

DAMAGES FOR BREACH AND INTERPRETATION OF JURISDICTION AGREEMENTS IN COMMON LAW CANADA

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An important provision often found in international or interprovincial commercial contracts is a jurisdiction agreement. Such a provision is used by the parties to provide them some measure of certainty regarding the forum in which disputes arising under their contract would be settled. In Canada, it is fairly well established that a jurisdiction agreement serves as a basis of jurisdiction and an action brought in breach of such an agreement shall be stayed, unless there is strong cause why it should not be. However, other aspects of the law on jurisdiction agreements are not yet so well established. For example: What principles guide Canadian courts in the interpretation of jurisdiction agreements and how different are these principles from those applied in the case of ordinary contracts? Can a party impeach the enforcement of a foreign judgment on the basis that it was given by a foreign court in breach of a jurisdiction agreement? And, to what extent can the victim of a breach of a jurisdiction agreement bring an action for damages in respect of that specific breach? This article examines these issues. It identifies areas where there are gaps in the existing jurisprudence and issues on which the law is unsettled or underdeveloped. It proffers solutions to those issues and, for this purpose, draws on comparative jurisprudence from other countries, where appropriate.

La clause d'élection de for est une disposition importante que l'on retrouve souvent dans les contrats commerciaux interprovinciaux ou internationaux. Les parties se fient à une telle disposition pour se procurer un certain niveau de certitude quant au tribunal compétent qui entendrait tout différend découlant du contrat. Au Canada, il est de jurisprudence plutôt constante que la clause d'élection de for serve de base pour déterminer la compétence d'un tribunal, et qu'une action intentée en contravention d'une telle clause sera suspendue sauf en cas de motifs sérieux. Toutefois, d'autres aspects relatifs aux clauses d'élection de for ne sont pas encore aussi bien établis. À titre d'exemples : Quels principes guident les tribunaux canadiens dans leur interprétation des ententes portant sur la compétence, et dans quelle mesure ces principes diffèrent-ils de ceux qui s'appliquent dans le cas de contrats ordinaires? Une partie au litige peut-elle s'opposer à l'exécution d'un jugement étranger en

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invoquant le fait qu'il a été rendu par un tribunal étranger en rupture d'une entente portant sur la compétence? Et, dans quelle mesure la victime d'une telle rupture peut-elle intenter une action en dommages-intérêts fondée sur celle-ci? Cet article examine ces questions et cerne les domaines dans lesquels il existe des faiblesses dans la jurisprudence actuelle ainsi que les questions sur lesquelles le droit est incertain ou insuffisamment développé. Les auteurs y proposent des solutions et, à cette fin, procèdent à une étude comparative avec la jurisprudence étrangère, le cas échéant.

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1. Introduction

Risk and risk management are important considerations in interprovincial and international transactions. Legal risk, especially litigation risk, takes on new dimensions in such transactions. Risk often results from uncertainty. One of the uncertainties common to such transactions is the inability of the parties to predict which court will have jurisdiction to hear their claim when a dispute arises. This ability of the parties to predict which institution will have jurisdiction to hear their claim and avoid litigation in multiple legal systems is important for them to be able to assess their legal positions and effectively negotiate their contract. Typically, in a contract underlying an international or interprovincial commercial transaction, a jurisdiction agreement or forum selection clause is included as an important means of managing such risk.

A jurisdiction agreement is an agreement by which parties designate the place (country, province or state, or type of court) for the settlement

of disputes arising between them.¹ There are several types of jurisdiction agreements. First, a jurisdiction agreement may assign jurisdiction to a province or country with which one or more of the parties has a connection, or it may grant jurisdiction to a neutral forum. Second, a jurisdiction agreement may be bilateral or unilateral. Bilateral agreements apply to, and may be invoked by, both contracting parties. Conversely, unilateral agreements (sometimes referred to as one-way jurisdiction agreements) may allow only one party to rely on the agreement, or may afford greater jurisdictional flexibility to the party in whose favour the agreement operates. There does not appear to be any Canadian case in which the validity of a unilateral jurisdiction agreement has been directly considered.² Third, the parties may confer exclusive, non-exclusive, or hybrid jurisdiction to their chosen forum. An exclusive jurisdiction agreement nominates the courts of one country, province, or state to determine disputes between the parties concerned. A non-exclusive jurisdiction agreement confers jurisdiction on one forum, but not to the exclusion of others, allowing each party to bring an action in the named forum, or before any other competent court. As a subset of the non-exclusive jurisdiction clause, parties may also agree to give jurisdiction to two courts concurrently.³ Concurrent jurisdiction agreements are useful where, for example, the contracting parties reside in different provinces or countries and cannot reach an agreement as to the preferred court. Finally, a hybrid agreement (also referred to as a unilateral

¹ However, it is possible for a jurisdiction agreement to be found in a unilateral legal act, such as the declaration of a trust.

² An example of a unilateral jurisdiction agreement can be found in the contract that was litigated in the recent Supreme Court of Canada decision *Douez v Facebook Inc*, 2017 SCC 33 at para 8, [2017] BCWLD 4054 [*Douez*]. That agreement provides: “You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County.” The validity of the clause was, however, not made an issue in the case. Comparatively, in Europe, there is divided jurisprudence on the validity of such agreements. While the English courts have upheld it, French courts have decided otherwise. See e.g. *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd*, [2013] EWHC 1328 (Comm); Cass civ 1^{re}, 26 September 2012, (2012) Bull civ, 11-26.022; Cass civ 1^{re}, 25 March 2015, (2015) Bull civ, 13-27.264. For a recent discussion on the subject see Mary Keyes & Brooke Adele Marshall, “Jurisdiction Agreements: Exclusive, Optional and Asymmetrical” (2015) 11:3 J Priv Intl L 345 at 363–77 [Keyes & Marshall]; Lauren D Miller, “Is the Unilateral Jurisdiction Clause No Longer an Option? Examining Courts’ Justifications for Upholding or Invalidating Asymmetrical or Unilateral Jurisdiction Clauses” (2016) 51 Tex Intl LJ 2.

³ For examples of where a non-exclusive jurisdiction clause has been construed as assigning concurrent jurisdiction, see *Khalij Commercial Bank Ltd v Woods* (1985), 50 OR (2d) 446 at paras 9–11, 17 DLR (4th) 358 (SC (H Ct J)) [*Khalij*]; *Old North State Brewing Co v Newlands Services Inc* (1998), 58 BCLR (3d) 144 at paras 35–37, [1999] 4 WWR 573 (CA) [*Old North State*].

non-exclusive clause)⁴ stipulates that one party submits to the exclusive jurisdiction of a particular court and the other party, to the non-exclusive jurisdiction of that court. This type of agreement is often used where there is an imbalance in negotiating power.⁵ For example, in the context of loan agreements, a hybrid jurisdiction agreement would ensure that a creditor, as a commercially dominant party, could commence an action wherever their borrower's assets were located.

The type of jurisdiction agreement parties choose to use will depend on the parties' needs in each case, and may also reflect the negotiating powers on each side. A party may prefer actions to be commenced in their home country on the basis of convenience, or out of preference for the local laws governing the dispute. Such parties are therefore likely to favour an exclusive jurisdiction agreement. Others may prefer a non-exclusive jurisdiction agreement because they seek greater flexibility or the assurance that they can bring an action in any jurisdiction where the other party has assets. However, the range of jurisdiction agreements available raises questions over the enforceability of each clause and whether all jurisdiction agreements merit the same degree of protection from the courts with a view to ensuring their effectiveness.

In Canada, it is fairly well established that a jurisdiction agreement serves as a basis of jurisdiction and an action brought in breach of such an agreement shall be stayed unless there is strong cause why it should not be.⁶ Other aspects of the law on jurisdiction agreements are not yet so well established. This paper seeks to address two such issues: (1) the extent to which substantive contract law doctrines are relevant to the enforcement of jurisdiction agreements, especially where the victim of a breach of a jurisdiction agreement brings an action for damages in respect to that specific breach; and (2) the principles that guide Canadian courts in the interpretation of jurisdiction agreements and the extent to which such principles are different to those applied in the case of ordinary contracts.

⁴ Richard Fentiman, "Unilateral Jurisdiction Agreements in Europe" (2013) 72:1 Cambridge LJ 24 at 24.

⁵ *Ibid.*

⁶ See e.g. *Douez*, *supra* note 2; *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27, 224 DLR (4th) 577 [*ZI Pompey*]; *Momentous.ca Corp v Canadian American Association of Professional Baseball Ltd*, 2012 SCC 9, 343 DLR (4th) 1 [*Momentous.ca Corp*]; Genevieve Saumier & Jeffrey Bagg, "Forum Selection Clauses Before Canadian Courts: A Tale of Two (or Three?) Solitudes" (2013) 46:2 UBC L Rev 439 [Saumier & Bagg]; Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law, 2016) at 127–32 [Pitel & Rafferty].

