

Commercial Litigation

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Here Be Dragons: Business Disputes in Foreign Lands

If your company is looking to do business outside Canada, you may want to consider the potential problems that can arise from getting entangled in an extra-provincial or international legal dispute – and, in particular, the difficulties that can arise from being forced to fight a court battle in a place where the judicial systems aren't as reliable as they are in Ontario.

Getting the Home Court Advantage

Litigating in many foreign countries can be risky and uncertain. Believe it or not, Ontario has one of the best respected court systems in the world. As well, Canada generally has a long tradition of faithful adherence to the rule of law and our judges can always be expected to be independent from the parties in the legal dispute before them and committed to giving an impartial decision on the merits of the case. The same cannot always be said for many places around the world which do not share Canada's legal traditions.

In some foreign countries, there is a distinct possibility that judicial officials may expect bribes to advance your case and local businesses may be able to exert their influence to delay the case or to have your evidence disregarded. If you must fight a court battle in places like these, there is always a chance that you could be denied a fair hearing. There is an obvious advantage to litigating, if you have to, close to home where these concerns don't arise.

There are other obvious advantages to being in your home jurisdiction: being able to retain legal counsel familiar with your business or industry, for example, or the cost savings that can be enjoyed when your witnesses reside where you carry on business. It is because there are usually distinct advantages to fighting legal disputes on your home turf that conflicts arise over which court system should decide disputes between companies operating in different countries.

In its decision in *Club Resorts Ltd. v. Van Breda*, Canada's Supreme Court has provided new guidance on two issues: (1) when can an Ontario court assume jurisdiction over a dispute, and (2) when should jurisdiction be declined because another forum is a more convenient place for the dispute to be resolved. Each of these questions is considered in more detail below.

Is There a Real and Substantial Connection?

In order to assume jurisdiction over a legal dispute – that is, to permit the dispute to be heard in Ontario — our courts

look for “real and substantial connections” to this province. This means that there must be some legal connection between Ontario and either the subject matter of the dispute or the proposed defendant.

In *Van Breda*, the Supreme Court said that before agreeing to hear and decide a dispute, courts should follow a two-stage process. First, the party bringing the action has to show that the case falls within one of the established or “presumptive” categories in which an Ontario court can hear and decide the dispute. These categories include the following situations:

- the defendant is resident in Ontario;
- the defendant carries on business in Ontario;
- the conduct giving rise to the dispute was committed in Ontario, or
- the contract connected with the dispute was made in Ontario.

If the situation does not fall within one of these presumptive categories, the party seeking to commence an action in Ontario still has an opportunity to show a new but similar ground on which a real and substantial connection to Ontario can be made out. Second, once the party demonstrates a real and substantial connection to Ontario, the other side will have a chance to show that the presumptive acceptance of jurisdiction should be denied because there is no real or strong relationship between the subject matter of the dispute and Ontario.

Is There a *More Convenient Forum*?

Even assuming a real and substantial connection to Ontario based on the presumptive factors outlined above, you could still be forced to litigate in a foreign country because of the doctrine of *forum non conveniens* (literally, “this is not the convenient forum”).

This doctrine gives a court discretion to decline to exercise its jurisdiction in limited circumstances if it will assure

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fairness to the parties and result in the efficient resolution of the dispute. In effect, the Ontario court would be giving up its power to adjudicate the matter in favour of another jurisdiction. The courts will only do this if the defendant can identify another forum and show not only that it has jurisdiction, but also that it is clearly more appropriate than the Ontario court.

Examples of the factors the court considers when applying this doctrine include the location of the parties and witnesses, the law to be applied to the issues raised in the dispute, the possibility of conflicting judgments and loss of judicial advantage. At this stage, it is possible for the plaintiff to raise any concerns it might have with the jurisdiction, such as fraud, corruption and other factors limiting its ability to get a fair hearing.

Recent cases in Ontario indicate that if there is clear evidence of corruption in the judiciary of the foreign country, it is unlikely that an Ontario court would consider

that forum to be a more convenient one than Ontario. If, therefore, you believe you are operating in a country in which judicial corruption could be an issue, you should do everything you can to help an Ontario court assume jurisdiction because of one or more of the presumptive connecting factors listed above, *i.e.*, by entering into contractual arrangements here or by expressly requiring disputes to be litigated in Ontario.

Tread Carefully When Contracting Abroad

When contracting with suppliers overseas, or if you are forced to start or defend a foreign court action, it is important to keep jurisdictional issues in mind. If you need assistance dealing with disputes with parties outside Canada, the members of our commercial litigation group would be pleased to assist you.

The author wishes to thank Summer Motiwala, Student-At-Law, for her assistance in preparing this bulletin.

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Pallett Valo LLP Commercial Litigation Practice

Our firm has the largest Commercial Litigation department in Peel Region, with the depth and expertise to provide legal advice and representation in complex litigation matters. Our clients are served with advice that is designed to minimize and avoid risks and business disruption through alternative dispute resolution mechanisms, and decisive and aggressive action in the courts when necessary.

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