Colliding Galaxies—Cross-Border Coverage Meets Conflict of Laws

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I. Introduction

Insurance coverage lawyers have long known the reach of insurance coverage across state and international boundaries. In the known universe of covered events, we are not surprised to see a policyholder based out of the province of Alberta, insured by a carrier with an head office in the province of Ontario, and with insured interests based in Louisiana. *Nova Chemicals Corp. v. Ace Ina Insurance* 2004 ABQB 318 (Alta. Q.B. 2004). Interjurisdictional business, even within the same country, where it involves crossing state, provincial, or territorial lines gives rise to a whole set of issues that thoughtful coverage counsel will not take for granted. This paper provides an overview of a few conflict of laws principles used north of the border in the common-law jurisdictions of Canada to illustrate comparatively where U.S. and Canadian coverage counsel might see things differently (or identically from different perspectives).

In Canada, conflict laws are considered national rather than international in character. J.-G Castel and Janet Walker, *Canadian Conflict of Laws*, (Butterworths, 5th ed. 2004 looseleaf) at p. 1-1. The purpose of conflict of laws principles is to (1) avoid legal inconsistencies, (2) enable a court to resolve jurisdictional issues without doubt, and (3) choose the law applicable to the dispute. J.-G Castel, *ibid*., at p. 1-3.

Looking south from our perspective, we see the various American jurisdictions have explored the topic of insurance and conflict laws in depth. The *Restatement (Second) of Conflicts* offers an organized collection of theories on conflicts of laws. The majority of states use the *Second Restatement* as a guide for resolving jurisdictional issues in insurance coverage cases. Without pretending any expertise in U.S. law, we understand the *Second Restatement*'s methodology is flexible and fairly closely aligned with the choice of law principles entrenched in Canadian case law. Our understanding is based on the *Second Restatement*'s analysis, which demands a balancing of various factors and interests.

Based on experience in fielding inquiries from our U.S. colleagues here, we understand there is sometimes a perception that, with the exception of our piece of France called the province of Quebec, the substantive law of Canada is uniform. While similar laws are in place in most of the Canadian common-law provinces and territories, Canada is a federation of provinces and territories, so each is just like a U.S. state constitutionally. Thus, although there are differences in the division of powers between federal and provincial or territorial jurisdictions that may not be the same as in the U.S., provincial laws are made by the legislative branch elected in each province. Judges appointed to the superior and appellate courts apply the laws of the province or territory and although they might take some guidance from the courts of other provinces or territories, they have independent legal jurisdiction. Just as a Massachusetts state court is never bound by the decision of an Illinois state court, so too, a judge of the Ontario Superior Court of Justice will never be bound by a decision of the Alberta Queen's Bench. Although Canadian courts do not have the benefit of a general guide such as your *Second Restatement*, those doing business in Canada can be assured the basic conflict of law principles have been addressed by our Supreme Court of Canada. The decisions from this level of court are binding on all Canadian jurisdictions, thus providing a certain degree of uniformity in our common law.

Judgement enforcement and recognition issues aside, in Canada there are three principal general categories of conflicts issues.

The first category addresses the issue of whether a particular court has jurisdiction *simpliciter*, or "general jurisdiction," to resolve the dispute in question. Jurisdiction *simpliciter* means absolute jurisdiction:

Black's Law Dictionary, 2d Pocket Ed., *s.v.* "simpliciter." In these cases a court is asked to rule on its own jurisdiction before considering the merits of the case.

The second category of conflicts issues, *forum non conveniens*, has been occasionally litigated in the insurance coverage context in Canada. Sometimes a court with jurisdiction *simpliciter* will be asked not to exercise its jurisdiction. In these cases, the court questions whether it *should* take jurisdiction. See *Norex Petroleum Ltd. v. Chubb Insurance Co. of Canada 2008 CarswellAlta 974* (Alta. Q.B., 2008); *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (Ont. C.A.) at paras. 43-44; *Lemmex v. Bernard* (2002), 60 O.R. (3d) 54 (Ont. C.A.) at para. 29; *Jordan v. Schatz*, 2000 BCCA 409 (B.C. C.A., 2000); *Kvaerner U.S. Inc. v. Liberty Mutual Insurance Co.* 30 C.C.L.I. (3d) 115 (Sask. Q.B., 2001) *aff'd* ; *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* 2004 CarswellOnt 1382 (Ont. S.C.J., 2004) at para. 9. The Supreme Court of Canada clarified the relationship between jurisdiction *simpliciter* and *forum non conveniens* in *Unifund Assurance Co. of Canada v. Insurance Corp. of British Columbia* 2003 SCC 40 (S.C.C.) as follows:

> Obviously, jurisdiction *simpliciter* and *forum non conveniens* are related and the factors determining the latter inquiry will overlap with those applicable in the former…The first jurisdictional inquiry consists in establishing whether there exists a sufficient connection between the forum and the action, not whether the said connection is stronger than those existing between the action and other forums. The jurisdiction *simpliciter* inquiry is one based on order, fairness and efficiency in the context of the needs of modern federalism.

Unifund, supra at para 24.

The third category of conflicts issues is choice of law. The divergence of insurance coverage jurisprudence and the prevalence of forum shopping are making choice of law a more frequently litigated issue in the coverage context. The court's task when addressing choice of law issues is to determine the applicable law of the contract. This determination guides the court's contract interpretation. If an insurance contract is connected with more than one system of law, a potential conflict between the laws of these systems may arise. The outcome of a court's applicable law analysis can have a material impact on the outcome of a coverage dispute.

This paper discusses jurisdiction *simpliciter*, choice of jurisdiction and choice of law from a Canadian perspective. However, given the amount of cross-border trade between our countries, Canadian conflicts issues often arise in cases involving U.S. jurisdictions. Likewise, we expect conflicts issues arise from time to time here that involve one or more Canadian jurisdictions.

II. Jurisdiction *Simpliciter*

While not claiming expertise in U.S. jurisdictional law, we understand that U.S. federal district courts have personal jurisdiction over nonresident defendants to the extent authorized under the law of the forum state in which the district court sits. See comments made in *Wausau Underwriters Ins. Co. v. State Auto. Mut. Ins. Co.* Slip Copy, 2007 WL 4232962 (D.N.J. 2007). This will typically require the court to analyze the provisions of a particular state's long-arm statute.

As we understand it, the provisions of long-arm statutes are subject to the constitutional limits of the Due Process Clause of the Fourteenth Amendment in your Constitution. See *Decker v. Circus Circus Hotel,* 49 F. Supp. 2d 743, 745-46 (D.N.J. 1999). The United States Supreme Court has clarified that it is "essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities in the forum state." *Hanson v. Denckla,* 357 U.S. 235, 254, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

The New Jersey long-arm statute, for example, requires the defendant to have sufficient contacts with the forum state. The focus is on the "relationship among the defendant, the forum and the litigation." *Keeton*

v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984) (quoting *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977)). In *Wausau Underwriters*, *supra*, this meant the district court in that state could still have personal jurisdiction over an insurer that did not do business in New Jersey if "(i) its liability policy affords coverage to the insured who is sued in New Jersey in connection with (ii) a forum related event."

The writers defer to Lee R. Russ in consultation with Thomas F. Segalla, 2 *Couch on Insurance* §24:1 (database updated June 2008) and the references therein, for an excellent overview of jurisdiction and venue issues in the U.S. insurance context. Our purpose in mentioning your law here is to set the context for a discussion in this section of our paper on the bases for jurisdiction in Canadian common-law courts.

A Canadian common-law court will take jurisdiction over an out-of-province or foreign defendant on one of three bases: (1) consent-based jurisdiction (includes jurisdiction clauses and attornment), (2) presence-based jurisdiction, and 3) assumed jurisdiction (a real and substantial connection). *Muscutt v. Courcelles*, *supra,* para. 19. We note in passing that each of these also forms the basis for the recognition and enforcement of extra-provincial judgments. However, judgement recognition and enforcement are issue beyond the intended scope of this paper.

A. Consent

If both the policyholder and insurer agree to have their dispute resolved in a particular forum, that forum will have jurisdiction to hear the matter. Consent-based jurisdiction permits a court to take jurisdiction over an extra-provincial defendant who consents, by voluntary submission (usually by filing an appearance or pleaded defence), or by a prior agreement to submit disputes to the jurisdiction of the domestic court. *Muscutt v. Courcelles*, *supra*, at para. 19.

