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Reforming the Law of Crossborder Litigation: Judicial Jurisdiction

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Consultation Paper

Reforming the Law of Crossborder Litigation Judicial Jurisdiction

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OHLS Law Commission of Ontario

Scholar in Residence

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JUDICIAL JURISDICTION

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I. Introduction

The Law Commission of Ontario (LCO) is a partnership between the Attorney General, Ontario's six law schools, the Law Foundation of Ontario and the Law Society of Upper Canada. Its function is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and study areas that are underserved by other research. Pursuant to this mandate, the LCO has initiated a project to propose reforms to the law of crossborder litigation in Ontario.

The purpose of this Consultation Paper is to solicit input into one area of possible reform of the law of crossborder litigation, that of judicial jurisdiction. This paper provides a brief overview of the problems that exist under the current state of the law and it canvasses some possible legislative provisions that might be included in a statute on judicial jurisdiction. The LCO looks to the stakeholders and their expert knowledge to assist it in ensuring that all the relevant issues are identified and that the problems that now exist are resolved in the most appropriate way.¹

This Consultation Paper will be distributed to stakeholders for comment, as well as posted on the LCO website. Based on the LCO's independent research, including the responses to this Paper, the LCO will prepare recommendations for legislative action.

II. Background

A. The need for reform

The law of judicial jurisdiction in crossborder matters in Ontario is complex and uncertain. This can create the need for expensive and time-consuming litigation to resolve basic questions of whether a plaintiff will be permitted to bring a claim in an Ontario court and whether a defendant will be required to defend in Ontario.

At one time, it was relatively uncommon for cases to involve parties from other provinces or countries, or to relate to events occurring outside Ontario, or to contracts concluded or performed outside Ontario. The process of globalization has served to make these cases routine in our courts. It is urgent, therefore, to ensure that the law of jurisdiction in crossborder cases—both interprovincial and international—is clear and certain to all those relying upon it to understand their rights and obligations.

Uncertainty in the law of jurisdiction has a direct impact on access to justice for litigants. They may be unable to travel *to* other provinces or countries to bring their claims—or they may be unable to travel *from* other provinces or countries to Ontario to determine whether they must defend against a claim

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brought against them in Ontario. Even where it is not necessary to travel to do so, they may be unable or unwilling to participate in costly and protracted determinations of whether an Ontario court can and should exercise jurisdiction—determinations that can often become a pre-requisite to a hearing of a matter on the merits when the law is uncertain.

Uncertainty in the law of jurisdiction has a direct impact on business decisions affecting the local economy. Businesses that want to avoid being drawn into litigation over the question of jurisdiction may choose to locate elsewhere or to structure their dealings so as to avoid contact with Ontario. According to Ontario's Chief Justice, Warren Winkler, "Ontario needs to do a better job of marketing its world-class legal system to the business community as a means of strengthening its economy during these tough financial times."²

Clarifying the law of jurisdiction by adopting legislation could make the civil justice system in Ontario considerably more relevant, more effective and more accessible to litigants—both those who lack the resources to litigate complex issues of judicial jurisdiction, and those who might otherwise find it more convenient and cost-effective to do business elsewhere.

B. The current state of the law

Since the landmark decision of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye (Morguard)*,³ the law of jurisdiction in crossborder matters has been in foment across Canada.⁴ In cases involving defendants served outside Ontario who have not consented to the court's jurisdiction, the current state of the law in Ontario requires the courts to evaluate individually eight qualitative factors such as "the unfairness to the defendant in assuming jurisdiction" and "the unfairness to the plaintiff of not assuming jurisdiction." The courts must then weigh these factors together in a flexible and fact-specific way.⁵ This can reduce certainty and predictability for lawyers advising clients and for litigants preparing their claims and defences. It can add considerably to the threshold cost and uncertainty of bringing or defending a claim with crossborder elements in an Ontario court in all but the clearest of cases.

In 1994, the Uniform Law Conference of Canada (ULCC) adopted the Court Jurisdiction and Proceedings Transfer Act (CJPTA). Part II of the CJPTA, containing the provisions for "Territorial Competence," is reproduced in Appendix "A." The CJPTA has been enacted in British Columbia,⁶ Saskatchewan,⁷ and Nova Scotia⁸ and it has been recommended for enactment in Alberta by the Alberta Law Reform Institute.⁹ When it was promulgated some 15 years ago, the CJPTA was a good reflection of the law of jurisdiction in Canada. It has been proclaimed in effect in three provinces in the last four years.

However, in the last 15 years, the law and practice of crossborder litigation has evolved in significant ways. For example, the Supreme Court of Canada has rendered various decisions emphasizing the importance of respect for party

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autonomy in international contracts; and Canada has participated in the preparation of the Hague Convention on Choice of Court Agreements,¹⁰ and which has been signed by the United States and is being considered for adoption in Canada.¹¹ Such developments warrant review of the provisions of the CJPTA to ensure that any legislation that is recommended is suitable for the current needs of Ontarians.

By introducing a statute on the law of jurisdiction, Ontario courts would be able to rely on codified rules in situations in which their jurisdiction is currently a matter of the common law. In most situations, judicial discretion would be exercised only in determining whether to decline jurisdiction and not in determining “*jurisdiction simpliciter*” (*i.e.*, whether to exercise jurisdiction).

A statute on judicial jurisdiction would not replace or supersede other legislative enactments affecting court jurisdiction, such as the Courts of Justice Act¹² or the International Commercial Arbitration Act.¹³ As is provided in the CJPTA, in the event of a conflict or an inconsistency with another Act that expressly confers jurisdiction on a court, or denies jurisdiction to a court, that Act would prevail.¹⁴

Considering the current state of the law of judicial jurisdiction in Ontario, in your view, would the interests of Ontario residents be best served by developing a statute on judicial jurisdiction or would it be preferable to allow the common law to continue to evolve without introducing legislation?

If a statute should be developed, what are the main concerns that it should address?

C. Uniformity, consistency and evolution in the law

With the adoption of the CJPTA by the Uniform Law Conference of Canada and its enactment by three provinces, there has emerged the possibility of establishing uniformity in the law of jurisdiction among the common law provinces. One option for Ontario would be to adopt the CJPTA as enacted in those provinces. However, in view of the evolution since 1994 of the law and practice of crossborder litigation, the benefits of uniformity with those three provinces must be weighed against the benefits of any revisions that might be recommended to respond to these developments.

Some of the possible departures from the CJPTA would be merely matters of terminology. For example, the CJPTA introduced the term “territorial competence.” This was explained by the drafters as necessary to indicate that “Jurisdiction is not established by the availability of service of process, but by the existence of defined connections between the territory or legal system of the enacting jurisdiction, and a party to the proceeding or the facts on which the

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proceeding is based. ...and to distinguish it from other jurisdictional rules relating to subject-matter or other factors.”¹⁵

The world is a very different place from what it was fifteen years ago. So much of our dealings, both personal and professional, occur in virtual rather than physical environments that words like “territorial” seem more apt to confuse than clarify. Moreover, while it is true that the law of judicial jurisdiction does encompass questions of “subject matter jurisdiction” that are beyond the scope of the proposed statute, the law in Ontario operates in such a way that questions of subject-matter jurisdiction are unlikely to be confused with the matters dealt with in the statute. Accordingly, while the terms “territorial competence” and “jurisdiction *simpliciter*” would not be wrong, the terms used in this Consultation Draft are simply “jurisdiction” or “judicial jurisdiction”.

Other departures in terminology from the CJPTA may have greater significance. For example, this Consultation Draft does not speak of situations in which a court “*has jurisdiction*” and those in which it “*does not have jurisdiction*” as might be advocated by some. Rather, it speaks of situations in which a court “*may exercise jurisdiction*” and those in which it “*may not exercise jurisdiction.*” This may seem like mere semantics, but it is not.

Canada’s superior courts of justice have always enjoyed a plenary and inherent jurisdiction that is subject only to applicable legislation. The Courts of Justice Act affirms that “The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by the courts of common law and equity in England and Ontario.”¹⁶ It is not proposed that a statute on jurisdiction would override this provision of the Courts of Justice Act (or any provision of any other statute). If, as *Morguard* suggested, the inherent jurisdiction of the superior courts is constitutional in nature, it would seem odd for it to be subject to amendment by a provincial statute, promulgated pursuant to the limited section 92.14 of the Constitution to make laws in relation to procedure in civil matters in the province.

The *Morguard* decision held that Canadian courts must exercise their jurisdiction in an appropriately restrained manner, as a matter of the constitutional requirements of the principles of order and fairness. Since a statute on jurisdiction need only address the manner in which Ontario courts *exercise* jurisdiction, it seems prudent to provide only for when the Ontario courts “may exercise” their jurisdiction in respect of crossborder litigation and when they “may not”, and not to venture into questions of what jurisdiction the courts *have* and what jurisdiction they *do not have* in an absolute sense. While preserving the existence of a jurisdiction that “may not be exercised” may seem to be of little practical benefit, it preserves the possibility of revising and updating the statute without purporting to alter the basic scope of authority of the judicial branch of government.

Still other departures from the CJPTA considered in this Consultation Paper are clearly substantive in nature, as is explained in each case of proposed revision. It is important in each situation to weigh the benefits of uniformity with

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the law of the provinces that have adopted the CJPTA against the benefits of the proposed provisions in making the law more relevant, effective and accessible.

On a related question of uniformity, Title III of Book X of the Civil Code of Québec,¹⁷ which is reproduced in Appendix “B”, contains provisions for the International Jurisdiction of Québec Authorities which are not identical to those found in the CJPTA. Provisions in other Books of the Civil Code of Québec reflect the unique traditions of the Québec legal system, the relationship between the private international law of Québec and that of the common law provinces of Canada is more complex. On one view, while the law of jurisdiction in the common law provinces may be different from the law of jurisdiction in Québec, the two should be consistent with one another.¹⁸ Accordingly, in developing a statute for judicial jurisdiction in Ontario it is important to take account of the law in Québec.

On a further question of uniformity, should Canada become a party to the Hague Convention Choice of Court Agreements,¹⁹ which is reproduced in Appendix “C”, Ontario may wish to implement a statute providing for jurisdiction in the area of commercial agreements containing exclusive jurisdiction clauses. It would be important for a general statute on jurisdiction to be consistent with a specialized statute for implementing the Convention.

In sum, while the merits of achieving uniformity or consistency may seem clear, it is less clear whether Ontario should aim to achieve uniformity with the provinces that have adopted or might adopt the CJPTA, or with Québec, or with the countries and provinces that might adopt the Convention on Choice of Court Agreements, or whether it should aim to achieve as much consistency as possible with the common principles underlying all these instruments.

Considering the patchwork of legislative regimes (the CJPTA and the Civil Code of Québec) and common law doctrines that operate in Canada, should a statute in Ontario seek to harmonize its provisions with the law in other parts of Canada?

If so, or should drafters endeavour to use the same language as exists in enactments or common law doctrines in other provinces, or would it be sufficient for the statute to be consistent in its effect with the law in other parts of the country?

Does your view apply to all questions of jurisdiction, or are there particular areas of the law of jurisdiction in which either uniformity or consistency should be sought?

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D. Related areas of reform

The law of judicial jurisdiction is just one of several important features of the law of crossborder litigation that merit consideration with a view to proposing legislation. For example, the CJPTA includes in Part III a framework for transferring proceedings or parts of proceedings to other courts in Canada and elsewhere. With the rapid increase in crossborder litigation in areas of consumer law and family law, particularly in light of the new technologies now available, a mechanism for transferring proceedings could improve the efficiency and reduce the cost of crossborder litigation throughout Canada.

A transfer mechanism could help to overcome geographical barriers to access to justice faced by litigants in Canadian courts, for example, where it is convenient to make determinations in one province about an injury suffered there and to make determinations in the province where the injured person resided about the extent of the harm suffered. A transfer mechanism could also be supplemented by a framework for court-to-court communications in key areas of need, such as multijurisdictional insolvencies and class proceedings.

Other areas of the law of crossborder litigation that are ripe for reform and new initiatives include the recognition and enforcement of judgments from other provinces and other countries, particularly judgments for non-monetary relief and judgments for damages that are excessive by Canadian standards. In addition, the limitation periods that apply to the enforcement of foreign judgments and arbitral awards could also be clarified. Still other areas of crossborder litigation need modernizing, such as proof of foreign law, particularly where the “foreign law” is the law of another province. These questions and others may be addressed in future LCO reports on Reforming the Law of Crossborder Litigation.

