LITIGATION OR ARBITRATION? FORUM SELECTION AND ARBITRATION CLAUSES AND THE PROSPECTS FOR ADJUDICATING INTERNATIONAL HUMAN RIGHTS CLAIMS IN CANADA

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ABSTRACT

Forum selection and arbitration clauses are a mainstay of international commercial agreements. Contracting parties often negotiate and insert a clause specifying either the chosen forum for adjudicating any disputes arising from the contractual relationship, or agreeing to arbitrate the dispute.

This paper will briefly explore the implications of promoting a social contract model for advancing and adjudicating international human rights claims in Canada from the perspective of the differing judicial approaches to the enforceability of forum selection and arbitration clauses.

Keywords: access to justice, arbitration, arbitration clause, conflict of laws, forum non conveniens, forum selection clause, international litigation, international human rights, jurisdiction, jus cogens, litigation, state immunity, torture, universal jurisdiction

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Forum selection and arbitration clauses are a mainstay of international commercial agreements. Contracting parties often negotiate and insert a clause specifying either the chosen forum for adjudicating any disputes arising from the contractual relationship, or agreeing to arbitrate the dispute.

Yet, not all disputes are characterized as contractual in nature; sometimes one party alleges fraud or tortious conduct against the other party. Party autonomy, certainty, predictability and lower transaction costs are oft-cited public policy goals in the enforcement of ex ante forum selection or arbitration clauses. In *GreCon Dimter Inc. v. J.R. Normand Inc. et al.*,[1] LeBel, J. at 269 notes:

> "The recognition of the autonomy of the parties…is also related to the trend toward international harmonization of the rules of conflict of laws and of jurisdiction. That harmonization is being achieved by means, inter alia, of international agreements sponsored by international organizations such as the Hague Conference on Private International Law and the United Nations Commission on International Trade Law ("UNCITRAL").
> …
> [where legislatures] recognize the primacy of the autonomy of the parties in situations involving conflicts of jurisdiction. Moreover, this legislative choice, by providing for the use of arbitration clauses and choice of forum clauses, fosters foreseeability and certainty in international legal transactions."

However, forum selection clauses are not interpreted and enforced within a jurisprudential vacuum as they are subject to the juridical process of characterization.

As Janet Walker notes:

> "[t]he distinction between substance and procedure, or right and remedy, is an important subject of characterization...The characterization of a particular rule, whether foreign or domestic, as substantive or procedural, cannot be done in the abstract because substance and procedure are not clear-cut or unalterable categories."[2]

This paper will briefly explore the implications of promoting a social contract model for advancing and adjudicating international human rights claims in Canada from the perspective of the differing judicial approaches to the enforceability of forum selection and arbitration clauses.

Forum Selection Clauses

The issues of the enforceability of a forum selection clause and characterization are front and centre in the recent Court of Appeal for Ontario decision in *Matrix Integrated Solutions Limited v. Radiant Hospitality Systems Ltd, 2009 ONCA 593 (CanLII)* [3]

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[1] *GreCon Dimter Inc. v. J.R. Normand Inc. et al.,* 2005 SCC 46, (2005) 255 D.L.R. (4th) 257, (2005) 336 N.R. 347, (2005) J.E. 2005-1369 (S.C.C.) [cited to D.L.R.].

[2] J.G. Castel and Janet Walker, Canadian Conflict of Laws, 6th Ed., Looseleaf-Release 10, Dec. 2007 (Markham: LexisNexis Canada Inc. 2005, Vol. 1, Chap. 3 "Characterization and the Incidental Question" and Chapter 6 "Substance and Procedure", §6.2, p. 6-2).

[3] *Matrix Integrated Solutions Limited v. Radiant Hospitality Systems Ltd, 2009 ONCA 593 (CanLII)* ["*Matrix v.Radiant*"].

In M*atrix v. Radiant*, the plaintiff/appellant, Matrix Integrated Solutions Limited [“Matrix”] was an Ontario restaurant equipment seller and installer. The defendant/respondent, Radiant Hospitality Systems Ltd. [“Radiant”] was a Texas limited partnership that sold restaurant equipment in Canada and the United States. The parties executed a Non-Exclusive Reseller Agreement [the “Reseller Agreement”] under which the Ontario plaintiff was authorized to resell the Texas defendants in Ontario. The Reseller Agreement contained the following forum selection clause:

> "This Agreement shall be governed by and construed in all respects in accordance with the laws of the State of Texas, U.S.A. In any civil action by either party relating to this Agreement, the prevailing party shall recover from and be reimbursed by the other party for all costs, reasonable attorneys' fees and related expenses. [Matrix] hereby consents and submits to the exclusive jurisdiction and venue over any action, suit or other legal proceeding that may arise out of, or in connection with this Agreement , by any state or federal court located in Tarrant County in the State of Texas, U.S.A. Reseller shall bring any action, suit or other legal proceeding to enforce, directly or indirectly, this Agreement or any right based upon it only in Tarrant County in the State of Texas, U.S.A. The parties agree that the United Nations Convention for the International Sale of Goods shall not apply to this Agreement."

