ULCC CJPTA UPDATE PROJECT

WORKING AGENDA AS OF 23 JULY 2020

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[1] This memo summarize the categorization of issues that we (the Working Group, "WG") agreed on at our telephone meeting on 25 June. I've cross-referenced where necessary to the "Notes for Working Group" (NWG) that were circulated to the group for our first meeting, on 15 June, which provides background on the issues.

[2] On 25 June, we grouped the issues into three categories, 1. issues on which the model act should definitely be changed, 2. issues on which we ought to consider whether the model act should be changed, 3. issues that should come off the agenda. Within 2, we sub-categorized into A. high priority – deal with this early on, B. medium priority – deal with this in a second phase, C. low priority – deal with this, if at all, towards the end.

[3] At our telephone meeting of 17 July, we made some decisions about the 1A issues. I have updated the discussion of those issues accordingly.

[4] The current plan is that this version of this memo will be circulated to the ULCC delegates for a report on this project that is scheduled for 11 August 2020.

ISSUES ON WHICH WE THINK THE MODEL ACT SHOULD DEFINITELY BE CHANGED (CATEGORY 1)

High-priority issues (subcategory 1A)

The claim-by-claim structure of the act (NWG I(e))

[5] At the meeting on 17 July, we decided not to propose a revision to the statute on this, but to refer to the issue, if need be, in the commentary.

[6] The issue has to do with the "real and substantial connection" ground of territorial competence. CJPTA s. 3(e) refers to a real and substantial connection "between [the province] and the facts on which the proceeding against that person is based". Since the facts on which a proceeding is based are determined by the nature of the claim being brought, the act leaves it ambiguous whether territorial competence in relation to one claim carries with it territorial competence over any closely related claim against the same party, even if the other claim was based on a different set of facts that, on their own, do not have a real and substantial connection with the province.

[7] The problem is also found in the s. 10 presumptions, some of which are drafted in terms of whether "the proceeding concerns" a claim of a particular nature. For a proceeding that concerns a tort claim, territorial competence is presumed if the tort was "committed in" the province (s. 10(g)). For a proceeding that concerns a contract claim, territorial competence is presumed, *inter alia*, if the contractual obligations, to a substantial extent, were to be performed in the province (s. 10(e)(i)). It is possible to construct situations in which the alleged tort is committed in the province but the allegedly broken contractual obligations were to be performed outside the province, and vice-versa.

[8] This issue is given prominence by the Supreme Court of Canada's observation that if a real and substantial connection exists in respect of a legal and factual situation, "the court must assume jurisdiction over all aspects of the case" (*Club Resorts v Van Breda*, 2012 SCC 17, at para. 99). This was

echoed in *SSAB Alabama Inc. v Canadian National Railway Co.*, 2020 SKCA 74. The court concluded that the Saskatchewan Queen's Bench had territorial competence under the CJPTA (SK) because the proceeding was within the presumption in s. 9(g) of that act, since it concerned a tort committed in Saskatchewan. The Court of Appeal observed at para. 69 that it did not need to consider whether the proceeding also fitted the presumptions relating to contractual obligations to be performed to a substantial extent in Saskatchewan (s. 9(e)(i)) or a business carried on in Saskatchewan (s. 9(h)). Richards C.J.S. explained at para. 69:

> This is because, as LeBel J. held in *Van Breda* (at para. 99), if a real and substantial connection exists between the forum and the subject matter of the litigation in respect of one factual and legal situation, a court must take jurisdiction over all aspects of the case. If the goals of fairness and efficiency are to be advanced, a plaintiff should not be obliged to litigate one cause of action in one jurisdiction and a second cause of action in another. In the circumstances of this case, the fact that the Court of Queen's Bench has territorial jurisdiction in relation to the tort cause of action means that it has such jurisdiction to try the whole of CN's claim against SSAB.

[9] A similar approach was taken in *Flying Frog Trading Co. Ltd. v Amer Sports OY*, 2018 BCCA 384. Territorial competence was found by virtue of the presumption relating to contractual obligations substantially to be performed in BC (CJPTA (BC), s. 10(e)(i)). The proceeding was actually a claim in tort against a third party for inducing the breach of the contract. Nevertheless, the Court of Appeal held that the statutory language covered the proceeding because it "concerned contractual obligations" and the contract was one substantially to be performed in BC. The plaintiff did not have to show that the tort presumption (in s. 10(g)) was satisfied, just because the claim was in tort (see para. 22).

[10] The WG took the view that the risk of a court taking too narrow a view, and finding it had territorial competence for claim X but not for claim Y arising out of the same facts, was virtually nil. As the *SSAB Alabama* case showed, they have the means, and arguably the obligation, to find territorial competence over "all aspects of the case" once a real and substantial connection is found.

