and the amount in issue.

24. This formulation was introduced by the Supreme Court of Canada in *Morguard Trust v. De Savoye*, supra, note 8.

25. In the context of the United Kingdom, this means the defendant’s place of registered office, if one, and otherwise in the place of incorporation or formation (Art. 60(3)).
applies. Where two or more of these are states bound by the Convention, presumably the choice of the forum is left to the plaintiff.

The Uniform Act provides that a court has jurisdiction if, at the time of commencement of the proceedings, the defendant was "ordinarily resident" in the forum province (Section 3(d)). The Act does not define the term "ordinarily resident" as it applies to natural persons. The Uniform Law Conference concluded that this should not result in uncertainty because the term has been defined in numerous cases involving other statutes and any "express statutory definition would probably fail to match the existing concept and would therefore provide difficulty rather than certainty." Where two defendants are involved and only one is ordinarily resident in the forum province, there is no presumption that the court has jurisdiction with respect to the second defendant unless the proceeding has a real and substantial connection to the forum province.

As is the case with the Convention, the Act provides rules determining when a corporation is ordinarily resident in a province. Section 7 lists alternative factors, more numerous and less restrictive than those of the Convention. Under the Convention, an organization is deemed to be located in a state if it has its principal place of business in that state. Under the Uniform Act, all that is required is that the organization have a place of business (whether principal or otherwise) in the province, have or be required to have a registered office (which need not be it "statutory seat") in the province, or have an office or agency in the province at which service of process may be effected.

VI. NON-PERSONAL FACTORS

The uncertainty associated with the lack of a definition of personal domicile, referred to above, and the alternatives available in the case of a corporate defendant is increased in the context of commercial contracts falling within the scope of this paper by Article 5 of the Convention. Under Article 5(1)(a), a plaintiff can disregard the defendant domicile rule of Article 2 where the matter relates to a contract. The action may be brought by a plaintiff in the "place of performance of the obligation in question." Article 5(1)(b) provides that, in the context of a sale of goods, this is the place where the goods were delivered or should have been delivered, and in the context of a contract for the provision of...
services, this is the place where the services were provided or should have been provided.  

However, other than proceedings involving contracts for the sale of goods or services, the Convention provides no guidance as to the meaning of "place of performance of the obligation in question." Since a single contract may provide for several obligations, it appears possible that actions involving such a contract may be brought in any one of different fora. This uncertainty has been the source of considerable litigation before the European Court of Justice, which has not provided a definitive approach.

The approach contained in Article 5(1) of the Convention is implemented on a somewhat expanded scale by section 3 of the Uniform Act. In the case of litigation involving a commercial contract, a court has jurisdiction if there is a real and substantial connection between that province and the facts on which the proceedings against the defendant were based (Section 3(e)). Section 10 of the Act sets out a non-exclusive list of factors that, if extant, give rise to a rebuttable presumption that such a connection exists. The features of this provision most relevant to a non-specific commercial contract are set out in sections 10(e) and 10(h). A court is presumed to have jurisdiction where the action involves breach of contractual obligations that, to a substantial extent, were to be performed in the province where the court is located (Section 10(e)(i)). In addition, a court has presumed jurisdiction where the action concerns contractual obligations where the contract resulted from a solicitation of business in the province of the forum by or on behalf of the seller (section 10(e)(iii)(B)) or where the action "concerns a business carried on in" the forum province (Section 10(h)). It is not a requirement in the context of the latter factor that the action involve performance of the contract in that province. Another factor that connects the proceedings to a province is the designation of

30. See id. art. 5(1)(b).
33. See Uniform Law Conference of Canada, Uniform Statutes, Uniform Court Jurisdiction and Proceedings Transfer Act, supra note 10, § 3(e).
34. See id. § 10.
35. See id. §§ 10(e), 10(h).
36. See id. § 10(e)(i).
37. See id. § 10(e)(iii)(B), 10(h).
the law applicable to the contract made “in express terms” by the parties to the contract (Section 10(e)(ii)).