III. Jurisdiction based on the parties’ consent

There are three main bases for judicial jurisdiction: the parties’ consent, the presence or residence of the defendant; and a real and substantial connection between the matter and the forum. Each is an independently sufficient basis of jurisdiction.²⁰

With the rapid increase in cross-border communications and commerce, the first of these three bases, consent, is emerging as a primary basis of jurisdiction with distinctive features. It has been singled out for special attention, both in the Supreme Court of Canada²¹ and in a multilateral Convention promulgated by The Hague Conference on Private International Law for business-to-business disputes.²² These and other developments suggest that jurisdiction based on the parties’ consent, particularly as reflected in jurisdiction agreements, should be treated differently from the other bases of jurisdiction and not just as another basis for service out of the jurisdiction or another factor to consider in exercising discretion to decline jurisdiction.²³

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The parties' consent may be demonstrated either by their active participation in the proceedings ("attornment") or by an agreement to submit disputes to a particular court or tribunal. By commencing matters in Ontario courts, plaintiffs (or applicants²⁴) demonstrate their consent to the jurisdiction of the Ontario court to decide their matter. As a result, the focus of the court's attention in determining whether it has jurisdiction is on whether the defendant (or respondent²⁵) has also consented, either by attornment or by agreement.

A. Attornment

Perhaps the least controversial basis for jurisdiction is that which is established by the parties' participation in the proceedings before the court whose jurisdiction is later challenged. The principle is simple. Where the parties have attorned, they are estopped by their conduct from later challenging the jurisdiction of the court.

The principles of attornment apply both to a plaintiff who commences a proceeding to which the proceeding in question is a counterclaim and to a defendant who participates in the proceeding to contest the merits of the claim.

Jurisdiction over a defendant in a counterclaim—Despite the widespread acceptance of this basis of jurisdiction, there remain instances in which Canadian courts have declined jurisdiction over counterclaims brought against parties who have commenced proceedings before them. For example, in one case, the Court of Appeal for Ontario held that a foreign government that had sued a person in Ontario was entitled to immunity from the counterclaim brought by that person in the Ontario courts.²⁶

The question of jurisdiction over this counterclaim was the subject of another statute which, as mentioned, would prevail over a statute on jurisdiction. However, the case raised a larger question, because Ontario Rule 27.01(1) permits defendants to bring claims against plaintiffs in the same proceeding by way of counterclaim even where those claims are not related to the main claim. Should defendants in counterclaims be regarded as having accepted the jurisdiction of the Ontario court only in respect of claims against them that are directly related to the claims that they have commenced? Alternatively, should they be regarded as having accepted the jurisdiction of the Ontario court over all claims that may be brought by the defendant against them?

A provision for attornment based on the wording of the CJPTA could read:

A court may exercise jurisdiction in a civil matter over any person²⁷ who has consented to its authority to do so by:

(i) commencing a proceeding to which the proceeding in question is a related counterclaim

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Should a provision for exercising jurisdiction over defendants to counterclaims specify that this is limited to counterclaims that are related to the main proceeding?

Jurisdiction over a defendant who contests the merits—The practice of appearing in the proceedings solely for the purpose of challenging the jurisdiction of the court once posed difficulties for determining whether a defendant had attorned.²⁸ These difficulties were overcome by abolishing conditional appearances and by providing that jurisdictional objections would be determined in advance of addressing the merits.²⁹ Typically, a defendant who wishes to challenge jurisdiction will do so before entering a defence.

While this approach is sound in principle, uncertainty can arise in situations where key facts affecting the jurisdiction of the court are contested.³⁰ Should a defendant be regarded as attorning by participating in the establishment of such facts for the limited purpose of determining jurisdiction?

In addition, the viability of a crossborder proceeding may turn on a pure question of law. For example, where, under the law of a place in which a tort has occurred, no claims could be brought on behalf of a deceased plaintiff's estate or family members, the question whether the law of that place applied could dispose of the matter. Should seeking such a determination of law constitute attornment?

A provision for jurisdiction based on attornment based on the wording of the CJPTA could read:

A court may exercise jurisdiction in a civil matter over any person who has consented to its authority to do so by:

..., or

(ii) contesting the merits of the claim

Should a provision for attornment define or enlarge upon what constitutes contesting the merits?

If so, should the statute provide for determining jurisdictionally significant facts or potentially dispositive questions of law in a way that would preserve the right to challenge jurisdiction?

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B. Agreement

If attornment is the least controversial basis for jurisdiction, the next least controversial basis is an agreement between the parties nominating a particular court or courts or an arbitral tribunal as having jurisdiction over disputes between them. Party autonomy is an increasingly significant factor in crossborder matters in Canada and elsewhere. As the Supreme Court of Canada observed, “respecting the autonomy of the parties makes it possible to implement the broader principle of achieving legal certainty in international transactions.”³¹

One of the ways of exercising party autonomy in international dealings is to enter into an agreement to arbitrate disputes. All Canadian provinces have legislation governing international commercial arbitration, under which the courts are bound to grant a party’s request to refer matters to arbitration that are subject to valid arbitration clauses.³² Accordingly, a statute on jurisdiction would not need to provide for the effect of arbitration clauses.

Another way of exercising party autonomy is to enter into an agreement nominating a particular court or courts to resolve disputes between them. Canada was an active participant in preparing The Hague Conference on Private International Law, Convention on Choice of Court Agreements, June 2005.³³ According to the Preamble to the Convention, “the enhanced judicial co-operation necessary to promote international trade and investment requires a secure international legal regime that ensures the effectiveness of exclusive choice of court agreements by parties to commercial transactions.” A provision for permitting jurisdiction based on the parties’ agreement could read:

A court may exercise jurisdiction in a civil matter over any person who has consented to its authority do so by: ...

(iii) entering into an agreement to submit disputes to it

Special considerations affecting exclusive jurisdiction agreements nominating other courts—Exclusive jurisdiction agreements give rise to special considerations because the parties have agreed not only to submit their disputes to the nominated court but also to forgo the opportunity to submit their disputes to other courts. Accordingly, special considerations arise both in cases involving exclusive jurisdiction agreements nominating Ontario courts and those involving exclusive jurisdiction agreements nominating other courts.

In cases involving exclusive jurisdiction agreements nominating Ontario courts, the question arises as to whether an Ontario court may set aside the agreement and decline jurisdiction and, if so, on what grounds. Since this is a question of declining jurisdiction, it will be dealt with in that section of the Consultation Paper.

Different questions arise in respect of jurisdiction agreements nominating *other* courts. Where the agreement is *non-exclusive* or “permissive”, an Ontario court is not precluded from exercising jurisdiction. However, the existence of

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such an agreement may be a relevant consideration in determining whether another forum is more appropriate. Accordingly, this too will be dealt with in the section on declining jurisdiction.

However, where the jurisdiction agreement nominating another court is *exclusive*, a question arises as to whether an Ontario court may exercise jurisdiction. Historically, common law courts have treated this as a question of whether they should decline jurisdiction on the basis of the jurisdiction agreement. Under the “strong cause” test,³⁴ the court ordinarily gives effect to the jurisdiction agreement and stays its proceeding unless there is *strong cause* not to do so. Under the strong cause test the jurisdiction agreement does not oust the court’s jurisdiction, but is treated as a factor, albeit an important one, in a determining whether the nominated forum is a clearly more appropriate forum.

The Civil Code of Québec takes a more direct approach. Under article 3148 “a Québec authority has *no* jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority...” (emphasis added). The agreement precludes the court from exercising jurisdiction. The only question for a Québec court is whether the jurisdiction agreement may be set aside. This approach is consistent with the Convention on Choice of Court Agreements which provides that courts of Contracting States other than those of the chosen court *must* suspend or dismiss such proceedings except in specified circumstances.

Accordingly, the statute could provide that, subject to certain defined exceptions, a court may not exercise jurisdiction in a civil matter that the parties have agreed to submit to the exclusive authority of another court. A provision for this could read:

A court may not exercise jurisdiction in a civil matter that the parties have agreed to submit to the exclusive authority of another court...

Should the statute provide that valid exclusive jurisdiction agreements are, in principle, determinative of the court’s jurisdiction, or should it provide that such agreements are a factor to weighed with other factors in the exercise of discretion to assume or decline jurisdiction?

Setting aside exclusive jurisdiction agreements nominating other courts— Three reasons why a court might wish to disregard a jurisdiction agreement: the agreement is invalid, the nominated court declines jurisdiction, or the agreement is unjust or contrary to public policy.

Invalid agreements—A jurisdiction agreement may be null and void for many of the same reasons that other agreements may be invalid, such as lack of

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capacity, lack of consent and illegality. The Convention on Choice of Court Agreements provides for the validity of the agreement to be tested under two laws.

The Law Governing Validity—The Convention on Choice of Court Agreements provides that the validity of jurisdiction agreements should be determined in accordance with *the law of the chosen court*.³⁵ The application of the law of the chosen court may not be appropriate outside the commercial context contemplated by the Convention. However, the existing provisions of Ontario law for protecting where necessary specified groups such as Ontario consumers³⁶ would prevail over such a provision in this statute in any event.

The Law Governing Capacity—The Convention on Choice of Court Agreements also permits a court to exercise jurisdiction in the face of an exclusive jurisdiction agreement where the party lacked capacity to conclude the agreement. This is to be tested by applying *the law of the court seised*. In other words the Ontario court would ask whether the party lacked capacity to conclude the agreement under Ontario law. The application of the law of the forum to capacity may not be appropriate outside a commercial context, and it may also be inappropriate for determining the capacity of a corporation, which is often regarded as a matter for the law of the corporation's domicile.

However, a determination that a party lacked capacity to conclude an agreement would also lead to a finding that the agreement was null and void. Accordingly, any difficulties arising from specifying the law governing a party's capacity to enter into a jurisdiction agreement could be obviated by omitting any reference to the governing law in either provision. In common law courts, the mandatory application of foreign law can add considerable time and expense to the proceedings and special concerns arise where the parties fail to plead or prove the foreign law. Accordingly, while the court may take guidance from provisions of the Convention on Choice of Court Agreements in determining the applicable law, and may apply foreign law where appropriate, it may not be desirable for the statute to require the application of foreign law in this context.

The Convention on Choice of Court Agreements also permits a court to exercise jurisdiction in the face of an exclusive jurisdiction agreement where, for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed. For example, the court chosen might have jurisdictional rules that prevent it from exercising jurisdiction. Alternatively, war or natural disaster could make the chosen court inaccessible. There could be other exceptional reasons beyond the control of the parties why the agreement was inoperative or incapable of being performed. Under these circumstances, it would be inappropriate for the court to decline jurisdiction solely because the parties had agreed to submit disputes exclusively to another forum.

All of these contingencies could be addressed by a provision based on the language of the Model Law on International Commercial Arbitration Act, which is a schedule to Ontario's International Commercial Arbitration Act. That provision requires courts to give effect to the parties' arbitration agreements unless the

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agreements are “null and void, inoperative or incapable of being performed”. Accordingly a provision for this could read:

...unless

(i) the agreement is null and void, or inoperative or incapable of being performed;

Are these suitable bases on which to determine the validity of a jurisdiction agreement?

Should provision(s) for determining the validity of jurisdiction agreements specify the law to be applied?

The chosen court has declined jurisdiction—Despite the validity and effectiveness of an exclusive jurisdiction agreement nominating another court, an Ontario court may wish to disregard it where it would fail to secure access to the court that the parties have chosen. One reason for this could be that the chosen court had decided not to exercise jurisdiction. This could be argued as coming within the “inoperative or incapable of being performed” clause of the previous provision. However, it deals with situations in which the agreement has arguably been performed by the parties through submission of the dispute to the chosen court, but the chosen court has declined jurisdiction and prevented the matter from being heard in that forum on the merits.

The Convention on Choice of Court Agreements permits a court to exercise jurisdiction in the face of an exclusive jurisdiction agreement where the chosen court has decided not to exercise jurisdiction. This would seem to be a useful provision for inclusion in an Ontario statute:

...unless...

(ii) the chosen court has decided not to exercise jurisdiction;

Manifest injustice or public policy—There may be other cases in which the egregious unfairness of giving effect to a jurisdiction agreement persuades the court to set it aside. The Convention on Choice of Court Agreements provides for an exception to the application of a choice of court agreement where “giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised.”³⁷ This resembles the strong cause test, but placing the issue in this context makes it clear that it is a truly exceptional departure from the practice of giving effect to valid jurisdiction agreements.

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Nevertheless, the reference to the public policy *of the State of the court seised* is intended to clarify that the very high threshold of *international* public policy that applies in other situations in the conflict of laws does not apply in this situation. In other words, it would not be necessary for a party to show that the agreement would be contrary to the public policy of most states, only that it would be contrary to the public policy of Ontario.

A provision for this could read:

...unless...

(iii) giving effect to the agreement would be manifestly unjust or contrary to public policy.

Certain groups, such as consumers and workers, already enjoy the protection of specialized statutes. These statutes secure access to the Ontario courts notwithstanding the existence of exclusive jurisdiction agreements in favour of some other court.³⁸ Whether a more relaxed standard is appropriate for small businesses and sole proprietorships that may not understand well the effect of jurisdiction agreements nor have the ability to bargain effectively for a forum that is readily accessible to them may be a question of whether, as groups analogous to those protected by statute, they come within the protection of the public policy provision in this section.

Are the grounds specified for setting aside a jurisdiction agreement—invalidity, that the chosen court has declined jurisdiction, and manifest injustice and public policy—sufficiently specific and comprehensive?

Are there other grounds that should be included?

Should any of these grounds be omitted?