The arguments in this paper are founded on the notion that a jurisdiction agreement is a contract.⁷ As Adrian Briggs notes, “[t]here is no distinction of principle between a contract to sell and a contract to sue.”⁸ This should be especially so in private international law within common law Canada, where jurisdiction is principally a question of private law and therefore largely unburdened by state interests.⁹ We argue that in addressing issues related to jurisdiction agreements, the courts should aim to advance their effectiveness rather than defeat them,¹⁰ and that the sanctity of a contract is as important to a jurisdiction agreement as it is to any other contractual term.

2. Damages for Breach of Jurisdiction Agreement

Ordinarily, damages are available to address a breach of contract in Canadian law. Jurisdiction agreements are contracts,¹¹ even though in law they are separable from the main contract.¹² In principle, therefore,

⁷ Trevor Hartley, *Choice-of-court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention* (Oxford: Oxford University Press, 2013) at 4.

⁸ Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford: Oxford University Press, 2008) at 195 [Briggs, *Agreements on Jurisdiction*].

⁹ This characterization of jurisdictional issues in the common law tradition is not free from controversy. For a useful but brief discussion, see CJS Knight, “The Damage of Damages: Agreements on Jurisdiction and Choice of Law” (2008) 4:3 J Priv Intl L 501 at 504–07 [Knight].

¹⁰ See generally Catherine Walsh, “The Uses and Abuses of Party Autonomy in International Contracts” (2010) 60 UNBLJ 12.

¹¹ See generally Adrian Briggs, “The Subtle Variety of Jurisdiction Agreements” (2012) LMCLQ 364 [Briggs, “Subtle Variety”]; Koji Takahashi, “Damages for Breach of a Choice-of-Court Agreement” (2008) 10 Yearbook Private Intl L 57 at 68–70 [Takahashi, 2008].

¹² The principle of separability is recognized in Canadian law, but the jurisprudence on the principle of separability of jurisdiction agreements is limited. See *Fairfield v Low* (1990), 71 OR (2d) 599, 28 CPR (3d) 289 (SC (H Ct J)) [*Fairfield*]; *Ash v Corp of Lloyd’s* (1992), 95 DLR (4th) 766, 9 OR (3d) 755 (CA); *Morrison v Society of Lloyd’s*, 224 NBR (2d) 1, 574 APR 1. The courts have sought to draw a distinction between cases in which it is argued that the contract is void and cases in which it is argued the contract is voidable. This void/voidable distinction that has been applied in the existing Canadian jurisprudence is important. However, it is submitted that in the context of jurisdiction agreements, the distinction should be relevant only when applied to the jurisdiction agreement *itself*, as opposed to the underlying contract. In other words, the courts should draw a distinction between a plea that the underlying contract is void or voidable and a plea that the jurisdiction agreement is void or voidable. In the case of the former, the courts can draw an analogy with the way a similar argument is treated in the face of a choice of law agreement. In such cases, the principle of putative proper law of contract is used. In other words, on a plea that a contract is invalid, the courts assume that the contract is valid and use the law that would have been applicable if the contract were valid to determine the issue of invalidity. In the

ordinary contract law should apply to jurisdiction agreements and damages should be an available remedy where such an agreement is breached. On the surface, it is uncontroversial and just that a party should be compensated for having to defend proceedings that would never have taken place, had both parties abided by their agreement—a classic case of breach of contract. In reality, however, the extent to which the victim of a breach of an exclusive jurisdiction agreement can receive damages is uncertain in Canada.

To date, the two principal remedies for breach of a jurisdiction agreement are stay of proceedings and an anti-suit injunction. Both remedies, unlike damages, are discretionary in nature. There appears to be no Canadian judicial or legislative authority on the issue of awarding damages for breach of a jurisdiction agreement, and very limited academic literature exists on the subject in Canada.¹³ We argue that breach of a jurisdiction agreement should entitle the victim of the breach to damages in Canada, although we acknowledge that there are challenges (discussed below) in providing such a

same vein, where it is argued that a jurisdiction agreement should not be enforced because the underlying contract is void or voidable, that issue should be left for the court selected by the parties to determine on the assumption that the agreement is valid. In such cases, the court need not enter into the merits of the plea at all. The party asserting that a jurisdiction agreement is invalid might argue that this position makes a preliminary assumption of the validity of the contract. However, such an approach seems preferable to proceeding on a preliminary assumption that the contract is invalid because it better accords with support in favour of upholding jurisdiction agreements. Although this approach may appear to defy logic, it is submitted that this is one area where commercial common sense and pragmatism should prevail in interprovincial and international commercial dispute resolution. A more nuanced approach is recommended where the plea of invalidity is directed at the jurisdiction agreement *itself*; for example, where a party is arguing they did not have the capacity to enter into the jurisdiction agreement, or a legislated formal requirement was not satisfied, or the enforcement of the jurisdiction agreement itself would be contrary to public policy. In such a case, it is submitted that the court should hear preliminary evidence on the issue and determine whether there is a good arguable case that the jurisdiction agreement is invalid given the alleged ground of invalidity. Based on that determination, the court may decide to stay its proceedings for the matter to be determined by the chosen forum or go ahead with hearing and making a final determination solely on the issue of invalidity of the jurisdiction agreement. Compare *Hague Convention on Choice of Court Agreements*, *supra* note 59, art 3(d) (Canada is however not a party to the convention). EC, *Regulation (EC) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, [2012] OJ, L 351/1 [Brussels I Regulation (Recast)].

¹³ For a brief discussion, see Vaughan Black, “Book Review of Adrian Briggs, *Agreements on Jurisdiction and Choice of Law*” (2010) 49 *Can Bus LJ* 300 at 305–08. More extensive academic writing and jurisprudence exist in the UK. See Briggs, *Agreements on Jurisdiction*, *supra* note 8 at 299–38; James Ruddell, “Monetary Remedies for Wrongful Foreign Proceedings” (2015) 1 *LMCLQ* 9.

remedy.¹⁴ In addition to damages, we explore the option of not enforcing a foreign judgment given in breach of a jurisdiction agreement.

Comparatively, the English courts have recognized for some time that damages may be awarded when an arbitration agreement is breached.¹⁵ More recently, they have also been willing to award damages for the breach of an exclusive English jurisdiction agreement. In *Union Discount Co Ltd v Zoller*,¹⁶ the English Court of Appeal found there was no authority to prevent an award of damages instead of an equitable remedy where a jurisdiction agreement was breached. The Court held that damages may be recovered: where the claimant seeks to recover in the English proceedings any costs incurred by him as a defendant in foreign proceedings; where the claimant in the foreign proceeding brought the action in breach of a jurisdiction agreement; where the rules of the foreign court only permit the recovery of costs in exceptional circumstances; and where the foreign authority has not adjudicated as to costs.¹⁷ The damages that may be recovered in England include reasonable expenses incurred when defending the claim brought in breach of the jurisdiction agreement. In addition, the court may order the plaintiff in the foreign proceedings to indemnify the defendant against any future costs incurred in the foreign proceedings, where doing so does not contradict the judgment of the foreign court.¹⁸ Indeed, the English courts have gone as far as to hold that, in principle, a claim in damages may lie against a legal advisor for the tort of inducing breach of contract where it can be established that the party in breach of the jurisdiction agreement was advised by the legal advisor to bring pre-emptive action in breach of a jurisdiction agreement.¹⁹

¹⁴ For a discussion of some of the challenges, see Knight, *supra* note 9 at 508–13.

¹⁵ See e.g. *A v B*, [2007] EWHC 54 (Comm), [2007] 1 All ER (Comm) 633.

¹⁶ [2001] EWCA Civ 1755, [2002] 1 All ER 693. See also *Donohue v Armco Inc*, [2001] UKHL 64, [2002] 1 All ER 749 at paras 36, 48 [*Donohue*]; *A/S D/S Svendborg v Akar*, [2003] EWHC 797 (Comm); *National Westminster Bank Plc v Rabobank Nederland*, [2007] EWHC 3163 (Comm), [2008] 1 All ER (Comm) 266; *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG*, [2014] EWCA Civ 1010, [2014] 2 Lloyd's Rep 544 [*Starlight*]. In Australia, it is also now accepted that breach of a jurisdiction agreement gives rise to a right to damages. See *Commonwealth Bank of Australia v White* (No 2 of 2004), [2004] VSC 268 at para 5. Albert Dinelli, "The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract Meets Private International Law" (2015) 38:3 Melbourne UL Rev 1023 [Dinelli].

¹⁷ *Union Discount*, *supra* note 16 at para 18.

¹⁸ Daniel Tan, "Damages for Breach of Forum Selection Clauses, Principled Remedies, and Control of International Civil Litigation" (2005) 40 Tex Intl LJ 623 at 651 [Tan].

¹⁹ *AMT Futures Ltd v Marzillier, Dr Meier & Dr Guntner Rechtsanwalts-gesellschaft MbH*, [2014] EWHC 1085 (Comm), [2014] 2 Lloyd's Rep 349. Although the Court of Appeal subsequently reversed this decision on a jurisdictional point, it was quick to affirm the existence of a cause of action for damages for breach of an exclusive jurisdiction agreement.