A factor often associated with commercial contracts that induces the presumption that there is a real and substantial connection between a proceeding and a province is the location in that province of movable or immovable property where a party to the proceedings is seeking a ruling as to proprietary or possessory rights or a security interest in the property (Section 10(a)).

VII. COMPARISON OF THE CANADIAN UNIFORM ACT AND THE LUGANO CONVENTION

It is reasonable for comparison purposes to treat “domicile” referred to in Article 2 of the Convention and “ordinary residence” referred to in section 3(d) of the Uniform Act as rough equivalents. Furthermore, there are parallels between the two systems with respect to the second major test of jurisdiction prescribed by the Convention. Section 5(1)(b) of the Convention refines the “place of performance of the obligation” factor in the context of contracts for the sale of goods or the provision of services as the state where the delivery occurred or should have occurred. While there is no similar statutory refinement of the meaning of place of performance in section 10(e)(i) of the Uniform Act, in many cases, this will be the place of delivery of goods or services under a sales or service contract.

The equivalent of the Article 5(1)(a) of the Convention test contained in section 10(e) of the Uniform Act refers to the jurisdiction in which the contractual obligations to “a substantial extent” were to be performed. The provision directs the court applying the section to focus on the feature of the contract that involves substantial performance where there is more than one performance obligation. While it provides somewhat more guidance than does section 5(1)(a), it still entails an assessment as to which performance obligation required of each party to the contract is the most substantial. Where it is clear that one party has

38. See Uniform Law Conference of Canada, Uniform Statutes, Uniform Court Jurisdiction and Proceedings Transfer Act, supra note 10, § 10(e)(ii).

39. See id. § 10(a) (alluding to a rough equivalence applicable only to immovable property is contained in the Convention); see Lugano Convention, supra note 23, art. 6(4) (providing an alternative to the place of domicile of the defendant where contract proceedings against the defendant can be combined with proceedings against the same defendant involving rights in rem in immovable property, where in such a case, the action may be brought in the court of the state where the property is situated); see also, Lugano Convention, supra note 23, art. 22 (explaining a court of the state in which immovable property is situated has exclusive jurisdiction with respect to actions involving rights to the property).

40. See Lugano Convention, supra note 23, art. 5(1)(b).
the dominant obligations (e.g., the seller who must deliver goods) the "substantial" test must be applied where the performance is to occur in two or more provinces.

However, the important difference between the approaches of the Convention and the Model Act is not found in the detailed provisions setting out specific jurisdictional factors. What is of much greater significance is the extent to which each system recognizes the jurisdiction of courts on the basis of factors other than domicile (ordinary residence) or place of performance of contractual obligations. The Convention is very limited in this respect. However, as noted above, section 3(e) of the Uniform Act permits a court to take jurisdiction when it concludes that there is "a real and substantial connection" between the facts of the case and the province of the forum. The list of factors in section 10 that require the conclusion that such a connection exists is not exclusive. A court may decide that there are other factors that induce this connection. Furthermore, section 12 of the Uniform Act recognizes the power of a provincial legislature to grant or deny through other, more focused, legislative provisions exclusive or concurrent jurisdiction to courts on the basis of factors not recognized in the Act as giving jurisdiction to these courts.41

The lack of prescription of the forum in which an action is to be commenced embodied in the Uniform Act is further emphasized by section 6, which empowers a court that does not otherwise have jurisdiction to hear a case and issue a judgment where there is no court outside the province in which the plaintiff can commence the proceedings, or the plaintiff cannot reasonably be expected to commence proceedings. When a court concludes that a court of another province that does have jurisdiction is one in which the plaintiff cannot reasonably be expected to bring his or her action, it is employing the principle of forum non conveniens in reverse. This provision, which originated in Article 3136 of the Quebec Civil Code, was apparently included ex abundanti cautela. It is superfluous42 and, perhaps, constitutionally suspect.43 It is inconceivable that this jurisdiction would ever be invoked

41. See Uniform Law Conference of Canada, Uniform Statutes, Uniform Court Jurisdiction and Proceedings Transfer Act, supra note 10, § 12 (explaining the constitutionality of such legislation can be questioned should it grant exclusive jurisdiction on a basis that does not meet the "close and substantial" connection test established by the Supreme Court).