In sum, the provisions of the statute relating to jurisdiction based on the consent of the parties could read:

Consent

1. (a) *A court may exercise jurisdiction in a civil matter over any person who has consented to its authority to do so by:*

(i) commencing a proceeding to which the proceeding in question is a related counterclaim,

(ii) contesting the merits of the claim, or

(iii) entering into an agreement to submit disputes to it.

(b) A court may not exercise jurisdiction in a civil matter that the parties have agreed to submit to the exclusive authority of another court, unless

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- (i) the agreement is null and void, inoperative or incapable of being performed;*
- (ii) the chosen court has decided not to exercise jurisdiction; or*
- (iii) giving effect to the agreement would be manifestly unjust or contrary to public policy.*

IV. Jurisdiction based on the defendant's ordinary residence

There is also widespread support for jurisdiction over defendants in their own courts. In fact, this has historically been regarded as the primary basis of jurisdiction.³⁹ The exercise of jurisdiction over defendants in their own courts may be justified on various bases. First, while the defendant may not, in fact, have chosen the court, it is likely to be the court in which the defendant is most amenable to responding, in terms of the convenience of participating in the proceedings and familiarity with the law and procedure of the forum. Second, where a defendant has been served locally with the notice of proceeding, the matter will have the appearance of a local case, and any issues that arise from its crossborder elements, including those concerning judicial jurisdiction, will come to light only if the parties raise them.

In this regard, the presumption of entitlement to defend locally may be considered a corollary to the presumption that persons ought to comply (at least, at a minimum) with the standards of conduct of the legal system with which they are most closely connected. From the perspective of civil litigation as a means of regulation, it may be suggested that it is reasonable for persons to be accountable for their conduct in their own courts regardless of where the conduct occurred or where it gave rise to the claim brought against them.

Of course, as with some of the other jurisdictional standards, this is just a presumption and it remains open to defendants sued in the courts of their residence to persuade the court that there is a more suitable forum elsewhere, just as it is open to plaintiffs to argue that courts in places other than the defendants' residence are appropriate fora where there are strong connections with the matter.

Domicile, presence, residence—In most civil law countries, defendants are treated as local defendants if they are domiciled in the forum. However, in common law countries, defendants have been treated as local defendants if they were physically present in the territory of the forum when served with the notice of proceeding. Presence-based jurisdiction has generated controversy. Unfairness can result from serving defendants while temporarily present in places with which neither they nor the matter have other connections.⁴⁰ Further, while the presence of a natural person is easily verified through the personal service of the notice of a proceeding, the presence of corporations and other juristic entities is less easily determined in this way.

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A. Individuals

The Uniform Law Conference of Canada replaced the concept of presence with the concept of ordinary residence for natural persons and for legal entities. Ordinary residence represents a settled connection with a particular forum. Defendants who are ordinarily resident in Ontario may be regarded as local persons in Ontario courts and may fairly be thought to regard the Ontario courts as their own courts. Where a defendant who is ordinarily resident in Ontario has not indicated a willingness to resolve a dispute elsewhere, an Ontario court is a forum to which a plaintiff should be able to resort with some confidence. Subject to the defendant demonstrating otherwise,⁴¹ it is likely to be the most convenient court for the defendant and, in this way, a suitable basis for jurisdiction.

Although ordinary residence is not subject to change as quickly as presence, there could still be situations in which a change in ordinary residence could occur at some point between the time the cause of action arises and the time when the question of jurisdiction is determined. Accordingly, the statute could specify the relevant time at which the person would need to be ordinarily resident for jurisdictional purposes. However, it would seem likely that many of other the connections identified in this statute could also vary during this time period. Accordingly, it may be desirable in the alternative either to specify the moment at which the relevant connection is to be considered in a general provision, or to leave it to the common law.

A provision for ordinary residence could read:

A court may exercise jurisdiction in a civil matter over any person who is ordinarily resident in Ontario.

Is ordinary residence the best means of defining the connection to Ontario that would establish general jurisdiction over persons regardless of consent?

Should the statute specify the time at which the person's ordinary residence in Ontario is determined for the purposes of establishing jurisdiction?

Alternatively, should the statute contain a general provision specifying the time at which the connections to Ontario described in the statute are determined for the purposes of establish jurisdiction?

If so, what is the relevant point in time?

B. Corporations, partnerships and unincorporated associations

Ontario courts have jurisdiction over locally incorporated corporations. In addition, as will be discussed below, they have jurisdiction over matters with a real and substantial connection to Ontario even if the defendant is not ordinarily

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resident in Ontario. As a result, Ontario courts usually exercise jurisdiction over extra-provincial corporations only where claims arise in respect of the business that they do in Ontario. They do not usually exercise jurisdiction over extra-provincial corporations for claims arising out of business done elsewhere.

In some other legal systems, courts exercise jurisdiction over foreign corporations based on their business activities in the forum even where the claims do not relate to the business activities in the forum. Most countries, however, take a narrower approach to jurisdiction over corporations.⁴² In 2002, the Committee on International Civil and Commercial Litigation of the International Law Association in its Report and Resolutions on Jurisdiction over Corporations recommended that jurisdiction over corporations at the place of their seat or incorporation be supplemented only with jurisdiction over corporations in the place where their “central management” was exercised and where their business or professional activity was “principally carried on”.⁴³ A provision for this could read:

A corporation, partnership or unincorporated association is ordinarily resident in Ontario if:

- (i) it is registered as a business entity in Ontario,*
- (ii) its central management is exercised in Ontario, or*
- (iii) its business, or other professional activity is principally carried on in Ontario.*

Are these grounds—registration, central management and principal location of business and professional activities—appropriate for determining the ordinary residence of parties other than natural persons?

C. Ships

A provision for ships was included in the CJPTA to codify the existing rule for jurisdiction *in rem*, which exists only over vessels and is based on their presence in the forum as demonstrated by service (arrest). Most actions *in rem* are brought in the Federal Court under its admiralty jurisdiction, but concurrent jurisdiction exists in the Ontario courts. A provision for this could read:

A court may exercise jurisdiction in a civil matter over any vessel that is served or arrested in Ontario.

In sum, the provisions of the statute relating to jurisdiction based on the ordinary residence of the defendant could read:

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Ordinary Residence

2. (a) A court may exercise jurisdiction in a civil matter over any person who is ordinarily resident in Ontario.

(b) A corporation, partnership or unincorporated association is ordinarily resident in Ontario if:

(i) it is registered as a business entity in Ontario,

(ii) its central management is exercised in Ontario, or

(iii) its business, or other professional activity is principally carried on in Ontario.

(c) A court may exercise jurisdiction in a civil matter over any vessel that is served or arrested in Ontario.

V. Jurisdiction based on a real and substantial connection

Most legal systems contemplate the exercise of jurisdiction over claims against non-local defendants who have not consented to the court's jurisdiction, where there is a strong connection between the matter and the forum. In the United States this is described as "long-arm jurisdiction"; in the English courts it is described as "assumed jurisdiction"; in Europe, it is described as "special jurisdiction." The Supreme Court of Canada acknowledged in *Morguard* that jurisdiction exercised on this basis may constitute appropriately restrained jurisdiction required by the constitutional principles of order and fairness.

Substantial connections between the matter and Ontario can help to ensure that an Ontario court has ready access to the evidence and the witnesses and in this way is a convenient forum for the trial of the matter. In addition, just as it was suggested that local persons are reasonably expected to be accountable in the local courts for their conduct, wherever the conduct occurs, so too, do most persons reasonably expect to be accountable in Ontario courts for occurrences in Ontario that foreseeably give rise to claims in Ontario even if they are not Ontario residents. Some might describe this as a matter of the authority to regulate not only persons, but also events within the territory of the forum. A provision for this basis of jurisdiction could read:

*A court may exercise jurisdiction in a civil matter where there is a real and substantial connection between Ontario and the matters in dispute.*⁴⁴

In principle, this provision is sufficient as it is. However, many jurisdictions provide lists of examples of this basis of jurisdiction in the rules for service out of the jurisdiction, such as Ontario's Rule 17.02. These lists, which vary from place to place, provide a rough guide to the likely outcome of a determination of judicial jurisdiction.

There are a number of reasons why a rough guide has been sufficient in the past. On the one hand, in some common law countries, it is necessary to obtain leave of the court to serve a defendant outside the jurisdiction when this

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ground of jurisdiction is invoked; and even where leave is not required, the burden of proof often remains on the plaintiff to persuade the court that jurisdiction should not be declined where a defendant objects. In this way, the enumerated grounds are merely presumptive of jurisdiction. On the other hand, the courts sometimes exercise jurisdiction over matters that do not fit within the lists. In this way, the enumerated grounds are not exhaustive. Thus, the court has discretion to depart both upwards and downwards from the list as a matter of jurisdiction simpliciter.

This is reflected in the CJPTA, whose drafters reviewed the examples of the connections found in the rules of court across Canada and included those that were widely accepted as constituting real and substantial connections sufficient to support the exercise of jurisdiction. The CJPTA describes the enumerated grounds as presumptively constituting real and substantial connections, and it notes that the list is not exhaustive.

Under the CJPTA, it is open to defendants to persuade the court that even though one of the enumerated grounds exists, the connection is not real and substantial. This challenge is available in addition to any request by the defendant that the court exercise its discretion to decline jurisdiction because some other forum is clearly more appropriate. Thus, there are two “layers” of discretion to “depart downwards” from the list.

There does not seem to have been any instance in which the facts supporting the exercise of jurisdiction on the basis of an enumerated real and substantial connection were made out and yet the court found that the connection was, nevertheless, *not* real and substantial. Accordingly, there may be no reason to preserve this first layer of discretion to depart downwards from the list.

Also under the CJPTA, it is open to plaintiffs to persuade the court that even though none of the enumerated grounds exists, there *is* a real and substantial connection to the forum. This basis of jurisdiction is available in addition to the forum of necessity ground of jurisdiction (discussed later). Thus, there are two “layers” of discretion to “depart upwards” from the list.

There does not seem to have been any instance in which the facts supporting the exercise of jurisdiction on the basis of an enumerated real and substantial connection were not made out and yet the court found that a real and substantial *did*, in fact, exist. Accordingly, there may be no reason to preserve this first layer of discretion to depart upwards from the list.

The Civil Code of Québec operates differently. It provides for various bases of jurisdiction similar to those contained in the rules for service out, but which are applied without discretion. This does not mean that Québec courts do not exercise any discretion in determining whether or not to assume jurisdiction. Rather, it means that Québec courts exercise discretion to decline jurisdiction only on the basis of the *forum non conveniens* provision in article 3135, and they exercise discretion to assume jurisdiction only on the basis of the forum of

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necessity provision in article 3136. In Québec, there is only one layer of discretion in each direction.⁴⁵ Accordingly, one option for an Ontario statute would be to state the grounds on which a real and substantial connection could exist as a definitive list.

Should it be thought imprudent to attempt to establish a definitive list, one way to provide a small measure of flexibility would be to indicate that the list was illustrative of the real and substantial connections that would suffice to support jurisdiction.⁴⁶ This could be done by adding “such as” to the provision above as follows:

A court may exercise jurisdiction in a civil matter where there is a real and substantial connection between Ontario and the matters in dispute, such as...

The list itself would need to be sufficiently comprehensive to ensure that any case with a real and substantial connection that was not specifically enumerated would readily be understood as coming within the *ejusdem generis* scope of this provision, and the list would need not to be over-inclusive so as to encompass cases in which there was no real and substantial connection and which might not be stayed on grounds of *forum non conveniens*.

Framed in this way, such a list would provide flexibility in interpreting the facts of the case, but the opportunities for a court to depart *downward* from the list would be limited to a determination that there was a clearly more appropriate forum elsewhere, and would not include a finding that, despite the case fitting one of the categories on the list, there was no real and substantial connection between the matter and Ontario. The opportunities for a court to depart *upward* from the list would be explicitly confined to cases that had connections that were analogous to the connections enumerated in the list, or to cases that met the stringent test of forum of necessity.

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Should the statute preserve the “two layers of discretion” that exist in the CJPTA for exercising jurisdiction based on a real and substantial connection? In other words, should the statute preserve discretion to identify real and substantial connections beyond those contained in a list, and to determine that connections contained in the list were not real and substantial, in addition to the discretion to accept or decline jurisdiction on grounds other than the existence of a real and substantial connection?

Alternatively, should discretion be confined to the “second layer”—that associated with an exercise of jurisdiction on forum of necessity grounds or declining jurisdiction on forum non conveniens grounds?

If so, should the statute eliminate discretion in determining what constitutes a real and substantial connection by providing a definitive list as has been done in the Civil Code of Québec?

Alternatively, should the courts retain the flexibility to find that a real and substantial connection exists on grounds analogous to those listed in the statute?