1. Jurisdiction *simplicter* by expressed consent: jurisdiction clauses

The advisory form of CGL policy recommended by the Insurance Bureau of Canada does not contain a jurisdiction clause. However, as there is no direct regulation of such wording in common-law markets, this does not preclude carriers either endorsing them to existing forms or drafting them into company forms. As with other aspects of Canadian legal and social history, the British system of laws including principles of conflict of laws, is influential and therefore worth reviewing.

First, the text writers. A jurisdiction clause reflects at least one party's intent to submit to the exclusive or nonexclusive jurisdiction of a chosen forum. *See* Robert Merkin, *Colinvaux's Law of Insurance* 7 ed., (London: Sweet & Maxwell, 1997) p. 29. According to one British text, "[a] clause by which the parties agree that disputes are to be resolved in the English courts will generally be effected in conferring jurisdiction upon those courts." *See* Legh-Jones, Longmore, Birds, Owen, *MacGillivray on Insurance* 9th Ed., (London: Sweet & Maxwell, 1997) at p. 297.

Next, the British common-law cases. In *MacKender v. Feldia* [1967] 2 QB 590 (CA, England) Lord Denning MR considered the legal effect of the following liability insurance policy clause:

> Notwithstanding that this policy has been effected in London, England, this policy shall be governed exclusively by Belgian law and any disputes arising thereunder shall be exclusively subject to Belgian jurisdiction, it being agreed that all summonses, notices or processes requiring to be served upon the underwriters for the purposes of such jurisdiction shall be deemed to be properly served if addressed to them and delivered to them care of Lloyd's agent at Antwerp.

The underwriter applied to an English court for leave to serve a writ out of the court's jurisdiction against a Swiss policyholder. The court of first instance granted the leave *ex parte* (without notice). This deci-

sion was affirmed on appeal after service was effected. However, the Swiss policyholder appealed further to the House of Lords. The underwriter maintained the dispute concerning the policy should be tried in England notwithstanding the jurisdiction clause. The policy by its wording was *exclusively subject to Belgian jurisdiction*. In response, the policyholder argued that the policy's exclusive foreign jurisdiction clause should be respected and that the English court could not have jurisdiction *simpliciter*.

Lord Denning acknowledged that the English rules of court permitted service out of jurisdiction whenever a contract is "made within the jurisdiction." However, this in no way usurped the jurisdiction *simpliciter* of the Belgian courts, which was conferred by way of the clause. Lord Denning concluded the jurisdiction clause was a "strong ground why discretion should be exercised against leave to serve out of the jurisdiction."

Although the law of jurisdiction has come a long way since 1967, Lord Denning's reasoning is still applicable in the modern Canadian case law. A properly worded exclusive jurisdiction clause should have the effect of placing an onus on the party seeking to avoid it to persuade the court why the clause should not be given effect. Canadian case law suggests an exclusive jurisdiction clause will be enforced unless the balance of convenience heavily favours disregarding it. *National Bank of Canada v. Halifax Insurance Co.* 1996 CarswellNB 47 (N.B. Q.B., T.D., 1996).

Canadian courts typically endorse and enforce such clauses since they create a sense of certainty and security in commercial transactions. See *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 (S.C.C.) at paras. 19-20. See also*Crown Resources Corp. S.A. v. National Iranian Oil Co.* (2006), 273 D.L.R. (4th) 65 (Ont. C.A.) ; *V. Kelner Pilatus Center Inc. v. Charest* (2007), [2007] O.J. No. 2206 (Ont. S.C.J.) at para. 29; *Union des consommateurs c. Dell Computer Corp.*, 2007 SCC 34 (S.C.C.) and *Kanitz v. Rogers Cable Inc.* (2002), [2002] O.J. No. 665 (Ont. S.C.J.).

Drafters and counsel who seek to enforce their efforts must understand the difference between exclusive jurisdiction and nonexclusive jurisdiction. English case law suggests an ambiguous jurisdiction clause, which may not be clear on exclusivity will nonetheless commonly be construed as conferring exclusive jurisdiction on the named courts. *Sohio v. Gatoil* [1989] 1 Lloyd's Rep. 588, *1P Metal v. Ruote OZ* [1993] 2 Lloyd's Rep. 368; *British Aerospace v. Dee Howard* [1994] 1 Lloyd's Rep. 368. However, this may not always be the case in the liability insurance context in Canada. The rule of *contra proferentum* is very much alive and well in Canada. Under this rule, the party drafting the insurance policy carries the burden of any ambiguity created by the wording. *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252 at 269. Therefore, whether an ambiguous jurisdiction clause confers exclusive or nonexclusive jurisdiction will likely be decided in the policyholder's favour in most instances where the insurer either drafts or is deemed to accept the wording as its own.

Some drafters may avoid an exclusive jurisdiction clause because they may prefer the flexibility of being able to forum shop. While it is true that a jurisdiction clause places a heavy burden on the party seeking to oppose it, there are various safeguards that override these clauses in certain circumstances. See *Ash et al. v. Corp. of Lloyds et al.*, (1991) 6 O.R. (3d) 235 (Ont. Gen. Div.), McKeown J. at para. 30 aff'd, (1992) 9 O.R. (3d) 755 (C.A.) *per* Carthy J. A.

In common-law Canada, there are three traditional safeguards that can help a policyholder or insurer override the effect of a properly drafted exclusive jurisdiction clause. These safeguards are: (1) satisfaction of the "strong cause" test, (2) public policy, and (3) avoiding the policy.

a. The "strong cause" test

In Canadian common law, the first way to override a jurisdiction clause is by satisfying the "strong cause" test. The burden for showing a "strong cause" rests with the party seeking to avoid the clause. The thresh-

old is beyond a mere "balance of convenience. *Rudder v. Microsoft Corp.* (1999) 40 CPC (4th) 394 (Ont. S.C.J.). Bastarache J. writing for the majority of the Supreme Court of Canada in *ZI Pompey Industrie v. ECU-Line NV* 2003 SCC 27 (S.C.C., 2003), described the nature of this test at paragraph 27:

> The "strong cause" test reflects the desirability that parties honour their contractual commitments and is consistent with the principles of order and fairness at the heart of private international law, as well as those of certainty and security of transaction at the hear of international commercial transactions. I see no reason to depart from the traditional approach for a stay of proceedings when the applicability of a forum selection clause is at issue. The Court of Appeal in effect read the choice of jurisdiction clause out of the contract. This approach is, in my opinion untenable.

Although the *ZI Pompey* decision did not involve an insurance contract, the court's reasoning likely applies in the liability insurance context. See for example *Commonwealth Insurance v. American Home Assurance Co*. 2008 CarswellMan. (Man. QB). In *ZI Pompey*, the plaintiff argued there was a "strong cause" to override a jurisdiction clause in a bill of lading. The plaintiff argued the bill in question was a contract of adhesion, which by its nature was unilaterally devised by the defendant. Bastarache J. rejected the plaintiff's submission mentioning that a bill of lading is often entered into by sophisticated parties. There was no evidence of the bill of lading being the result of "grossly uneven bargaining power that would invalidate the forum selection clause" *Ibid.*, at para. 29.

Two areas of Bastarache J.'s reasoning are relevant in the context of liability insurance policies. First, a jurisdiction clause will not be invalid simply because it was part of a contract of adhesion. Since most liability insurance policies are contracts of adhesion, liability insurers have an assurance that, in Canada, the jurisdiction clauses they incorporate into their policies will not automatically be dismissed. Second, Bastarache J. suggests that grossly uneven bargaining power can override a jurisdiction clause. Thus, parties standing to benefit from the "strong cause" test are those people and small businesses who can prove they are grossly overpowered by a more dominant insurer. The Ontario Court of Appeal, for example, ruled an exclusive jurisdiction clause invalid where it was not the product of a negotiation between the parties. *Straus v. Decaire 2007 CarswellOnt 7889 (Ont. C.A., 2007).*

b. Public policy

The second way to override an insurance policy's exclusive jurisdiction clause is to persuade the court that honouring the clause would be contrary to public policy in the *lex fori*. In *Society of Lloyd's v. Saunders*, 148 O.A.C. 362, (Ont. C.A., 2001) the respondent insurance underwriters each deposited a percentage of premium income with applicant insurance company. According to Feldman J.A.:

> Had this court been of the view that compliance with the *Securities Act* was so basic to the public policy of Ontario that a judgment which did not give effect to the Act could never be registered and enforced, no matter what the circumstances, then it would have treated that as a factor which, in effect, trumped all other factors, *including the exclusive jurisdiction clause* and the connections to England, and it would not have stayed the action.