42. See Saskatchewan, supra note 6 (explaining that enacted the Uniform Act did not include this provision).

43. See Morguard Trust v. De Savoye, supra note 8 (discussing the provision could well be called into question under the principle on a constitutional basis if the matter involved falls within the jurisdiction of another forum, and the province of that forum has not enacted this feature of the Uniform Act); see Janet Walker, Muscutt Misplaced: The
on the ground that there is no Canadian court readily available to the plaintiff.

VIII. LIS PENDENS AND *FORUM NON CONVENIENS*

Two different scenarios may involve actions commenced in courts of two jurisdictions relating to the same matter between the same parties. The first is where both courts have jurisdiction under the rules of the system. The second is where there is temporary uncertainty as to whether the court first seized with the action has jurisdiction, but it is clear that the second court does.

The Convention recognizes that in rare situations duplicate proceedings may be started in courts of different states that have jurisdiction in the same matter between the same parties. However, rather than giving to the courts the power to determine which of the two is the most appropriate under the circumstances, Articles 27-29 provide a first-in-time rule. The court first seized is given priority, and the other court must stay the proceedings before it. Under Article 27, where related actions are involved, a court may decline jurisdiction in favour of another court first seized with jurisdiction.

The first-in-time approach also applies to cases falling within the second scenario. A court in which an action is brought must stay proceedings until it has been determined whether another court before which an action involving the same parties and the same issues was earlier brought has jurisdiction. If that jurisdiction is established, the second court must stay proceedings before it.

Essentially the same approach applies where the court of another state has taken jurisdiction on a basis other than that permitted by the Convention. Under Article 26(1), it is up to the court first seized with the matter to voluntarily decline to hear the case unless the defendant has entered an appearance. However, as a result of Article 27(1), the court that clearly has jurisdiction must not proceed with an action brought

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44. See Lugano Convention, supra note 23 (discussing how inflexible implementation of objective one noted above leaves little room for the application of the principle of *forum non conveniens* that could otherwise be used to address cases falling within the first scenario); see Owusu v. Jackson, C-281/02 (discussing that the European Court of Justice has held that the principle is not consistent with the Convention); see also Gilles Cumiberti, *Current Developments, Private International Law, Forum Non-conveniens and the Brussels Convention*, 54 INT'L & COMP. L.Q. 980 (2005) (discussing criticism of this conclusion).

45. See Lugano Convention, supra note 23, art. 30 (addressing the all-important question as to when proceedings have started in a jurisdiction).
before it until the issue of the first court's jurisdiction is determined by
the first court (Article 27(1)).

The system implemented by the Convention under which an action
in one jurisdiction necessarily results in a stay of an action relating to the
same matter between the same parties in another jurisdiction provides
significant potential for abuse. A person who expects to be sued for
breach of contract in a court of a state that clearly has jurisdiction can
delay commencement of the action by bringing a baseless action against
the potential plaintiff in another state alleging breach of the same
contract by the potential plaintiff. The effect of this is to invoke the stay
provided in Article 27(1) with respect to an action based on the contract
thereafter brought by the plaintiff against the person in a state that clearly
has jurisdiction under the Convention. This delays (possibly for many
years, depending upon efficiency of the court system of the state in
which the obstructing person brought his or her action) a just
determination of the matter by the appropriate court. In addition, it
places the plaintiff in the position of either having to argue before the
court in which the person's action was started that the court does not
have jurisdiction under the Convention, or avoiding participation in the
proceedings and seeking from the courts of the state or states in which
the judgment is to be enforced a ruling that the judgment should not be
recognized.