With these considerations in mind, a simplified list based on the list found in the CJPTA could include the following connections:

...where the proceedings relate to:

- (i) immovable or movable property⁴⁷ in Ontario;*
- (ii) the estates of persons who died while ordinarily resident⁴⁸ in Ontario, including their movable property elsewhere;*
- (iii) trusts administered in Ontario, or by trustees ordinarily resident in Ontario;*
- (iv) contractual or other obligations⁴⁹ to be performed in Ontario, or governed by the law of Ontario;*
- (v) torts, equitable wrongs, or unjust enrichment⁵⁰ that occurred in Ontario;*
- (vi) the status or capacity of persons ordinarily resident in Ontario;*
or
- (vii) claims by public authorities in Ontario.*

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Is the proposed list of real and substantial connections sufficiently comprehensive? If not, what should be added?

Is the list over-inclusive? If so what should be omitted?

A further question arises as to how these provisions would apply to matters in which there were connections to more than one place, for example, in the case of a trust with several trustees that were ordinarily resident in various places. In cases with connections to Ontario and to other places, the Ontario courts would be authorized to exercise jurisdiction, but would also be able to exercise their discretion to decline jurisdiction where this was warranted under the provisions for that in the statute.

In sum, the provisions of the statute relating to jurisdiction based on a real and substantial connection between the matter and the forum could read:

Real and Substantial Connection

3. A court may exercise jurisdiction in a civil matter where there is a real and substantial connection between Ontario and the matters in dispute, such as where the proceedings relate to:

(i) immovable or movable property in Ontario;

(ii) the estates of persons who died while ordinarily resident in Ontario, including their movable property elsewhere;

(iii) trusts administered in Ontario, or by trustees ordinarily resident in Ontario;

(iv) contractual or other obligations to be performed in Ontario, or governed by the law of Ontario;

(v) torts, equitable wrongs, or unjust enrichment that occurred in Ontario;

(vi) the status or capacity of persons ordinarily resident in Ontario;
or

(vii) claims by public authorities in Ontario.

Exclusive jurisdiction over title to immovables—On one final point relating to things located in the territory of the forum, historically, as a result of the widely recognized exclusive jurisdiction of the courts of the place where an immovable is situated to determine title to the immovable, all other courts have regarded themselves as lacking jurisdiction to do so.⁵¹ This rule is codified in Article 22 of the Brussels I Regulation, and it applies to questions of title to land, rights in public registers and other immovables.

The question arises as to whether, in codifying the law of jurisdiction, it would be appropriate to include a provision reflecting this lack of jurisdiction.

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Although Ontario courts have recently relied upon this rule to decline jurisdiction in recent cases, there are also cases in which courts have assumed jurisdiction to provide *in personam* relief between parties disputing title to foreign immovables. Accordingly, as an alternative to specifying that the courts lack jurisdiction, it would be possible to leave this question to the courts' discretion on a case-by-case basis. This would permit them to exercise jurisdiction where an order was sought, for example, against an Ontario resident, requiring the transfer of title to a foreign immovable; and it would permit them to decline jurisdiction where, for the reasons considered below, some other forum, such as the place where the immovable was situated, was clearly more appropriate.

Should provision be made for prohibiting courts from exercising jurisdiction over questions of title to immovables located outside Ontario, or for tortious damage to foreign immovables?

If so, should special provision be made for an exception to this prohibition for matters involving persons within the jurisdiction of the court who may be ordered to convey title to foreign immovables?

VI. Additional bases of jurisdiction

To the three main bases for judicial jurisdiction may be added three more supplementary bases. While they are narrower in scope and less commonly invoked, they are conceptually distinct from the main bases and, therefore, are necessary features of a comprehensive statute on jurisdiction.

A. Forum of necessity

It is a fundamental principle of civil justice that there must be a means to prevent a denial of justice. The right to be protected from a denial of justice is enshrined in the European Convention on Human Rights.⁵²

Despite the breadth of the available bases of jurisdiction contemplated so far, there remains the possibility that for some reason it will be impossible or impracticable for a plaintiff or applicant to commence proceedings in any other court. Rare as such circumstances may be, provision has been made for them in Ontario Rule 17.03, the Civil Code of Québec⁵³ and the CJPTA.⁵⁴ Rule 17.03 simply provides that "In any case to which rule 17.02 does not apply, the court may grant leave to serve an originating process or notice of a reference outside Ontario." It could be argued that the lack of a real and substantial connection could render the exercise of this basis of jurisdiction unconstitutional. However, it could also be suggested that this was the nature of the unsuccessful challenge brought against Rule 17.02(h) in the *Muscutt* decisions.⁵⁵

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Under the doctrine of *forum non conveniens*, Ontario courts have retained the residual discretion to decline a request for a stay despite finding that another forum is clearly more appropriate where granting a stay would unjustly deprive the plaintiff of a legitimate juridical or personal advantage. In one case, where a claim was begun in Nova Scotia even though it was not the province to which the claim had a real and substantial connection, the Court of Appeal rejected the argument that the lack of a real and substantial connection prevented the court from exercising jurisdiction. As the court explained, fairness was an essential requirement of the jurisdictional analysis.⁵⁶

The following provision is based on the formulations found in the Civil Code of Québec and the CJPTA:

A court may exercise jurisdiction in a civil matter where there is no other court in which the matter can be commenced, or where commencing the matter elsewhere cannot reasonably be required.

Should a provision for forum of necessity be included in the statute?

If so, should such a provision specify the need for a substantial connection between the matter and/or the parties and Ontario?

B. Ancillary proceedings

Most codifications of jurisdiction include provision for related, ancillary or incidental proceedings. Ontario Rule 17.02(o) permits service outside Ontario of a notice of proceeding against a person “who is a necessary or proper party to a proceeding properly brought against another person served in Ontario.” Similarly, the Civil Code of Québec provides that “where a Québec authority has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross demand.”⁵⁷

As with forum of necessity, Ontario courts have approached instances of this basis of jurisdiction with caution. Nevertheless, it can be an important means of avoiding an unnecessary multiplicity of proceedings.

A provision for this could read:

A court may exercise jurisdiction in counterclaim, crossclaim or third party claim in respect of a civil matter over which it may exercise jurisdiction under this statute.

One reason for permitting jurisdiction to be extended to encompass ancillary proceedings is to avoid a multiplicity of proceedings. The question arises whether this should be a condition of exercising jurisdiction over ancillary proceedings.

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Should a provision be included for jurisdiction over ancillary proceedings based on jurisdiction over the main claim?

If so, should such a provision specify the need to demonstrate that exercising jurisdiction would avoid a multiplicity?

C. Interim measures

One vestige of historical approaches to common law procedure is the view that interim measures should be taken solely for the benefit of local proceedings. While courts need to be cautious in granting interim relief in support of foreign proceedings, the ability to do so is becoming an accepted feature of judicial cooperation in crossborder litigation. For example, article 3138 of the Civil Code of Québec provides: “A Québec authority may order provisional or conservatory measures even if it has no jurisdiction over the merits of the dispute.”

The provision for including among the real and substantial connections to Ontario “contractual *or other obligations to be performed in Ontario*” is intended to include, as one of the “other obligations”, interim relief to be effected in Ontario. This would clarify that an Ontario court could exercise jurisdiction in respect of interim relief that was to be effected *in Ontario*.⁵⁸ It would not preclude issuing injunctions addressed to persons who, as ordinary residents of Ontario, would be required to comply with these orders elsewhere. Such persons would be subject to the jurisdiction of the Ontario court in any event.

A provision for jurisdiction over “other obligations to be performed in Ontario” may seem sufficient to provide for jurisdiction to order *interim measures* even though the Ontario courts could not exercise jurisdiction over the matter on the merits. However, the other provisions in the statute are based on connections with the matter itself (and not with the relief sought). Accordingly, a provision may be needed to remove the historical restriction on interim measures in aid of proceedings in other courts.⁵⁹

A provision for this based on the Civil Code of Québec could read:

The provisions of this statute apply, with necessary modifications to interim measures in respect of proceedings in other courts and tribunals.

Should a provision be included for jurisdiction to order interim measures independent from the main claim?

If so, are there restrictions on its availability that should included?

In sum, the provisions of the statute relating to the additional bases of jurisdiction could read:

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Additional Bases

Forum of Necessity

4. (1) *A court may exercise jurisdiction in a civil matter where there is no other court in which the matter can be commenced, or where commencing the matter elsewhere cannot reasonably be required.*

Ancillary Proceedings

(2) *A court may exercise jurisdiction in counterclaim, crossclaim or third party claim in respect of a civil matter over which it may exercise jurisdiction under this statute.*

Interim Measures

(3) *The provisions of this statute apply, with necessary modifications to interim measures in respect of proceedings in other courts and tribunals.*

VII. Declining jurisdiction

A. Where jurisdiction is based on an exclusive jurisdiction clause

Just as there might be occasions when Ontario courts wish to set aside exclusive jurisdiction agreements nominating other courts and exercise jurisdiction, so too might there be occasions when Ontario courts wish to set aside jurisdiction agreements nominating them and decline jurisdiction. As with exclusive jurisdiction agreement nominating other courts, special considerations would apply. Under such agreements, the parties agree to submit all disputes to a particular court or courts. In doing so, they not only accept the jurisdiction of those court or courts, but also agree to forgo resort to other courts. Under these circumstances a court must be satisfied that there is a reason to decline jurisdiction that is sufficiently compelling to warrant setting aside the parties agreement.

One such reason could be that the agreement purported to endorse the exercise of jurisdiction by an Ontario court in a dispute concerning a subject matter over which the Ontario court lacked jurisdiction, or the agreement might be null and void for other reasons. The Convention on Choice of Court Agreements provides that the court nominated in an exclusive jurisdiction agreement may decline jurisdiction only where the agreement is null and void.⁶⁰ Following the language recommended earlier,⁶¹ a provision for this could read:

5. (1) *A court may decline to exercise jurisdiction provided for in an exclusive jurisdiction agreement only where the agreement is null and void, inoperative or incapable of being performed.*

The Convention on Choice of Court Agreements applies only to business-to-business contracts. An Ontario statute would not be limited in application to commercial contracts. In addition, upholding jurisdiction agreements could cause

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undue hardship to foreign defendants who were not in a position to negotiate its terms, and who, because they are not Ontario residents, do not enjoy the protection of remedial statutes in Ontario. Therefore it may be necessary to provide further for setting aside agreements where giving effect to them would be manifestly unjust or contrary to public policy.

A court may decline to exercise jurisdiction based on an exclusive jurisdiction agreement only where ... giving effect to the agreement would be manifestly unjust or contrary to public policy.

An alternative approach to that of special provisions for a court to decline jurisdiction founded on an exclusive jurisdiction agreement would be to include the existence of an exclusive jurisdiction clause nominating the Ontario courts among the circumstances to be considered in deciding whether to exercise discretion to decline jurisdiction on grounds of *forum non conveniens*.

On what grounds should an Ontario court be permitted to decline jurisdiction that is founded on an exclusive jurisdiction clause nominating it?

Should these grounds resemble those that would permit an Ontario court to set aside an exclusive jurisdiction clause nominating another court, or should they resemble those on which a court might decline jurisdiction on grounds of *forum non conveniens*?

Are there other grounds that should be included?

B. *Forum non conveniens*

Even though an Ontario court *may* exercise jurisdiction to decide a case, it may decide that it *should not* do so, and it will exercise discretion to decline to decide the case. This is usually described as staying a proceeding based on the doctrine of *forum non conveniens* because there is a clearly more appropriate forum elsewhere.⁶² In the common law, this forms an integral part of the jurisdictional determination. Even if an Ontario court decides that it *may* exercise jurisdiction, it may also consider whether it *should* exercise jurisdiction.

Ontario courts have inherent authority to decline jurisdiction as reflected in the Courts of Justice Act.⁶³ This authority exists in both local and cross-border cases to provide appropriate relief in cases of stays and abuse of process. For example, a court would not be prevented from granting a stay in favour of a clearly more appropriate forum where the plaintiff had deliberately allowed the limitation period there to lapse so as to eliminate it as a more appropriate forum. This is because the court has inherent discretion to prevent an abuse.

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The discretionary nature of the court's authority to grant stays in favour of more appropriate fora is sometimes reflected in the imposition of terms on the applicant for a stay. These terms may be imposed to ensure that the other forum remains clearly more appropriate. For example, where the limitation period that would be applied in the other forum passes after the commencement of the claim in Ontario and the plaintiff's choice of Ontario was not unreasonable, the court might ask the party seeking the stay to waive the limitation period in the other forum. In granting relief, the court does not dismiss the proceeding, but orders a stay, and it does so on terms so that the matter could be revived should the applicant fail to comply with the terms. A typical provision for this includes the phrase "on such terms as are just".

Should a provision for declining jurisdiction specify its discretionary nature and that the court has the authority impose terms?

The Supreme Court of Canada has held that that the standard for granting a stay based on *forum non conveniens* is that there is a "clearly" more appropriate forum elsewhere.⁶⁴ In addition, historically, the standards for exercising the discretion to decline jurisdiction have varied with the location of the defendant when served. Local defendants had the burden of proof in persuading the court that there was a clearly more appropriate forum elsewhere, and plaintiffs who had served defendants outside the province had the burden of proof in persuading the court that there was not.⁶⁵ The drafters of the CJPTA eliminated this distinction but in some of the provinces that still rely on the common law, such as Ontario, it has continued to be relied upon.

