

GOVERNING LAW CLAUSES: JURISDICTION, AN EVOLVING AREA OF LAW IN ONTARIO



FRASER MILNER CASGRAIN LLP
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Susan Brown, Partner
Leanna Olson, Articling Student
Fraser Milner Casgrain LLP

I. INTRODUCTION

So, you have your contract negotiated and drafted and you may even have a jurisdiction clause, choice of law clause or both; but what will happen if disputes arise down the road? Will the court really hold the parties to their agreement?

The conflict of laws case law has been evolving and the tests have not been consistently applied. The Ontario Court of Appeal recently tried to simplify the analysis, but even this new simplification leads to further questions as to how the test should be applied.

In this paper we will review particular factors that drafters must consider when including forum clauses in contracts as well as the tests the courts have used when jurisdiction has been disputed and how they have been recently changed by the Court of Appeal in the *Van Breda*¹ decision. In so doing, we will indicate where the tests and applications of the test remain unclear.

II. GOVERNING LAW CLAUSE CONSIDERATIONS

Boilerplate clauses may need to be amended in certain circumstances. Before accepting a choice of law or forum clause parties should consider the purpose, meaning and suitability of the clause.

WHY HAVE A GOVERNING LAW CLAUSE?

As a starting point, courts have been instructed by the Supreme Court of Canada to hold parties to their contracted terms. Parties should consider having a forum clause in their contract because this will lead to increased certainty and predictability in interpreting the contract in the future. Where there is a forum clause the burden will then be on the party trying to resolve the dispute in a forum not stipulated in the contract to show strong cause why the court should not uphold the forum clause.

WHEN SHOULD I HAVE A GOVERNING LAW CLAUSE?

When the parties are negotiating a contract they should first consider whether it is necessary to have a forum selection clause. In the event that parties do not choose to have a forum selection clause, the court will look for a real and substantial connection to Ontario so that the courts may take jurisdiction and then determine whether there is another more appropriate forum.

However, it is preferable to have a forum selection clause in a contract when one of the following occurs:

- When parties are in different jurisdictions;
- When transactions occur in different jurisdictions;

¹ *Van Breda v. Village Resorts Limited*, 2010 ONCA 84 [*Van Breda*], online: <<http://canlii.org/en/on/onca/doc/2010/2010onca84/2010onca84.html>>.

- When a problem will be more effectively dealt with in one jurisdiction over another; and
- When there is a jurisdiction that would be more convenient for the parties.

HOW SHOULD I DRAFT A GOVERNING LAW CLAUSE?

Parties may word their forum selection clause in a number of different ways when drafting a contract. Various wording will be interpreted differently and should be understood before selecting an appropriate clause.

DIFFERENT TYPES OF CLAUSES

The first distinction that must be made is between choices of law and choice of forum clause.

Choice of Law

A choice of law clause indicates the law under which the parties have chosen to interpret their potential dispute. The choice of law does not indicate that the parties have chosen to have their disputes heard in the same place as the chosen law. If, for example, the parties chose the law of England and the dispute was before the Ontario Courts the Ontario Court may take jurisdiction and the parties would need to prove the law in England as a matter of fact to the trial Judge.² Elderkin and Shin Doi recommend that the choice of law clause should provide “that the agreement is to be both ‘constituted’ and ‘interpreted’ in accordance with the choice of law”³ so that the rules of construction and the meaning of words and phrases are determined according to the chosen law.

Choice of Forum

A choice of forum clause, on the other hand, indicates in which jurisdiction or jurisdictions the parties agree to have the dispute heard. Depending on the wording of the clause, the parties may give exclusive, non-exclusive or concurrent jurisdiction to a particular forum.

Exclusive jurisdiction: The best way to indicate that the parties would like to resolve disputes in one and only one jurisdiction is to indicate that they choose to give ‘exclusive’ jurisdiction to a particular forum. For example, the parties could agree that “all disputes arising in connection with the Agreement shall be determined *exclusively* by courts in Ontario.”