Matrix commenced an action against Radiant and two of its former employees, Frank Naccarato and Gus Markou, alleging conspiracy and for knowingly assisting Matrix’s former employees in breaching their fiduciary duties to leave Matrix in order to form Radeon Technologies Ltd. At the same time, Radiant terminated the Reseller Agreement and entered an agreement with Radeon, all of which Matrix alleged was beyond the ambit of the forum selection clause as not “arising out of, or in connection with” their agreement. Radiant successfully brought a motion for as stay of action against it based on the forum selection clause. Matrix appealed. The Court of Appeal of Ontario allowed the appeal.

Writing for the unanimous Court of Appeal, Sharpe, J.A. (Laskin and LaForme, JJ.A. concurring), held that the motions judge had erred in characterizing Matrix’s claims as being contractual in nature and subject to the forum selection clause. Justice Sharpe points out that:

> [10] The motion judge did not have the benefit of this court’s decision in Precious Metal Capital Corp. v. Smith 2008 ONCA 577 (CanLII), (2008), 92 O.R. (3d) 701 (“Precious Metal”). Precious Metal dealt with the application of forum selection clauses in a series of agreements to claims for breach of fiduciary duty similar to those advanced in the present case. Writing for the court, Doherty J.A. held that in order to determine whether the claims for breach of fiduciary duty fell within the reach of the forum selection clauses, an important first step was to characterize the nature of the claims as they were in the statement of claim. Doherty J.A., at paras 10-11, agreed with the conclusion of the motion judge that the claims “in pith and substance” centred on a fiduciary relationship and the allegation that two of the defendants “deliberately orchestrated events” to put the plaintiff at a disadvantage and to misappropriate to themselves a commercial opportunity. As the case was “not contractual in substance” but rather about “an allegedly abusive course of conduct by fiduciaries”, the forum selection clauses in those agreements did not apply.”

Relying on Doherty, J.A.'s contextual approach in *Precious Metal,*[4] Sharpe, J.A. further observes that:

> [11] Applying a similar analysis to this case, the claims for breach of fiduciary duty and conspiracy advanced in the amended statement of claim cannot fairly be described as "contractual in substance". As in Precious Metal, they are "in pith and substance" centred on a fiduciary relationship and the allegation that Radiant conspired with and knowingly assisted Naccarato and Markou to breach their fiduciary obligations. The RA is merely part of the factual background that explains the existence and nature of the relationship that existed between Matrix and Radiant prior to the alleged wrongs that form the basis of this action. In my view, the claims for conspiracy and knowing assistance do not arise out of or in connection with the provisions of the RA. The elements of the causes of action asserted do not depend upon the RA, and the RA can be removed from the picture without undermining those claims.
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> [12] I respectfully disagree with the motion judge's conclusion that Matrix relied upon the RA in advancing this claim. The motion judge focused on the ambiguous reference to a "breach of a duty of good faith" in paras. 37-38 of the amended statement of claim:
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> 37. Each and all of the defendants have violated the duty of good faith owing to Matrix as a result of the circumstances set out above.
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> 38. In particular, Naccarato and Markou owed a duty of good faith in the performance of all obligations arising from their employment with Matrix.

The Court of Appeal distinguished a line of authority construing arbitration clauses which held that words such as "relating to", "respecting", "in connection with" or "concerning" are expansive terms, and reflect an intention of the parties to embrace claims beyond those that may be brought "under" the contract or that are founded "upon" the contract.[5] Relying on the Court of Appeal's earlier decisions in *Dalimpex Ltd. v. Janicki,*[6]and the Alberta Court of Appeal decision in *Kaverit Steel and Crane Ltd. v. Kone Corp*.[7], Sharpe, J.A. confirmed that the proper test in deciding whether to apply a contractual provision which employs the words "disputes arising out of or in connection with" the parties' contract is "if either claimant or defendant relies on the existence of a contractual obligation as a necessary element to create the claim, or to defeat it."