Should the provision for declining jurisdiction on discretionary grounds specify the standard as one of a "clearly" more appropriate forum elsewhere, or should the standard be simply one of demonstrating that there is a more appropriate forum elsewhere?

Should a provision for declining jurisdiction specify whether it is the moving party or the respondent who bears the burden of proof in establishing whether or not there is a clearly more appropriate in cases of defendants who are Ontario residents and those who are not?

In view of these considerations, a provision for declining jurisdiction could begin with the following:

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(2) A court may [exercise discretion to] decline jurisdiction [on such terms as are just] where there is a [clearly] more appropriate forum elsewhere for the proceeding.

Further provision could then be made for factors to be considered in declining jurisdiction that would take into account the bases on which jurisdiction was invoked. Some of these factors would weigh in favour of a stay and others would weigh against it, and still others could support either result depending on the facts of the case.

The provision could begin as follows:

(3) In deciding whether to decline jurisdiction the court may consider, among other things,

C. Participation of the moving party in the proceedings

It was recommended above that Ontario courts be permitted to exercise jurisdiction over persons who contest the merits of the claim, even where there is no other basis for jurisdiction. Potential difficulties were noted in distinguishing between steps taken solely to object to the exercise of jurisdiction and those taken to contest the merits of the claim.

On a related front, under an increasingly case-managed process for civil disputes, fixed time-lines for the progress of a proceeding are likely to be disrupted by complex jurisdictional challenges. Moreover, should the rules continue to provide for the determination of jurisdictional challenges before other steps are taken in the proceeding, the potential for disrupting the progress of a proceeding could encourage those wishing to engage in dilatory tactics,⁶⁶ to make spurious challenges to jurisdiction. To address this problem, the British Columbia Supreme Court Rules⁶⁷ permits parties to participate in the proceedings, including defending the action on the merits without attorning, provided they have filed objections to the exercise of jurisdiction within 30 days of making an appearance.

The particular mechanisms that may be adopted in the Ontario Rules of Civil Procedure for addressing the competing interests of case management and the early resolution of jurisdictional challenges are beyond the scope of this Consultation Paper. The possibility that a party asking an Ontario court to decline jurisdiction may be required, nevertheless, to participate in the proceedings raises the possibility that they should not be precluded from requesting the court to decline jurisdiction, and that, instead, the nature and extent of their participation should be taken into account in deciding whether to decline jurisdiction.

Moreover, there may be situations in which limited participation without attorning might be appropriate. For example, where defendants believe that the

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claim would be struck out upon the application of the law of another country, the determination of *whether* that law applies may be a more cost-effective means of disposing of the case than determining whether the court can and should exercise jurisdiction. But in some cases a cost-effective means of resolving the dispute such as this would be invoked only if it did not preclude a request for a stay of proceedings. Should the right be preserved to ask the court to stay or dismiss the proceedings, the nature and extent of a party's participation in the proceedings would then become a relevant factor in determining whether there was a clearly more appropriate forum elsewhere.

In both situations, depending on the circumstances of the proceeding and the nature of the moving party's participation in it, the court would determine whether or not the party had accepted the court's jurisdiction in a manner that was inconsistent with staying the proceeding. A provision for this factor could read:

(i) the participation of the moving party in the proceedings

Should participation in the proceedings preclude a request to decline jurisdiction or should it be considered as a factor affecting the exercise of discretion to do so?

D. Non-exclusive jurisdiction agreements

In the case of jurisdiction based on an exclusive jurisdiction agreement, it has been recommended that Ontario courts be permitted to decline jurisdiction only where the agreement is "null and void, inoperative or incapable of being performed." The case of jurisdiction based on *non-exclusive* jurisdiction agreements is different. Under these agreements, the parties accept the jurisdiction of the nominated court or courts and, in so doing, they agree to forego any objection to the basic jurisdiction of the court or courts. However, they do not agree to forego access to other courts, nor do they agree to forego asking the court to decline jurisdiction on the basis that there is a more appropriate forum elsewhere.⁶⁸ Accordingly, the existence of a non-exclusive jurisdiction agreement would be a factor considered in the course of a discretionary determination as to whether the court should decline jurisdiction.

Furthermore, there may be agreements between the parties relevant to whether a court should decline jurisdiction other than non-exclusive jurisdiction agreements, such as agreements for the amicable resolution of disputes. A provision for this factor that takes these considerations into account could read:

(ii) an agreement between the parties concerning the resolution of disputes other than an exclusive jurisdiction agreement

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Should a provision be included for considering as a factor the existence of a non-exclusive jurisdiction agreement?

E. Comparative convenience

In some cases, particularly where a matter has arisen abroad, it may be more convenient and less expensive for the parties to present their claims and defences in another forum. Whether the court should decline jurisdiction for this reason will be a function of a balance of convenience between the parties. Where one party simply cannot present its case in Ontario or in the proposed alternative forum, the court may be inclined to grant or deny the request for a stay accordingly. This situation could arise for reasons of the parties' respective resources, or because critical evidence or witnesses may be accessible in only one of the possible fora, or even because the jurisdictional rules of a proposed alternative forum do not permit it to decide the case.

More difficult situations arise where the parties are both capable of litigating in both fora, but the relative challenges they face and their relative capacities to do so are unequal. Under these circumstances, the analysis will be one of a balance of convenience and, where the parties' situations seem finely balanced, the court may wish to resort to the traditional allocation of the burden of proof – on defendants who are Ontario residents, and on plaintiffs where the defendants are not Ontario residents.⁶⁹

Still more difficult are the situations in which it is no more practicable for the defendant to defend against the matter in Ontario than it is for the plaintiff to travel to the forum proposed by the defendant. Whether it becomes appropriate to exercise jurisdiction over a claim that cannot properly be defended against simply because the plaintiff cannot travel raises difficult questions that remain to be resolved.

Collectively, these situations represent the issues most commonly addressed in requests for stays based on *forum non conveniens*. They also encompass, in some measure the concern to prevent the unjust deprivation of a legitimate juridical or personal advantage. A provision for these considerations could read:

(iii) the comparative convenience and expense for the parties to the proceeding,

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Should a provision concerning comparative convenience specify different standards depending on where the defendant is based?

F. Applicable law

There have been instances in which the difficulties of ascertaining and applying foreign law have been cited as justification for declining jurisdiction (or for refusing to do so where the applicable law is that of the forum in which the stay is sought). In an era of globalization the instances in which crossborder litigation might give rise to the application of foreign law are increased, but so too are the means, in an information era, to make the laws of other countries more accessible. Whether this represents a significant consideration will depend on the facts of the case.

In the common law, the introduction of foreign law is generally a function of party prosecution and rarely constitutes a distinct responsibility for the court. As such, questions of applicable law bearing on the question of whether a court should decline jurisdiction are likely to fall within the previous category of considerations (*i.e.*, those relating to the comparative convenience and expense for the parties to the proceeding.) However, there may be situations in which it is anticipated that the relevant legal principles are simply too difficult to be grasped or applied in an effective way by an Ontario court, even with the benefit of expert witnesses.

A further concern arises in respect of the law to be applied when an Ontario court is asked to grant a stay in favour of a forum that will not apply the law that, pursuant to the law of Ontario, ought to be applied to the matters in dispute.⁷⁰ Under these circumstances, an Ontario court may wish to refuse a request for a stay for reasons of the law to be applied to the issues in the proceeding. This could also warrant making the law to be applied to the issues in the proceeding a factor in determining whether to decline jurisdiction.

A provision for this ground for declining jurisdiction could read:

(iv) the law to be applied to issues in the proceeding,

Should the law applicable to the issues in the proceeding be included as a factor in determining whether to decline jurisdiction?

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G. Avoiding multiplicity

The Ontario Courts of Justice Act provides that “as far as possible, multiplicity of legal proceedings shall be avoided.”⁷¹ While this provision has, historically, been applied to duplicative legal proceedings *within* Ontario, it is increasingly becoming relevant to situations in which the duplicative legal proceedings are underway in Ontario and elsewhere. The Civil Code of Québec makes provision for declining jurisdiction to prevent a multiplicity of actions.⁷² Stays have also been refused on this basis.⁷³ While the particular approach to be taken to the proper resolution of a multiplicity of proceedings remains to be clarified, it seems clear that this is a relevant factor to be considered in deciding whether to decline jurisdiction.

A provision for this ground for declining jurisdiction could read:

(v) the desirability of avoiding a multiplicity of legal proceedings and the possibility of inconsistent results,

Should the statute provide for taking the potential of a multiplicity of legal proceedings into account in determining whether to decline jurisdiction?

H. Due administration of justice

The CJPTA contains as a general consideration for declining jurisdiction “the fair and efficient working of the Canadian legal system as a whole.” If the list of factors that may be considered is expressed as non-exhaustive, the courts would be able to exercise discretion on bases other than those listed. Furthermore, their inherent jurisdiction to prevent abuse, as expressed in section 106 of the Courts Justice Act would remain, notwithstanding the enactment of a jurisdictional statute. Accordingly, a general provision such as exists in the CJPTA would be needed only if it was thought necessary to give the courts further guidance on how their discretion should be exercised beyond the factors indicated.

Is a general provision (“basket clause”) necessary in a non-exhaustive list of considerations such as this? Under what circumstances might it be invoked?

In sum, the provisions relating to declining jurisdiction could read:

Declining Jurisdiction

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5. (1) *A court may decline to exercise jurisdiction provided for in an exclusive jurisdiction agreement only where the agreement is null and void, inoperative or incapable of being performed, or where giving effect to the agreement would be manifestly unjust or contrary to public policy.*

(2) *A court may [exercise discretion to] decline jurisdiction [on such terms as are just] where there is a [clearly] more appropriate forum elsewhere for the proceeding.*

(3) *In deciding whether to decline jurisdiction, the court may consider among other things:*

(i) the participation of the moving party in the proceedings,

(ii) an agreement between the parties concerning the resolution of disputes other than an exclusive jurisdiction agreement,

(iii) the comparative convenience and expense for the parties to the proceeding,

(iv) the law to be applied to issues in the proceeding, and

(v) the desirability of avoiding a multiplicity of legal proceedings and the possibility of inconsistent results.

VIII. Inconsistency with other statutes

As mentioned in a number of places in this Consultation Paper, an important consideration in interpreting and applying the provisions of a statute on judicial jurisdiction in Ontario would be the fact that it operates subject to other statutes that affect the jurisdiction of the courts. Accordingly, a provision based on the formulation in the CJPTA could read:

Inconsistency with Other Acts

6. Where there is a conflict or inconsistency between this Act and another Act of Ontario or of Canada that affects the jurisdiction of a court, that Act prevails.

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IX. Summary of proposed provisions

Judicial Jurisdiction

Consent

1. (a) A court may exercise jurisdiction in a civil matter over any person who has consented to its authority to do so by:

- (i) commencing a proceeding to which the proceeding in question is a related counterclaim,
- (ii) contesting the merits of the claim, or
- (iii) entering into an agreement to submit disputes to it.

(b) A court may not exercise jurisdiction in a civil matter that the parties have agreed to submit to the exclusive authority of another court, unless

- (i) the agreement is null and void, inoperative or incapable of being performed;
- (ii) the chosen court has decided not to exercise jurisdiction; or
- (iii) giving effect to the agreement would be manifestly unjust or contrary to public policy.

Ordinary Residence

2. (a) A court may exercise jurisdiction in a civil matter over any person who is ordinarily resident in Ontario.

(b) A corporation, partnership or unincorporated association is ordinarily resident in Ontario if:

- (i) it is registered as a business entity in Ontario,
- (ii) its central management is exercised in Ontario, or
- (iii) its business, or other professional activity is principally carried on in Ontario.

(c) A court may exercise jurisdiction in a civil matter over any vessel that is served or arrested in Ontario.

Real and Substantial Connection

3. A court may exercise jurisdiction in a civil matter where there is a real and substantial connection between Ontario and the matters in dispute, such as where the proceedings relate to:

- (i) immovable or movable property in Ontario;
- (ii) the estates of persons who died while ordinarily resident in Ontario, including their movable property elsewhere;

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- (iii) trusts administered in Ontario, or by trustees ordinarily resident in Ontario;
- (iv) contractual or other obligations to be performed in Ontario, or governed by the law of Ontario;
- (v) torts, equitable wrongs, or unjust enrichment that occurred in Ontario;
- (vi) the status or capacity of persons ordinarily resident in Ontario; or
- (vii) claims by public authorities in Ontario.

Additional Bases

Forum of Necessity

4. (1) A court may exercise jurisdiction in a civil matter where there is no other court in which the matter can be commenced, or where commencing the matter elsewhere cannot reasonably be required.

Ancillary Proceedings

(2) A court may exercise jurisdiction in counterclaim, crossclaim or third party claim in respect of a civil matter over which it may exercise jurisdiction under this statute.

Interim Measures

(3) The provisions of this statute apply, with necessary modifications to interim measures in respect of proceedings in other courts and tribunals.