Canadian courts commonly award costs to a party forced to litigate in Canada in breach of a foreign jurisdiction agreement where the plaintiff fails to establish a strong cause for the case to proceed in Canada.²⁰ This accords with the general “losing party pays” rule that broadly applies in the Canadian court system.²¹ The award of costs, however, does not proceed on the same principles as an award of damages. For example, while costs are a discretionary remedy at common law, damages are as of right to the victim of a breach.

Hypothetically, there are at least four situations in which Canadian courts might be faced with an action for, or a decision to award, such damages. First, where an action is instituted abroad in breach of a Canadian jurisdiction agreement and the foreign defendant (now Canadian plaintiff) seeks damages for the breach in the Canadian court. Here, damages could be awarded alone or in addition to an anti-suit injunction to restrain the foreign proceedings. Second, where an action is instituted in Canada in breach of a foreign jurisdiction agreement, and the defendant counterclaims for damages for breach of the foreign jurisdiction agreement. Here, damages could be awarded in addition to a stay of proceedings or as a stand-alone remedy if the court decides to exercise jurisdiction over the case. Third, where an action is instituted abroad in breach of a foreign jurisdiction agreement and the foreign defendant (now Canadian plaintiff) seeks damages for the breach in a Canadian court. Here, assuming the Canadian courts have jurisdiction in respect of the claim, only damages are likely to be the appropriate remedy given the restricted jurisprudence on when a Canadian court can grant an anti-suit injunction to restrain the foreign proceedings. Fourth, where, in an action brought in Canada to enforce a foreign judgment given in a claim that was instituted abroad in breach of a Canadian (or foreign) jurisdiction agreement, the judgment debtor relies on the breach to counterclaim for damages to set-off part or the whole of the foreign judgment debt. In each of these situations, an award of damages would hold the parties to their jurisdictional bargain and safeguard the jurisdiction agreement.

There are several important reasons why a Canadian court may award damages where a jurisdiction agreement is breached. Damages provide

See *Marzillier, Dr Meier & Dr Guntner Rechtsanwalts-gesellschaft MbH v AMT Futures Ltd*, [2015] EWCA Civ 143, [2015] I L Pr 20 at para 62.

²⁰ See e.g. *ZI Pompey*, *supra* note 6 at para 42; *GreCon Dimter Inc v JR Normand Inc*, 2005 SCC 46 at para 61, 255 DLR (4th) 257 [*GreCon*].

²¹ Note that an award for costs is distinct from an award for damages. Costs refer to an order that the losing party pay the legal expenses of the prevailing party in an action. Damages refer to the specific compensation awarded on the grounds that one party has suffered a loss or injury from the wrong of another, e.g. through a breach of contract. See *Black's Law Dictionary*, 9th ed, *sub verbo* “damages”.

a malleable remedy. Stays of proceedings and anti-suit injunctions are relatively inflexible as generally “all or nothing” approaches to deciding the forum for litigation.²² Conversely, damages allow courts to provide monetary compensation for a breach of jurisdiction agreement. There are many kinds of losses that, subject to the law on the remoteness of damages, may be compensated with damages, and the quantum of an award can be varied “to suit the circumstances” of a given case.²³ In this way, damages may provide a customizable solution that better reflects the needs of the parties and the terms of their jurisdiction agreement. Also, by awarding damages where a jurisdiction agreement is breached, the courts encourage contractual performance by imposing financial consequence for breach, as is the case in respect of any other contractual term. This would likely help prevent forum shopping and therefore provide parties with greater certainty in their jurisdictional bargains. Furthermore, unlike anti-suit injunctions, damages—being a money judgment—are more likely to be enforced abroad. Foreign courts are generally quite willing to enforce foreign money judgments, but are often less keen to enforce non-money judgments, such as an anti-suit injunction.²⁴

Notwithstanding its apparent utility, there are significant legal challenges in awarding damages for breach of a jurisdiction agreement. Indeed, it has been argued that where a party seeks a remedy that will directly or indirectly influence litigation abroad, comity and other principles of private international law require limits to be placed on such remedies, even if the principles of domestic law would allow for the remedy.²⁵ It is submitted that a case-by-case assessment rather than a blanket denial of remedy is appropriate in such cases. As Tan argues, even if damages are

²² See Vaughan Black, “Conditional *Forum Non Conveniens* in Canadian Courts” (2013) 39:1 *Queen’s LJ* 41 (regarding conditional stay of proceedings). There are very limited situations in which a Canadian court may issue an anti-suit injunction to restrain proceedings abroad. See *Amchem Products Inc v British Columbia (Workers’ Compensation Board)*, [1993] 1 SCR 897, 102 DLR (4th) 96. Unlike the UK, Canadian courts have not developed a unique test from granting anti-suit injunctions when a jurisdiction agreement is at issue. *Donohue*, *supra* note 16 at para 24. For further details on anti-suit injunctions and the Canadian case law see Halsbury’s Laws of Canada (online), *Conflict of Laws*, “Jurisdiction: Declining Jurisdiction, Restraining Foreign Proceedings: Anti-Suit Injunctions: Restraining Foreign Proceedings” (II.2(2)) at HCF-30 “Restraining Plaintiffs in Foreign Proceedings” [Halsbury’s *Conflict of Laws*]; Pitel & Rafferty, *supra* note 6 at 148–61.

²³ Tan, *supra* note 18 at 645.

²⁴ Only a few foreign courts have followed the Canadian jurisprudence that allow for the enforcement of non-money judgments. *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52, [2006] 2 SCR 612; *Brunei Investment Agency v Fidelis Nominees Ltd*, [2008] JLR 337, [2008] JRC 152 (Jersey Royal Court); *Miller v Gianne*, [2007 CILR 18] (Cayman Islands Grand Court). See also *Davis v Turning Properties Pty Ltd*, [2005] NSWSC 742 (New South Wales Supreme Court); *Pattni v Ali* (2006), [2006] UKPC 51 at para 27, [2007] 2 All ER (Comm) 427.

²⁵ Tan, *supra* note 18 at 637.

inappropriate in some cases, the courts should consider whether there are *any* circumstances where damages can be fairly awarded and not simply rule out the cause of action.²⁶ In other words, an acknowledgement that courts may award damages for the breach of a jurisdiction agreement, followed by a case-by-case assessment of whether an award should be made in each instance, is a better way to proceed than *a priori* denial of the existence of such a remedy, especially given, as noted above, the varying circumstances in which the issue may arise.

In Canada, the Supreme Court has emphasized a strong role for comity in private international law decisions. In deciding whether to award damages for breach of jurisdiction agreement, this emphasis on comity will be a significant consideration for the courts. Unlike other contractual terms, a party cannot “singularly” breach a jurisdiction agreement; it must be “aided” by a court. In awarding damages, a court may be perceived as suggesting that the foreign court was incorrect in disregarding a jurisdiction agreement.²⁷ Admittedly, damages like anti-suit injunctions are an *in personam* remedy directed at the litigant and not against the foreign court. However, an award of damages may be viewed as disturbing the autonomy of and interfering with foreign judicial authority and process.²⁸ It may be seen as a collateral attack on the jurisdiction of the foreign court.

It is submitted that concerns for comity need to be put in context with the reality of international litigation.²⁹ For instance, if a party suffers financial loss from the breach of a jurisdiction agreement, comity may not be a satisfactory reason for renouncing judicial responsibility towards that party, especially where the party has a sufficient connection to Canada, and an award of damages may be the only effective remedy.³⁰ Furthermore, the impact of comity should vary from case to case. For example, comity should not be a significant concern where the foreign court has stayed or dismissed the action brought in breach of a Canadian jurisdiction agreement.³¹ Moreover, damages may be awarded in varying amounts and, therefore, may be varied to exert more or less pressure on comity as a given case requires.³² For these reasons, comity should not prevent courts from awarding damages for a breach of jurisdiction agreement, although the

²⁶ *Ibid* at 637.

²⁷ Gilles Cuniberti & Marta Requejo, “Damages for Breach of a Choice-of-Court Agreement” (2010) University of Luxembourg Law Working Paper No 2010-2, online: <ssrn.com/abstract=1689417> at 7 [Cuniberti & Requejo].

²⁸ Koji Takahashi, “Damages for Breach of a Choice-of-Court Agreement: Remaining Issues” (2009) 11 YB Private Intl L 73 at 104.

²⁹ Takahashi, 2008, *supra* note 11 at 90.

³⁰ *Ibid*.

³¹ *Ibid* at 79.

³² Cuniberti & Requejo, *supra* note 27 at 7.

scope of the remedy will, to some extent, be informed by comity. Exactly how far comity should go to restrain damages would be something for the Canadian courts to delineate once the right to damages for the breach of jurisdiction agreements has been recognized in Canadian law.

Another significant challenge in awarding damages for breach of jurisdiction agreements relates to quantification of damages. In some situations, a claim for damages would force a court to speculate on the nature of the judgment that may have been given if the action had been instituted in the agreed forum.³³ The difficulty is exacerbated where the litigation is pending before the non-contractual forum. In such a situation, the court may need to determine the hypothetical result in the forum named in the jurisdiction agreement as well as the hypothetical result in the non-contractual forum, and take that into account in quantifying the plaintiff's loss.³⁴ Given these difficulties in the quantification of damages, one may argue³⁵ that a more straightforward approach is to deny all claims for damages rather than attempt to distinguish cases in which they can be quantified and those in which they cannot.