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[4] *Precious Metal Capital Corp. v. Smith* 2008 ONCA 577 (CanLII), (2008), 92 O.R. (3d) 701 ("Precious Metal"). See, Antonin I. Pribetic, "Staking Claims Against Foreign Defendants in Canada: Choice of Law and Jurisdiction Issues Arising from the in Personam Exception to the Mocambique Rule for Foreign Immovables "(2009) 35 *Adv. Q*. 230 at 253-263.

[5] See, M*antini v. Smith Lyons LLP* 2003 CanLII 20875 (ON C.A.), (2003), 64 O.R. (3d) 505, at para. 19 (C.A.); *Woolcock v. Bushert* 2004 CanLII 35081 (ON C.A.), (2004), 246 D.L.R. (4th) 139 ("Woolcock"), at para. 22 (Ont. C.A.).

[6] *Dalimpex Ltd. v. Janicki,* 2003 CanLII 34234 (ON C.A.), (2003), 64 O.R. (3d) 737 at ¶¶ 41-43.

[7] *Kaverit Steel and Crane Ltd. v. Kone Corp*. 1992 CanLII 2827 (AB C.A.), (1992), 87 D.L.R. (4th) 129 ("Kaverit Steel"), at p. 135, leave to appeal to S.C.C. refused, [1992] 2 S.C.R. vii.

In the learned Justice's view, the claims for breach of fiduciary duties and conspiracy could not fairly be described as contractual in substance as Matrix's claims were centred on a fiduciary relationship. The Reseller Agreement was merely part of the factual background, whereas the claims for conspiracy and knowingly assisting breach of fiduciary duties did not arise out of or in connection with provisions of that agreement. As such, Matrix's claims were sustainable in lieu of any reference to the Reseller Agreement. Similarly, any putative defences arising from provisions in the agreement had no direct bearing on the claims of conspiracy or knowingly assisting breach of fiduciary duties.

Arbitration Clauses

The decision in *Matrix v. Radiant* hints at a pro-arbitration bias by the Ontario Court of Appeal. In an earlier decision this year in *Dancap Productions Inc., v. Key Brand Entertainment, Inc., 2009 ONCA 135*,[8] Justice Sharpe reaffirmed the Canadian judiciary's "deferential approach" to the principle of competence/competence for arbitral jurisdiction.

The issue on appeal was whether the motion judge erred in refusing to grant a stay on account of arbitration and forum selection clauses in one of the contracts entered into by the respondents "Dancap" and the appellants "Key Brand". Dancap and Key Brand executed a preliminary Term Sheet outlining the general terms of a participation agreement related to Key Brand's acquisition of theatrical assets, including two Toronto theatres. Dancap was to gain an equity position in Key Brand and membership on its board, which included the right to manage the theatres pursuant to separate management agreements yet to be concluded. The parties also entered into an Additional Rights Agreement ("ARA") which, inter alia, set out the parties' agreement to negotiate in good faith towards the conclusion of the management agreements. Following Key Brand's acquisition of the assets, but prior to the finalization of the management agreements, Key Brand sold the Toronto theatres to the respondent Mirvish Enterprises Limited ("Mirvish"). Dancap immediately threatened proceedings. However, Key Brand won the "race to the courthouse"; a month before Dancap sued in Ontario, Key Branch had already commenced an action in the United States District Court in California for an order compelling Dancap to submit their dispute to arbitration.

The ARA contained an "entire agreement" clause providing that it "supersedes all prior agreements, negotiations and understandings concerning the subject matter hereof" and that it "shall supplement each of the Management Agreements and the Shareholders Agreement of even date". The entire agreement clause further provided that "if there is a conflict between this Agreement and… the Management Agreements, this Agreement shall control and provide [Dancap] with the additional rights granted… under this Agreement."[9] The ARA and Shareholders Agreement both contained an arbitration clause requiring that "[a]ny dispute, controversy or claim arising out of or relating to" the agreement (except for equitable claims) be submitted to arbitration "in accordance with the JAMS International Arbitration Rules. The tribunal will consist of a sole arbitrator." The ARA and Shareholders Agreement also contained a forum selection clause providing for the exclusive jurisdiction of the state or United States District courts in California. However, the Term Sheet was silent on both arbitration and forum selection. Key Branch then moved for a stay of the Ontario action based upon art. 8(1) of the

[8] *Dancap Productions Inc., v. Key Brand Entertainment, Inc., 2009 ONCA 135* (Ont. C.A.) per Sharpe, Armstrong and Watt JJ.A. ["*Dancap*"].
[9] Id, at ¶ 13.

