

CROSS-BORDER LITIGATION BULLETIN

Summer 2005

A CLAUSE IN TIME SAVES TIME, MONEY AND MAYBE EVEN YOUR CASE...

HOW PROPER JURISDICTION AND GOVERNING LAW CLAUSES MAY GIVE YOU ONE LESS THING TO WORRY ABOUT IN CROSS-BORDER CONTRACTS

INTRODUCTION

Of the \$40 billion of foreign capital invested in Canada in 2004, over 70% came from the United States. As trade and cross-border investment continue to grow, so too have the prevalence of contracts between parties from opposite sides of the border. While the risk of litigation may seem remote at the time of entering into such cross-border contracts, prudence dictates that one considers not only what would happen *if* there were to be a dispute, but also *where* and *how* such a dispute should best be resolved.

CONSIDERATIONS

It has now become common practice for contracts to include a provision that sets out where future disputes are to be litigated and what law will apply. Practical, financial or commercial considerations often factor in on this choice. For example, freight carriers with global operations may seek to minimize legal risk and costs by having all their shipping contracts subject to the laws of a single jurisdiction under the laws of that jurisdiction.

Common issues to consider include:

- Are there differences in the substantive laws of each jurisdiction and do they confer different rights on the parties?
- Is the nature of the contract such that a party may require an interim injunction, or similar remedy, and will seeking to enjoin a party in another jurisdiction be overly cumbersome?
- Are there different procedural requirements in each jurisdiction such as for the service of court documents on foreign parties?
- Would a party likely seek punitive or treble damages and are these more likely to be awarded in one of the jurisdictions?

There are actually two sets of choices to make: firstly, choosing where future litigation will take place; and, secondly, the set of laws under which the contract will be interpreted.

FORUM SELECTION CLAUSES

A forum selection clause basically names the jurisdiction, commonly referred to as the “forum”, where the dispute is to be resolved. The wording of such a clause needs to be precise in order to confer exclusive jurisdiction to a particular forum so that any contemplated dispute is subject to the clause. If there is ambiguity in the wording of the clause there is a risk that another court may assume concurrent jurisdiction.

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¹ This bulletin was written with the assistance of Chris Calenti, Student-at-Law

Should a party to a contract commence an action in a court that, according to the forum selection clause, does not have jurisdiction to hear the dispute, the defendant will typically apply for a stay of the proceedings. Under Canadian law, a forum selection clause will be upheld and enforced unless the plaintiff seeking to avoid the clause can establish that there is “strong cause” why the provision should not apply. Canadian courts may look at factors such as:

- in which jurisdiction the evidence is located
- the degree of connection between the parties and each of the alternative jurisdictions
- whether there are material differences in the laws of each jurisdiction
- whether the choice of law is merely an attempt to gain a procedural advantage
- whether the plaintiffs would suffer prejudice by having to sue in a foreign court

GOVERNING LAW CLAUSES

As its name suggests, a governing law clause selects the law under which a contract will be interpreted and construed. In Canada, courts generally respect the operation of governing law clauses as long as they are bona fide, legal and not contrary to Canadian public policy. Essentially, parties are not able to rely on governing law clauses in order to evade a mandatory provision of the law with which the contract has its closest and most real connection. However, as long as there is a real connection between the transaction and the chosen law of the contract, the governing law clause will generally be enforced. In terms of public policy, a governing law clause will not be upheld if its effect would offend the principles of natural justice or cause substantial harm to the public.

As with a forum selection clause, the operation of a governing law clause applies to disputes between the parties to a contract and does not confer any rights on third parties under the chosen law of the governing law clause not otherwise available to them in their own jurisdiction.

CONCLUSION

In light of the above, foreign companies contracting with Canadian counterparts are generally free to choose the law and jurisdiction they wish to govern a contract between them. A forum selection clause drafted in broad terms coupled with a governing law clause should be enforceable as long as there is a real and substantial connection between either the transaction or the parties to the system of laws these clauses select. Naturally, prior to contracting with a party in a foreign jurisdiction, it is advisable to seek a legal opinion as to the applicability of local law and the enforceability of the parties’ choice of law.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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Brett is an associate in the firm's Commercial Litigation and Corporate Restructuring Groups. He has a general corporate commercial litigation practice with an emphasis on financial services, insolvency and cross-border disputes. Brett regularly acts for a variety of US based corporations and financial institutes and is the editor of the firm's cross-border litigation bulletin.

CROSS-BORDER LITIGATION

McMillan Binch Mendelsohn has cultivated a "north-south" orientation for many years. As America's Canadian Law Firm we recognized early on the cross-border legal challenges posed by economic integration in North America. Whether you are being sued or thinking of suing in Canada, or choosing to sue in Canada rather than the United States for strategic reasons, knowing the differences between commercial litigation in the two countries allows you to avoid surprises.

We have extensive experience resolving commercial, trade, transfer pricing, procurement and other cross-border disputes through arbitration, litigation and mediation. Our expertise includes conflict of laws disputes, jurisdiction issues, anti-suit injunctions, negative declarations, enforcement of foreign judgments, and enforcing letters rogatory.

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