It is submitted that this will be a wrong way for the Canadian courts to proceed. The difficulties with quantification of damages should not inhibit an award. In Canadian contract law, the fact that damages cannot be easily ascertained or assessed with certainty does not bar an action for damages. As Williams LJ observed in *Chaplin v Hicks*, “the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract.”³⁵ Accordingly, this concern should not result in a blanket rule denying all actions for damages for breach of a jurisdiction agreement.

A court that seeks to award damages for breach of a jurisdiction agreement may also have to grapple with the issue of motive or flagrancy of the breach and its impact on the cause of action or remedy. Canadian courts mostly enforce exclusive jurisdiction clauses, but they do not always do so. If we accept that a foreign court should have the same latitude, then it is arguable whether the defendant commits a breach by attempting to get the foreign court to proceed despite the clause. Even if the foreign court refuses

³³ Tan, *supra* note 18 at 653.

³⁴ *Ibid.*

³⁵ [1911] 2 KB 786 at 792 (CA); see also *Penvidic Contracting Co v International Nickel Co of Canada Ltd*, [1976] 1 SCR 267 at 279–80, 53 DLR (3d) 748. Recently, in *Millbrook Development Company v Coast to Coast Contractors Inc*, 2016 CanLII 30531 (NL SC (TD)), Valerie L Marshall J, after summarizing the law on the subject, noted: “Difficulty in assessing damages does not preclude an award of damages. If there is an evidentiary basis to find that there was a loss, then the Court must do its best to engage in assessment, even if the Court must resort to ‘guess work, or estimates’” at para 109.

to hear the case, the attempt may have been reasonable depending on the facts. Indeed, it has been suggested that “the right to invoke the court’s discretion not to enforce a jurisdiction agreement cannot be waived.”³⁶ This raises the question: Would the availability of damages depend on whether the defendant did not have a good faith basis for proceeding despite the agreement?

It is submitted that reasonableness of breach, good faith, or similar pleas should not inhibit the award of damages for breach of a jurisdiction agreement, just as such pleas do not afford an excuse for breach of any other contractual term. Although some have argued against it,³⁷ the common law of contract is, justifiably, a strict liability system.³⁸ We do not see any reason why an exception should be created in respect of breach of a jurisdiction agreement. Also, although the Supreme Court has held that lack of good faith in terminating a contract may be the basis of a cause of action for damages,³⁹ the courts have not gone as far as to say that the exercise of good faith can be an excuse for non-performance.⁴⁰ Indeed, rather, the Supreme Court has held that “acting in good faith or thinking that one has interpreted the contract correctly are not valid defences to an action for breach of contract.”⁴¹

Furthermore, it is worth recalling that the issue at stake is not what the foreign court did; rather it is the defendant’s breach that lays the foundation for the cause of action. In other words, the action that gives rise to the breach is not the foreign court’s acceptance and exercise of jurisdiction or decision not to accept and exercise jurisdiction, but the action of the defendant in initiating a proceeding in the non-chosen court. In the words of Longmore LJ, “the owners’ breach of contract lies in the bringing of the claims. Whether they succeed in Greece or would have failed in England is irrelevant.”⁴² The preceding is not meant to suggest that the decision of the foreign court is not relevant: the decision of the foreign court will go to the extent of loss that is suffered by the party “forced” to litigate in the non-chosen forum.

³⁶ Keyes & Marshall, *supra* note 2 at 355, n 52.

³⁷ See e.g. Eric Posner, “Fault in Contract Law” (2009) 107:18 Mich L Rev 1431.

³⁸ Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 376–86.

³⁹ *Bhasin v Hrynew*, 2014 SCC 71 at paras 55, 108–09, [2014] 3 SCR 494.

⁴⁰ Michael Furmston, *Cheshire, Fifoot and Furmston’s Law of Contract*, 16th ed (Oxford: Oxford University Press, 2012) at 666–67 (agreement, impossibility of performance and frustration, and contractual excuses for non-performance are the only accepted excuses for non-performance in contract law).

⁴¹ *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619 at para 54, 170 DLR (4th) 577.

⁴² *Starlight*, *supra* note 16 at para 20.

It becomes an important factor to take into account in the assessment of damages.⁴³

Admittedly, damages may not always provide true compensation for a breach of jurisdiction agreement.⁴⁴ The victim of a breach may prefer an order for specific performance, which only a stay of proceedings or anti-suit injunction order can provide. However, as discussed above, awarding damages could serve as a useful tool for holding parties to their jurisdictional bargain and safeguarding jurisdiction agreements in Canadian law. Damages could be used separately or in conjunction with a stay of proceedings or an anti-suit injunction. Although damages will not always provide a perfect remedy, there are cases where they may provide the best means of protecting a jurisdiction agreement. For this reason, it is submitted that the Canadian courts should award damages for breach of jurisdiction agreements in appropriate circumstances, such as where the foreign action was dismissed or stayed.

Our argument that damages should be available for breach of a jurisdiction agreement is founded on the notion that such an agreement is a “contract”. Admittedly, this point is not free from debate.⁴⁵ For example, one may argue that in Canadian law there are circumstances in which the law would excuse a party from complying with an exclusive jurisdiction clause through the “strong cause test”.⁴⁶ The law does not take that approach to any other clause of a contract: a seller cannot demonstrate “strong cause” for why he or she should not have to provide the promised goods. Accordingly, the existence of the “strong cause test” appears to suggest that Canadian law treats a contract to sue in a defined forum differently from other contracts such as a contract to sell. It is submitted that this argument is correct only to the extent that one is dealing with a jurisdiction agreement in a *jurisdictional context*. In that context, the jurisdiction agreement of the parties is subject to the law on the jurisdiction of the court as established by statute or the common law.⁴⁷ By their jurisdiction agreement, the parties seek to bring themselves within a statutorily or common law established ground of adjudicatory jurisdiction, or influence how a court should

⁴³ Dinelli, *supra* note 16 at 1038.

⁴⁴ Pitel & Rafferty, *supra* note 6 at 118.

⁴⁵ For a recent discussion, see Vaughan Black & Stephen GA Pitel, “Forum-Selection Clauses: Beyond the Contracting Parties” (2016) 12:1 J Priv Intl L 26 at 51 [Black & Pitel], outlining some of the ways in which “forum-selection clauses are not treated quite like most other contract terms”.

⁴⁶ See e.g. Douez, *supra* note 2; *ZI Pompey*, *supra* note 6; *Momentous.ca Corp*, *supra* note 6; Saumier & Bagg, *supra* note 6.

⁴⁷ *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 3; *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003, c 2 (2nd Sess), s 4; *The Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1, s 4.

exercise the jurisdiction it already has. Without the jurisdiction agreement, their named court will not usually have jurisdiction over their claim. A jurisdiction agreement cannot confer jurisdiction on a court in the absence of legislation⁴⁸ or a common law rule⁴⁹ that allows for that; indeed, subject matter jurisdiction is non-contractible.

The situation is different outside the jurisdictional context. When a party brings an action for breach of a jurisdiction agreement, there is no jurisdictional question in respect of the jurisdiction agreement. Such a party is not in any different position to a buyer who sues for breach for non-delivery. Both parties seek to enforce a substantive right conferred by contract—one for non-delivery, the other for disregarding an obligation not to sue in a forum other than that agreed by the parties. They do not in any way seek to contest, influence, or bring themselves with the jurisdiction, which the courts already have by legislation or common law. The court may have jurisdiction because of the jurisdiction agreement or on some other ground, but that is not the legal issue before the court. The issue before the court is whether one party is in breach of an obligation in their contract.

3. Non-enforcement of Foreign Judgment Obtained in Breach of Jurisdiction Agreements

An issue related to the award for damage from breach of a jurisdiction agreement is the extent to which Canadian courts may enforce a foreign judgment given in breach of a foreign or Canadian jurisdiction agreement. This issue is undecided in common law Canada.⁵⁰ There are, however, policy reasons and aspects of the Canadian recognition and enforcement regime that, through analogous reasoning, may ground a decision not to enforce a foreign judgment given in breach of an exclusive jurisdiction agreement.

⁴⁸ A classic example is in divorce proceedings. *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 3(1) provides: “A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.” This statutory requirement cannot be overcome by consent in the form of a jurisdiction agreement.

⁴⁹ At common law, submission is a recognized basis of jurisdiction. It is, however, a rule of the common law that the courts do not have jurisdiction with respect to a question of title and ownership of real property situated abroad. This subject matter jurisdictional limit imposed by the rule cannot be overcome by consent of the parties.

⁵⁰ One Canadian case in which this issue might have arisen was in *Old North State*, *supra* note 3. It involved an action to enforce a North Carolina judgment in British Columbia. The contract between the parties contained a clause concerning choice of forum and choice of law as follows: “This Agreement will be governed by and interpreted in accordance with the laws of the Province of British Columbia, Canada and the parties will attorn to the jurisdiction of the Courts of the Province of British Columbia, Canada” at para 1. The BCCA held that the clause “did not grant exclusive jurisdiction to the courts of British Columbia” at para 37. Thus, the action in North Carolina was not in breach of the agreement.

