Conflicts 101: A Primer (or Refresher) on Conflict of Laws

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Overview

- Review of conflict of laws principles, their source in common law and statute law, and how and when they apply
- Jurisdictional issues
- Enforcement of Judgments
- Choice of law principles
- Choice of forum and choice of law clauses
- Throughout:
  - Tips for in-house counsel and solicitors
  - Tips for litigators
You can use conflict of laws principles to better your client’s position, both through informed use of choice of forum and choice of law clauses, and by way of litigation strategy.

Wherever there is a foreign element in your fact pattern, ask yourself whether conflict of laws principles may apply and seek guidance from someone familiar with the subject matter.
What is it?

- Conflict of laws is also called private international law.
- It is a component of domestic law in every jurisdiction.
- Distinct from public international law, which governs the relationship among sovereign states and international organizations.
When does it apply?

- This body of law is relevant when disputes arise containing a “foreign element” i.e., a link to a jurisdiction other than the local forum.
- Sometimes referred to as the application of laws in space.
- Conflict of laws rules exist because of the diversity of legal systems in the world and even within a given federal state like Canada.
When does it apply?

- Important: each province and territory within Canada is a jurisdiction for conflict of laws purposes, as is the federal government when the matter is within federal constitutional jurisdiction.

- Unfortunate tendency of some judges to treat conflicts principles as if they were pan-Canadian when there are important differences among Canadian jurisdictions.
Categories of Issues

- **Jurisdiction**: When does the forum court have jurisdiction to entertain a proceeding containing a foreign element? When should it exercise discretion to decline jurisdiction?

- **Recognition and Enforcement of Judgments**: When will the local forum’s courts enforce a judgment of another jurisdiction’s courts or a decision of an arbitrator or tribunal made in another jurisdiction?
Categories of Issues

- Choice of Law: If the law of the forum differs from the law of some other potentially relevant foreign jurisdiction, which jurisdiction’s law will be applied to resolve the dispute? How is the choice of law made?
Example: A Swiss company purchases a mining tenure in Argentina from an Ontario company, who also holds mineral rights in Nunavut. It alleges there were fraudulent misrepresentations made. Where should it sue? If it sues in Ontario, will the Ontario court take jurisdiction and can it properly do so? Whose law would apply to determine whether the Swiss company is entitled to a remedy? And if the Ontario court issues a judgment, will that judgment be recognized and enforced in Switzerland or in Nunavut?
Sources of Law

1. International treaties implemented by domestic statute, e.g., *New York Convention of the Recognition of Enforcement of Foreign Arbitral Awards*;

2. Domestic statutes codifying conflicts principles without an international overlay, such as Rules of Court in the provinces and territories and subject-specific statutes, like the *PPSA*. 
3. The common law: Conflict of laws is still rooted in common law concepts to the extent they haven’t been modified by statutes.

- Note that customary rules of public international law can provide guidance in conflicts cases.
- Note also that the law of contract is very important to conflict of laws principles because parties can contract for a particular jurisdiction or a particular body of substantive law for the resolution of their disputes.
**Terminology**

*Lex fori* = law of the forum

*Lex causae* = law chosen by the forum court from among the relevant legal systems based on the application of conflicts rules.

Domestic law, local law = law of the forum

Foreign Law = law of any other legal unit, *i.e.* not the forum
Characterization

- Conflict of laws principles are subtly different from other substantive law principles since their primary role is to point you to a jurisdiction or a domestic body of substantive law.

- Example of a conflict of laws rule:
  - Disposition of immovables is governed by the *lex situs*.

- This conflict of laws principle is telling you to figure out the *situs* of the immovable, after which you will know whose law applies to the question of whether or not a transfer of that immovable is valid or not.
Characterization

- It becomes obvious that you have to characterize the issue in order to then pick the proper conflict of laws rule and apply it.
- There are two steps to characterization:
  1. Is it a matter of substance or procedure?
  2. If it is a matter of substantive law, what area of law is implicated?
The characterization exercise is done through the eyes of the forum, *i.e.*, from the perspective of the forum’s legal concepts and categories.