UNCITRAL Model Law on International Arbitration as incorporated in Ontario by the *International Commercial Arbitration Act, R.S.O. 1990, c. I.9*.[10] The motion judge dismissed Key Brand's motion. Morawetz, J. ruled that Dancap's claims arose solely under the Term Sheet and not under the ARA and that the arbitration and forum selection clauses did not apply.

The Court of Appeal allowed the appeal and stayed the Ontario action, pending the resolution of the arbitration on the "core issue of whether Key Brand has the right to terminate any management rights to the theatres that Dancap may have obtained under either the Term Sheet or the ARA upon the sale of the theatres." [11]Writing for the unanimous Court, Sharpe, J.A., held that:

> "[32] It is now well-established in Ontario that the court should refuse to grant a stay under art. 8(1) of the Model Law where it is "arguable" that the dispute falls within the terms of an arbitration agreement. [Dalimpex Ltd. v. Janicki (2003), 64 O.R. (3d) 737 (C.A.), at para. 21, Charron J.A. and Hinkson J.A. in Gulf Canada Resources Ltd. v. Arochem International Ltd. (1992), 66 B.C.L.R. (2d) 113 (B.C.C.A.) internal quotation omitted] . . .
>
> [33] As Charron J.A. explained in Dalimpex, at para. 22, "a deferential approach" allowing the arbitrator to decide whether the dispute is arbitrable, absent a clear case to the contrary, 'is consistent both with the wording of the legislation and the intention of the parties to review their disputes to arbitration.'"

Justice Sharpe also relied upon the recent Supreme Court of Canada decision in *Dell Computer Corp. v. Union des consommateurs*,[12] which endorsed the "competence-competence" principle, calling for deference to arbitrators to resolve challenges to their jurisdiction.[13] The parties consented to the admission of fresh evidence relating to a recent order issued by the District Court in California, which required the parties to submit to arbitration. The Court of Appeal's deferential approach was not limited to arbitrability. Sharpe, J.A. had no difficulty in extending judicial comity to the U.S. court, without any form of reciprocity requirement, stating:

> "[36] It may well be that in the United States , courts do not follow the deferential approach to arbitrability set out in Dalimpex and Dell. (I note, however, that in the statement of defence Dancap has filed in the arbitration, Dancap maintains that Key Brand's claims are not arbitrable and reserves the right to argue the point before the arbitrator as well as before the Ninth Circuit Court of Appeals.)
>
> [37] Whatever the law may be in the United States, I am persuaded that the motion judge erred in ruling on the scope of the arbitration clause rather than leaving the issue to the arbitrator. While the issue of whether the dispute between the parties is covered by the ARA is by no means free from doubt, for the reasons that follow, I conclude that it is at least arguable that the ARA arbitration clause governs the core issue raised in the action. That issue was properly identified by the District Court judge as being whether Key Brand has the right to terminate any management rights

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[10] R.S.O. 1990, c. I-9.
[11] *Dancap, supra* note 8, at ¶ 43.
[12] Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34 (S.C.C.) ["Dell"].
[13] *Dancap*, at ¶34, citing Deschamps, J., in *Dell* [2007] 2 S.C.R. 801 (S.C.C.) at ¶ 84).

> to the theatres that Dancap may have obtained under either the Term Sheet or the ARA upon the sale of the theatres to Mirvish."

Is arbitration a viable alternative to litigation for adjudicating International Human Rights Claims in Canada?

In *Dell,* the Supreme Court of Canada observed that:

> "[l]egislative policy…now accepts arbitration as a valid form of dispute resolution and, moreover, seeks to promote its use." [14]

In *Beals v. Saldanha* [15] on the issue of public policy as a defence to the enforcement of a foreign judgment, Justice Major for the majority held:

> "The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign law is *contrary to our view of basic morality.*" (Emphasis added).

Both normative statements reflect a Rawlsian view of contractualism: that morality (and, therefore, public policy) is based on social contract or agreement.[16] Each statement identifies the continuing jurisprudential debate over the nature and scope of a court's jurisdiction *ratione materiae* and the judicial role in reviewing private contractual disputes submitted to consensual arbitration. It also highlights the tension between promoting the primacy of party autonomy and contractual freedom, on the one hand, and defining the limits to judicial intervention of matters involving the "public order" or public interest, on the other. Essentially, it addresses the issue of the privatization of justice and whether a social contract model is appropriate in disputes affecting the public interest.

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[14] *Dell, supra* note 12, at ¶ 143, per Bastarache and LeBel JJ..

[15] *Beals v. Saldanha* [2003] 3 S.C.R. 416, (2003) 234 D.L.R. (4th) 1 (S.C.C.) ["Beals"].