Society of Lloyd's v. Saunders (2001), 148 O.A.C. 362 (C.A.,) para. 78 [emphasis added].

c. Avoiding the policy

The third way to override a jurisdiction clause in an insurance policy is by attacking the validity of the entire policy. However, the party must establish the insurance policy was void *ab initio* (from the beginning). A jurisdiction clause in a voidable contract is still valid. As Lord Denning held in *MacKender*:

> I can well see that if the issue was whether there ever had been any contract at all, as, for instance, if there was a plea of non est factum, then the foreign jurisdiction clause might not apply at all. But here there was a contract, and when it was made, it contained the foreign jurisdiction clause. Even if there was non-disclosure, nevertheless non-disclosure does not automatically avoid the contract. It only makes it voidable. It gives the insurers a right to elect. They can either avoid the contract or affirm it. If they avoid it, it is avoided in this sense, that the insurers are no longer bound by it. They can repudiate the contract and refuse to pay on it. But things already done are not undone. The contract is not avoided from the beginning but only from the moment of avoidance. In particular, the foreign jurisdiction clause is not abrogated. A dispute as to non-disclosure is "a dispute arising under" the policy and remains within the clause: just as does a dispute as to whether one side or other was entitled to repudiate the contract: see *Heyman v. Darwins Ltd*. [1942] A.C. 356 (HL, 1942).

MacKender v. Feldia [1967] 2 QB 590 (CA, England) at p. 598.

Lord Denning's reasoning was affirmed in *Ash, supra*. The Ontario Court of Appeal relied on *MacKender*. An allegation of fraud, if proven, would merely render the contract voidable at the election of the defrauded party, not void *ab initio*. The court held that the jurisdiction clause was valid.

Turning briefly to Europe, the EU has developed a comprehensive regime governing the validity of jurisdiction clauses in insurance contracts. This has been achieved through the Brussels Convention on Jurisdiction and the Enforcement of Judgment in Civil and Commercial Matters 1968 ("the Brussels Convention"). Section 3 of the Brussels Convention addresses matters relating to insurance. Under Articles 12 and 12A, an agreement conferring jurisdiction in an insurance contract (exclusive or permissive) is valid only where it is:

1) entered into only after the dispute has arisen;
2) concluded between an assured and an insurer who are domiciled in the same Contracting State, and operates to confer jurisdiction upon the courts of that State;
3) entered into with an assured who is not domiciled in a Contracting State; and,
4) in relation to a contract of an insurance in so far as it covers various transport risks.

Contracting State means a state that is a party to the Brussels Convention.

Brussels Convention, *supra*, at Articles 12 and 12A.

The Brussels Convention is drafted to make it impossible for an overzealous policyholder to oust the jurisdiction of the policyholder's home court. More interesting is that the Brussels Convention's requirement that a jurisdiction clause must come into existence *after* the dispute arises. It is unlikely this would ever form a part of North American common law as this defeats the entire purpose of jurisdiction clauses in a insurance policy from our perspective. Insurers usually want to minimize the risk by knowing which court will have jurisdiction *simpliciter* well *before* a dispute arises.

2. Jurisdiction *simplicter* by implicit consent: attornment

United States and other foreign insurers and their policyholders should be alert to the possibility that their conduct directly or through counsel in a Canadian lawsuit may amount to consent. This may result in a particular court having jurisdiction it would not otherwise have. See *Jordan v. Schatz*, *supra*, at para. 16. In Canada, even if a defendant has not expressly agreed to submit to the jurisdiction of the court, a Canadian court may take jurisdiction if the defendant submits a defence pleading on the merits of the claim (also known as jurisdiction by attornment). In *Gourmet Resources International Inc. (Trustee of) v. Paramount Capital Corp.* (1991), 5 C.P.C. (3d) 140 (Ont. Gen. Div.) aff'd (1993), 14 O.R. (3d) 319, (C.A.), Justice Gotlib stated:

> As I see the established case law, it is not sufficient for the defendant to argue both jurisdiction and the merits and if it loses on the merits to withdraw from the case. The arguing of any of the merits of the case in my view has been fatal to the defendant herein and accordingly summary judgment will be issued to the applicant/plaintiff…

The question of attornment is fact-driven. A defendant to a suit in Canada could unintentionally attorn to the court's jurisdiction. *First National Bank of Houston v. Houston E&C Inc.*, [1990] 5 W.W.R. 719 (B.C. C.A.). In one decision, the court held that a defendant attorned to the jurisdiction of the court where it sent a letter to the plaintiff, informing the plaintiff it would defend the case. See: *Roglass Consultants Inc. v. Kennedy, Lock and Kennedy,* [1984] B.C.J. No. 2763 (B.C. C.A., 1984). In *Stoymenoff v. Airtours PLC* (2001), 17 C.P.C. (5th) 387 (Ont. S.C.J.), the court found that "[b]y delivering a Statement of Defence the defendant attorns Search Term End to the jurisdiction of the court in which the Statement of Claim is issued." In this respect, some courts may be perceived as unduly harsh. In *Norex*, *supra*, for example, the Alberta Court of Queen's Bench held that "neither error nor lack of intention is relevant to the question."

However, in the liability insurance context courts prefer substance over form. A policyholder cannot attorn to the jurisdiction of a court unless there was intention to attorn. See *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC*, *supra*, (defendant policyholder intending to contest jurisdiction not bound by pleading filed by insurer-appointed defence counsel and action stayed when intent demonstrated).

B. Presence-Based Jurisdiction

Presence-based jurisdiction is usually not contentious. In Canada, a policyholder may always sue an insurer "as of right" when the insurer is properly served within its own jurisdiction or where it is resident. *United Oilseed Products Ltd. v. Royal Bank* (1988), 60 Alta. L.R. (2d) 73, (C.A.). The jurisdiction need not be the insurer's home forum. An insurer simply has to be "carrying on business" to be present in the jurisdiction. The usual factors proving an entity is carrying on business include: a physical presence, the employment of salesmen, agents or other representatives, commercial relationships with residents, or the presence of advertising services. *Acura Data Systems Inc. v. Compulogic Management Information Systems 1999 SKQB 244* (Sask. Q.B.).

In England, a court has presence-based jurisdiction over any defendant that is present in England at the time the writ is served. The defendant's physical presence need not be permanent. A temporary physical presence will suffice. Robert Merkin, *supra*, at p. 29.

C. Assumed-Based Jurisdiction: A Real and Substantial Connection

A Canadian court will conduct an assumed-based jurisdiction analysis when there is a jurisdiction issue and either (1) the policyholder and the insurer have not consented to the jurisdiction, or (2) the defendant (usually the insurer in a coverage dispute) has no presence in the jurisdiction where the lawsuit was filed. *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 223 D.L.R. (4th) 627 (Ont. C.A.). The nature of assumed-based jurisdiction was described succinctly by Justice Macdonald in *Hirsi v. Swift Transportation Co.* 2004 CarswellOnt 2140 (S.C.J.):

> Before a court may assume jurisdiction over an action involving foreign defendants who have not attorned to the jurisdiction, it must be satisfied that there is a real and substantial connection between the facts giving rise to the action and the forum in which the action is brought. The "real and substantial" connection test ensures that a court, considering the issue of jurisdiction, is guided by principles of order and fairness. It prevents the court from unduly entering into matters in which the jurisdiction in which it is located has little interest.

In *Morguard Investments Ltd. v. De Savoye Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077 (S.C.C.), the Supreme Court of Canada concluded the proper exercise of jurisdiction depends on principles of order and fairness. With this in mind, a Canadian court will exercise assumed-based jurisdiction only if the court is satisfied there is a "real and substantial connection" between the *cause of action* and the *forum court*. See *Beals v. Saldanha*, 2003 SCC 72 (S.C.C.) para. 32. Whether there is a real and substantial connection requires an eight factor analysis, commonly referred to as the *Muscutt* criteria:

(a) the connection between the forum and the plaintiff's claim;

(b) the connection between the forum and the defendant;

(c) unfairness to the defendant in assuming jurisdiction;

(d) unfairness to the plaintiff in not assuming jurisdiction;

(e) the involvement of the other parties in 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; and

(h) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

Muscutt, supra.