[11] There was perhaps more of a risk of too broad a view. It was conceivable that a court might find it had territorial competence based on a real and substantial connection with one claim in the proceeding, and then hold that it therefore had territorial competence in respect of every other claim made in that proceeding, even if those claims taken individually or collectively might not have a real and substantial connection with the province. However, the members of the WG were unaware of any case in which this had actually come up. Even if the issue were to come up, the WG thought that the courts can deal with that risk and avoid jurisdictional overreach, in two ways. One is to decline jurisdiction over the proceeding, in whole or in part, on the basis of *forum non conveniens*. The other is to find that the real and substantial connection that arguably exists in respect of one claim in the proceeding, taken in isolation, is rebutted by a showing that the proceeding taken as a whole lacks a real and substantial connection with the province.

[12] Therefore, the WG concluded that the model act did not need to be revised to deal with this issue. To the extent that it was a real problem the courts already had the means to deal with it, and an express statutory provision would probably create more difficulties than it would solve.

Presumption if the proceeding concerns a business carried on in the province (CJPTA s. 10(h), NWG V.1(c))

[13] At the meeting of 17 July we decided that the presumption should be clarified by specifying that the proceeding concerns a business that the defendant carries on in the province. Section 10(h) would

now read as follows. (I've used "person against whom the proceeding is brought" rather than "defendant" in order to be consistent with the drafting of s. 3, and of course that person might be a defendant by counterclaim rather than a defendant.)

> (h) concerns a business that the person against whom the proceeding is brought carried on in [enacting province or territory].

Forum selection clauses (NWG IV.3, IX.1)

[14] At our meeting of 17 July, we decided that

i. There has to be a CJPTA provision dealing with forum selection clauses.

ii. The provision should deal only with clauses selecting an exclusive judicial forum. Arbitration clauses should be flagged as an issue in the commentary but the rules for their application should be left to arbitration legislation.

iii. The court seized of the issue of enforcing an exclusive forum selection clause (the "court seized") must, as at common law, have discretion to disregard the parties' choice.

iv. The nature of the discretion to disregard the parties' choice of forum should not differ as between cases where the parties gave exclusive jurisdiction to a court other than the one seized (the discretion is to exercise jurisdiction) and those where the parties gave exclusive jurisdiction to the court seized (the discretion is to decline jurisdiction).

v. The nature of the discretion should not differ as between cases where the choice is between the court seized and another Canadian forum and those where the choice is between the court seized and a truly foreign forum.

vi. The proposed statutory language describing the nature of the discretion should use the common law "strong cause" formula.

vii. The discretion should not apply, or should be differently exercised, if the forum selection clause is in a consumer or employment contract (the "non-commercial exception").

[15] Two questions we discussed but did not finally resolve were:

viii. Should the "strong cause" formula be amplified by a list of factors the court seized must take into account?

ix. How should the non-commercial exception be expressed? The discussion revolved around two options: A. Deny the clause any effect if the party is invoked against a consumer or employee. B. Allow the clause to have effect if the clause is invoked against a consumer or employee, but specify that "strong cause" must be found if enforcing the clause will in effect deny access to justice by the consumer or employee.

[16] The consensus at the meeting seemed to be that it would help to look at some possible statutory language. For our next meeting I propose the following statutory language for discussion. Some of the language is taken from *Z.I. Pompey Industrie v ECU-Line N.V.*, 2003 SCC 27 at para. 39, and the reference to public policies is prompted by *Douez v Facebook Inc.*, 2017 SCC 33 at para 29.

[17] First, the addition in s. 11 of provisions dealing with a an exclusive forum selection clause in favour of the court seized: In relation to subs. (1), the only changes are adding the initial "subject to" phrase, and inserting "clearly" (see para.[19]).

> 11. (1) Subject to subsection (3), 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 clearly more appropriate forum in which to hear the proceeding.

[*The present subsection (2) with the list of relevant circumstances, remains as is.*]

(3) If a proceeding concerns a dispute that the parties have agreed shall be subject to the exclusive jurisdiction of the court, the court must exercise its territorial competence unless the party seeking to have the court decline to exercise its territorial competence shows strong cause why that party should not be required to adhere to the agreement.

(4) In deciding whether strong cause has been shown for the purpose of subsection (3), the court must consider all the circumstances of the case, including those listed in subsection (2), and must also consider the public policies that, on the one hand, will be served by holding parties to their agreement and, on the other, will be served by enabling the party in question to have recourse to another forum.

[18] And here's the draft of a new section dealing with an exclusive forum selection clause in favour of a court outside the province: I've included three options for subsection (3), dealing with consumer and employment contracts. I think those terms would preferably be defined in s. 1. (The definitions could be part of this new section, but consumer contracts are also referred to in s. 10(e)(iii)(A).) We could include the options in the proposed model act, so enacting provinces could each choose which approach they prefer– with, of course, a resulting loss in uniformity. I personally think we should choose whether we prefer Option A, B or C and go with that one.