[16] See, J. Rawls, J. A THEORY OF JUSTICE (Cambridge, MA: Harvard University Press, 1971). *Cf.* T.M. Scanlon, "Contractualism and Utilitarianism", in A. Sen and B. Williams (eds.), UTILITARIANISM AND BEYOND (Cambridge: Cambridge University Press, 1982), pp. 103-28, and T.M. Scanlon, What We Owe to Each Other (Cambridge, MA: Harvard University Press, 1998).

The Yin of Litigation and the Yen of Arbitration

In their dissenting reasons, Bastarache and Lebel JJ. (Fish J. concurring) in *Dell* refer to the Court's earlier decision in *Desputeaux v. Éditions Chouette (1987) inc.*,[17] which addressed whether questions relating to ownership of copyright fell outside arbitral jurisdiction. In effect, a matter may be excluded from the field covered by arbitration because it is by nature a "matter of public order".[18]

As between litigation and arbitration, legislative policy actively supports arbitration as a viable form of alternative dispute resolution and promotes its use. Domestically, the *Arbitration Act, 1991* [19]and internationally, the *New York Convention*[20] and the *UNCITRAL Model* are prime examples of legislative policy which reflects a pro-arbitration bias premised on the primacy of contractual freedom, party autonomy, and to a great extent, a presumption of equality of bargaining power and informed consent.

However, the *Dell* case also demonstrates the inherent problems in adopting a strict contractualist approach to arbitration. Granted, the majority in *Dell* did address the issue of contracts of adhesion, noting the "introduction of arts. 1435 to 1437 C.C.Q. — which lay down special rules on the validity of certain clauses typically found in contracts of adhesion or consumer contracts — into the law of contractual obligations."[21] However, the majority seems to have elevated the primacy of contractual choice, irrespective of whether the contract is asymmetrical or fails to protect "the weakest and most vulnerable contracting parties", suggesting that some "abuse" is tolerable, while other forms of "abuse" are not.[22]

Equally important is the majority's stated procedural preference of arbitration over class actions. Specifically, the public policy choice of form over substance: "class action is a procedure, and its purpose is not to create a new right." So much for access to justice in cases involving click-wrap internet agreements.

In *Dell,* the majority held that *Bill 48* had no retroactive effect.[23] Nevertheless, the Quebec legislature's response in the form of as blocking legislation[24] restores the balance in protecting consumers and is a welcome, albeit overdue, development. [25]

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[17] *Desputeaux v. Éditions Chouette (1987) inc.,* [2003] 1 S.C.R. 178, 2003 SCC 17 (SCC) per LeBel J. (Gonthier, Iacobucci, Bastarache, Binnie, Arbour, and Deschamps JJ. concurring)
[18] *Id.,* at ¶ 52 *per* LeBel, J.
[19] *Arbitration Act, 1991*, S.O. 1991, C.17 (as am.)
[20] the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* concluded at New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, [the "New York Convention"].
[21] *Dell, supra* note 21, at ¶ 81.
[22] See, *Dell* at ¶ 90 where the majority distinguishes between different types of clauses (external, illegible, incomprehensible and abusive) aimed at different types of abuse.
[23] *Dell, supra* at 12, at ¶¶ 112-120)
[24] *An Act to amend the Consumer Protection Act and the Act respecting the collection of certain debts*, 2nd Sess., 37th Leg., (now S.Q. 2006, c. 56), assented to on December 14, 2006)
[25] See also, Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A §6(2).

Whither International Human Rights?

Whether international human rights norms are (or ought to be) incorporated into legislative policy favouring arbitration is more problematic. At the outset, state immunity is an exception to foreign judgment recognition and enforcement and the traditional Canadian judicial approach has favoured restrictive immunity, rather than adopting universal jurisdiction or the *jus cogens* doctrine.

Justice Goudge, in *Bouzari v. Republic of Iran* [26] notes:

> …[W]here Canada's obligations arise as a matter of customary international law…customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation. So far as possible, domestic legislation should be interpreted consistently with those obligations. This is even more so where the obligation is a peremptory norm of customary international law, or jus cogens. (citation omitted)

Canada's Federal State Immunity Act, 1985 R.S.C., S.18[27] provides that a foreign state cannot be subject to the jurisdiction of Canadian courts except in specific circumstances: where the damage occurred as part of the commercial activity of the state (section 5), or where the foreign state is responsible for death or personal injury that occurred in Canada or damage of loss of property that occurred in Canada (section 6). These exceptions reflect existing peremptory norms of international law and customary international law, which through "adoptionist" theory, were integrated into the law of Canada.[28]