These criteria were applied in *Majestic Empire Inc. v. Federation Insurance Co. of Canada*, [2004] I.L.R. I-4292 (Ont. S.C.J.). In that case, the policyholder was a federally incorporated company with its head office in the province of Ontario. The policyholder had brought an action in Ontario against its Quebec insurers for failing to honour a claim following a fire at the policyholder's premises in Quebec. The insurers were unaware of policyholder's Ontario domicile until after the fire, because the policyholder's Quebec address appeared on the insurance policy. The insurers knew the policyholder owned and operated the insured premises located in Quebec. The insurers moved to stay the Ontario action on the basis that Ontario did not have jurisdiction *simpliciter*. The insurers argued they did not know they were dealing with an out-of-province policyholder and did not intend to expose themselves to risk of litigation in Ontario.

The Court rejected the insurers' jurisdiction *simpliciter* argument. The Court concluded the dispute had a real and substantial connection to Ontario since:

1) the policyholder was a resident of the province of Ontario;

2) some of the policyholder's damages *arguably* arose in Ontario; and

3) the policyholder desired a jury trial, which was unavailable in the province of Quebec.

For another insurance coverage decision applying the *Muscutt* criteria see the *Norex,* case discussed below.

III. Choice of Jurisdiction: *Forum non Conveniens*

After a Canadian court has decided it has jurisdiction to resolve an insurance coverage dispute, the next task is to determine whether it *should* take jurisdiction. Courts understand that coverage litigation becomes costly when subject to the risk of forum shopping. See *Lloyd's Underwriters v. Cominco Ltd.* 2007 BCCA 249 (inappropriate "forum shopping"). Every Canadian province and territory (with the exception of Quebec) and, to the writers' knowledge, most U.S. jurisdictions, use the doctrine of *forum non conveniens* to answer this question. The doctrine has been characterized in English law as a self-denying ordinance allowing

a court to stay proceedings in favour of another clearly more appropriate (not convenient) forum. *Airbus Industrie GIE v. Patel* [1998] 2 WLR 686 (HL)).

Section 84 of the *Second Restatement* addresses *forum non-conveniens*. The two most important factors, according to the *Second Restatement*, are: (1) since the plaintiff chooses the place of suit, his choice of a forum should not be disturbed except for weighty reasons, and (2) the action will not be dismissed unless a suitable alternative forum is available to the plaintiff. The most cited decision we have seen in the U.S. concerning *forum non-conveniens* is *Piper Aircraft Co. v. Reyno*, 102 S. Ct. 252 (1981). In the U.S. the *forum non-conveniens* doctrine is holistic and considers a wide ranges of factors. The approach is similar in common-law jurisdictions of Canada.

The doctrine's contemporary interpretation in Canada derives from *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (S.C.C.). The relevant factors from a Canadian common-law court's perspective, when conducting a *forum non conveniens* analysis, while not exhaustive, include:

1) the location of the majority of the parties;
2) where each party carries on business;
3) where the cause of action arose;
4) where the loss or damage occurred;
5) any juridical advantage for the plaintiff in this jurisdiction;
6) any juridical disadvantage for the defendant in this jurisdiction;
7) convenience or inconvenience to potential witnesses;
8) the cost of conducting the litigation in this jurisdiction;
9) applicable substantive law; and
10) difficulty in proving foreign law, if necessary.

See *Norex Petroleum Ltd., supra*, at para. 91.

Several of these factors overlap with the "real and substantial connection" factors in the *Muscutt* criteria. See *Unifund Assurance Co. of Canada v. Insurance Corp. of British Columbia* 2003 SCC 40 (S.C.C.). However, these two tests serve distinct purposes. In Canadian common law, the *forum non conveniens* test moderates an inappropriate exercise of a court's jurisdiction. According to Castel, these factors are not meant to be exhaustive. Every case must be decided on the basis of the circumstances before the court. See *Norex Petroleum Ltd. v. Chubb Insurance Co. of Canada,* 2008 CarswellAlta 974 (Q.B.) citing J.-G. Castel & J. Walker, *Canadian Conflict of Laws*, 6th ed. Looseleaf (Markham, Ontario: Butterworths, 2005) (updated to May 2007—Release 8) at s. 13.5.

In *Maddaloni v. ING Groupe Commerce*, 2003 CarswellOnt 5026 (S.C.J) aff'd 2004 CarswellOnt. 4518 (C.A.), the defendant insurer sought a stay of proceedings based on the province of Ontario being an inappropriate forum. The policyholder's action in Ontario was based on a breach of the insurance contract. While conducting a *forum non conveniens* analysis, Rouleau J. found that (1) the location of the contract was Québec; (2) the law of Québec governed the contract; (2) the majority of witnesses would come from Québec; (3) a larger number of "key witnesses" would come from the Montreal, Québec, area; (4) with the exception of the business records, virtually all of the evidence would come from the province of Québec; (5) the factual matters of the claim arose in Québec; and (6) the plaintiff was a resident of Ontario and the defendant had its head office in Ontario. The Court concluded when looked at objectively the claim was "almost totally within the province of Québec."

Unfortunately, most *forum non conveniens* disputes concerning liability insurance policies are not as clear cut as the *Maddaloni* decision. In *Zurich Insurance Co. v. Muscletech Research & Development Inc.* 2004 CarswellOnt 2626 (Ont. S.C.J., 2004) the defendant policyholder moved to stay an action brought by the plaintiff insurer. Both the policyholder and insurer were based in Ontario. The insurer's Ontario action was to determine its obligations under ten Ontario-based insurance contracts. The defendant policyholder argued California was the more appropriate forum to hear the dispute. The policyholder argued issues involved events that occurred in the U.S. required American witnesses and documentation, that the portion of its business operations relevant to the dispute was in the U.S. and had no connection to Ontario. The insurer argued the core of the Ontario action was simply the interpretation of an Ontaria-based liability insurance policy. California had very little to do with the interpretation of the contract. Justice Pitt found this argument persuasive. He therefore held that Ontario was an appropriate forum to resolve the interpretation issues.

In *Association of Architects (Ontario) v. Deskin* (2000), 19 C.C.L.I. (3d) 275 (Ont. S.C.J.), a fire broke out in an underground parking area of a facility in Québec designed by an Ontario-based architect. The respondent brought 13 separate actions against the architect in Québec arising from fire. The Ontario-based architect was a member of an indemnity plan issued by the applicant association, which also had offices in Ontario. While the Québec actions were pending, the association brought an application in Ontario to determine its duty to indemnify architect. The architect countered with a motion requesting the court stay the association's application because there were proceedings pending in Quebec. The architect's application was dismissed. According to Epstein J., the question of the more appropriate jurisdiction had to be assessed in terms of the narrower dispute of the association's duty to indemnify.

Epstein J. found that (1) the contract in dispute was signed in Ontario; (2) it was unlikely that witnesses would be called for the purposes of resolving the proceeding in Ontario; (3) the facts were, essentially not in dispute and the matter would proceed by way of affidavit evidence; (4) the association and the policyholder had their place of business or resided in Ontario; (5) the moving parties were situated in Quebec; and (6) the proper law of the contract was most likely the law of Ontario. Epstein J. came to "the inescapable conclusion" that Ontario had the strongest connection to the issue in the application.

Epstein J. acknowledged the decision had the effect of separating out one of the many issues that were before the Quebec court for determination. Justice Epstein conceded that severing the issues in dispute should not typically be encouraged. However, the judge found cases involving liability insurance are unique since it is easy to separate the interpretation issues from other issues with factual underpinnings. *Deskin* , *supra*, at para. 32.

The issue in *Commonwealth Insurance Co. v. Canadian Imperial Bank of Commerce* 21 C.C.L.I. (4th) 226 (Ont. C.A.) was whether New York or Ontario was the more appropriate forum to resolve a coverage dispute under a property policy covering property damaged during the terrorist attacks of September 11, 2001, in New York. The court noted that the policy was signed in the province of Ontario. However the court was also quick to note that, while this may be relevant for the purposes of determining the proper law of contract, it was not of any significance for determining the proper forum for the dispute. The court then proceeded to balance several factors.

In terms of the governing law of the contract, the court found that Ontario law applied. While noting this factor was not determinative, the court said that it was an important consideration. In terms of the location of the majority of witnesses, the court found this factor weighed in favour of New York. However this conclusion was tempered by the presence of key witnesses being located in Ontario.

The court found that in terms of document location there were key documents in both New York and Ontario. While the coverage documentation was in New York, the documentation for the two other issues in dispute between the parties was located in Ontario. Considering the "jurisdiction in which the factual matters

arose" factor, the court concluded both parties could point to events that occurred in their preferred jurisdiction. The court found that factor to be neutral. The court also found "the location of the parties" factor to be neutral.