This is especially so where the foreign court accepted jurisdiction (despite the jurisdiction agreement), in circumstances where a Canadian court would not have found “strong cause” to exercise jurisdiction, if the proceeding was before the Canadian court.

First, the *Canada-United Kingdom Civil and Commercial Judgments Convention* has been implemented at the federal level and in all provinces and territories except Quebec.⁵¹ Broadly speaking, the *Convention* reflects a reciprocal arrangement that streamlines the enforcement of judgments between the two countries. For a UK judgment to be enforced under the legislation, one of the requirements to be satisfied is that the original court had jurisdiction to deal with the original claim. Article V, section 2(b) provides that a court will “not be regarded as having jurisdiction ... [where] the proceedings in the original court” were brought contrary to a jurisdiction agreement.⁵² Thus, the *Convention* explicitly provides that a UK judgment given in breach of a jurisdiction agreement will be unenforceable in Canada.

It is, however, unclear whether article V.2(b) is limited purely to actions brought in the UK in breach of Canadian jurisdiction agreements, or whether it extends to actions brought in the UK in breach of any foreign jurisdiction agreements. Furthermore, it is worth noting that article V.2(b) only provides a defence to the registration of a judgment under the federal and provincial legislations enacted pursuant to the *Convention*. A judgment creditor who brought an action in England in breach of a jurisdiction agreement could simply bring an action to enforce the UK judgment in Canada, rather than trying to register it under the *Convention*. In such an action, which will be an action to enforce the judgment at common law, the defence arising from article V.2(b) would not be available. This state of affairs is made

⁵¹ Given effect at the federal level under: *Canada-United Kingdom Civil and Commercial Judgments Convention Act*, RSC 1985, c C-30 [*Convention*]; effected at the provincial level under: *An Act Respecting the Convention Between Canada and the United Kingdom of Great Britain and Northern Ireland Providing For the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*, SNB 1984, c R-4.1, s 2, as repealed by *Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (Canada-United Kingdom) Act*, SNB 2016, c 109, Schedule A; *Canada-United Kingdom Judgments Recognition Act*, RSPEI 1988, c C-1, s 2; *Canada and the United Kingdom Reciprocal Recognition and Enforcement of Judgments Act*, RSNL 1990, c C-3, s 4; *Canada and United Kingdom Reciprocal Recognition and Enforcement of Judgments Act*, RSNS 1989, c 52, s 4; *Court Order Enforcement Act*, RSBC 1996, c 78, s 42; *International Conventions Implementation Act*, RSA 2000, c I-6, s 3; *Reciprocal Enforcement of Judgments (Canada-UK) Act*, RSNWT 1988, c R-2, s 2, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28; *Reciprocal Enforcement of Judgments (UK) Act*, RSY 2002, c 190, s 3; *Reciprocal Enforcement of Judgments (UK) Act*, RSO 1990, c R.6, s 3; *The Canada-United Kingdom Judgments Enforcement Act*, RSM 1987, c J21, s 2; *The Canada-United Kingdom Judgments Enforcement Act*, SS 1988-89, c C-0.1, s 3.

⁵² *Convention*, *supra* note 51, Part III, art v, s 2(b) [article V.2(b)].

possible because proceeding by way of the *Convention* is not mandatory, but rather, only an option.⁵³ Admittedly, these limitations undermine, to some extent, the strength of any comparative argument for not enforcing a foreign judgment obtained in breach of a jurisdiction agreement, using article V.2(b) of the *Convention*.

Second, it is submitted that although there is a narrow scope for the application of the public policy defence in actions to enforce foreign judgments in Canada, a judgment founded on a breach of a jurisdiction agreement should come within the scope of the defence.⁵⁴ For the public policy defence to apply, the foreign judgment must have been given on the basis of a law that violates the fundamental values or morality of the forum.⁵⁵ The jurisprudence of the Supreme Court of Canada has shown strong support for jurisdiction agreements. In *ZI Pompey Industrie v ECU-Line NV*, Bastarache J observed that “[forum selection] clauses are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law.”⁵⁶ In *GreCon Dimter Inc v JR Normand Inc*, LeBel J expanded on *ZI Pompey*, noting that the achievement of legal certainty in international transactions is linked to respect for party autonomy.⁵⁷ He noted that: “This Court has often stressed the importance of [jurisdiction] clauses and the need to encourage them, because they provide international commercial relations with the stability and foreseeability required for purposes of the critical components of private international law, namely order and fairness.”⁵⁸ The judicial recognition of the importance of jurisdiction agreements in Canada is consistent with international law and the law in many jurisdictions; indeed, there is a global trend encouraging the use of jurisdiction agreements through ensuring their effectiveness.⁵⁹ It is submitted that respect for party autonomy, in this instance as reflected in a jurisdiction agreement, is a fundamental value of Canadian private international law.

Comparatively,⁶⁰ the UK *Civil Jurisdiction and Judgments Act 1982* provides for a defence to enforcement where the proceedings were brought

⁵³ *Ibid*, Part II, art ii, s 4.

⁵⁴ *Beals v Saldanha*, 2003 SCC 72 at para 41, [2003] 3 SCR 416.

⁵⁵ *Pitel & Rafferty*, *supra* note 6 at 191.

⁵⁶ *Supra* note 6 at para 20.

⁵⁷ *GreCon*, *supra* note 20 at para 45.

⁵⁸ *Ibid* at para 22.

⁵⁹ See e.g. Brussels I Regulation (Recast), *supra* note 12; *The Hague Convention on Choice of Court Agreements*, 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015) [*Hague Convention on Choice of Court Agreements*].

⁶⁰ *Hague Convention on Choice of Court Agreements*, *supra* note 59, provides for the enforcement of judgments given on the basis of a jurisdiction agreement. There is, however,

contrary to a jurisdiction agreement and the defendant did not otherwise submit to the jurisdiction of the foreign court.⁶¹ Refusing to enforce a foreign judgment given in breach of a jurisdiction agreement is one effective means of holding parties to their bargain: indeed, enforcing a foreign judgment given in breach of a jurisdiction agreement, while at the same time refusing a claim for damages brought by the victim of the breach, subject the judgment debtor/victim of breach to double financial loss and injustice. A middle ground of allowing a claim of damages to set-off part or all of the foreign judgment debt is a useful compromise that would serve the ends of justice.

4. Interpretation of Jurisdiction Agreements

Interpretation is the means of discovering the meaning of a text. In the process, the effect of the text may expand or contract. Accordingly, the approach adopted by the Canadian courts in interpreting jurisdiction agreements can enhance or undermine the effectiveness of such agreements. In general, it appears Canadian courts have not developed specific rules for the interpretation of jurisdiction agreements.⁶² While this provides courts with flexibility, it may have the effect of undermining some jurisdiction agreements in cases where the courts' jurisprudence reduces predictability—one of the reasons why parties create such agreements in the first place. Conversely, the flexible approach adopted by the court may make jurisdiction agreements more effective by signalling to the parties to draft clear and certain jurisdiction agreements that will not give rise to interpretive disputes.⁶³

As argued above, a jurisdiction agreement is a contract. By extension, they are largely interpreted according to standard principles of contractual interpretation.⁶⁴ For example, the entire contract must be taken into account

no provision that expressly prohibits the enforcement of judgments given in breach of a jurisdiction agreement. Given the way the Convention is framed to mandate the enforcement of jurisdiction agreements as a basis of jurisdiction, it is unlikely that such a situation would arise between the contracting parties.

⁶¹ *Civil Jurisdiction and Judgments Act 1982* (UK), c 27, s 32(1). See generally Adrian Briggs, *Private International Law in English Courts* (Oxford: Oxford University Press, 2014) at 482–83.

⁶² Geoff R Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Markham, Ont: LexisNexis Canada, 2012) at 279 [Hall]; Pitel & Rafferty, *supra* note 6 at 131–32.

⁶³ For a useful discussion on drafting jurisdiction agreements see Briggs, *Agreements on Jurisdiction*, *supra* note 8 at 149–91.

⁶⁴ See Hall, *supra* note 62 at 279–86; Halsbury's *Conflict of Laws*, *supra* note 22, "Jurisdiction: The Bases of Judicial Jurisdiction: The Parties' Consent" (II.1(3)(b)) at HCF-7 "Agreements Nominating the Courts of the Forum"; see also *Monde Petroleum SA v Westernzagros Ltd*, [2015] EWHC 67 (Comm) at paras 33–39, [2015] 1 Lloyd's Rep 330 [*Monde Petroleum*] (recent English case dealing with the interpretation of jurisdiction agreements).

when interpreting a jurisdiction agreement⁶⁵ and the words of an agreement must “be given their plain meaning.”⁶⁶ In addition, the principle of *contra proferentem*, which provides that ambiguities be interpreted against the party who drafted the clause, is frequently applied to jurisdiction agreements.⁶⁷

The analysis required to interpret a jurisdiction agreement is an objective, contextual analysis.⁶⁸ The wording of the specific agreement is crucial to this analysis as well as the circumstances surrounding the parties’ contractual relationship. When dealing with jurisdiction agreements in commercial contracts, the standard for interpretation is that of the reasonable commercial person. In *Nickel Developments Ltd v Canada Safeway Ltd*, the Manitoba Court of Appeal explained that this approach is found in both English and Canadian authorities on the premise “that a commercial construction is more likely to give effect to the intention of the parties.”⁶⁹

Multiple interpretive issues can arise within the context of jurisdiction agreements, including the scope of the subject matter of such agreements, whether they are exclusive or non-exclusive, and whether a jurisdiction agreement in one contract governs in respect of another contract.⁷⁰ However, to date there is no Canadian work that has isolated these issues for detailed discussion grounded in the existing jurisprudence.⁷¹ This section aims to fill that gap.