In cases involving exclusively tort-based claims for personal injury damages arising from state-sponsored torture or human rights abuses, Canadian courts have resisted assuming jurisdiction. In *Bouzari, supra,* the trial court dismissed Mr. Bouzari's claim, finding that the *State Immunity Act* was constitutional and that there was no international law exception to state immunity for torture. The Ontario Court of Appeal rejected Mr. Bouzari's appeal, agreeing with the lower court that there was no exception to state immunity for torture. The Court of Appeal also declined jurisdiction on the grounds that Ontario was not the proper forum to hear Mr. Bouzari's claim, concluding that "Canada's treaty obligation pursuant to Article 14 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,*[29] did not extend to providing the right to civil remedy against a foreign state for torture committed abroad," a view disputed by some commentators. [30]

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[26] *Bouzari v. Republic of Iran* (2004) 71 O.R. (3d) 675 at 690, (2004) 243 D.L.R. (4th) 406, (2004) 122 C.R.R. (2d) 26, (2004) 132 A.C.W.S. (3d) 275 (Ont. C.A.) [cited to O.R.] ("Bouzari v. Iran").

[27] State Immunity Act, 1985 R.S.C., S.18 (as am.)

[28] See, R. v. Hape, 2007 SCC 26 (SCC) at para.36 per LeBel, J. quoting with approval Trendtex Trading Corp. v. Central Bank of Nigeria [1977] 1 Q.B. 529 (C.A.) at 554 (per Denning L.J.). Cf. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (USSC) and the draft United Nations (U.N.) Convention on Jurisdictional Immunities of States and Their Property, Resolution A/RES/59/38 adopted by the United Nations General Assembly, Fifty-ninth session (December 2, 2004)).

[29] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36 (in force in Canada as at June 26, 1987).

[30] For e.g., see, F. Larocque, "Bouzari v. Iran: Testing the Limits of State Immunity in Canadian Courts" (2003) 41 *Can. Y Int'l L.* 341.

The commercial context, which prompted the torture, was insufficient to bring the lawsuit within the section 5 "commercial activity" exception to the restrictive immunity availing under section 3 of the *State Immunity Act.* Admittedly, Mr. Bouzari may not have been the ideal plaintiff to establish a precedent for an international human rights claim given that he was not a Canadian resident at the time of the alleged torture at the hands of the Iranian secret police. However, from a procedural standpoint, *Bouzari v. Iran* was incorrectly decided for two reasons. First, the Court of Appeal failed to consider Rule 17.2(h) of the *Rules of Civil Procedure* [31] which confers a jurisdictional basis for service *ex juris* allowing the court to apply the "real and substantial connection" test without expressly establishing *jurisdiction simpliciter* vis-à-vis assumed jurisdiction. Rule 17.2(h) reads:

> **"Damage Sustained in Ontario"**
>
> 17.02 (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*; (emphasis added)

Second, Goudge, J.A. in *Bouzari v. Iran* also conveniently side-stepped the application of "real and substantial connection" test altogether, which included amongst its eight factors, a consideration of "unfairness to the plaintiff in not assuming jurisdiction.[32]

In contrast, in *Crown Resources Corp. S.A. v. National Iranian Drilling Co.,* [33] the assignees in bankruptcy of a Canadian corporation commenced actions in Ontario relating to a contractual dispute for oil drilling and related services with a state-owned Iranian company. The actions arose from three contracts, executed in 1990, 1996 and 1998. The 1990 contract contained a clause specifying the Republic of Iran as the choice of forum and Iranian law as the choice of law. In contrast, the 1996 contract forum selection clause specified Ontario as the chosen forum and Ontario law as the governing law. The 1998 contract was silent on either choice of forum or choice of law. The plaintiffs were initially successful in resisting a motion for stay of proceedings on various grounds, including *jurisdiction simpliciter, forum non conveniens* and the state immunity exception. The motions judge concluded that state immunity did not apply because of the commercial nature of the dispute. Moreover, Ontario was the appropriate forum for the case to be heard, despite the fact that much of the dispute concerned activities in Iran, given that the plaintiff would not be able to obtain a fair trial in Iran. While the lower court's decision was varied on appeal on the issue of the enforceability of the forum selection clauses, the lower court ruling on the commercial activity exception to state immunity was not. [34]

A priori, it appears difficult to reconcile these two decisions given the underlying commercial activities. However, under the *State Immunity Act,* a state committing human rights abuses or torture within its territory is immune to a lawsuit brought in a Canadian court, while a state or affiliated agency violating a commercial agreement with a Canadian company is not. However, assume *arguendo* that Mr. Bouzari entered into a contract with the Islamic Republic of

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[31] *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194.