One of the most interesting parts of the decision from a comparative U.S.-Canadian law standpoint is the court's juridical advantage discussion. The plaintiff's juridical advantage, Commonwealth argued, heavily favoured the insurer because (1) the action concerned complex matters of law and technical interpretation of insurance coverage not suitable for a trial by jury; and (2) if the case proceeded in New York both parties would have to call expert witnesses on Ontario law to testify before the New York court because Ontario law governed the contract. CIBC argued its loss of juridical advantage related to its ability to compel the attendance of certain witnesses it regarded as necessary to prove its claims on the coverage issues.

The court concluded, based on the affidavit information before it, that Commonwealth had not established, on a balance of probabilities, that the New York action would proceed before a civil jury. There was also no evidence before the court that New York law was different from Ontario law. The court concluded the juridical advantage factor was neutral.

The court looked at the avoidance of multiplicity of proceedings factor, finding it was also neutral. The court considered the order of commencement of proceedings. Commonwealth argued that, because the Ontario action was commenced first, it was the action that should proceed. CIBC argued this factor should not be of great weight as it would otherwise override all other factors. The court held that because the respective proceedings in both jurisdictions were commenced shortly after one another the "commencement proceedings" factor was neutral.

The court concluded that Ontario was the more appropriate forum. Of the nine factors its considered, five were neutral. The remaining four factors (the governing law of the policy, the location of the majority of witnesses, the location of the bulk of the evidence and, to a lesser extent, the location where the policy was signed) were carefully balanced. The court concluded given the governing law of the policy and the fact that certain documents for two of the three issues in dispute were not in New York, those facts outweighed the significance of the location of the witnesses and the documentation relevant for the coverage issues.

In *Whirlpool Canada Co. v. National Union Fire Insurance Co. of Pittsburgh, PA* (2005), 198 Man. R. (2d) 18, 2005 MBQB 205 (Q.B.) the Court suggested the determinative factor in the *forum conveniens* analysis is what law is applicable in interpreting the insurance policy. Since the application would proceed on the basis of affidavit evidence, the location of the parties and witnesses, according to the court was not relevant. However, although New York or Michigan law was more appropriate for the determination of the issues, the court still held that Manitoba was the *forum conveniens*. The insurer had not met the onus of showing why a forum other than Manitoba was "clearly" more appropriate. However, according to the court, where there is no one forum that is most or more appropriate, the domestic forum wins by default.

The *Whirlpool* decision was followed in *Commonwealth Insurance Co. v American Home Assurance Co.*, *supra*. The facts of this case are discussed in the choice of law section of this paper in greater detail. In short, an explosion occurred at a chemical plant in North Carolina. The company allegedly responsible for the explosion was based in the province of Manitoba and had excess insurance with a U.K. company fronted through a policy issued by American Home Assurance Co. The excess policy contained a jurisdiction clause requiring coverage disputes to be resolved in England. The court's *forum non conveniens* analysis was essentially restricted to the applicable substantive law and juridical advantage. The court found that the applicable substantive law was Manitoba law. The court therefore held Manitoba was the most appropriate forum to litigate the coverage dispute.

The *Whirlpool* decision was cited by the policyholder in *Norex*, *supra*, as authority for the proposition that the applicable substantive law was the determinative factor in a *forum non-conveniens* analysis in the context of an insurance coverage application. The Alberta court confirmed however that the applicable law factor is not necessarily determinative. It is only one of several factors that should be considered.

In *Norex* the court had to determine whether the appropriate forum for litigation ought to be the Canadian province of Alberta or Russia. Russian law certainly applied to one of the policies in question. However, after reviewing ten factors the court ultimately held that Alberta was the appropriate forum for the dispute to be resolved. While several of the factors were neutral, the factor of "fundamental importance" was the plaintiff's juridical advantage weighed in favour of Manitoba. According to the court, "it is of fundamental importance that litigants be assured that their dispute will be adjudicated in an honest, fair and unbiased tribunal. No litigant should have to run the risk that the court hearing the dispute might be corrupt." The court did not believe it would have a problem applying Russian law.

In the writers' opinion, the Canadian case law suggests that if a court concludes the law of its own jurisdiction governs the interpretation of an insurance policy, then it will generally exercise its jurisdiction. Notwithstanding the holistic factor approach endorsed in most of the case law in the insurance coverage context, if a court arrives at the conclusion that the applicable law is that of a foreign common-law jurisdiction, the court will more readily defer to that jurisdiction. However, cases such as *Norex* suggest there are circumstances when other factors, such as the plaintiff's juridical advantage, will trump the applicable law factor.

IV. Choice of Law: The Policy's "Proper" Law

The English courts consider a contract's "proper," "governing," or "applicable" law is "the law which governs the contract and the parties' obligations under it; the law which determines (normally) validity and legality, its construction and effect, and the conditions of its discharge." *Amin Rasheed Shipping Corp. v. Kuwait Ins Co* [1984] AC 50, p 69 *per* Lord Wilberforce.

In the U.S., the determination of which law applies to an insurance contract appears to differ from state to state. According to *Couch on Insurance*, with increasing legislative intervention, often "the question is addressed by statute, and even when no statute decides the issue, the law that will be chosen often depends on the type of insurance at issue, whether the parties have specified which state's law they desire to have govern, and which right or obligation is at issue." *Couch on Insurance on CD-ROM (Couch)*, §24:1 (Clark Boardman Callaghan: Jan. 2004).

Broadly speaking, the writers understand American states either follow a variation of the traditional doctrine of *lex loci contractus* (the place where the contract was made), a variation of the *Second Restatement*'s "significant relationship" approach, or a completely unique approach. The *First Restatement on Conflict of Laws* endorsed the law of the *lex loci contractus*. This approach is still applied in several U.S. jurisdictions. See for example *Seabulk Offshore, Ltd. v. American Home Assur. Co.,* 377 F.3d 408 (Va. 2004); *Colonial Life & Accident Ins. Co. v. Hartford Fire Ins. Co.,* 358 F.3d 1306 (Ala. 2004); *American Family Life Assur. Co. of Columbus, Ga. v. U.S. Fire Co.*, 885 F.2d 826 (Ga. 1989); *Bohannan v. Allstate Ins. Co.*, 820 P.2d 787 (Okla. 1991); *Vantage Tech., LLC v. Cross,* 17 S.W.3d 637 (Tenn. Ct. App.1999). However, some jurisdictions adopting this approach have developed exceptions to this rule. For example, we understand in Kansas, a court will not apply the law of the *lex loci contractus* if application of that law would be contrary to Kansas's public policy. See *Mirville v. Mirville*, 10 Fed. App. 640 (Kan. 2001).

We understand many states have abandoned the *lex loci contractus* rule and have adopted the *Second Restatement*. *See* Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed*

Blessing, 56 Md. L. Rev. 1248 (1997). There is also academic debate in some jurisdictions about the utility of the "significant contacts" approach. Some argue this approach derives from the *Second Restatement*. Others argue the approach is distinct. *See* Harvey Couch, *Is Significant Contacts a Choice-of Law Methodology?,* 56 Ark. L. Rev. 745 (2004) (concluding of the five states purporting to use the "significant contacts" methodology, only Indiana and Arkansas have truly preserved the approach in light of the *Second Restatement*).

The *Second Restatement* follows the principle of *depecage*. This principle requires a separate choice-of-law analysis for each issue in a case. See *Act I, LLC v. Davis*, 60 P.3d 145 (2002). Under the *Second Restatement*, the laws of the state with the "most significant relationship" should apply. If a contract does not contain a choice-of-law provision, the court must turn to the applicable presumptive references. The presumptive reference for insurance contracts is set out in section 193. See *Restatement (Second) of Conflict of Laws* §193 (1971), cmt. A (stating that s. 193 applies to various kinds of casualty insurance including liability insurance). Section 193 of the *Second Restatement* provides:

The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in §6 to the transaction and the parties, in which event the local law of the other state will be applied.

Section 6 of the *Second Restatement* provides:

a) the needs of the interstate and international systems;

b) the relevant policies of the forum;

c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;

d) the protection of justified expectations;

e) the basic policies underlying the particular field of law;

f) certainty, predictability and uniformity of result; and

g) ease in the determination and application of the law to be applied.