Declining Jurisdiction

5. (1) A court may decline to exercise jurisdiction based on an exclusive jurisdiction agreement only where the agreement is null and void, inoperative or incapable of being performed, or where giving effect to the agreement would be manifestly unjust or contrary to public policy.

(2) A court may [exercise discretion to] decline jurisdiction [on such terms as are just] where there is a [clearly] more appropriate forum elsewhere for the proceeding.

(3) In deciding whether to decline jurisdiction, the court may consider, among other things,

- (i) the participation of the moving party in the proceedings,
- (ii) an agreement between the parties concerning the resolution of disputes other than an exclusive jurisdiction agreement,
- (iii) the comparative convenience and expense for the parties to the proceeding,
- (iv) the law to be applied to issues in the proceeding, and
- (v) the desirability of avoiding a multiplicity of legal proceedings and the possibility of inconsistent results.

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Inconsistency with Other Acts

6. Where there is a conflict or inconsistency between this Act and another Act of Ontario or of Canada that affects the jurisdiction of a court, that Act prevails.

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X. Summary of consultation questions

II. Background

The current state of the law—Considering the current state of the law of judicial jurisdiction in Ontario, in your view, would the interests of Ontario residents be best served by developing a statute on judicial jurisdiction or would it be preferable to allow the common law to continue to evolve without introducing legislation?

If a statute should be developed, what are the main concerns that it should address?

Uniformity, consistency and evolution in the law—Considering the patchwork of legislative regimes (the CJPTA and the Civil Code of Québec) and common law doctrines that operate in Canada, should a statute in Ontario seek to harmonize its provisions with the law in other parts of Canada?

If so, or should drafters endeavour to use the same language as exists in enactments or common law doctrines in other provinces, or would it be sufficient for the statute to be consistent in its effect with the law in other parts of the country?

Does your view apply to all questions of jurisdiction, or are there particular areas of the law of jurisdiction in which either uniformity or consistency should be sought?

III. Jurisdiction based on the parties' consent

1. Attornment

Counterclaims—Should a provision for exercising jurisdiction over defendants to counterclaims specify that this is limited to counterclaims that are related to the main proceeding?

Contesting the merits of the claim—Should a provision for attornment define or enlarge upon what constitutes contesting the merits?

If so, should the statute provide for determining jurisdictionally significant facts or potentially dispositive questions of law in a way that would preserve the right to challenge jurisdiction?

2. Agreement

Should the statute provide that valid exclusive jurisdiction agreements are, in principle, determinative of the court's jurisdiction, or should it provide that such agreements are a factor to weighed with other factors in the exercise of discretion to assume or decline jurisdiction?

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Are these suitable bases on which to determine the validity of a jurisdiction agreement?

Should provision(s) for determining the validity of jurisdiction agreements specify the law to be applied?

Are the grounds specified for setting aside a jurisdiction agreement—invalidity, that the chosen court has declined jurisdiction, and manifest injustice and public policy—sufficiently specific and comprehensive?

Are there other grounds that should be included? Should any of these grounds be omitted?

IV. Jurisdiction based on the defendant’s ordinary residence

1. Individuals

Is ordinary residence the best means of defining the connection to Ontario that would establish general jurisdiction over persons regardless of consent?

Should the statute specify the time at which the person’s ordinary residence in Ontario is determined for the purposes of establish jurisdiction?

Alternatively, should the statute contain a general provision specifying the time at which the connections to Ontario described in the statute are determined for the purposes of establishing jurisdiction?

If so, what is the relevant point in time?

2. Corporations, partnerships and unincorporated associations

Are these grounds—registration, central management and principal location of business and professional activities—appropriate for determining the ordinary residence of parties other than natural persons?

V. Jurisdiction based on a real and substantial connection

Should the statute preserve the “two layers of discretion” that exist in the CJPTA for exercising jurisdiction based on a real and substantial connection? In other words, should the statute preserve discretion to identify real and substantial connections beyond those contained in a list, and to determine that connections contained in the list were not real and substantial, in addition to the discretion to accept or decline jurisdiction on grounds other than the existence of a real and substantial connection?

Alternatively, should discretion be confined to the “second layer”—that associated with an exercise of jurisdiction on forum of necessity grounds or declining jurisdiction on forum non conveniens grounds?

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If so, should the statute eliminate discretion in determining what constitutes a real and substantial connection by providing a definitive list as has been done in the Civil Code of Québec?

Alternatively, should the courts retain the flexibility to find that a real and substantial connection exists on grounds analogous to those listed in the statute?

Is the proposed list of real and substantial connections sufficiently comprehensive? If not, what should be added?

Is the list over-inclusive? If so what should be omitted?

Should provision be made for prohibiting courts from exercising jurisdiction over questions of title to immovables located outside Ontario, or for tortious damage to foreign immovables?

If so, should special provision be made for an exception to this prohibition for matters involving persons within the jurisdiction of the court who may be ordered to convey title to foreign immovables?

VI. Additional bases of jurisdiction

1. Forum of necessity

Should a provision for forum of necessity be included in the statute?

If so, should such a provision specify the need for a substantial connection between the matter and/or the parties and Ontario?

2. Ancillary proceedings

Should a provision be included for jurisdiction over ancillary proceedings based on jurisdiction over the main claim?

If so, should such a provision specify the need to demonstrate that exercising jurisdiction would avoid a multiplicity?

3. Interim measures

Should a provision be included for jurisdiction to order interim measures independent from the main claim?

If so, are there restrictions on its availability that should included?

VII. Declining jurisdiction

1. Where jurisdiction is based on an exclusive jurisdiction clause

On what grounds should an Ontario court be permitted to decline jurisdiction that is founded an exclusive jurisdiction clause nominating it?

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Should these grounds resemble those that would permit an Ontario court to set aside an exclusive jurisdiction clause nominating another court, or should they resemble those on which a court might decline jurisdiction on grounds of forum non conveniens?

Are there other grounds that should be included?

2. Forum non conveniens

Should a provision for declining jurisdiction specify its discretionary nature and that the court has the authority impose terms?

Should the provision for declining jurisdiction on discretionary grounds specify the standard as one of a “clearly” more appropriate forum elsewhere, or should the standard be simply one of demonstrating that there is a more appropriate forum elsewhere?

Should a provision for declining jurisdiction specify whether it is the moving party or the respondent who bears the burden of proof in establishing whether or not there is a clearly more appropriate in cases of defendants who are Ontario residents and those who are not?

3. Participation of the moving party in the proceedings

Should participation in the proceedings preclude a request to decline jurisdiction or should it be considered as a factor affecting the exercise of discretion to do so?

4. Non-exclusive jurisdiction agreements

Should a provision be included for considering as a factor the existence of a non-exclusive jurisdiction agreement?

5. Comparative convenience

Should the provision concerning comparative convenience specify different standards depending on where the defendant is based?

6. Applicable law

Should the law applicable to the issues in the proceeding be included as a factor in determining whether to decline jurisdiction?

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7. Avoiding multiplicity

Should the statute provide for taking the potential of a multiplicity of legal proceedings into account in determining whether to decline jurisdiction?

8. Due administration of justice

Is a general provision (“basket clause”) necessary in a non-exhaustive list of considerations such as this? Under what circumstances might it be invoked?

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XI. How to participate

The LCO invites your comments on the issues raised in this Consultation Paper. Your comments will be considered in preparing the Report and Recommendations on Judicial Jurisdiction. Submissions must be received by April 13, 2009.

You can mail, fax, or e-mail your comments to:

Law Commission of Ontario
Crossborder Litigation Project
Computer Methods Building, Suite 201, 4850 Keele Street,
Toronto, ON, Canada, M3J 1P3

Fax: (416) 650-8418

E-mail: lawcommission@lco-cdo.org

If you have questions regarding this consultation, please call (416) 650-8406 or use the e-mail address above.

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Endnotes

¹ This consultation paper has been prepared for the Law Commission by Professor Janet Walker (Osgoode Hall Law School) as Scholar-in-Residence, in consultation with the members of the LCO Private International Law Working Group: Professors Vaughan Black (Dalhousie University), Joost Blom (University of British Columbia), Jean-Gabriel Castel (Osgoode Hall Law School), Elizabeth Edinger (University of British Columbia), Gérald Goldstein (Université de Montréal), Tanya Monestier (Queen's University), Stephen Pitel (University of Western Ontario), Nicholas Rafferty (University of Calgary), and Geneviève Saumier (McGill University).

² R. Todd, "Winkler: Promotion is Key", *Law Times*, 1 December 2008; J. Dammann & H. Hansmann, "Globalizing Commercial Litigation" (2008) 94 *Cornell L. Rev.* 1.

³ *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077.

⁴ V. Black, "The Other Side of *Morguard*: New Limits on Judicial Jurisdiction" (1993), 22 *Can. Bus. L.J.* 4.

⁵ *Muscutt v. Courcelles* (2002) 213 D.L.R. (4th) 577 (Ont. C.A.); J. Walker, "Beyond Real and Substantial Connection: The *Muscutt* Quintet" in T. Archibald & M. Cochrane eds, *Annual Review of Civil Justice 2002* (Toronto; Carswell, 2003); S.G.A. Pitel, "Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction" (2006) 85 *Can. Bar Rev.* 61; T. Monestier, "A 'Real and Substantial' Mess: the Law of Jurisdiction in Canada" (2007) 33 *Queen's L.J.* 179; J.-G. Castel, "The Uncertainty Factor in Canadian Private International Law" (2007) 52 *McGill LJ* 555.

⁶ Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28. L. Edinger, "New British Columbia Legislation: *The Court Jurisdiction and Proceedings Transfer Act*. The Enforcement of Canadian Judgments and Decrees Act" (2006) 39 *U.B.C. L. Rev.* 407.

⁷ Court Jurisdiction and Proceedings Transfer Act, S.S. 1997, c. C-41.1.

⁸ Court Jurisdiction and Proceedings Transfer Act, S.N.S. 2003 (2d Sess.), c. 2.

⁹ Alberta Law Reform Institute, Final Report No. 94 *Foreign Judgments* (2008) available at www.law.ualberta.ca/alri/docs/FR94.pdf.

¹⁰ Convention on Choice of Court Agreements, 2005, available at www.hcch.net.

¹¹ Proceedings of the 2008 Annual Meeting of the Uniform Law Conference of Canada, Québec City, Civil Section Resolutions, item 13, at www.ulcc.ca.

¹² Courts of Justice Act, R.S.O. 1990, c. C.43.

¹³ International Commercial Arbitration Act, R.S.O. 1990, c. S-9, or the State Immunity Act R.S.C. 1985, c. S-18, which, as federal legislation, would be paramount in any event.

¹⁴ Uniform Law Conference of Canada, Court Jurisdiction and Proceedings Transfer Act, s. 12 available at www.ulcc.ca.

¹⁵ Uniform Law Conference of Canada, Court Jurisdiction and Proceedings Transfer Act, at 3.

¹⁶ This reflects s. 129 of the Constitution Act, 1867, which provides that "Except as otherwise provided by the Act...all Courts of Civil...Jurisdiction ...existing...at the Union,

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shall continue...as if the Union had not been made; subject nevertheless [to applicable legislation].”

¹⁷ Civil Code of Québec, R.S.Q. 1991, c. 64, arts. 3134-3154. See generally, G. Goldstein & E. Groffier *Droit international privé* (Montréal, Yvon Blais, 1998) Vol 1, 290-365.

¹⁸ *Spar Aerospace Ltd. v. American Mobile Satellite Corp.* [2002] 4 S.C.R. 205; V. Black & J. Walker, “The Deconstitutionalization of Canadian Private International Law” (2003) 21 Supreme Court LR (2d) 181; and see J. Walker, “Droit International Privé” dans L. Bélanger Hardy et A. Grenon, dir., *Éléments de common law canadienne – comparaison avec le droit civil québécois* (Toronto: Thomson Carswell, 2008) and G. Goldstein, “Private International Law” in *Elements of Quebec Civil Law - Comparison with the Common Law of Canada* (Toronto: Thomson Carswell, 2008).

¹⁹ Convention on Choice of Court Agreements, *above*, note 10.

²⁰ *Shekhdar v. K&M Engineering and Consulting Corp.*, [2006] O.J. No. 2120 (C.A.) (consent); *Morguard*, *above*, note 3 (residence, real and substantial connection).

²¹ *ZI Pompey Industrie v. ECU-Line NV (“The Canmar Fortune”)* [2003] 1 SCR 450, citing *The “Eleftheria”*, [1969] 1 Lloyd’s L.R. 237 (Adm. Div.); *GreCon Dimter Inc v. JR Normand Inc* 2005 SCC 46.

²² Convention on Choice of Court Agreements, *above*, note 10. The United States has signed the Convention and the Uniform Law Conference of Canada is preparing recommendations for its adoption in Canada.

²³ Indeed, some might argue that legislative provisions for jurisdiction in business-to-business disputes involving exclusive jurisdiction agreements should await the adoption of the Choice of Court Convention. This Consultation Draft contemplates provisions for jurisdiction over matters involving jurisdiction agreements that are not limited to those for business-to-business disputes or those involving exclusive jurisdiction agreements, but that seek to be compatible with the potential for implementing the Convention.