[32] *Bouzari v. Iran*, *supra* note 26 at ¶¶ 31 and 38; Muscutt v. Courcelles (2002) 60 O.R. (3d) 20, (2002) 213 D.L.R. (4th) 577 (Ont. C.A.).

[33] *Crown Resources Corp. S.A. v. National Iranian Drilling Co.,* (2005) 142 A.C.W.S. (3d) 421 (Ont. S.C.J.) *per* Greer, J.

[34] *Crown Resources Corp. S.A. v. National Iranian Drilling Co.,*[2006] O.J. No. 3345 (Ont. C.A.) per Labrosse, Laskin and Armstrong JJ.A. Application for leave refused with costs on March 8, 2007 (31684) (S.C.C.)

Iran which contained an arbitration clause or arbitration agreement (specifying Ontario law as the applicable law). The commercial activity exception in section 5 of the *State Immunity Act* would trump any state immunity defence, particularly if the defendant state provided an express waiver and voluntarily consented to private arbitration of any disputes arising under the agreement, whether contractual, tortious or restitutionary in nature. Article 7 of the *International Commercial Arbitration Act* reads as follows:

> **Article 7. Definition and form of arbitration agreement**
>
> (1)"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Any public policy defence would, therefore, be assessed in terms of "international public policy" or "*ordre public international*" rather than Canadian domestic public policy.[35]

With the possible exceptions of Articles 34(b) and 36(b) of the *International Commercial Arbitration Act,* both of which refer to "the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State" or "the recognition or enforcement of the award would be contrary to the public policy of this State", a Canadian court would have no real difficulty in enforcing such an international commercial arbitration award, particularly where an arbitrator's decision was neither previously annulled nor successfully challenged during enforcement proceedings. Of course, the foregoing approach is inapplicable in a non-commercial context. I would argue, however, that the "justice exception" jurisdictional argument raised by Professor Trevor Farrow in his article "Globalization, International Human Rights, and Civil Procedure" [36]in the context of recognition of foreign judgments, would apply, *mutatis mutandis*, to recognition of a foreign arbitral awards against a defendant Multinational Corporation, or a defendant State, for that matter.

It is important to point out, however, that the Court of Appeal for Ontario has recently reformulated the "real and substantial connection" test for assumed jurisdiction in *Van Breda v. Village Resorts Limited.* [37] Perhaps the most promising change is the explicit recognition of a "forum of necessity" exception:

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[35] See van den Berg, "Distinction Domestic-International Public Policy", (1996) XXI Yearbook at p. 502 and D*ieter Krombach v André Bamberski,* Case C-7/98, [2000] ECR I-0000, paragraph 19 (ECJ), where it was held that the infringement must constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order.

[36] (2003), 41(3) *Alta. L. Rev.* 671 at 702.

[37] Van Breda v. Village Resorts Limited, 2010 ONCA 84 (Ont. C.A.) [hereinafter "Van Breda"] At ¶109, Sharpe, J.A. clarifies and reformulates the Muscutt test (the "Van Breda" test) as follows:

> First, the court should determine whether the claim falls under rule 17.02 (excepting subrules (h) and (o)) to determine whether a real and substantial connection with Ontario is presumed to exist. The presence or absence of a presumption will frame the second stage of the analysis. If one of the connections identified in rule 17.02 (excepting subrules (h) and (o)) is made out, the defendant bears the burden of showing that a real and substantial connection does not exist. If one of those connections is not made out, the burden falls on the plaintiff to demonstrate that, in the particular circumstances of the case, the real and substantial connection test is met.

[100] The post-*Muscutt* emergence of the forum of necessity doctrine has a direct bearing on this issue. The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction. The forum of necessity doctrine does not redefine real and substantial connection to embrace "forum of last resort" cases; it operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction. In my view, the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be accommodated by explicit recognition of the forum of necessity exception rather than by distorting the real and substantial connection test.[38]

At the second stage, the core of the analysis rests upon the connection between Ontario and the plaintiff's claim and the defendant, respectively.

The remaining considerations should not be treated as independent factors having more or less equal weight when determining whether there is a real and substantial connection but as general legal principles that bear upon the analysis.

Consideration of the fairness of assuming or refusing jurisdiction is a necessary tool in assessing the strengths of the connections between the forum and the plaintiff's claim and the defendant. However, fairness is not a free-standing factor capable of trumping weak connections, subject only to the forum of necessity exception.

Consideration of jurisdiction *simpliciter* and the real and substantial connection test should not anticipate, incorporate or replicate consideration of the matters that pertain to *forum non conveniens* test.