Some courts have found that indicators, other than using the word ‘exclusive,’ such as using mandatory language and indicating that the parties choose a specific forum and “no other courts,”⁴ indicates exclusivity of forum. However, in order to maintain certainty, including the word ‘exclusive’ ensures that the intention of the parties is clear.

Non-exclusive jurisdiction: Parties may also want to agree to one forum but not to the exclusion of others. The following clause is an example of where the Court held that Ontario Courts were not given exclusive jurisdiction and a Newfoundland Court, therefore, could have concurrent jurisdiction:⁵

The parties hereto agree that this contract is made in the Province of Ontario and the Courts of the Province of Ontario shall have jurisdiction in reference to any matters herein, and in particular in reference to the injunction referred to in the previous paragraph.⁶

However, in order to strive for certainty, it is preferable to include whether the jurisdiction specified in the contract gives exclusive or non-exclusive jurisdiction to a particular forum.

2 *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, [1993] S.C.J. No. 125 para. 27 (QL) online: <<http://canlii.org/en/ca/scc/doc/1993/1993canlii43/1993canlii43.html>>.

3 Synthia L. Elderkin & Julia S. Shin Doi, *Behind and Beyond Boilerplate: Drafting Commercial Agreements*, 2d ed. (Toronto: Thomson Carswell, 2005) at 82 [*Behind and Beyond Boilerplate*].

4 *Can-Am Produce and Trading Ltd. v. “Senator” The* (1996), 112 F.T.R. 255, [1996] F.C.J. No. 550 (QL).

5 *Westcott v. AlSCO Products of Canada Ltd.*, [1960] N.J. No. 3, 26 D.L.R. (2d) 281 para. 9 (QL) “In order to oust the jurisdiction of the Newfoundland Courts it would have been necessary to have said so in express terms in the contract. This could have been done very simply by merely adding the word “exclusive” before “jurisdiction” in the clause. This has not been done, and it may well be that the parties deliberately refrained from doing anything more than giving a concurrent jurisdiction to the Ontario Courts.”

6 *Ibid.* para. 2.

Concurrent jurisdiction: as a subset of a non-exclusive jurisdiction clause, parties may want to allow disputes to be heard in more than one forum. The Ontario High Court of Justice found that the following clause made a choice of law and provided for concurrent jurisdiction:

This Instrument of Charge shall be construed and its interpretation governed in all respects by the laws of Dubai and each of the parties hereto hereby submits to the jurisdiction of the Civil Court of Dubai.⁷

The Court said “this paragraph grants concurrent jurisdiction to any other court in which the matter is otherwise properly brought. Therefore, this case is properly before this court.”⁸

Again, in order to strive for certainty, it is preferable to indicate clearly whether the parties would like to give jurisdiction to one or more fora in the contract from the outset as opposed to waiting for the Court to interpret the forum clause.

EXCEPTIONS

It is important to note that the ability of a Court to take jurisdiction may be limited in some circumstances. For example, matters relating to real and personal property within the jurisdiction is a matter for the courts in which the property is located.⁹ In addition, statutes may also affect the ability of the court to take jurisdiction.¹⁰

EXAMPLES

Behind and Beyond the Boilerplate

Authors Elderkin and Shin Doi Recommend provide the following examples of governing law clauses in their book:

1. This Agreement is governed by the laws of the Province of Ontario and the laws of Canada applicable therein.
2. This Agreement and each of the documents contemplated by or delivered under or in connection with this Agreement are governed by and are to be construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein and treated in all respects as an Ontario contract. The parties to this Agreement hereby irrevocably and unconditionally attorn to the [exclusive or non-exclusive] jurisdiction of the courts of the Province of Ontario and all courts competent to hear appeals therefrom.
3. This Agreement is conclusively deemed to be a contract made under the laws of the Province of Ontario, and for all purposes is to be construed in accordance with the laws of the Province of Ontario, without regard to principles of conflicts of law.¹¹

Pompey

The following clause was upheld by the Supreme Court of Canada in *Pompey*:

The contract evidenced by or contained in this Bill of Lading is governed by the law of Belgium, and any claim of dispute arising hereunder or in connection herewith shall be determined by the courts in Antwerp and no other Courts.¹²

7 *Khalij Commercial Bank Ltd. v. Woods* (1985) 50 O.R. (2d) 446, [1985] O.J. No. 2500, para. 20 (QL).