Several jurisdictions in the U.S. endorse the approach in the *Second Restatement* or a factor balancing approach that is similar to the *Second Restatement*. See, *e.g.*, *Palmer G. Lewis Co. v. Arco Chem. Co.,* 904 P.2d 1221 (Alaska 1995); *Smith v. Hughes Aircraft Co. Corp.,* 783 F. Supp. 1222 (D. Ariz. 1991), *aff'd in part, rev'd in part by* 10 F.3d 1448 (9th Cir. Ariz.1993) *opinion amended and superseded on denial of reh'g by* 22 F.3d 1432 (9th Cir. Ariz.); *Ducharme v. Ducharme*, 872 S.W.2d 392 (Ark.1994); *Colonial Gas Energy Sys. v. Unigard Mut. Ins. Co.*, 441 F. Supp. 765 (N.D. Cal.1977); *TPLC, Inc. v. United Nat'l Ins. Co.*, 44 F.3d 1484 (Colo.1995); *Interface Flooring Sys., Inc. v. Aetna Cas. & Sur. Co.,* 804 A.2d 201 (Conn. 2002); *Certain Underwriters at Lloyd's, London v. Burlington N. R.R. Co.*, 653 A.2d 304, 304 (Del. Sup. 1994); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Binker,* 665 F. Supp. 35, D.D.C.1987). For an excellent review of U.S. choice of law issues in the insurance context see Symeon C. Symeonides, *Choice of Law in the American Courts in 2007: Twenty-First Annual Survey*, 56 Am. J. Comp. L. 243 (Spring 2008).

Having briefly review the choice of law in the U.S., the remainder of this section focuses on Canadian law exploring (1) the effect choice of law insurance legislation has on liability insurance policies; (2) the effectiveness of a choice of law provision in a liability insurance policy; and (3) in the absence of a choice of law provision, how to determine the intentions of the insurer and policyholder for finding the law that governs the policy.

A. The Effect of Insurance Legislation

In Canada, insurance contracts are regulated by the provincial governments. Despite the fact that liability insurance relationships are inter-provincial in nature, the legislation respecting insurers and their policyholders, exclusive of marine policies, is largely provincial. Brown and Menezes, *Insurance Law in Canada*, 2007 Release 3 at p. 1.21.

Most of the provincial and territorial insurance acts contain a clause addressing choice of law that appears to import the doctrine of the *lex loci contractus*. In Ontario, for example, the Insurance Act provides as follows:

> 122. Except where otherwise provided and where not inconsistent with other provisions of this Act, this Part applies to every contract of insurance made in Ontario, other than contracts of,
>
> (a) accident and sickness insurance;
>
> (b) life insurance; and
>
> (c) marine insurance. R.S.O. 1990, c. I.8, s. 122; 2002, c. 18, Sched. H, s. 4 (16).
>
> Contracts deemed made in Ontario
>
> 123. Where the subject-matter of a contract of insurance is property in Ontario or an insurable interest of a person resident in Ontario, the contract of insurance, if signed, countersigned, issued or delivered in Ontario or committed to the post office or to any carrier, messenger or agent to be delivered or handed over to the insured or the insured's assign or agent in Ontario shall be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all money payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insurer in lawful money of Canada. R.S.O. 1990, c. I.8, s. 123.

The foregoing sections do not specifically refer to liability insurance. However, the sections are is supposed to be general in application. See Gordon Hilliker, *Liability Insurance Law in Canada*, 4th, (Toronto: Butterworths, 2006). p. 16. According to Hilliker, it is unlikely that this provision applies to liability insurance since the subject matter of liability is not "property in a province." Gordon Hilliker, *ibid*, at p. 16. However, in *Jones v. Kansa General Insurance Co.,* 1992 CarswellOnt. 664 (Ont. C.A.), the Ontario Court of Appeal simply cited section 123 of the Insurance Act, with little analysis, as the basis for concluding an insurance contract issued to an American policyholder was "made in Ontario."

Brown and Menezes have also commented on the limited scope this choice of law provision. Brown and Menezes, *Insurance Law in Canada*, *supra*, vol. 1 p. 1-24. These authors refer to the Ontario High Court's decision in *Burson v. German Union Insurance Co.* (1905), 10 O.L.R. 238 (Ont. H.C.) where it was held that the provision would not apply if a policy was prepared, issued and mailed from outside of Ontario. The scope of this provision is therefore limited in its application.

Surprisingly, these insurance statute provisions are rarely incorporated into a court's choice of law analysis in Canadian insurance coverage decisions. That is not to say the effect of these provisions should be ignored or overlooked. For example, in *Canadian Imperial Bank of Commerce*, *supra*, the Ontario court applied both the common-law choice of law test and section 123 of the Insurance Act in its reasons. In regards to its statutory analysis, the court said:

> 67. The Policy satisfies the requirements under section 122 of the *Insurance Act* for a "contract of insurance made in Ontario." The Policy was prepared in Ontario by CIBC's broker at its head office in Toronto and was delivered by the broker to CIBC at its head office, which is also located in Toronto. In addition, all of the insurers who were parties to the Policy, subscribed to the Policy

> at their offices in Toronto, other than Commonwealth which subscribed at its head office in Vancouver. In addition, the requirements under section 123 of the *Insurance Act* to evidence a contract made in Ontario have also been demonstrated. The subject matter of the Policy extends to the insurable interest of CIBC in the New York Property. CIBC is resident in Ontario and the Policy was issued and delivered in Ontario. I agree with the respondent that the present circumstances are indistinguishable from the facts in *Laidlaw Inc., Re*.

Coverage counsel should carefully consider the possibility that provincial insurance legislation might influence the outcome of a choice of law analysis. A choice of law clause can also be declared invalid where the insurance policy does not conform to local legislation. See *Commonwealth Insurance Co. v American Home Assurance Co.*, *supra*. citing to s. 22 of the province of Manitoba Insurance Act.

B. Choice of Law Provisions in Liability Insurance Contracts

If there is an express choice of law clause in contract of insurance it will most often be respected by common-law courts. See *R v. International Trustee* [1937] AC 500 at p. 529, *per* Lord Atkin, approved in *Amin Rasheed Shipping Corp.*, *supra*, at p. 61 *per* Lord Diplock; *Second Restatement*, *supra*, section 186. According to U.K. insurance author Malcolm Clarke, the reason why English judges rarely challenge choice of law clauses that are incorporated into insurance policies is because the judges are "content with the commercial certainty that express choice usually provides." Malcolm Clarke, *The Law of Insurance Contracts*, (London: Lloyd's of London Press Ltd., 1989) at p. 14.

When an insurer and policyholder have expressly selected the law that will govern the contract provided the choice is bona fide and legal, and there is no reason for avoiding the choice on the ground of public policy. *Vita Food Products Inc v. Unus Shipping Co.*, *supra* at note 66. J.-G Castel and Janet Walker, *supra* at note 2, cite about 50 cases for this principle including *Vita Food Products Inc v. Unus Shipping Co* [1939] AC 277 (PC, Nova Scotia); *Nike Informatic Systems Ltd. v. Avac Systems Ltd.* (1980), 105 D.L.R. (3d) 455 (B.C.S.C.); *Avenue Properties Ltd. v. First City Development Corp.* (1986),32 DLR (4th) 40 (B.C.C.A.) rev.'g (1985), 65 B.C.L.R. 301 (SC).

1. Choice of law clauses that are not bona fide or legal

In France, a choice of law clause is not bona fide unless the choice is the law of a legal system that is sufficiently connected to the contract. Malcolm Clarke, *supra* citing Batiffol & Lagarde, *Droit International Prive*, (7th ed.), Nos 574-575. It is difficult to predict whether Canadian courts take the same approach. This issue has not been put before a Canadian court. The common law in the U.S. and England diverge on this point.

The writers understand in most U.S. states, the chosen law in a contract applies "unless…the chosen state has no substantial relationship to parties or the transaction and there is no other reasonable basis for the parties' choice…" *Restatement Second*, *supra* note 63, s. 187. See also *Gerli & Co. Inc. v. Cunard SS Co Ltd.,* 48 F.2d 115 (2d Cir. 1931) ("[a]bsent fraud or violation of public policy, contractual selection of governing law is generally determinative so long as the State selected has sufficient contacts with the transaction."); *International Minerals & Resources v. Pappas,* 96 F.3d 586, 593 (2d Cir.1996) [internal citations and quotations omitted], *reaff'd in Day Spring Enters., Inc. v. LMC Intern., Inc.,* 2004 WL 2191568, (W.D.N.Y. 2004). For an application of this rule in the CGL context see *Uniroyal, Inc. v. Home Ins. Co.,* 707 F. Supp. 1368, (E.D.N.Y. 1988), where the court gave effect to a choice of law the provision only after it was satisfied that there were enough contacts with New York to warrant honouring the stipulation.