[*Add to s. 1*] "consumer contract" means a contract is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and "consumer" means the purchaser in such a contract. [*This is basically lifted from the current s. 10(e)(iii)(A), which could then be amended so that (A) would just say, "is a consumer contract"*.]

[*Also add to s. 1*] "employment contract" means an individual employment contract.

11*bis*(1) If a proceeding concerns a dispute that the parties have agreed shall be subject to the exclusive jurisdiction of a court outside the province, the court must decline to exercise its territorial competence unless the party that invokes the territorial competence of the court shows strong cause why that party should not be required to adhere to the agreement.

(2) In deciding whether strong cause has been shown for the purpose of subsection (1), the court must consider all the circumstances of the case, including those listed in section 11(2), and must also consider the public policies that, on the one hand, will be served by holding parties to their agreement and, on the other, will be served by enabling the party that invokes the territorial competence of the court to bring the proceeding.

(3) [Option A] If the proceeding concerns a consumer contract or an employment contract and the party that invokes the territorial competence of the court is the consumer or the employee, that party is conclusively deemed to have shown strong cause for the purpose of subsection (1).

(3) [Option B] If the proceeding concerns a consumer contract or an employment contract and the party that invokes the territorial competence of the court is the consumer or the employee, the party seeking to rely on the agreement must show

strong cause why the consumer or the employee should be required to adhere to the agreement.

[Option C would be to make no special provision for consumer or employment contracts, because we think that the reference to public policies in subs. (2) will do the job.]

Forum non conveniens – *"clearly" more appropriate*

[19] At our meeting of 17 July, we decided to propose adding the word "clearly" to s. 11(1). The test for *forum non conveniens* in s. 11(1) would now read, "on the ground that a court of another state is a clearly more appropriate forum in which to hear the proceeding" (see para. [17]).

ISSUES ON WHICH WE OUGHT TO CONSIDER WHETHER THE MODEL ACT SHOULD BE CHANGED (CATEGORY 2)

High-priority issues (2A)

Transfers of proceedings (NWG I(c))

[20] The WG thought it was worth reviewing Vaughan Black's survey of the transfer provisions in the Osgoode Hall LJ, to see if there were problems with the provisions that ought to be fixed.

"Residual" real and substantial connection if none of the s. 10 presumptions applies (NWG V.4(a)-(b))

[21] Courts in the three CJPTA provinces have been divided in their approaches to how a plaintiff can show that a real and substantial connection with the province exists on the (pleaded) facts, when none of the presumptions in s. 10 applies. Some have made a holistic, "discretionary" assessment of the facts. Others have said that since the common law requires judges to determine the existence of a real and substantial connection by identifying a presumptive connecting factor, the same approach should be used here. The WG thought this was an important question on which the CJPTA arguably should give more guidance than it does.

Medium-priority issues (2B)

"Territorial competence" terminology, "has jurisdiction" vs "may exercise jurisdiction" phrasing, and linking territorial competence expressly to jurisdiction (NWG I(a)-(b), III)

[22] One issue is whether the model act should say "territorial jurisdiction" (or maybe just "jurisdiction") rather than "territorial competence." A related question is whether it is more accurate to say that a court "has jurisdiction" if the statutory rule is satisfied, or "may exercise jurisdiction." And a third question, if "territorial competence" is retained, is whether it's desirable to make explicit that territorial competence is essential for the exercise of jurisdiction. The WG thought these three questions were worth discussing, and should be discussed together, but it was not a high priority item.

The *Moçambique* rule (NWG II)

[23] This issue arose when the WG discussed territorial versus subject matter competence. The rule that a court has no jurisdiction to adjudicate on title to immovable property in another jurisdiction (*British South Africa Co. v Companhia de Moçambique*, [1893] AC 602 (HL)) straddles the two. Analytically it's a

rule of subject matter competence, I think (because it relates to the court's right to decide a particular type of dispute notwithstanding that it has *in personam* jurisdiction as against the defendant). But it's akin to restricting *in rem* jurisdiction to a *res* that is in the territory, which would be territorial competence. The WG thought that it was appropriate to consider whether the CJPTA should codify – or reform – the *Moçambique* rule in the interests of certainty.

Whether to add a claim against a "necessary or proper party" to the list of presumed real and substantial connections in s. 10 (NWG V.2(b))

[24] The argument for doing so is that the efficient administration of justice is served when a plaintiff, who is suing a resident of the province, can bring a closely related claim against a non-resident in the same proceeding (or the defendant can bring a non-resident third party into the proceeding), even if the related claim does not, standing alone, meet the rules for territorial competence. The argument against it is that "necessary or proper party" is a very generous standard. If we were to suggest adding a new presumption, perhaps it should be more narrowly defined, for example by referring to "necessary party" only.