The involvement of other parties to the suit is only relevant in cases where that is asserted as a possible connecting factor and in relation to avoiding a multiplicity of proceedings under *forum non conveniens.*

The willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis is as an overarching principle that disciplines the exercise of jurisdiction against extra-provincial defendants. This principle provides perspective and is intended to prevent a judicial tendency to overreach to assume jurisdiction when the plaintiff is an Ontario resident. If the court would not be prepared to recognize and enforce an extra-provincial judgment against an Ontario defendant rendered on the same jurisdictional basis, it should not assume jurisdiction against the extra-provincial defendant.

Whether the case is interprovincial or international in nature, and comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere are relevant considerations, not as independent factors having more or less equal weight with the others, but as general principles of private international law that bear upon the interpretation and application of the real and substantial connection test.

The factors to be considered for jurisdiction *simpliciter* are different and distinct from those to be considered for *forum non conveniens*. The *forum non conveniens* factors have no bearing on real and substantial connection and, therefore, should only be considered after it has been determined that there is a real and substantial connection and that jurisdiction *simpliciter* has been established.

Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction.

[38] Id. at ¶100.

Conclusion

Unless the Canadian federal *State Immunity Act* is amended to create a general “torture” or “human rights abuse” exception, or Canadian federal legislation akin to the U.S. *Alien Tort Statute,* [39] is enacted, the only viable procedural route is to attempt to enforce a foreign arbitral award obtained against a state based upon commercial activity and rely upon the “forum of necessity” exception to the reformulated “real and substantial connection” test in *Van Breda.* This will, of necessity, include concurrent claims framed in contract and tort, as well as claims imposing liability against Canadian corporations “aiding and abetting” the alleged torture or human rights violations committed in the host state’s territory and falling within the ambit of acts committed by individuals acting in an official capacity. [40]

Recent efforts to amend the Canadian federal *State Immunity Act* are reflected in the form of *Bill C-35- An Act to deter terrorism, and to amend the State Immunity Act,* which did not make it past First Reading due to the recent prorogation of Canadian Parliament. [41] Bill C-35 was an Act to deter terrorism, and to amend the State Immunity Act (the Justice for Victims of Terrorism Act or JVTA) which was introduced in the House of Commons on June 2nd 2009 by the Minister of Public Safety, the Honourable Peter Van Loan. The bill was to establish a cause of action that allowing victims of terrorism to sue individuals, organizations and terrorist entities for loss or damage suffered as a result of acts committed or omissions made that otherwise would be punishable under Part II.1 of the Criminal Code (which deals with terrorism offences). Essentially, Bill C-35 would have allowed victims of terrorism to sue state-sponsors of terrorism for losses or damage occurring inside or outside Canada on or after January 1, 1985. For the Canadian international litigation and arbitration bars, Bill C-35 held promise to expand the narrow exceptions to state immunity by amending the *State Immunity Act* to create a new---albeit admittedly equally narrow---exception, which would serve to remove state immunity only “when the state in question has been placed on a list established by Cabinet on the basis that there are reasonable grounds to believe that it has supported or currently supports terrorism.” According to the official Legislative Summary:

> "Bill C-35 is similar to a number of private members’ bills and senators’ public bills that have been introduced in Parliament since 2005.(4) The primary difference between the previous bills and Bill C-35 is that the other bills sought to include the cause of action in the Criminal Code, whereas Bill C-35 creates a free-standing civil cause of action."

Obviously, enforcing a foreign arbitral award against a foreign state implies that there are exigible assets in Canada which fall within the commercial activity exception or there is an express waiver of immunity by the state or related agency (See §12 of the *State Immunity Act).* Only time will tell whether the winds of political change or judicial activism will finally hold sway and allow victims of human rights abuses and torture equal access to Canadian justice.

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[39] *Alien Tort Statute,* 28 U.S.C. §1350 (also referred to as the *Alien Tort Claims Act).*

[40] See, *Presbyterian Church of Sudan v. Talisman Energy*, Inc. No. 07-0016-cv (USCA 2d Cir. Docketed Jan.3, 2007), *cf. Doe I v. Unocal Corp.,* 963 F. Supp. 880 (C.D. Cal 1997) which imposed liability under the ATS against private corporations by imposing a standard of “knowing practical assistance or encouragement that has a substantial effect on the perpetration of a crime.”

[41] “House shut? Liberals to report for work anyway, *The Toronto Star*, January 6, 2010 (available online at: http://www.thestar.com/news/canada/article/746615--house-shut-liberals-to-report-for-work-anyway)