The English take a different approach. There, "the courts will respect the choice of system of law having no factual connection with the contract." Malcolm Clarke, *supra*, at p. 14. Contrast with *Bitoumanous Casualty Corp. v. Hems*, 2007 WL 1545641 ((E.D. Pa.) (where the court held that Pennsylvania, not New Jersey had

a substantial and overriding interest in the case and therefore was the applicable law for the purposes of interpreting a pollution exclusion). Given the close historical nexus between Canadian and English law its possible that a Canadian court would endorse this right-to-contract-based approach. However, it would be prudent that there be a reasonable basis for the parties' choice of law to ensure a Canadian court honours the stipulation.

As noted above, in *Commonwealth Insurance Co. v American Home Assurance Co.*, *supra*, the Manitoba Queen's Bench ruled a choice of law clause invalid in a liability policy. The policyholder chemical company was insured by a primary policy that was issued in Manitoba. The excess coverage was from American Home and an insurer based in England named Coromin. An explosion occurred at a chemical plant in North Carolina. The underlying action settled for $5 million, which was beyond the limits of the policyholder's primary policy. The primary insurer commenced a suit in Manitoba to recover a share of the substantial amounts it expended defending the action from American Home and Coromin.

Coromin brought a motion challenging Manitoba as being not the most appropriate forum for the suit to be litigated. The excess insurer had the following choice of law clause in its policy:

> It is hereby agreed that this Policy of Insurance shall be governed by and construed in accordance with English Law and that English Courts alone shall have jurisdiction in any dispute arising hereunder.

The Manitoba court commented that the courts will "ordinarily respect a choice of forum and law clause negotiated between two commercial parties even where the choice may not be that of a more convenient forum. Indeed, if such a clause exists and is enforceable as between the parties, it is usually dispositive of the jurisdictional question." However, the court provided several reasons why the clause was unenforceable.

First, Commonwealth and Coromin were not privy to the same contract. The primary's claim was based on equitable contribution not contract. The court said that even if Coromin could enforce the clause against its policyholder, the excess insurer did not have the right to enforce the clause against the primary insurer.

Second, the court would not enforce the clause because the policyholder never received a copy of the contract and was unaware of the choice of law provision. The court added that the province's statutory choice of law clause also overrode the effect of any contractual choice of law clause in Coromin's policy. The Manitoba statutory choice of law clause is nearly identical to section 123 of the Ontario Insurance Act quoted above.

Third, the choice of forum and law clause in the policy was unenforceable because of the way Coromin explained it had issued its policy. According to Coromin, although it was not licensed and registered to do insurance business in Manitoba, it issued the policy through a "front" (*i.e.*, American Home). The additional coverage was generated and defined by Coromin through the issuance of what Coromin described to be a "difference in conditions" endorsement attached to the American Home policy. The "difference in conditions" that Coromin issued expanded the excess liability coverage provided by the American Home policy to U.S. $50,000,000 and deleted any territorial restrictions.

The court noted the American Home policy contained a Canadian law clause that required disputes over interpretation of the contract to be construed by Canadian courts. Thus, when Coromin agreed to follow the forms and fortunes of American Home, Coromin, according to the court, agreed to modify its choice of forum and law clause.

The *Commonwealth Insurance Co. v American Home Assurance Co.* decision involved a peculiar set of circumstances. The decision refused to enforce a choice of law clause. The court did preface its analysis by conceding that choice of forum and law clauses are frequently dispositive of jurisdictional issues. This suggests the decision might be an exception.

Would it be legal for an insurer and policyholder to agree that the law of New York applies to the interpretation of the insuring agreement but the law of Ontario governs the interpretation of the exclusions? The answer to this issue is unclear as it is unsettled whether a Canadian court would give effect to a choice of law provision that has the effect of bifurcating an insurance policy's governing law.

In *Ronald A. Chisholm Ltd. v. Agro & Diverses Souscriptions Internationales—ADSI—S.A.*, 4 O.R. (3d) 539 (Gen. Div.), C Limited, an Ontario corporation, whose only office was in Ontario, purchased a cargo of fruit from E Limited of England. The court in this case had to determine which law would govern the insurance policy that insured the fruit. The policy provided that the "institute clauses" would be governed by English law and that the "all risks cover" would be governed by French law. The court held:

> The damages were suffered in Ontario. One of the parties is in Ontario, one is in France. The evidence and witnesses may be found in numerous locations, including California, many of which are unconnected with either Ontario or France. The law of England appears to apply to some of the contract, and the law of France to one portion. In other documents no governing law is specified. *The laws of England and France can be applied by an Ontario court.* As I have found, there is no applicable clause giving exclusive jurisdiction. There is no concern of a multiplicity of proceedings. The relevance of law and fact can be dealt with in Ontario. Because of the international nature of the transaction, there is no natural geographic forum. For these reasons I agree with the master's conclusion that the defendant has failed to show that there is another forum more convenient than Ontario. [Emphasis added.]

Ronald A. Chisholm Ltd., *supra*, was not appealed. In the writers' view, a strong argument can be made that choice of law provisions that bifurcate the governing law are neither bona fide nor legal. One British author comments that, "[i]n general, it has always been held that an insurance relationship cannot be fragmented, as the scission of a unitary contract, it has been felt, would produce great inconvenience, confusion, and difficulties." Malcolm Clarke, *supra* at p. 12. From a U.S. perspective, the authors are aware the United States Court of Appeals for the Second Circuit in *Maryland Casualty Co. v. Continental Casualty Co*., 332 F.3d 145 (N.Y. 2003), dismissed the policyholder's choice-of-law argument that the laws of as many as 50 states should simultaneously govern the same clause of the same insurance policy.

2. Choice of law clauses contrary to public policy

A choice of law provision in an insurance contract will generally not violate public policy. *Hofeld v. Nationwide Life Ins. Co*., 59 Ill. 2d 522 (Ill. 1975). However, sometimes a choice of law clause has been held to violate the public policy of the *lex fori*. For example, the Ninth Circuit of the U.S. Federal Court of Appeals once ruled that it would be contrary to public policy to include a choice of law provision in a malpractice liability policy.

In *Haiston v. Grease Valley Medical Reimbursement Fund Ltd*., 784 F.2d 1392 (9th Cir. 1986), the plaintiff policyholder, a doctor, was sued for malpractice by a patient. The policyholder sought a defence and coverage from the defendant, his liability insurance carrier. The insurance contract provided that it would be governed by Cayman Islands law. However, any disputes between the policyholder and the insurer were to be determined in arbitration pursuant to Californian arbitration law. The court held this clause was inapplicable. According to Senior Circuit Judge Choy, the protection of California residents from any potential risk of injury thought to be created by insurance and from the unscrupulous practices of insurance companies that profit from premiums from California constituted sufficient interest to apply California law to malpractice policy.

For a second example of public policy trumping a choice of law clause, see *Porter Hayden Co. v. Century Indem. Co.,* 136 F.3d 380 (4th Cir. 1998), where the choice of law provision was trumped by a statutory pre-

sumption of arbitrability. Other reasons why a choice of law clause could be deemed contrary to public policy include instances where the clause would have the effect of

1) validating a contract when the *lex fori* would deem it illegal because a party lacked capacity; or
2) avoiding a mandatory statute of the forum.

Collier, *Conflicts of Laws* (1987), pp 143 ff at 124.

See also *Re Mellon Estate* (1920) 53 DLR 664 (Alta. SC); and *Golden Acres Ltd. V. Queensland Estate Property Ltd.*, [1969] Q.L.R. 378 (where the court held that a choice of law clause was not valid because it was aimed at circumventing an otherwise mandatory statute).

The applicable laws of the chosen jurisdiction will sometimes cause an affront to the forum's public policy. See *Loewen Group Inc. v. Continental Insurance Co. of Canada* (1997), 48 C.C.L.I. (2d) 119, (B.C. S.C.) where the court held there was a reasonable possibility that a British Columbian court would apply the relief from forfeiture provision of the B.C. Insurance Act, *supra* note 61, notwithstanding the proper law of the contract was the law of Illinois. It may have been an important factor, however, that relief from forfeiture was also available to the plaintiff under Illinois law.

C. Determining the Applicable Law of a Liability Policy That Does Not Contain a Choice of Law Provision

Insurers have be incorporating choice of law provisions in their contracts with greater frequency. While this trend is likely to continue, coverage counsel will still most often find the "proper law" of a policy must be determined in the absence of a choice of law clause. We have explained how local statute may have an impact on the validity of such clauses in Canadian provincial courts. This section of the paper will focus on the common-law test for determining a policy's proper law.