8 *Ibid.* para. 11.

9 For example, *Ontario Rules of Civil Procedure*, R.O. 1990 Reg. 194. Rule 17(1)(a).

10 For example *Bills of Exchange Act*, R.S.C. 1985, c. B-4 and the *Carriage by Air Act*, R.S.C. 1985, c. C-26.

11 *Behind and Beyond Boilerplate*, at 79.

12 *Pompey* para. 4 [emphasis added].

National Iranian Oil Co.

After doing a strong cause analysis the Ontario Court of Appeal upheld the following clauses:

52. SETTLEMENT OF DISPUTES

If any dispute ... or difference of any kind shall arise between the Company and the Contractor in connection with or arising out of the Contract or the carrying out of the Works ... and is not resolved through correspondence or negotiations ... the case, as per the Laws of the Islamic Republic of Iran, shall be resolved by referring it to the Competent Iranian Court in Iran.

53. RELEVANT LAW

The Law governing the Contract shall be the laws of the Islamic Republic of Iran and relevant Iranian courts shall have complete competence and jurisdiction in all cases.¹³

Red Seal Tours Inc.

The Ontario Court of Appeal upheld the following jurisdiction clause:

Each party hereto irrevocably agrees to refer over the jurisdiction of the Aruba courts any matters arising this agreement [sic], where each party irrevocably waives any applicable law.¹⁴

Justice Sharpe said:

It is well-established that the law strongly favours the enforcement of choice of forum clauses and that special deference is owed to forum selection clauses found in international agreements involving sophisticated parties. I do not accept the submission that there is “strong cause” to displace the forum chosen by the parties or that Ontario jurisdiction should be assumed on the basis that Aruba is not *the forum conveniens*.¹⁵

GreCon Dimter Inc.

The Supreme Court of Canada upheld the following clauses:

Choice of Forum

It is agreed, by and between the seller and buyer, that all disputes and matters whatsoever arising under, in connection with, or instant to this contract (whether arising under contract, tort, other legal theories, or specific statutes) shall be litigated, if at all, in and before a court located in Alfeld (Leine), Germany to the exclusion of the courts of any other state or country.

Choice of Law

This agreement is governed by and construed under the laws of Germany to the exclusion of all other laws of any other state or country (without regard to the principles of conflicts of law).¹⁶

III. JURISDICTION ANALYSIS

Courts go through a multi-stage analysis when determining whether they should take jurisdiction when jurisdiction is disputed. First, the Court will consider whether they have presence or consent based jurisdiction *simpliciter*. If neither is applicable the Court will analyze whether or not they may assume jurisdiction because there is a real and substantial connection to the province of Ontario. If the parties have an agreement which provides for a forum other than Ontario, the Court will not assume jurisdiction unless

13 *Crown Resources Corp. S.A. v. National Iranian Oil Co.*, [2006] O.J. No. 3345, 273 D.L.R. (4th) 65 paras. 15 and 41, leave to appeal by the S.C.C. refused, 31684 (October 23, 2006).

14 *Red Seal Tours Inc. v. Occidental Hotels Management B.V.*, 2007 ONCA 620 (CanLII) para. 4, online: <<http://canlii.org/en/on/onca/doc/2007/2007onca620/2007onca620.html>>.

15 *Ibid.* para. 13.

16 *GreCon Dimter inc. v. J. R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, para. 4, online: <<http://canlii.org/en/ca/scc/doc/2005/2005scc46/2005scc46.html>>.

the plaintiff can demonstrate strong cause not to give effect to the chosen forum. If the Court finds that it does not have jurisdiction *simpliciter* or is not persuaded that there is strong cause not to give effect to the agreed foreign forum it will not assume jurisdiction and the Court will stay the action. If, on the other hand, the Court believes it may take jurisdiction, the Court still has discretion to decline jurisdiction if the forum is the *forum non conveniens*. The burden at this stage is on the defendant to show that there is another clearly more appropriate forum.