²⁴ The term “plaintiff” in this paper includes “applicant”.

²⁵ The term “defendant” in this paper includes “respondent”.

²⁶ *United States of America v. Friedland* (1999), 182 D.L.R. (4th) 614 (Ont. C.A.).

²⁷ The term “person” in this paper includes both natural and legal persons.

²⁸ *Henry v. Geoprosco International Ltd.* [1976] Q.B. 726.

²⁹ Ontario Rules of Civil Procedure, R.R.O 1990. Reg. 194, Rule 17.06.

³⁰ See for example, *Young v. Tyco International of Canada, Ltd.* 2008 ONCA 709.

³¹ *GreCon Dimter Inc v JR Normand Inc* 2005 SCC 46.

³² See Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, which is a Schedule of the International Commercial Arbitration Act, *above*, note 13.

³³ Available at www.hcch.net.

³⁴ *ZI Pompey Industrie v. ECU-Line NV (“The Canmar Fortune”)* [2003] 1 SCR 450; *The “Eleftheria”*, [1969] 1 Lloyd’s L.R. 237 (Adm. Div.)

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³⁵ Article 6, and see L. Collins ed *Dicey, Morris and Collins on the Conflict of Laws*, 14th ed (London: Sweet & Maxwell, 2006) at 523

³⁶ Consumer Protection Act, S.O. 1992, c. 30.

³⁷ On the question of public policy and jurisdiction agreements, see G. Saumier, “What’s in a Name? Lloyd’s, International Comity and Public Policy” (2002) *Can. Bus L. J.* 388.

³⁸ *Eg.*, *Marine Liability Act*, S.C. 2001. c. 6 s. 46.

³⁹ For example, the first article of Title III of Book X, of the Civil Code of Québec, *above*, note 17, art 3134 provides: “In the absence of any special provision, the Québec authorities have jurisdiction when the defendant is domiciled in Québec.”

⁴⁰ *Maharanees of Baroda v. Wildenstein* [1972] 2 All ER 689 (CA, England); *Burnham v. Superior Court of California*, 495 U.S. 604, 110 S.Ct. 2105 (US Supreme Court).

⁴¹ As is discussed below under the heading “Declining Jurisdiction.”

⁴² The Permanent Bureau of the Hague Conference (Prel. Doc. No 17 of May 1992); Hague Conference On Private International Law, “International Jurisdiction and Foreign Judgments in Civil and Commercial Matters”, Prel. Doc. No 7 (April 1997).

⁴³ www.ila-hq.org/html/layout_committee.htm.

⁴⁴ Alternatives to the term “matters in dispute” could be “the action” or “the subject matter of the action.”

⁴⁵ To clarify, the articles of the Civil Code of Québec do not refer to these grounds of jurisdiction as “real and substantial connections.” That is a common law term. However, the Supreme Court of Canada held in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78 that these articles operate as expressions of the constitutional principles of order and fairness and, in this way, as counterparts to the real and substantial connection test.

⁴⁶ J. Blom & E. Edinger, “The Chimera of the Real and Substantial Connection Test” (2005) 38 *U.B.C. L.R.* 373.

⁴⁷ An important question arises as to the relevant time at which a movable needs to be located in Ontario for the exercise of jurisdiction. It is suggested that this should be the time at when the action is commenced, although, as discussed above in connection with the location of defendants for purposes of determining ordinary residence, it is not clear whether that should be specified in the statute.

⁴⁸ The connecting factor “ordinary residence” is used in the CJPTA. However, “domicile” is the traditional connecting factor, and it is used in the Civil Code of Quebec, article 3153. There is no indication that the drafters of these two instruments intended the standards to be different.

⁴⁹ “Other obligations” is intended to cover obligations arising from injunctive orders and the enforcement of judgments and arbitral awards.

⁵⁰ An alternative might be “a restitutionary obligation”, but that would arguably be the result of the order that culminated the proceedings, not the cause that gave rise to them.

⁵¹ *Duke v. Andler* [1932] S.C.R. 724; *British South Africa Company v. Companhia de Moçambique* [1893] A.C. 602 (Q.B.).

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⁵² Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950 provides in part “In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

⁵³ Civil Code of Québec, *above*, note 17, art. 3136 provides that “Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.”

⁵⁴ CJPTA, *above*, note 14, s. 6.

⁵⁵ See “Beyond Real and Substantial Connection” *above*, note 5.

⁵⁶ *Oakley v. Barry* (1998), 158 D.L.R. (4th) 679 (N.S.C.A.).

⁵⁷ Civil Code of Québec, *above*, note 17, art. 3139.

⁵⁸ S. Pitel & A. Valentine, “The Evolution of the Extra-territorial *Mareva* Injunction in Canada: Three Issues” (2006) 2 J.P.I.L. 339 and V. Black & E. Babin, “*Mareva* Injunctions in Canada: Territorial Aspects” (1997) 28 C.B.L.J. 430.

⁵⁹ *E.g.*, *Airbus Industrie GIE v. Patel* [1998] 2 W.L.R. 686 (H.L.).

⁶⁰ Convention on Choice of Court Agreements, 2005, *above*, note 10, article 5.1.

⁶¹ Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, which is a Schedule of the International Commercial Arbitration Act, *above*, note 13.

⁶² *Amchem Products Inc. v. British Columbia (Workers Compensation Board)*, [1993] 1 S.C.R. 897.

⁶³ Courts of Justice Act, *above*, note 12, s. 106 provides: “A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.”

⁶⁴ *Amchem Products Inc. v. British Columbia (Workers Compensation Board)*, *above*, note 62.

⁶⁵ *Spiliada Maritime Corp. v. Cansulex (“The Spiliada”)*, [1986] 3 All E.R. 843 (H.L.)

⁶⁶ Supreme Court Rules, B.C. Reg 130/2008, Rule 14 (6.4). See L. Edinger, “Disputing Jurisdiction, Attornment and *Mid-Ohio*” (2009) 67 The Advocate 33.

⁶⁷ Supreme Court Rules, B.C. Reg 130/2008, Rule 14 (6.4).

⁶⁸ *Sugar v. Megawheels Technologies Inc.*, [2006] O.J. No. 4493 (S.C.J.).

⁶⁹ *Frymer v. Brettschneider* (1994), 19 O.R. (3d) 60 (C.A.).

⁷⁰ This issue arose in *Lloyd’s Underwriters v. Cominco Ltd.* (2007), 279 D.L.R. (4th) 257, leave to appeal to S.C.C. granted 29 Nov 2007. And see *Dicey, Morris and Collins on the Conflict of Laws*, *above* note 35 at 478-79.

⁷¹ Courts of Justice Act, *above*, note 12, s. 138.

⁷² Article 3137 of Title III of Book X, of the Civil Code of Québec, *above*, note 17, provides “On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same

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facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.”

⁷³ *McNichol Estate v. Woldnik* (2001), 13 C.P.C. (5th) 61 (C.A.).

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Appendix “A” – CJPTA

Uniform Law Conference of Canada Uniform Court Jurisdiction and Proceedings Transfer Act

PART 2: TERRITORIAL COMPETENCE

Application of this Part

2.(1) In this Part, “court” means a court of [enacting province or territory].

(2) The territorial competence of a court is to be determined solely by reference to this Part.

Proceedings in personam

3. A court has territorial competence in a proceeding that is brought against a person only if

- (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
- (b) during the course of the proceeding that person submits to the court’s jurisdiction,
- (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
- (d) that person is ordinarily resident in [enacting province or territory] at the time of the commencement of the proceeding, or
- (e) there is a real and substantial connection between [enacting province or territory] and the facts on which the proceeding against that person is based.

Proceedings with no nominate defendant

4. A court has territorial competence in a proceeding that is not brought against a person or a vessel if there is a real and substantial connection between [enacting province or territory] and the facts upon which the proceeding is based.

Proceedings in rem

5. A court has territorial competence in a proceeding that is brought against a vessel if the vessel is served or arrested in [enacting province or territory].

Residual discretion

6. A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that

(a) there is no court outside [enacting province or territory] in which the plaintiff can commence the proceeding, or

(b) the commencement of the proceeding in a court outside [enacting province or territory] cannot reasonably be required.

Ordinary residence - corporations

7. A corporation is ordinarily resident in [enacting province or territory], for the purposes of this Part, only if

- (a) the corporation has or is required by law to have a registered office in [enacting province or territory],
- (b) pursuant to law, it
 - (i) has registered an address in [enacting province or territory] at which process may be served generally, or
 - (ii) has nominated an agent in [enacting province or territory] upon whom process may be served generally,
- (c) it has a place of business in [enacting province or territory], or
- (d) its central management is exercised in [enacting province or territory].

Ordinary residence - partnerships

8. A partnership is ordinarily resident in [enacting province or territory], for the purposes of this Part, only if

- (a) the partnership has, or is required by law to have, a registered office or business address in [enacting province or territory],
- (b) it has a place of business in [enacting province or territory], or
- (c) its central management is exercised in [enacting province or territory].

Ordinary residence - unincorporated associations

9. An unincorporated association is ordinarily resident in [enacting province or territory] for the purposes of this Part, only if

- (a) an officer of the association is ordinarily resident in [enacting province or territory], or

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(b) the association has a location in [enacting province or territory] for the purpose of conducting its activities.

Real and substantial connection

10. Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [enacting province or territory] and the facts on which a proceeding is based, a real and substantial connection between [enacting province or territory] and those facts is presumed to exist if the proceeding

(a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in [enacting province or territory],

(b) concerns the administration of the estate of a deceased person in relation to

(i) immovable property of the deceased person in [enacting province or territory], or

(ii) movable property anywhere of the deceased person if at the time of death he or she was ordinarily resident in [enacting province or territory],

(c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to

(i) immovable or movable property in [enacting province or territory], or

(ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in [enacting province or territory],

(d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:

(i) the trust assets include immovable or movable property in [enacting province or territory] and the relief claimed is only as to that property;

(ii) that trustee is ordinarily resident in [enacting province or territory];

(iii) the administration of the trust is principally carried on in [enacting province or territory];

(iv) by the express terms of a trust document, the trust is governed by the law of [enacting province or territory],

(e) concerns contractual obligations, and

(i) the contractual obligations, to a substantial extent, were to be performed in [enacting province or territory],

(ii) by its express terms, the contract is governed by the law of [enacting province or territory], or

(iii) the contract

(A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and

(B) resulted from a solicitation of business in [enacting province or territory] by or on behalf of the seller,

(f) concerns restitutionary obligations that, to a substantial extent, arose in [enacting province or territory],

(g) concerns a tort committed in [enacting province or territory],

(h) concerns a business carried on in [enacting province or territory],

(i) is a claim for an injunction ordering a party to do or refrain from doing anything

(i) in [enacting province or territory], or

(ii) in relation to immovable or movable property in [enacting province or territory],

(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in [enacting province or territory],

(k) is for enforcement of a judgment of a court made in or outside [enacting province or territory] or an arbitral award made in or outside [enacting province or territory], or

(l) is for the recovery of taxes or other indebtedness and is brought by the Crown [of the enacting province or territory] or by a local authority [of the enacting province or territory].

Discretion as to the exercise of territorial competence

11.(1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside [enacting province or territory] is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

(a) the comparative convenience and expense for the parties to the proceeding

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and for their witnesses, in litigating in the court or in any alternative forum,
(b) the law to be applied to issues in the proceeding,
(c) the desirability of avoiding multiplicity of legal proceedings,
(d) the desirability of avoiding conflicting decisions in different courts,
(e) the enforcement of an eventual judgment, and
(f) the fair and efficient working of the Canadian legal system as a whole.

Conflicts or inconsistencies with other Acts

12. If there is a conflict or inconsistency between this Part and another Act of [enacting province or territory] or of Canada that expressly
(a) confers jurisdiction or territorial competence on a court, or
(b) denies jurisdiction or territorial competence to a court, that other Act prevails.

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Appendix “B” – Title III, Book X, CcQ

Civil Code of Québec: Book Ten - Private International Law

TITLE THREE—INTERNATIONAL JURISDICTION OF QUÉBEC AUTHORITIES CHAPTER I—GENERAL PROVISIONS

3134. In the absence of any special provision, the Québec authorities have jurisdiction when the defendant is domiciled in Québec.

3135. Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

3136. Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.

3137. On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action,

between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

3138. A Québec authority may order provisional or conservatory measures even if it has no jurisdiction over the merits of the dispute.

3139. Where a Québec authority has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross demand.

3140. In cases of emergency or serious inconvenience, Québec authorities may also take such measures as they consider necessary for the protection of the person or property of a person present in Québec.

CHAPTER II—SPECIAL PROVISIONS SECTION – I: PERSONAL ACTIONS OF AN EXTRA-PATRIMONIAL AND FAMILY NATURE

3141. A Québec authority has jurisdiction to hear personal actions of an extra patrimonial and family nature when one of the persons concerned is domiciled in Québec.