A preliminary issue to address is the law governing the interpretation of a jurisdiction agreement. There appears to be no direct Canadian authority on this issue. As noted above, in the context of jurisdiction agreements, multiple interpretive issues could arise, such as the scope of the subject matter of such agreements, whether they are exclusive or non-exclusive,

⁶⁵ *Tercon Contractors Ltd v British Columbia (Minister of Transportation and Highways)*, 2010 SCC 4 at para 64, [2010] 1 SCR 69; see also *Yara Belle Plaine Inc v Ingersoll-Rand Co*, 2014 SKQB 254, 453 Sask R 79 [*Yara Belle*] (applying this principle to a jurisdiction clause).

⁶⁶ *Fairfield*, *supra* note 12 at 21.

⁶⁷ *Eli Lilly & Co v Novopharm Ltd*, [1998] 2 SCR 129 at paras 52–53, 161 DLR (4th) 1; see also *Yara Belle*, *supra* note 65 (applying this principle to a jurisdiction clause).

⁶⁸ *BC Rail Partnership v Standard Car Truck Co*, 2003 BCCA 597, 20 BCLR (4th) 1; *Richardson v RxHousing Inc*, 2010 NSSM 67, 297 NSR (2d) 254.

⁶⁹ 2001 MBCA 79 at para 34, 199 DLR (4th) 629.

⁷⁰ The extent that a non-signatory to a jurisdiction agreement may be bound by the agreement can also give rise to and be resolved through contractual interpretation. See generally Black & Pitel, *supra* note 45.

⁷¹ See generally Hall, *supra* note 62 at 279–86; Halsbury’s *Conflict of Laws*, *supra* note 22, “Jurisdiction: The Bases of Judicial Jurisdiction: The Parties’ Consent” (II.1(3)(b)) at HCF-7 “Agreements Nominating the Courts of the Forum”; Pitel & Rafferty, *supra* note 6 at 131–32.

and whether a jurisdiction agreement in one contract governs in respect of another contract. It appears that the Canadian courts have routinely applied the *lex fori* (the law of the forum) to address these interpretive questions. However, as a matter of private international law, interpretation is an issue of substance, which should be governed by the *lex causae* (the governing law). Thus, unless one characterizes all or some of the interpretive issues relating to jurisdiction agreements as procedural, the current approach of the courts is difficult to justify or correct. For example, while one can argue that the question of whether a jurisdiction agreement is exclusive or non-exclusive is procedural, going by the jurisdiction of the court,⁷² the issue of whether a jurisdiction agreement applies to a plaintiff's claim (for example, in tort) is more substantive. It is submitted that where it is a matter in dispute, the interpretation of a jurisdiction agreement should normally be decided under the law governing the jurisdiction agreement, which is generally also the law governing the contract of which it is a part.⁷³

A) Scope of the Jurisdiction Agreement

A critical issue for courts in interpreting jurisdiction agreements is determining what categories of claims or disputes are subject to a particular jurisdiction agreement. Determining the scope of a jurisdiction agreement is a matter of construction and is largely dependent on the parties' intentions and how the agreement was drafted.⁷⁴ One particularly common question of scope is whether a jurisdiction agreement applies to statutory or tort claims, or merely to contractual disputes.⁷⁵ The Canadian courts generally allow jurisdiction agreements to encompass at least some non-contractual disputes. Thus, plaintiffs cannot avoid a valid jurisdiction agreement by relying on non-contractual claims. For example, in *Sarabia v Oceanic Mindoro*, the BC Court of Appeal held that a jurisdiction agreement

⁷² But see *Faxtech Pty Ltd v ITL Optronics Ltd*, [2011] FCA 1320 (where the Australian Court noted that “[w]hether this jurisdiction clause is ‘exclusive’ needs to be determined according to the proper law of the contract. In this case, there is no doubt the proper law of the contract is English law” at para 5); Lord Collins of Mapesbury et al, eds, *Dicey, Morris and Collins on the Conflict of Laws*, vol 1, 15th ed (London, UK: Sweet & Maxwell, 2012) at para 12–103 [Mapesbury]; David McClean & Verónica Ruiz Abou-Nigm, eds, *Morris: The Conflict of Laws*, 8th ed (London, UK: Sweet & Maxwell, 2012) (noting that “[w]hether a jurisdiction clause is exclusive or ‘non-exclusive’ is a matter of construction of the contractual terms and in principle this construction should be done according to the law governing the agreement” at para 4–60).

⁷³ Briggs, “Subtle Variety”, *supra* note 11 at 365.

⁷⁴ See *Yara Belle*, *supra* note 65 at paras 45–60; *Hans v Volvo Trucks North America Inc*, 2010 BCSC 1700, 2 CPC (7th) 149.

⁷⁵ Gary B Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 3rd ed (Alphen aan den Rijn: Kluwer Law International, 2010) at 24 [Born].

contained in an employment contract applied to claims in tort.⁷⁶ The case involved an action by a seaman who was injured in the course of his employment on board a ship owned by the defendant. The defendant sought to have the action stayed on the basis of the plaintiff's employment contract, which contained a jurisdiction agreement to the effect that: "The Philippine Overseas Employment Administration (POEA or Administration) shall have original and exclusive jurisdiction over any and all disputes or controversies arising out of or by virtue of this Contract."⁷⁷ The Court held that "the words 'arising out of' [should be] interpreted generously to include non-contractual claims when they [appear] in a choice of forum clause in an international contract."⁷⁸ On that basis, Huddart JA stayed the action to give effect to the jurisdiction agreement and held that the respondent must be held to his promise not to sue his employer outside the Philippines, including in an action for negligence.

Similarly, in *Scalas Fashions Ltd v Yorkton Securities Inc*, the BC Court of Appeal found that a jurisdiction agreement in a standard form investment contract in Alberta applied to an action in tort for negligent advice.⁷⁹ The jurisdiction agreement stated: "Any disputes arising between [the parties] shall be exclusively within the jurisdiction of the Courts of the Province in which Yorkton accepts this agreement."⁸⁰ The Court found that the plain and ordinary meaning of the clause was that "any dispute" included disputes in tort, because the duty of care owed to the plaintiff arose from the contractual relationship between the parties, which was created by the contract containing the jurisdiction agreement.⁸¹ Accordingly, the Court stayed the action and upheld the jurisdiction agreement in favour of Alberta.

By contrast, in *Noble v Carnival Corp*, the Ontario Superior Court of Justice considered an action for damages brought by an employee who was injured in a motor vehicle accident in the course of her employment by the defendant ship operator.⁸² The defendant brought a motion to stay the action on the grounds that the employment contract contained a jurisdiction agreement providing that "any dispute or claims arising under this agreement shall be brought before the courts in England."⁸³ The Ontario Court first considered whether the jurisdiction "[a]greement was intended to cover the tort claims brought by the [p]laintiffs."⁸⁴ Sachs J focused on

⁷⁶ (1996), [1997] 2 WWR 116 at para 31, 84 BCAC 8.

⁷⁷ *Ibid* at para 3.

⁷⁸ *Ibid* at para 25.

⁷⁹ 2003 BCCA 366 at para 35, 17 BCLR (4th) 6.

⁸⁰ *Ibid* at para 5.

⁸¹ *Ibid* at paras 35–37.

⁸² 80 OR (3d) 392 at paras 1–3, 2006 CanLII 11441 (Sup Ct J).

⁸³ *Ibid* at para 6.

⁸⁴ *Ibid* at para 7.

the plain and ordinary meaning of the words of the clause. The term “any dispute” was found to be limited in the agreement by the words “arising under the agreement”.⁸⁵ Sachs J held that the plaintiff’s claim did not “arise under” the employment agreement and therefore the jurisdiction agreement in question did not cover the action in tort.⁸⁶

As is clear from the above cases, the Canadian courts are willing to interpret jurisdiction agreements to include non-contractual claims. However, in doing so, the courts do not appear to apply a presumption in favour of either an expansive or narrow reading of the scope of a jurisdiction agreement.⁸⁷ Instead, general principles of contract interpretation are applied on a case-by-case basis to resolve disputes concerning scope of the jurisdiction agreements.⁸⁸ This is consistent with the view expressed above that a jurisdiction agreement is a contract and, unless it undermines effectiveness, should be subject to principles of contract law.