In Canada, when the parties have not expressly chosen the applicable law, the courts will often apply the law that the parties have chosen implicitly or the law that has closest connection to the policy. This approach is consistent with the American approach. A conflict of laws analysis will be applied to determine the applicable law of a contract only if the parties have not expressed the applicable law either explicitly or implicitly in the contract. See *American Serv. Mut. Ins. Co. v. Bottum*, 371 F.2d 6 (8th Cir. 1967).

Some Canadian courts take a very straightforward approach to ascertain the "proper law" of an insurance policy. See *Provident Life & Accident Insurance Co. v. Walton* 1994 CarswellOnt 1067 at para. 4 (Ont. Gen. Div., 1994) ("the contract was signed and issued in the province of Ontario and will be interpreted according to its law"). Other courts will conduct a more thorough analysis.

The leading Canadian common-law authority for determining the proper law of an insurance contract is *Imperial Life Assurance Co. of Canada v. Colmenares* [1967] S.C.R. 443 (S.C.C). In that case, the plaintiff was a resident of and domiciled in Cuba. He applied for a policy of life insurance with the defendant insurer. The defendant insurer was a Canadian company with its headquarters in Toronto, Ontario. The policy was issued to the plaintiff through the defendant's Cuban office. However, the contract was accepted by the defendant insurer only by mailing the policy from its head office in Toronto. To make matters even more complicated for the Supreme Court, the policy was written in Spanish on a Canadian form.

In its decision, the Court said that proper law issues are to be resolved by considering the contract as a whole in light of all the circumstances that surround it and applying the law with which the contract has the closest and most substantial connection. See also *Assn. of Architects (Ontario)*, *supra*. The Court listed nine factors for consideration in the Canadian proper law analysis:

1) the domicile and residence of the parties;

2) the national character of a corporation and its principal place of business;
3) the place where the contract was made;
4) the place where it is to be performed;
5) whether the drafting reflects a particular system of law;
6) any economic connections;
7) the nature and location of the insured property;
8) the head office of the insurance company, whose activities may range over many countries; and
9) any other factors that may serve to localize the contract, which includes the currency referred to in the policy.

In consideration of the circumstances of the case, the Court held that the governing law of the contract was the law of Ontario. The Court found it quite significant that the appellant insurer's decision to accept the risk was made at its head office in Toronto.

The Manitoba Queen's Bench recently applied the *Colmenares* factors in the second part of the *Whirlpool* case *supra,* to determine the proper law of a liability policy. In *Commercial Union Assurance Co. of Canada v National Union Fire Insurance Co. of Pittsburgh, PA*, [2007] 1 W.W.R. 167 (Man. Q.B.) a turbine manufactured by a Canadian company based in Ontario for a hydro company based in Manitoba exploded causing extensive damage. Commercial Union, a Canadian insurer based in Toronto, Ontario, provided the turbine manufacturer policyholder with a primary liability insurance policy. National Union, an American insurer based in New York, issued an excess umbrella liability policy to the U.S. parent of the Ontario based subsidiary.

Commercial Union filed an application to determine whether National Union was obligated to share in the costs of defending the policyholder in an action by the Manitoba hydro company. The parties however sought a preliminary ruling about the proper law that would be applied to National Union's policy. This was important because under either Michigan or New York law, National Union submitted that the duty of an umbrella insurer to defend differs from Canadian law. National Union argued it should not have a duty to defend the action until the policy limits of the primary insurer are exhausted. In contrast, Commercial Union argued that under the law of Ontario, National Union's duty to defend was triggered because the claim against the policyholder was well in excess of the limits of the policy and in the alternative the Manitoba court should apply Manitoba law in line with Ontario law.

The court applied the reasoning in *Colmenares* stating the facts in that case were analogous. The court noted that in the instant case: "the head office of the insurer was in New York, the decision to go on the risk was made in New York and the policy was issued on a standard form by a New York company." Under the *Colmenares* analysis, the court held that the proper law of the policy was New York law.

The British Columbia Supreme Court in *Cansulex Ltd. v. Reed Stenhouse Ltd.* (1986), 70 B.C.L.R. 273 (B.C. S.C.) had to determine the proper law of a liability insurance policy and took a different approach. The court suggested that in the context of liability insurance, it is the location of the risk, instead of where the contract was concluded, that is most important. The CGL policy was issued by a New York-based company to a Calgary-based company through a Vancouver broker. The court held that it was the law of British Columbia and not the law of New York that had the closest connection to the policy. According to McEachern C.J.S.C., *Colmenares*, *supra*, was distinguishable because "it was a reasonable inference in that case that a person applying in Toronto to an Ontario corporation for a policy on a Canadian form would be governed by Canadian law." *Cansulex*, *supra* at para. 78.

McEachern C.J.S.C. did not think that the place of the formation of the contract was important. Rather, he emphasized that the most important factor for determining the proper law of the insurance contract was the subject of the contract: liability insurance for operations relating to sulphur to be shipped to Vancouver for export into an international market. He therefore concluded that the proper law was the law of British Columbia.

McEachern C.J.S.C.'s opinion, although applicable in the province of British Columbia, arguably diverges with the approach in other Canadian provinces. In *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* 2004 WL 628414 (Ont. S.C.J.), the Ontario Superior Court of Justice was tasked with determining the proper law of a CGL policy. The court found that (1) the relationship between the insurer and policyholder was initiated by a telephone call from Ontario to West Virginia; (2) the offer was sent by the insurer in the form of a letter from West Virginia to Ontario; (3) the letter was signed in Ontario by the policyholder and subsequently returned to West Virginia; and (4) the letter was later signed by the offerer in West Virginia. Without citing *Cansulex*, *supra*, the court quickly concluded that the policy had the closest connection to West Virginia.

Canadian courts have differed in their application of the "substantial connection" analysis depending on the evidence in the record in each case. Although the courts have looked to factors such as whether or not the contract can be localized, where the underwriting decisions were made, and location of the parties, different courts have given these factors different weight in their analysis depending on the quality of the evidence. The writers suggest it is incumbent upon coverage counsel to prepare and file as persuasive a record as possible with a Canadian court in any battle over either jurisdiction or choice of law issues.

Seemingly inconsistent treatment is reconciled by recognizing the different quality of the record in each case. It serves as a cautionary note for cross-border coverage cases. As Canadian counsel, do not be surprised when we ask for more evidence to buttress a foreign law position. While this may not be the norm before U.S. courts, when you come north, these factors are very much in play.

V. Conclusion

We have reviewed the different bases of jurisdiction *simpliciter* and how these bases relate to interjurisdictional liability insurance disputes. Liability insurers should, in an effort to ensure commercial certainty and minimize any unnecessary risk, incorporate law and jurisdiction clauses into their policy forms. At the time of writing, this drafting practice is not very prevalent in Canada.

Jurisdiction clauses are not always effective. Underwriters should draft them carefully, free from any ambiguity, particularly with respect to the clause's exclusivity. The Canadian common law will continue to protect policyholders that are unaware of the significance of a jurisdiction clause. The local insurance legislation and principles of privity of contract may have an impact on a jurisdiction clause or for that matter a choice of law and *forum non conveniens* analysis.

We have also analyzed the approach a Canadian court takes to determine whether it should exercise its jurisdiction to resolve a liability insurance issue. The trend in Canadian cases suggests that in situations with competing common-law regimes, the applicable law factor is one of the most, if not the only dominant factor that influences a court's decision to exercise its jurisdiction in a coverage proceeding. The weight of the factors seemingly changes when the applicable law is the law of a non-common-law jurisdiction.

With respect to choice of law specifically, choice of law clauses are generally enforceable so long as they are bona fide and legal. In the writers' view these clauses serve an important function and are underused by North American liability insurers. The incorporation of these clauses enhances commercial certainty and can result in lowering the cost of or even eliminating coverage litigation. While these clauses are not always valid, their presence often allows the court to conclude on the intentions of the parties.

In sum, coverage cases can be won or lost because of a court's ruling on conflicts issues. These issues should not be ignored, nor should cross-border cases be construed in a domestic legal context. As the authors of *Couch on Insurance* put it, "[f]or judicial economy alone, it is critical that both procedural and substantive issues be addressed within the context of the applicable conflict of law issues before instituting a law suit or forgoing a frivolous defense." *Couch on Insurance*, *supra*, at §24:1.

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