Proceedings by and against consumers and employees

[25] This issue was added in the course of WG discussions. Except for one of the s. 10 presumptions (s. 10(e)(iii), for proceeds concerning the purchase of goods or services by a consumer), the CJPTA currently does not make special provision for the jurisdictional issues relating to proceedings brought by and against consumers and employees. Certain changes the WG might recommend, such as a codification of the rules for jurisdiction when a forum selection clause either confers jurisdiction or denies it, would probably require such a special provision. (See para. [18].) Even aside from that, it seems appropriate to consider whether more should be put into the act about such claims.

Low-priority issues (2C)

Ordinary residence of a corporation or other entity (NWG IV.4)

[26] In civil law systems, and increasingly in common law systems, including the US, *in personam* jurisdiction over a corporation is divided between general jurisdiction (to use the US terminology), which is jurisdiction to hear any claim against that defendant, and specific jurisdiction, which is jurisdiction to hear only certain types of claim against that defendant. General jurisdiction can be exercised only by a court of a state where the corporation is (essentially) headquartered, whereas specific jurisdiction can be exercised by a state where the corporation is present (i.e. does business), but the jurisdiction is limited to claims related to the corporation's activities in that state. The CJPTA does not distinguish between the two. It gives general jurisdiction (territorial competence) if the corporation is ordinarily resident as defined by s. 7. Ordinary residence is defined in s. 7 in a way that basically reflects the common law, which bases *in personam* jurisdiction on the corporation's being present in the jurisdiction by doing business there. If the claim has little or nothing to do with the business that the corporation does in the province, the corporation can raise *forum non conveniens*.

[27] The WG recognized the argument that s. 7 of the CJPTA is out of sync with a fairly broad international consensus on jurisdiction over corporations. That said, it is in sync with what was confirmed as the Canadian common law (*Chevron Corp. v Yaiguaje*, 2015 SCC 42 at para. 81). The WG thought we should consider the issue but should do so at a late stage in the project.

ISSUES TAKEN OFF THE AGENDA

[28] We decided that the following issues would not form part of our project:

i. Empirical data on experience with the CJPTA compared with the common law (NWG I(d)). Not practicable.

ii. Class proceedings (NWG I(f)). Would need special, dedicated legislation.

iii. The jurisdictional ground that the defendant is plaintiff in another proceeding in the court (CJPTA s 3(a), NWG IV.1). No need to change the act.

iv. The jurisdictional ground that the defendant submits to the court's jurisdiction during the course of the proceeding (CJPTA s 3(b), NWG IV.2). No need to change the act.

v. Making provision in the CJPTA for the *Hague Choice of Court Convention* (NWG IV.3). This issue was best dealt with through the uniform act for implementing the convention, which, if enacted by the relevant province, would take precedence by virtue of CJPTA s. 12.

vi. The jurisdictional ground that an individual defendant is ordinarily resident in the province (CJPTA s 3(d), NWG IV.4). No need to change the ordinary residence criterion in respect of individuals. See paras. [26]-[27] for corporations etc.

vii. The presumption of a real and substantial connection if the proceeding concerns proprietary or possessory rights to property in the province (CJPTA s. 10(a), NWG V.1(a)). No need to change s. 10(a), but see para. [23] for the *Moçambique* issue.

viii. No need to remove s. 10(e)(ii), the presumption that applies if the proceeding concerns a contract expressly governed by the law of the province (NWG V.1(b)). The presumption is appropriate.

ix. No need to add, as a s. 10 presumed real and substantial connection, that the proceeding is connected with a contract that was concluded in the province (NWG V.2(a)).

x. No need to add a provision on how a presumed real and substantial connection is rebutted (NWG V.3). See, however, paras. [5]-**Error! Reference source not found.** on the "claim by c laim" issue, which, if we decide to address it in the act, may touch on the rebuttal question.

xi. Jurisdiction where there is no nominate defendant (CJPTA s. 4, NWG VI). No need to change the act.

xii. Jurisdiction *in rem* (CJPTA s. 5, NWG VII). No need to change the act.

xiii. Forum of necessity (CJPTA s. 6, NWG VIII). Leave it as is.

xiv. No need to add a provision about a court's power to impose terms when declining jurisdiction (NWG IX.2(b)).

xv. No need to add a provision about which party has the onus on persuading the court to decline jurisdiction on the ground of *forum non conveniens* (NWG IX.2(b)).

xvi. No need to add to or delete from the list of six factors to be considered in the *forum non conveniens* discretion (NWG IX.2(b)).