However, this jurisprudence contrasts with the approach to arbitration agreements, for which there exists a strong presumption that parties have the intention of arbitrating all their disputes—“presumption in favour of one-stop adjudication.”⁸⁹ Furthermore, the Canadian courts have held that sophisticated commercial parties who intend a jurisdiction agreement to “govern all potential disputes between them [are] likely [to] make such an intention explicit.”⁹⁰ Thus, where such an intention is not made clear, the Canadian courts will simply give effect to the parties’ intentions as provided by their agreement, including any words of limitation.

B) Exclusive or Non-exclusive Agreements

A jurisdiction agreement may grant exclusive or non-exclusive jurisdiction to a particular forum. In general, common law courts will not interpret a jurisdiction agreement as exclusive in the absence of some affirmation showing that the parties have so agreed.⁹¹ Clear and express language is

⁸⁵ *Ibid* at paras 10–11.

⁸⁶ *Ibid* at para 8.

⁸⁷ Born, *supra* note 75 at 25.

⁸⁸ *Ibid* at 25.

⁸⁹ *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd*, [1993] QB 701 at 726, [1993] 3 All ER 897; see also *Fiona Trust & Holding Corp v Privalov*, [2007] UKHL 40, [2007] 4 All ER 951; *Monde Petroleum*, *supra* note 64; Born, *supra* note 75 at 25.

⁹⁰ *Yara Belle*, *supra* note 65 at para 53.

⁹¹ *Keyes & Marshall*, *supra* note 2 (“[w]hile the common law does not strictly presume exclusivity, there is a tendency to conclude that jurisdiction agreements are exclusive, which is assumed to be the intention of rational commercial parties” at 352); Born, *supra* note 75 at 20.

required to confer exclusive jurisdiction. The Canadian courts have adopted a flexible interpretive approach to exclusivity that requires the party relying on the agreement to satisfy the court in that the jurisdiction agreement obliges the parties to resort to the relevant forum.⁹² Express language is generally required to confer exclusive jurisdiction and this means that in cases of ambiguity, courts tend to interpret jurisdiction agreements as permissive rather than exclusive.⁹³ For example, in *Khalij Commercial Bank Ltd v Woods*, the Ontario High Court of Justice found that a jurisdiction agreement, which provided that “each of the parties hereto hereby submits to the jurisdiction of the Civil Court of Dubai”, “grant[ed] concurrent jurisdiction to any Court in which the matter [was] ... properly brought”, rather than exclusive jurisdiction on Dubai.⁹⁴ The Court noted that the language of the provision meant only that the parties agreed to submit to courts in Dubai, but the granting of exclusive jurisdiction required express language to that effect.

Although express language is generally required, whether a jurisdiction agreement uses the word “exclusive” is not determinative.⁹⁵ Indeed, the use of the word “exclusive” has been found not to oust the discretion of another court to find jurisdiction.⁹⁶ For example, in *Na v Renfrew Security Bank & Trust (Offshore) Ltd*, the BC Supreme Court considered a contract in respect of a \$1 million deposit with the defendant bank, which contained a jurisdiction agreement.⁹⁷ The agreement stated that “the exclusive place of jurisdiction for all proceedings” between the parties was the courts in Nicosia, Cyprus. Despite this wording, the BC Court held that the parties had not agreed that Cyprus would be the exclusive jurisdiction for all proceedings. The agreement also stated that the bank was in a position to

⁹² Halsbury’s *Conflict of Laws*, *supra* note 22, “Jurisdiction: Declining Jurisdiction, Restraining Foreign Proceedings: Stays Granted on Grounds of *Forum Non Conveniens*: Parallel Proceedings” (II.2.(1)(c)) at HCF-29 “Authority to Prevent a Multiplicity of Proceedings”.

⁹³ See *Schleith v Holoday* (1997), 31 BCLR (3d) 81, 86 BCAC 105 (where the BC Court of Appeal applied the approach and held that an ambiguous jurisdiction clause will not be construed to grant exclusive jurisdiction).

⁹⁴ *Supra* note 3 at paras 7, 10.

⁹⁵ See *CP Ships Ltd v Ieccorp Logistics Inc*, 2015 ONSC 6243, 2015 CarswellOnt 15691 (WL Can) (the Court observed: “[t]he forum selection clause in this case does not use the magic word ‘exclusive’ in relation to jurisdiction” at para 18; however, relying on principles of contractual interpretation the principle that “[c]ontracts are interpreted in accordance with their context to ascertain the intent of the parties” at para 19, the Court held that the jurisdiction agreement in the case was exclusive).

⁹⁶ See e.g. *Na v Renfrew Security Bank & Trust (Offshore) Ltd*, 2003 BCSC 1204, 16 BCLR (4th) 345 [Na]; *Pirrana Small Car Centres Ltd v Rumm*, 27 BCLR 292, [1981] 5 WWR 79 (SC); *G & E Auto Brokers Ltd v Toyota Canada Inc* (1980), 25 BCLR 145, 117 DLR (3d) 707 (SC).

⁹⁷ *Supra* note 96 at paras 7–9.

bring legal proceedings in any jurisdiction and so the evidence did not show that the parties had agreed to establish Cyprus as the only jurisdiction for all disputes.⁹⁸ The Court declared that the BC Court had jurisdiction *simpliciter* over the dispute, as the alleged breach of contract had occurred in BC.

Conversely, the use of the phrase “no other courts” has been found to grant exclusivity. In *Can-Am Produce and Trading Ltd v Senator*, the Federal Court held that a jurisdiction agreement that did not contain the word “exclusive” was not prevented from being construed as granting exclusive jurisdiction.⁹⁹ In that case, the jurisdiction agreement in a Bill of Lading specified that disputes between the parties would “be determined [in] the courts in Buenos Aires *and no other courts*.”¹⁰⁰ A clause in the parties’ second Bill of Lading provided that disputes “shall be decided in the country where the Carrier has his principal place of business.”¹⁰¹ The phrasing of “and no other courts” and “shall be ...” was held to be mandatory language, and thus granted exclusive jurisdiction in that case. Similarly, in *Naccarato v Brio Beverages Inc*, the Alberta Court of Queen’s Bench held that a jurisdiction agreement conferred exclusive jurisdiction by stating, “any proceeding in respect of this Amending Agreement will be commenced and maintained in ... British Columbia.”¹⁰² The Court explained that the wording of this “clause [went] beyond stating that a claim *may* be brought in British Columbia”, in fact providing that a claim *would* be brought there.¹⁰³

In summary, the Canadian courts generally only interpret a jurisdiction agreement as exclusive where there is clear and express language indicating this was the intention of the parties. Where there is ambiguity, the courts will tend to interpret a jurisdiction agreement as providing non-exclusive jurisdiction. For this reason, contracting parties should be careful to draft their jurisdiction agreement clearly and in express terms, where they want to assign exclusive jurisdiction; the Canadian courts will not easily infer exclusive jurisdiction where the wording is unclear.

This interpretive approach may be considered beneficial for the effectiveness of jurisdiction agreements, because it encourages parties to ensure their agreements are drafted clearly, thus minimizing uncertainty in how courts will interpret them. Accordingly, the Canadian approach to interpreting exclusivity works to further the function of jurisdiction

⁹⁸ *Ibid* at paras 59–61. The clause in this case is an example of a unilateral jurisdiction agreement for which, as noted above, French and English courts are divided as to its validity. The validity of the clause was not argued as a distinct issue in this case.

⁹⁹ (1996), 112 FTR 255 at para 20, 1997 AMC 206 [*Can-Am*].

¹⁰⁰ *Ibid* at para 5 [emphasis added].

¹⁰¹ *Ibid* at para 7.

¹⁰² 1998 ABQB 1 at para 12, 214 AR 49.

¹⁰³ *Ibid* at para 25.

agreements, namely, to create certainty and order in private international and interprovincial commercial transactions.

C) Multiple Contracts and Jurisdiction Agreements

One area where the application of a jurisdiction agreement can be difficult is where there are two or more contracts between the parties and one of the contracts does not include a jurisdiction agreement, or a jurisdiction agreement in the same terms as the other(s). “In these situations, the courts must consider whether the matter in dispute falls under the contract that [contains the jurisdiction agreement,] or whether the [jurisdiction agreement] applies to the second [or other] contract[s].”¹⁰⁴ In *Instrument Concepts-Sensor Software Inc v Geokinetics Acquisition Co*, the Nova Scotia Supreme Court considered a technical services agreement (“TSA”) that included a jurisdiction agreement in favour of Texas.¹⁰⁵ The parties subsequently entered a Settlement Agreement that did not contain a jurisdiction agreement, which the applicant argued replaced the original TSA. The applicant sought a declaration absolving it of any liability under the original contract and an anti-suit injunction against the respondent in Texas. The respondent countered with a motion to dismiss the proceedings for lack of jurisdiction based on the TSA’s jurisdiction agreement. Pickup J held that even “where a subsequent agreement lacks a [jurisdiction agreement], [the] courts may be prepared to enforce a prior [jurisdiction agreement] where the subsequent agreement is a mere continuation of the ongoing agreement between the parties.”¹⁰⁶ The courts will give great weight to the fact that parties commenced their relationship with an agreement as to jurisdiction, particularly where there is no evidence showing “their original intention was abandoned.”¹⁰⁷ Moreover, Pickup J found that the Settlement Agreement of the parties did not subsist independently as a single written document, but was rather “the product of back and forth” between them and was ancillary to or derivative of the TSA.¹⁰⁸ If the parties had intended to oust the jurisdiction agreement, the Settlement Agreement should have used much clearer language.¹⁰⁹ Pickup J held that “silence in a second contract ... [was insufficient] to override a [jurisdiction agreement] in a first contract where the two contracts deal[t] with the same ... subject

¹⁰⁴ *Instrument Concepts-Sensor Software Inc v Geokinetics Acquisition Co*, 2012 NSSC 62 at para 22, 313 NSR (2d) 200 [*Instrument*].