3142. A Québec authority has jurisdiction to rule on the custody of a child provided he is domiciled in Québec.

3143. A Québec authority has jurisdiction to decide cases of support or applications for review of a foreign judgment which may be recognized in Québec respecting support when one of the parties has his domicile or residence in Québec.

3144. A Québec authority has jurisdiction in matters relating to nullity of marriage when one of the spouses has his domicile or

residence in Québec or when the marriage was solemnized in Québec.

3145. As regards the effects of marriage, particularly those which are binding on all spouses, regardless of their matrimonial regime, a Québec authority has jurisdiction when one of the spouses has his domicile or residence in Québec.

3146. A Québec authority has jurisdiction to rule on separation from bed and board when one of the spouses has his domicile or residence in Québec at the time of the institution of the proceedings.

3147. A Québec authority has jurisdiction matters of filiation if the child or one of his parents is domiciled in Québec.

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It has jurisdiction in matters of adoption

if the child or plaintiff is domiciled in Québec.

SECTION II—PERSONAL ACTIONS OF A PATRIMONIAL NATURE

3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where

(1) the defendant has his domicile or his residence in Québec;

(2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;

(3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;

(4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;

(5) the defendant submits to its jurisdiction.

However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a

specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

3149. A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

3150. A Québec authority has jurisdiction hear an action based on a contract of insurance where the holder, the insured or the beneficiary of the contract is domiciled resident in Québec, the contract is related to an insurable interest situated in Québec or the loss took place in Québec.

3151. A Québec authority has exclusive jurisdiction to hear in first instance all actions founded on liability under article 3129.

SECTION III—REAL AND MIXED ACTIONS

3152. A Québec authority has jurisdiction over a real action if the property in dispute is situated in Québec.

3153. A Québec authority has jurisdiction in matters of succession if the succession opens in Québec, the defendant or one of the defendants is domiciled in Québec or the deceased had elected that Québec law should govern his succession.

It also has jurisdiction if any property of the deceased is situated in Québec and a ruling is required as to the devolution or transmission of the property.

3154. A Québec authority has jurisdiction in matters of matrimonial regime in the following cases:

(1) the regime is dissolved by the death of one of the spouses and the authority has jurisdiction in respect of the succession of that spouse;

(2) the object of the proceedings relates only to property situated in Québec.

In other cases, a Québec authority has jurisdiction if one of the spouses has his domicile or residence in Québec on the date of institution of the proceedings.

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Appendix “C” – Hague Choice of Court Convention

CONVENTION ON CHOICE OF COURT AGREEMENTS

(Concluded 30 June 2005)

The States Parties to the present Convention,

Desiring to promote international trade and investment through enhanced judicial co-operation,

Believing that such co-operation can be enhanced by uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters,

Believing that such enhanced co-operation requires in particular an international legal regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements,

Have resolved to conclude this Convention and have agreed upon the following provisions -

CHAPTER I – SCOPE AND DEFINITIONS

Article 1 Scope

1. This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.

2. For the purposes of Chapter II, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.

3. For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought.

Article 2 Exclusions from scope

1. This Convention shall not apply to exclusive choice of court agreements -

a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;

b) relating to contracts of employment, including collective agreements.

2. This Convention shall not apply to the following matters -

a) the status and legal capacity of natural persons;

b) maintenance obligations;

c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;

d) wills and succession;

e) insolvency, composition and analogous matters;

f) the carriage of passengers and goods;

g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;

h) anti-trust (competition) matters;

i) liability for nuclear damage;

j) claims for personal injury brought by or on behalf of natural persons;

k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;

l) rights *in rem* in immovable property, and tenancies of immovable property;

m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;

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n) the validity of intellectual property rights other than copyright and related rights;

o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;

p) the validity of entries in public registers.

3. Notwithstanding paragraph 2, proceedings are not excluded from the scope of this Convention where a matter excluded under that paragraph arises merely as a preliminary question and not as an object of the proceedings. In particular, the mere fact that a matter excluded under paragraph 2 arises by way of defence does not exclude proceedings from the Convention, if that matter is not an object of the proceedings.

4. This Convention shall not apply to arbitration and related proceedings.

5. Proceedings are not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party thereto.

6. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3 Exclusive choice of court agreements

For the purposes of this Convention -

a) "exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to

the exclusion of the jurisdiction of any other courts;

b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;

c) an exclusive choice of court agreement must be concluded or documented -

i) in writing; or
ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;

d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

Article 4 Other definitions

1. In this Convention, "judgment" means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

2. For the purposes of this Convention, an entity or person other than a natural person shall be considered to be resident in the State -

a) where it has its statutory seat;

b) under whose law it was incorporated or formed;

c) where it has its central administration; or

d) where it has its principal place of business.

CHAPTER II – JURISDICTION

Article 5 Jurisdiction of the chosen court

1. The court or courts of a Contracting State designated in an exclusive choice of court

agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.

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2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

3. The preceding paragraphs shall not affect rules -

a) on jurisdiction related to subject matter or to the value of the claim;

b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

Article 6 Obligations of a court not chosen

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless -

a) the agreement is null and void under the law of the State of the chosen court;

b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;

c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;

d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or

e) the chosen court has decided not to hear the case.

Article 7 Interim measures of protection

Interim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.

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Appendix “D” – Brussels I Regulation

EU Regulation on Jurisdiction and on Recognition and Enforcement of Judgments in Civil and Commercial Matters

Council Regulation (EC) No 44/2001 of 22 December 2000

CHAPTER I—SCOPE

1. 1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration.

3. In this Regulation, the term "Member State" shall mean Member States with the exception of Denmark.

CHAPTER II—JURISDICTION

Section 1—General provisions

2. 1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

3. 1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.

4. 1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to

Articles 22 and 23, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.

Section 2—Special jurisdiction

5. A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies;

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

4. as regards a civil claim for damages or restitution which is based on an act giving

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rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;

6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;

7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

(a) has been arrested to secure such payment, or

(b) could have been so arrested, but bail or other security has been given;

provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

6. A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

4. in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights *in rem* in immovable property, in the court of the Member State in which the property is situated.

7. Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability.

Section 3—Jurisdiction in matters relating to insurance

8. In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

9. 1. An insurer domiciled in a Member State may be sued:

(a) in the courts of the Member State where he is domiciled, or

(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled,

(c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.

2. An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

10. In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

11. 1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which

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the injured party has brought against the insured.

2. Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

12. 1. Without prejudice to Article 11(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

13. The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen, or

2. which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or

3. which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State, or

4. which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State, or

5. which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 14.

14. The following are the risks referred to in Article 13(5):

1. any loss of or damage to:

(a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;

(b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;

2. any liability, other than for bodily injury to passengers or loss of or damage to their baggage:

(a) arising out of the use or operation of ships, installations or aircraft as referred to in point 1(a) in so far as, in respect of the latter, the law of the Member State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;

(b) for loss or damage caused by goods in transit as described in point 1(b);

3. any financial loss connected with the use or operation of ships, installations or aircraft as referred to in point 1(a), in particular loss of freight or charter-hire;

4. any risk or interest connected with any of those referred to in points 1 to 3;

5. notwithstanding points 1 to 4, all "large risks" as defined in Council Directive 73/239/EEC(7), as amended by Council Directives 88/357/EEC(8) and 90/618/EEC(9), as they may be amended.

Section 4—Jurisdiction over consumer contracts

15. 1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

(a) it is a contract for the sale of goods on instalment credit terms; or

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to

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that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

16. 1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

17. The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or

2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

Section 5—Jurisdiction over individual contracts of employment

18. 1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

19. An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled; or

2. in another Member State:

(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

20. 1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

21. The provisions of this Section may be departed from only by an agreement on jurisdiction:

1. which is entered into after the dispute has arisen; or

2. which allows the employee to bring proceedings in courts other than those indicated in this Section.

Section 6—Exclusive jurisdiction

22. The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

However, in proceedings which have as their object tenancies of immovable property

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concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

3. in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State;

5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

Section 7—Prorogation of jurisdiction

23. 1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall

have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

24. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.

Section 8—Examination as to jurisdiction and admissibility

25. Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the

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courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.

26. 1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

3. Article 19 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters⁽¹⁰⁾ shall apply instead of the provisions of paragraph 2 if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to this Regulation.

4. Where the provisions of Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted pursuant to that Convention.

Section 9—Lis pendens - related actions

27. 1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

28. 1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

29. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

30. For the purposes of this Section, a court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or

2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

Section 10—Provisional, including protective, measures

31. Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

Appendix “E” – Ontario Rule 17

Ontario Rules of Civil Procedure
Rule 17—Service Outside Ontario

Service Outside Ontario Without Leave

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

(a) Property in Ontario C in respect of real or personal property in Ontario;

(b) Administration of Estates — in respect of the administration of the estate of a deceased person,

(i) in respect of real property in Ontario, or

(ii) in respect of personal property, where the deceased person, at the time of death, was resident in Ontario;

(c) Interpretation of an Instrument — for the interpretation, rectification, enforcement or setting aside of a deed, will, contract or other instrument in respect of,

(i) real or personal property in Ontario, or

(ii) the personal property of a deceased person who, at the time of death, was resident in Ontario;

(d) Trustee Where Assets Include Property in Ontario — against a trustee in respect of the execution of a trust contained in a written instrument where the assets of the trust include real or personal property in Ontario;

(e) Mortgage on Property in Ontario — for foreclosure, sale, payment, possession or redemption in respect of a mortgage, charge or lien on real or personal property in Ontario;

(f) Contracts — in respect of a contract where,

(i) the contract was made in Ontario,

(ii) the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario,

(iii) the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract, or

(iv) a breach of the contract has been committed in Ontario, even though the

breach was preceded or accompanied by a breach outside Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario;

(g) Tort Committed in Ontario — in respect of a tort committed in Ontario;

(h) Damage Sustained in Ontario — in respect of damage sustained in Ontario arising from a tort, breach of contract, breach of fiduciary duty, or breach of confidence, wherever committed;

(i) Injunctions C for an injunction ordering a party to do, or refrain from doing, anything in Ontario or affecting real or personal property in Ontario;

(j) Support C for support;

(k) Custody or Access — for custody of or access to a minor;

(l) Invalidity of Marriage — to declare the invalidity of a marriage;

(m) Judgment of Court Outside Ontario — on a judgment of a court outside Ontario;

(n) Authorized by Statute — authorized by statute to be made against a person outside Ontario by a proceeding commenced in Ontario;

(o) Necessary or Proper Party — against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario;

(p) Person Resident or Carrying on Business in Ontario — against a person ordinarily resident or carrying on business in Ontario;

(q) Counterclaim, Crossclaim or Third Party Claim — properly the subject matter of a counterclaim, crossclaim or third or subsequent party claim under these rules; or

(r) Taxes — made by or on behalf of the Crown or a municipal corporation to recover money owing for taxes or other debts due to the Crown or the municipality.

Service Outside Ontario With Leave

17.03 (1) In any case to which rule 17.02 does not apply, the court may grant leave to

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serve an originating process or notice of a reference outside Ontario.

(2) A motion for leave to serve a party outside Ontario may be made without notice, and shall be supported by an affidavit or other evidence showing in which place or country the person is or probably may be found, and the grounds on which the motion is made.

Additional Requirements for Service Outside Ontario

17.04 (1) An originating process served outside Ontario without leave shall disclose the facts and specifically refer to the provision of rule 17.02 relied on in support of such service.

(2) Where an originating process is served outside Ontario with leave of the court, the originating process shall be served together with the order granting leave and any affidavit or other evidence used to obtain the order.

Manner of Service Outside Ontario

17.05 (1) Definitions — In this rule, “contracting state” means a contracting state under the Convention; “Convention” means the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters signed at The Hague on November 15, 1965.

(2) General Manner of Service — An originating process or other document to be served outside Ontario in a jurisdiction that is not a contracting state may be served in the manner provided by these rules for service in Ontario, or in the manner provided by the law of the jurisdiction where service is made, if service made in that manner could

reasonably be expected to come to the notice of the person to be served.

(3) Manner of Service in Convention States — An originating process or other document to be served outside Ontario in a contracting state shall be served,

(a) through the central authority in the contracting state; or

(b) in a manner that is permitted by Article 10 of the Convention and that would be permitted by these rules if the document were being served in Ontario.

Motion to Set Aside Service Outside Ontario

17.06 (1) A party who has been served with an originating process outside Ontario may move, before delivering a defence, notice of intent to defend or notice of appearance,

(a) for an order setting aside the service and any order that authorized the service; or

(b) for an order staying the proceeding.

(2) The court may make an order under subrule (1) or such other order as is just where it is satisfied that,

(a) service outside Ontario is not authorized by these rules;

(b) an order granting leave to serve outside Ontario should be set aside; or

(c) Ontario is not a convenient forum for the hearing of the proceeding.

(3) Where on a motion under subrule (1) the court concludes that service outside Ontario is not authorized by these rules, but the case is one in which it would have been appropriate to grant leave to serve outside Ontario under rule 17.03, the court may make an order validating the service.

(4) The making of a motion under subrule (1) is not in itself a submission to the jurisdiction of the court over the moving party.