Given the much less precise and less restrictive grounds in the
Uniform Act on which courts can take jurisdiction, theoretically, the risk
is much greater that duplicate proceedings will be started in two
provincial fora. Notwithstanding this, the Act contains no mechanism
equivalent to that of the Convention under which it can be determined
which proceeding may proceed and which must be temporarily or
permanently stayed. Nor is there any basis on which to determine which
of two judgments from courts in separate provinces is to prevail where
the courts in both provinces took jurisdiction on the basis of one of the
factors set out in section 3 of the Uniform Act. It is not possible for a
court in one province to conclude that a court in another province took

46. See id art. 35 (discussing it is open to the courts of a state to refuse to recognize a
judgment of a court of another state when the latter court took jurisdiction on a basis not
recognized by the Convention).
47. See Gasser v MISRAT, Case C-116/02 (discussing that the European Court of
Justice ruled that delay in getting a court ruling is not grounds for refusing to apply
Article 27).
48. See Trasporti Castelletti v Hugo Trumpy, Case C-159/97, [1999] ECR 1-1597
(ECJ) (discussing that this approach was used to delay hearing of a case for eight years);
see aslo T. Hartley, The European Union and The Systematic Dismantling of the
49. See Lugano Convention, supra note 23, art. 35.
jurisdiction on an impermissible ground (i.e., the defendant was not ordinarily resident in that province and there was no real and substantial connection to the province). Furthermore, it is not possible for a court to rule that the court of another province was a forum non conveniens. Consequently, the common law “strong cause” principle no longer applies, and anti-suit injunctions cannot be used.

The Uniform Act does, however, provide two mechanisms through which duplicate actions in different provinces can be avoided. The first is statutory codification of the forum non conveniens principle. This is addressed below. The second is a feature that dovetails with the principle of forum non conveniens. Under sections 13-14 of the Act, a court has the power to transfer all or part of proceedings to another court. When a court that has both subject-matter jurisdiction and jurisdiction simpliciter concludes that it is not a forum non conveniens, it may request that another court of another province or a court of a state that has subject-matter competence and that is a more appropriate forum accept all or part of the proceedings. Where the referring court does not have subject-matter jurisdiction or jurisdiction simpliciter, the transfer may be made to a court of another province or state that has both subject-matter jurisdiction and jurisdiction simpliciter. Whether the court to which the request for transfer is made has subject-matter jurisdiction or jurisdiction simpliciter is determined under the law of that jurisdiction.

50. See Uniform Law Conference of Canada, Uniform Statutes, Uniform Enforcement of Canadian Judgments Act, §§ 4, 6, available at http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1e1 (explaining the requirement of one province to recognize and enforce a “Canadian judgment” except in specified circumstances not relevant to the matters examined in this paper. A court is expressly precluded from staying or limiting the enforcement of a registered Canadian judgment on the grounds that the judge or court that made the judgment lacked jurisdiction over the judgment debtor under the principles of private international law (Section 6(2)). The assumption of this Act is that the judgment has been made by a court that has jurisdiction based on the rules set out in the Uniform Court Jurisdiction and Proceedings Transfer Act. There is no similar limitation on recognition under the Convention).

51. See Z.I. Pompey Industrie v. Ecu-Line N.V. [2003] 1 S.C.R.450 (discussing the principle that a court has the power to conclude that, even though the foreign court had jurisdiction on a basis recognized under the law of the domestic court (especially a choice-for-forum clause in an agreement between the parties), there is a strong cause for having the matter heard by the court and may proceed with the case).

52. See Amchem Productions Inc. v. British Columbia Workers' Compensation Board [1993] 1 S.C.R. 897 (discussing an anti-suit injunction issued by a court that has jurisdiction to hear an action, against a plaintiff who has brought an action involving the same matter in the court of another jurisdiction in circumstance where the issuing court concludes it would be "oppressive or vexation" for the action to proceed).
A court is empowered to accept all or part of the proceeding transferred from a court located in another jurisdiction. 53