However, the court is entitled to take into account the rules in the institutions of the foreign legal systems that might be involved.
Procedural issues

- Procedural issues are governed by the *lex fori*.
- What types of things are procedural?
  - Things dealt with in the Rules of Court; caps on damages (but not categories of damages); costs, *etc*.
  - The law of evidence is tricky: some aspects may be substantive, some may be procedural
Exclusionary Rules

- When will the domestic court refuse to apply a foreign law or enforce a foreign judgment and on what basis?
  - Just because the foreign law is different from the domestic law and therefore might seem repugnant, it will be applied unless one of the exceptions developed in conflict of laws jurisprudence applies.
Exclusionary Rules

Two key exceptions:

1. You can invoke forum policy to exclude or limit the *lex causae* and as a defence to recognition and enforcement of foreign awards and judgments rendered on the basis of a foreign law that offends forum public policy.
2. Where the claims or judgments are based on foreign sovereign rights or public rights: described as a refusal to enforce “penal, revenue and other public laws.”
Jurisdiction

• In most Canadian jurisdictions, including the three northern territories, issues of jurisdiction are resolved by the application of common law principles.

• In B.C., Saskatchewan and Nova Scotia, they are resolved almost exclusively under the Court Jurisdiction and Proceedings Transfer Act.
Jurisdiction Simpliciter/Territorial Competence: the question of whether the court can decide the case. A question to which there is a yes or no answer.

Forum Non Conveniens: should the court hear the case or exercise its discretion to decline jurisdiction?
Constitutional Overlay

- Canadian courts should give full faith and credit to judgments of other Canadian courts: *Morguard Investments Ltd. v. De Savoye* (1990 SCC). This case articulated the real and substantial connection test.

- Conflict of law principles developed in Canada must fit within Canada’s constitutional structure and be exercised in a manner consistent with the territorial restrictions created by the Constitution: *Club Resorts Ltd. v. Van Breda* (2012 SCC)
Bases for Jurisdiction

At common law:

- Presence-based (fleeting presence may suffice)
- Consent-based: forum selection clause; attornment/submission
- Real and substantial connection test
Where Do Forum Selection Clauses Fit into the Analysis?

- Canadian courts will enforce forum selection clauses unless a party can show strong cause as to why they should not.
- Burden is on the party relying on the clause to show that the clause is valid, clear and enforceable and that it applies to the cause of action. The burden then shifts to the other party to show strong cause why the clause should not be enforced by the domestic court.
Procedural Mechanisms

- Stay of Proceedings: used where domestic court is declining jurisdiction.
- Anti-suit injunction: order binding a party, requiring them to refrain from bringing or pursuing a proceeding in a foreign court.
- Anti-anti-suit injunction: order binding the party requiring them to refrain from seeking an anti-suit injunction.
Recognition and Enforcement of Judgments

- Two reasons to recognize and enforce a foreign judgment:
  1. So you can go after assets in the given jurisdiction; and
  2. For the preclusive/res judicata effect.

- The questions you have to ask:
  1. Are you seeking to enforce a foreign judgment or a foreign arbitration award (the *International Commercial Arbitration Act* applies)?
  2. Is the judgment that of another Canadian court (the *Reciprocal Enforcement of Judgments Act* applies)?
  3. Is the judgment from the United Kingdom (the *Reciprocal Enforcement of Judgments (Canada-UK) Act* applies)?
  4. Is the judgment from a non-reciprocating jurisdiction (in which case you must enforce it at common law)?
Recognition and Enforcement of Judgments

A party seeking to have a foreign judgment recognized and enforced at common law must show:

a) Foreign court had jurisdiction according to Canadian conflict of laws rules, sometimes referred to as indirect jurisdiction or jurisdiction in the international sense; and

b) Foreign judgment was final and conclusive.
Pecuniary v. Non-pecuniary Judgments

• At one time, Canadian courts only enforced pecuniary judgments for a sum certain. That changed with the Supreme Court of Canada decision in *Pro Space Swing Inc. v. Etna Golf Inc.*, 2006 SCC 52.

• This case is a cautious, incremental change. It is still a challenge to have non-pecuniary foreign judgments enforced in Canada.
Defences to Recognition and Enforcement Actions at Common Law

1. Foreign court did not have jurisdiction in the international sense.
2. Foreign judgment is based on foreign penal, revenue or other public law.
3. Foreign judgment (or law it is based on) is contrary to forum public policy.
4. Impeachment for fraud (typically extrinsic fraud such as fraudulently inducing the foreign court to take jurisdiction).
5. Impeachment because the foreign proceedings were conducted contrary to natural justice – must be primary breaches like failure to provide adequate notice or a sufficient opportunity to be heard.

***when enforcing a judgment under one of the reciprocal judgments statutes, look to the statute for the defences.
Recognition and Enforcement of Arbitration Awards

- The U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*New York Convention*).
- This Convention has a large number of signatory states such that international arbitration awards are enforceable almost anywhere.
- Process for enforcement in NWT/Nunavut is found in their respective *International Commercial Arbitration Act*. 
Choice of Law – What Is It About?

• This component of conflict of laws deals with the application of foreign law to resolve legal issues in a proceeding being litigated in the local forum.