The elements of the tests the Court should consider are set out below.

STEP 1: JURISDICTION *SIMPLICITER*

When parties dispute jurisdiction at the outset, a Court may take jurisdiction *simpliciter* in three circumstances, where there is:

1. Presence in the jurisdiction;
2. Consent to the jurisdiction; or
3. Assumed jurisdiction.

The Court will not take jurisdiction *simpliciter* absent strong cause if the parties have agreed to a foreign forum.

PRESENCE OR CONSENT BASED JURISDICTION

The Supreme Court of Canada said in *Morguard Investments*:

As discussed, fair process is not an issue within the Canadian federation. The question that remains, then, is when has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court has acted on the basis of some ground traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments - in the case of judgments in personam where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.¹⁷

The Ontario Court of Appeal in *Muscutt* elaborated:

Presence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extra-provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, or by prior agreement to submit disputes to the jurisdiction of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extra-provincial judgments. ...Assumed jurisdiction is initiated by service of the court's process out of the jurisdiction pursuant to Rule 17.02.¹⁸

If one of the above basis for taking jurisdiction is found, the Court will then do the analysis under Step 2 where the Court has discretion to decline jurisdiction if it is the *forum non conveniens*, that is, if there is another more appropriate forum. If, on the other hand, none of the above basis for taking jurisdiction is present the Court may then consider whether there is a contract with a forum selection clause providing for resolution of disputes in another forum; in such a case the court will do a 'strong cause' analysis. If there is no foreign forum selection clause the Court will look at factors to determine if there is a real and substantial connection to Ontario.

17 *Morguard Investments Ltd. v. De savoye*, [1990] 3 S.C.R. 1077, online:

<<http://www.canlii.org/en/ca/scc/doc/1990/1990canlii29/1990canlii29.html>>.

18 *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20, 2002 CanLII 44957 (C.A.) paras. 19-20 [*Muscutt*].

ASSUMED JURISDICTION - REAL AND SUBSTANTIAL CONNECTION

In the absence of presence or consent based jurisdiction, the Court will undertake an assessment of factors to determine whether there are enough connections to the jurisdiction to take jurisdiction.

The factors set out in *Muscutt* to determine whether there is a real and substantial connection to the local Court are as follows:

- (a) The connection between the plaintiff's claim and the forum;
- (b) The connection between the forum and the defendant;
- (c) Unfairness to the defendant in the Ontario Court assuming jurisdiction;
- (d) Unfairness to the plaintiff in not assuming jurisdiction;
- (e) The involvement of other parties to the suit;
- (f) The Court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
- (g) Whether the case is interprovincial or international in nature;
- (h) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.¹⁹

Again, the Court will weigh these factors to determine if there is a real and substantial connection to Ontario and if so it would take jurisdiction. If the factors do not show a real and substantial connection to Ontario the Court will decline jurisdiction and stay the action.

Recent Ontario Court of Appeal Changes in *Van Breda*

The above real and substantial connection analysis has recently been amended by the Court of Appeal. In February 2010, the Ontario Court of Appeal came out with a conflict of laws decision in *Van Breda* which changed the above *Muscutt* analysis. The decision does not comment on whether *Van Breda* affirms the list above Step 1 list for taking jurisdiction *simpliciter* or whether the modified test applies where there is a forum selection clause which provides for another forum.

What is clear is that the Court creates a list of situations where the real and substantial connection test will be based on rebuttable presumptions. This list is based on Rule 17.06 of the *Rules of Civil Procedure*²⁰ and excludes Rule 17.06 (h) and (o). The following situations create a presumption that the court should maintain jurisdiction over the matter; note that the elements of Rule 17.06 which do not create this rebuttable presumption have been struck out below:

- (a) in respect of real or personal property in Ontario;
- (b) 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) 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

¹⁹ *Ibid.* paras. 77-101.