IX. JURISDICTION SIMPLICITER AND FORUM NON CONVENIENS

Notwithstanding the identification in the Uniform Act of specific factors the existence of which, for the most part, dictate which court(s) has jurisdiction, litigants in jurisdictions that have enacted it do not have a high level of predictability with respect to jurisdiction simpliciter. Uncertainty is endemic to the open-ended "real and substantial connection" test. There remains considerable disagreement among Canadian courts as to what factors the test contemplates. 54 Furthermore, the value of the enumeration in section 10 of factors that give rise to the presumption of real and substantial connection is diminished, in any particular situation, by the possibility of one of the litigants establishing that there is a real and substantial connection to at least two provinces based on other factors. 55 For example, in the context of litigation involving a commercial contract, notwithstanding that the forum where the substantial part of the contract obligations is to be performed has jurisdiction under sections 3 and 10(e)(i), it is still open to one of the litigants to demonstrate that the action has a closer and more substantial connection to another province and that the action should be heard in a court of that province.

The principal mechanism contained in the Uniform Act to address this situation is the principle of forum non conveniens. 56 Once a court

53. See Uniform Law Conference of Canada, Uniform Statutes, Uniform Court Jurisdiction and Proceedings Transfer Act, supra, note 10, §§ 15-23 (providing detailed rules dealing with the logistics of the transfer of proceeding from one court to another).


55. Currently, there appears to be some confusion in the case law as to whether the factors enumerated in section 11 that are to be taken into account when applying the forum non conveniens test play a role in the determination as to whether or not a court has jurisdiction simpliciter. See Bouch v. Penny, [2009] 310 D.L.R. 433 (Can.); compare Stanway v. Wyeth Pharmaceuticals Inc., [2009] 314 D.L.R. 618 (Can.).
concludes on the basis of the factors set out in sections 3 and 10 that it has jurisdiction simpliciter, it must then determine whether or not it is the appropriate forum for the litigation. While the Uniform Act does not expressly so state, this is practically a mandatory step in the process when the defendant demonstrates that the action has a real and substantial connection to another province as well. Among the factors set out in Section 11(2) that a court must take into consideration when determining whether or not to accept or decline jurisdiction are the desirability of avoiding multiplicity of proceedings or conflicting decisions, the enforcement of an eventual judgment and "the fair and efficient working of the Canadian legal system as a whole." What is significant in this context is that it is up to one of the two courts involved to decide that it is a forum non conveniens, leaving the action to be determined by the other court.

Furthermore, a court may conclude that the action has its most real and substantial connection to the province of that court but nevertheless refuse to hear the case or may transfer it on the ground that, under the circumstances, it is not the most appropriate forum for the action. As noted above, section 11 of the Uniform Act provides that, after considering the interests of the parties and the "ends of justice" the court that has jurisdiction simpliciter may decline to exercise that jurisdiction on the ground that a court of another province (or state) is a more appropriate forum because, inter alia, it is more convenient and cost-effective for parties and witnesses.

X. IN SUMMARY

While the Convention, with its narrowly crafted tests for court jurisdiction, provides a significant level of predictability for both plaintiffs and defendants as to where an action must be commenced and defended, it does not completely eliminate the potential for forum shopping. By comparison, the imprecision of the "real and substantial connection" test of the Uniform Act when coupled with the lack of exclusiveness of the specifically enumerated factors in section 10 results in greater opportunity for forum shopping and a lower level of predictability for defendants as to where an action may have to be defended, and for plaintiffs as to whether a court will hear a case.

The differing approaches embodied in the Convention and Uniform Act can be explained, in part at least, by the contexts within which these systems function. The Convention applies to thirty sovereign states, many of which have very disparate legal and judicial systems. As a result, the approach contained in it is, perhaps, justifiably much more prescriptive than that contained in the Uniform Act, which was designed
to apply to thirteen jurisdictions in one country, all of which have similar judicial systems that function in the context of a single constitutional structure. While the Uniform Act has been designed to provide jurisdictional parameters for Canadian courts, its principal focus is on ensuring that judgments of the courts of one province are recognized and enforced in other provinces. The retention of the principle of forum non conveniens and the power to transfer and receive transfers of proceedings coupled with the inability of a court in a province to question the jurisdictional basis of a decision of a court in another province demonstrates a high degree of faith that Canadian courts will ensure that inefficiencies in and abuse of the system will be avoided. It remains to be seen whether this faith is warranted.