• Where no party pleads or proves foreign law, the *lex fori* applies by default.

• Becomes an issue after the domestic court has taken jurisdiction over an action containing a foreign element or elements.
• Choice of law methodology generally has four steps (without *renvoi*):
  1. Characterize the issue;
  2. Determine the connecting factor applied to this type of issue by reference to precedential jurisprudence;
  3. Follow the connecting factor to the particular jurisdiction it identifies; and
  4. Apply the foreign jurisdiction’s law to the facts.
Choice of Law

Example:
1. The issue is one of tort.
2. The choice of law rule for tort is *lex loci delicti* – the place where the wrong was committed.
3. If the tort was committed in Kansas, then Kansas substantive law will apply to all matters of substance (remember the *lex fori* applies to matters of procedure).
**Renvoi**

- What is *renvoi* and why does it scare law students?
- Without *renvoi*, choice of law methodology is relatively straightforward: once you determine the area of law and identify the conflict of laws rule, it will point you to another jurisdiction and you will apply the domestic substantive law of that jurisdiction.
- Where *renvoi* is applied, it can point you to the **conflict of laws rules** of the other jurisdiction, and they may point you somewhere else.
Types of *Renvoi*

- **Internal reference**: means no renvoi. You simply apply the substantive law of the *lex causae*.

- **Simple renvoi**: having heard evidence of the conflicts rule of the *lex causae*, the forum court engages in a single reference by applying the domestic law of the jurisdiction selected by that conflicts rule.
Types of *Renvoi*

- Foreign court principle – Country A, having determined to apply the law of Country B to an issue based on Country A’s choice of law rules, attempts to determine the issue as closely as possible to the way in which a court in Country B would do so, which includes considering if the court in Country B follows the internal reference approach (no *renvoi*), simple *renvoi* of the forum court principle. If Country B follows the foreign court principle, potential for endless bounces back and forth.
Choice of Law & Tort

• There is only one choice of law rule: tort issues are governed by the *lex loci delicti*.

• The SCC accepts there may be room for an exception, but courts have not embraced the idea by finding an exception is ever warranted in the interests of justice.

• Easy to apply for torts like assault, more complicated for torts committed in cyberspace.
There are two modes by which solicitors and in-house counsel can determine or influence conflict of laws outcomes for their clients:

1. Use of choice of forum clauses; and
2. Use of choice of law clauses.
Choice of Law & Contract

- This is an area where parties can override the common law by way of an express choice of law clause.
- An express choice of law will apply provided the choice is *bona fide*, legal and there are no reasons for avoiding the choice on grounds of public policy.
- Parties can choose a law otherwise unconnected with the parties or transaction.
• If no express choice, Canadian courts will look to see if there is an implied choice (i.e., have the parties demonstrated their choice with reasonable certainty despite lack of an express choice of law clause?).

• One key indicator will be a clause choosing a forum or place of arbitration (logical that they were also intending to choose that location’s law).
Choice of Law & Contract

- If no express or implied choice of law, the proper law of the contract is objectively determined by looking for connections to relevant jurisdictions.
More Complications re Choice of Law & Contract

- Many of the issues relating to the contract will be governed by the proper law (*i.e.*, the express, implied or objectively determined proper law)
- These issues include things like essential validity, interpretation, categories of damages recoverable.
- But there are issues in contract law governed by something other than the proper law (*e.g.*, the mode performance is governed by the law of the place of performance).
More Complications re Choice of Law & Contract

- Do not assume that the contract law issue you are dealing with is governed by the proper law of the contract. You need to do further research.
- This is not the only example of areas of law where there are multiple choice of law rules that depend on the particular legal issue – trusts and succession are other examples.
• The forum can enact mandatory choice of law rules or mandatory substantive provisions that are stated to apply regardless of the law that conflict of laws principles point you to or notwithstanding an express choice of law clause.
And lest we forget, the forum court can refuse to enforce the *lex causae* on the basis it offends foreign public policy or is a foreign penal, revenue or other public law.
Northwest Territories Case Law

- **Carter v. Vachon**, 2005 NWTSC 81
  - *Jurisdictional issue in family law context*
- **Davis v. Dunn**, 1996 CanLII 3662 (NWTSC)
  - *Reciprocal enforcement of judgments*
  - *Conflict of laws analysis and application*
The comprehensive, up-to-date source is Janet Walker’s text *Canadian Conflict of Laws, 6th edition* (Toronto: Butterworths, 2005-).

There is also a volume in Halsbury’s Laws of Canada, but it is getting dated.

The student text, *Private International Law in Common Law Canada*, came out in a new edition this summer.