²⁰ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

- (ii) the personal property of a deceased person who, at the time of death, was resident in Ontario;
- (d) 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) for foreclosure, sale, payment, possession or redemption in respect of a mortgage, charge or lien on real or personal property in Ontario;
- (f) 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) in respect of a tort committed in Ontario;
- ~~(h) 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) for an injunction ordering a party to do, or refrain from doing, anything in Ontario or affecting real or personal property in Ontario;
- (m) on a judgment of a court outside Ontario;
- (n) authorized by statute to be made against a person outside Ontario by a proceeding commenced in Ontario;
- ~~(o) against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario;~~
- (p) against a person ordinarily resident or carrying on business in Ontario;
- (q) properly the subject matter of a counterclaim, crossclaim or third or subsequent party claim under these rules; or
- (r) 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.

If one of the presumptions applies, then the defendant bears the burden of showing that a real and substantial connection does not exist. However, if one of the presumptions is not present the plaintiff must demonstrate that the real and substantial connection test is met.²¹

This refinement of the real and substantial connection test recently presented by the Court of Appeal in *Van Breda*, changes the focus of the real and substantial connection test set out in *Muscutt*. In order to determine whether there is a real and substantial connection the Court will focus on the core of the test which is the consideration of the connection between Ontario and the plaintiff's claim and the defendant, respectively. The remaining *Muscutt* factors are not independent factors but general legal principles that assist the analysis. These factors include:

21 *Van Breda*, para. 109.

- i) Considerations of fairness to the plaintiff and the defendant in assuming or refusing jurisdiction;
- ii) Involvement of other parties to the suit is only relevant in cases where that is asserted as a possible connecting factor;
- iii) The Court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis, which is an over arching principle;
- iv) Whether the case is interprovincial or international in nature, which is a general principle of international law; and
- v) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere, which is also a general principle of international law.

If the defendant has the onus and he is unable to show that there is no real and substantial connection to Ontario or if the plaintiff has the onus and shows that there is a real and substantial connection to Ontario, the Court will take jurisdiction subject to Step 2 analysis of *forum non conveniens*. If the defendant has the onus and shows that there is no real and substantial connection to Ontario or if the plaintiff has the onus and is unable to demonstrate that there is a real and substantial connection, the court will stay the action.

FOREIGN FORUM CLAUSE = NO JURISDICTION UNLESS STRONG CAUSE

If there is a foreign forum selection clause in the relevant contract the Court's discretion should be exercised by granting a stay unless "strong cause" for not doing so is shown. The Supreme Court of Canada stressed that, "[i]t is essential that the courts give full weight to the desirability of holding contracting parties to their agreements...the starting point is that the parties should be held to their bargain" and "that the parties' agreement is given effect in all but exceptional circumstances."²² The strong cause test imposes a "burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause."²³ Lower Courts have made additional comments that "the court should honour terms of that sort and give effect to them unless the balance of convenience massively favours an opposite conclusion"²⁴ and in cases where there is an exclusive jurisdiction clause "[a] jurisdiction clause casts a heavy onus on the party seeking to resort to a court of another jurisdiction to establish that the latter is a more appropriate forum."²⁵

The Supreme Court affirmed that "[i]n exercising its discretion the Court should take into account all the circumstances of the particular case" and without prejudice to this generality, Courts will look at the following factors to determine whether there is a strong cause to depart from the forum selection clause in the contract:

- (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the Canadian and foreign Courts.
- (b) Whether the law of the foreign Court applies and, if so, whether it differs from Canadian law in any material respects.
- (c) With what country either party is connected, and how closely.
- (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

22 *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450 paras. 20 and 21 [emphasis added] (*Pompey*) online: <<http://www.canlii.org/en/ca/scc/doc/2003/2003scc27/2003scc27.html>>.

23 *Ibid.* para. 20.

24 *Volkswagen Canada Inc. v. Auto Haus Frohlich*, 1985 CanLII 134 (AB C.A.) [emphasis added], online: <<http://www.canlii.org/en/ab/abca/doc/1985/1985canlii134/1985canlii134.html>>.