However, context does not explain entirely the difference in approach between the two systems. Essentially, the same approach to jurisdiction simpliciter contained in the Uniform Act is also contained in the Canadian Uniform Enforcement of Foreign Judgments Act\(^57\) applicable to non-Canadian judgments. The only significant difference between recognition and enforcement of domestic and foreign judgments is that in the latter case, the Canadian court has authority to refuse to recognize a foreign judgment on the basis of specified grounds\(^58\) or the conclusion that it was inappropriate for the foreign court to take jurisdiction.\(^59\)

If the two approaches are assessed on the basis of public policy, the outcome may not heavily favour one approach over the other. No doubt, the approach of the Convention provides a much higher level of

57. See Uniform Law Conference of Canada, supra note 3.

58. See Lugano Convention, supra note 23, arts. 33-35 (discussing grounds are very similar to those set out in Articles 33-35 of the Convention).

59. See Uniform Law Conference of Canada, Uniform Statutes, Uniform Enforcement of Foreign Judgments Act, §§ 4, 6, 10, available at http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1e5 (discussing judgments obtained by fraud or rendered in a proceeding that was conducted contrary to the principles of procedural fairness and natural justice or manifestly contrary to public policy in the province, or a judgment based on facts in a proceeding pending in the province or a judgment of a court of the province. Section 10 gives to the court before which the application for recognition is brought the power to refuse recognition, even where the foreign court had jurisdiction under the recognition rules set out in the Act (other than where there was a real and substantial connection between the state of the foreign court and the facts on which the proceeding was based), when “it was clearly inappropriate for the (foreign) court to take jurisdiction”).

A novel feature of the Enforcement of Foreign Judgments Act, not directly related to recognition, is the requirement in section 6 that the recognizing court limit the amount of non-compensatory damages awarded by the foreign court to an amount similar to an amount that could be awarded by the recognizing court. The court may reduce a foreign damage award that is “excessive in the circumstances” to an amount not less than that which the enforcing court could have awarded in the circumstances.
predictability for both plaintiffs and defendants. However, there is "another side to the coin" when it comes to assessing the relative benefits of the two systems. The potential for obstructive actions on the part of defendants is much greater under the first-in-time system of the Convention. The Uniform Act contains no first-in-time rule. However, it contains two features that minimize at least some of the problems that the first-in-time rule addresses: the power to transfer all or part of an action to another court, and the power of a court to rule that it is a forum non conveniens.60

In any event, the dominant, although not universal,61 Canadian view is that rigid certainty as to where an action must be commenced and defended is not necessarily a feature that is to be implemented at all costs. It is not the only public policy that should be embodied in law dealing with court jurisdiction and judgment recognition. A feature of the Uniform Act necessarily associated with the more flexible approach to jurisdiction it embodies is the opportunity for a court to facilitate justice and fairness as a minor aspect of the close and substantial test and through the exercise of the forum non conveniens principle. It may be clear that a provincial court has jurisdiction under one or more of the statutory tests, but it may not be so clear that justice and fairness to the defendant will result if the action were to be heard by that court. The facts of the case may dictate that these goals can be realized only if the action were heard by a court of another jurisdiction that has a real and substantial connection to the action.

60. See Uniform Law Conference of Canada, Uniform Statutes, Uniform Court Jurisdiction and Proceedings Transfer Act, supra note 10 (referencing that these measures do not provide a solution where a court proceeds to hear a case even though a court of another jurisdiction concludes that that first-mentioned court does not have jurisdiction simpliciter or is a forum non conveniens).

61. See Jean-Gabriel Castel, The Uncertainty Factor in Canadian Private International Law, 52 McGill L.J. 555 (2007) (citing a senior Canadian legal expert on Canadian conflict of law who favours the "certainty" approach and is very critical of recent Canadian judicial and legislative developments in the area of jurisdiction).