25 *Maritime Telegraph & Telephone Co. v. Pre Print Inc.*, 1996 CarswellNS 12 (NS C.A.), paras. 37 and 38.; *International Time Recorder Co. v. Lavie Computers Ltd.*, 2000 CarswellOnt 853 (ON S.C.J.), para. 26.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would

- (i) be deprived of security for that claim;
- (ii) be unable to enforce any judgment obtained;
- (iii) be faced with a time-bar not applicable in Canada; or
- (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.²⁶

The Court will weigh these factors according to the facts of each case to determine whether they will depart from the forum indicated in the contract. If the Court finds the plaintiff has shown a strong cause why the forum selection clause should not be enforced and the court should take jurisdiction, then the considerations under Step 2 may be considered to determine whether there is another more appropriate forum.²⁷ If the court finds that the plaintiff has not shown a strong cause why the forum selection clause should not be enforced it will stay the action.

STEP 2. FORUM NON CONVENIENS

Where the Court finds that it has jurisdiction over the case it may then do an analysis to determine whether there is another clearly more appropriate forum in order to determine whether they are the *forum non conveniens*.²⁸ *Van Breda* reiterates that that this is a separate analysis which should be done separate from the above factors.

The factors the court will consider are the following:

- (a) The location of the majority of the parties;
- (b) The location of key witnesses and evidence;
- (c) Contractual provisions that specify applicable law or accord jurisdiction;
- (d) The avoidance of multiplicity of proceedings;
- (e) The applicable law and its weight in comparison to the factual questions to be decided;
- (f) Geographical factors suggesting the natural forum;
- (g) Whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court.²⁹

If, after analysing the above factors, the Court finds that there is no other more appropriate forum it will maintain jurisdiction over the case. If, however, there is another more appropriate forum the Court will decline to take jurisdiction and stay the action.

²⁶ *Pompey*, para. 19.

²⁷ See for example *Straus v. Decaire*, 2007 CanLII 14347 (ON S.C.) para. 37, online: <<http://canlii.org/en/on/onsc/doc/2007/2007canlii14347/2007canlii14347.html>> aff'd 2007 ONCA 854 (CanLII).

²⁸ The Supreme Court of Canada found that the Quebec Court of Appeal erred in its analysis when it considered the *forum non conveniens* analysis without first determining that Quebec Courts had jurisdiction. The Court said, "a court may not decline jurisdiction that it does not have. The doctrine of *forum non conveniens* allows only for jurisdiction that is already recognized to be ousted." *GreCon Dimter inc. v. J. R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, para. 48, online: <<http://canlii.org/en/ca/scc/doc/2005/2005scc46/2005scc46.html>>.

²⁹ *Visram v. Chandarana*, [2007] O.J. No. 2844, 159 A.C.W.S. (3d) 72 paras. 17-18 citing *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20, 2002 CanLII 44957 (C.A.) at 34-35, para. 41.

IV. CONCLUSION

Notwithstanding the above, interpreting governing law clauses is an area of the law which may be difficult to predict. Each case is assessed on its own merits and according to its own facts. Even seemingly strong forum clauses will not necessarily be upheld by the Courts. A recent example is the clause considered in *Expedition Helicopters Inc. v. Honeywell Inc.*³⁰ The following clause was not upheld by the Ontario Superior Court, but is currently under appeal:

CHOICE OF LAW. THIS AGREEMENT SHALL BE GOVERNED, CONTROLLED AND INTERPRETED UNDER THE LAW OF THE STATE OF ARIZONA, EXCLUDING ITS CONFLICT OR CHOICE OF LAW PROVISIONS. The parties (i) agree that any state or federal court located in Phoenix, Arizona shall have exclusive jurisdiction to hear any suit, action or proceeding arising out of or in connection with this Agreement, and consent and submit to the exclusive jurisdiction of any such court in any such suit, action or proceeding and (ii) hereby waive, and agree not to assert, by way of motion, as a defense, or otherwise, in any such suit, action or proceeding to the extent permitted by the applicable law, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper, or that this Agreement or any of the transactions contemplated hereby may not be enforced in or by such courts.³¹

30 *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONSC 732 (CanLII), online: <<http://canlii.org/en/on/onsc/doc/2010/2010onsc732/2010onsc732.html>>.

31 *Ibid.* para. 11 [emphasis added].



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