¹⁰⁵ *Ibid* at paras 7, 11.

¹⁰⁶ *Ibid* at para 25.

¹⁰⁷ *Ibid* at para 25, citing *Danks v Ioli Management Consulting*, [2003] OJ No 4051 (QL) at para 23, 2003 CarswellOnt 3975 (WL Can) (Ont Sup Ct J).

¹⁰⁸ *Instrument*, *supra* note 104 at para 34.

¹⁰⁹ *Ibid* at para 35.

matter.”¹¹⁰ Thus, the jurisdiction agreement in the TSA continued to apply between the parties in their ongoing settlement negotiations and dispute.

Similarly, in *Red Seal Tours Inc v Occidental Hotels Management BV*, the parties entered into a tour operator contract, which included a jurisdiction agreement in favour of the Aruban courts.¹¹¹ Before the contract was executed, the parties entered into an additional contract of guarantee that did not contain a jurisdiction agreement. The Ontario Court of Appeal held that the contract of guarantee could not be read as a stand-alone agreement because its terms dealt with specific matters governed by the tour operator contract.¹¹² The Court based this finding on the fact that the contract of guarantee was described as a “contract addendum” and referenced the original contract.¹¹³

From this jurisprudence, it is clear that where parties have contracted to submit their commercial relationship to a particular jurisdiction, the Canadian courts will as far as possible hold parties to such an agreement. By broadly interpreting a jurisdiction agreement so that it also applies to subsequent contracts, courts maximize its effectiveness. The requirement for an express declaration that such an intention has changed prioritizes party autonomy in the original contract and creates certainty by disallowing parties to waver from their original stated intentions. It is, however, submitted that there must be clear evidence of significant connection between the contracts at issue and their course of negotiation. In long-term relational transactions and complex international transactions, it is common for parties to enter into separate agreements dealing with different aspects of their relationship.

One of the purposes of a jurisdiction agreement is to create certainty in commercial relationships. However, complexity and confusion can result where parties have more than one jurisdiction agreement. This often arises where complex commercial transactions are put in place through a number of interlinked contracts, each having its own provision for dispute resolution.¹¹⁴ Where all the jurisdiction agreements between the parties provide for non-exclusive jurisdiction, there will generally be no problem of interpretation because a claim can be brought in any of the named jurisdictions. Difficult questions of interpretation may arise, however, where there is more than one jurisdiction agreement at play, and one or more provide for exclusive jurisdiction. A number of principles relevant to resolving this issue can be distilled from existing Canadian jurisprudence.

¹¹⁰ *Ibid.*

¹¹¹ 2007 ONCA 620 at para 4, 284 DLR (4th) 702.

¹¹² *Ibid* at para 9.

¹¹³ *Ibid* at para 8.

¹¹⁴ Briggs, “Subtle Variety”, *supra* note 11 at 367.

First, the Canadian courts will read the multiple jurisdiction agreements together, if possible. The case of *Can-Am* is illustrative of this.¹¹⁵ The Federal Court considered a Bill of Lading containing a jurisdiction agreement which, on its face, provided for jurisdiction in favour of Buenos Aires and, on the reverse, a clause stating that disputes were to be “decided in the country where the Carrier has his principal place of business.”¹¹⁶ While the plaintiff argued these provisions were conflicting and therefore should not be applied, the Court disagreed, holding that, if possible, the jurisdiction agreements should be read together so as to give effect to the whole.¹¹⁷ The Court stated that the carrier had its place of business in Buenos Aires and thus the two provisions could be read together, resulting in a reasonable and intelligible provision.

Where reading the agreements together is not possible, the court’s task will be to determine whether the dispute fits into the scope of one of the agreements. In such cases, each jurisdiction agreement will be interpreted as intending to have individual effect. Courts will have to disentangle such provisions by identifying the particular contract, out of which the dispute most naturally arises and that jurisdiction agreement will govern the dispute.¹¹⁸ This approach was used by the Saskatchewan Court of Queen’s Bench in *Yara Belle Plaine Inc v Ingersoll-Rand Co.*¹¹⁹ The Court held that the jurisdiction agreements the parties had incorporated into five separate contracts for the supply of rotors did not apply to all potential disputes between them. The Court found that the reasonable explanation for putting the clauses into five of the contracts was that the parties intended to restrict the application of the clause to matters arising out of each separate contract. There would be no need to continue incorporating the clause into each successive agreement if the clause was intended to govern all disputes potentially arising between the parties.¹²⁰ Accordingly, the Court held that the jurisdiction agreements were restricted to the claims arising out of and in connection with the five specific contracts in which they were contained.¹²¹

This approach to multiple jurisdiction agreements in multiple contracts ensures each jurisdiction agreement is effective. Where there is confusion and potential conflict caused by multiple jurisdiction agreements, the Canadian courts have chosen not to simply declare the agreements void due to uncertainty. Rather, the courts try to interpret the clauses in a way that accords with the stated intentions of the parties. This approach supports

¹¹⁵ *Supra* note 99.

¹¹⁶ *Ibid* at para 7.

¹¹⁷ *Ibid* at para 9.

¹¹⁸ Briggs, “Subtle Variety”, *supra* note 11 at 368.

¹¹⁹ *Supra* note 65.

¹²⁰ *Ibid* at paras 51–54.

¹²¹ *Ibid* at para 54.

party autonomy and enhances the effectiveness of jurisdiction agreements in Canadian law.

Comparatively, it is worth noting that the English courts have similarly grappled with interpretive issues related to multiple jurisdiction agreements in multiple contracts. One can distil from the existing case law that where there are multiple related contracts, the task of the court in determining whether a dispute falls within the jurisdiction agreement of one or more related agreements will depend on the intention of the parties, as revealed by the agreements against the background of a number of general principles. These principles include the following: when construing a jurisdiction agreement, a broad and purposive construction must be followed; when looking at a complex series of agreements, there is the need to construe an agreement that was part of the series of agreements, by taking into account the overall scheme of the agreements, and reading sentences and phrases in the context of that overall scheme; just as parties to a single agreement do not intend, as rational businesspeople, for disputes under the same agreement to be determined by different tribunals, parties to an arrangement between them set out in multiple related agreements do not generally intend a dispute to be litigated in two different tribunals; and where parties have entered into a complex transaction, comprising numerous contracts containing multiple and inconsistent jurisdiction agreements, it is the jurisdiction clauses in the contracts “at the commercial centre of the transaction” that they must have intended to apply to regulate their disputes.¹²²

D) Implied Jurisdiction Agreements

The preceding discussion raises a question about the extent to which or the circumstances in which a jurisdiction agreement may be implied into a contract, if at all.¹²³ For example, can it be argued that parties have agreed

¹²² *Sebastian Holdings Inc v Deutsche Bank AG*, [2010] EWCA Civ 998 at paras 39–49, [2011] 2 All ER (Comm) 245; *UBS AG v HSH Nordbank AG*, [2009] EWCA Civ 585 at para 95, [2010] 1 All ER (Comm) 727; *Trust Risk Group SpA v AmTrust Europe Ltd*, [2015] EWCA Civ 437 at paras 44–49, [2016] 1 All ER (Comm) 325.

¹²³ In recent times, courts have recognized the relationship between implication of terms and interpretation and the need to take into account the factual matrix when interpreting contracts, in the same way as it is done when implying terms in fact. See *Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53, [2014] 2 SCR 633; *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37, [2016] 2 SCR 23. *Belize (AG) v Belize Telecom Ltd*, [2009] UKPC 10, [2009] 2 All ER 1127, Lord Hoffman (“[i]t follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean” at para 21). See also *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*, [2015] UKSC 72 at paras 14–32, [2016] 4 All ER 441.

to submit to the jurisdiction of the Canadian courts because they have expressly included a Canadian choice of law agreement in their contract? This is an important question for parties because, as a basis of jurisdiction, a jurisdiction agreement enjoys protection or status not granted to other bases of jurisdiction, such as through the application of the “strong cause” test and the prospect for damages in the event of breach. In general, as a matter of contract law and to the extent that the relevant requirements are met,¹²⁴ the common law does not prohibit courts from implying any particular term into a contract. Furthermore, the fact that Canadian law does not impose any formal requirements (for example, writing) on jurisdiction agreements leaves room for such a term to be implied into contracts.¹²⁵

There appears to be no significant Canadian authority on the extent to which or the circumstances in which a jurisdiction agreement may be implied into a contract, if at all.¹²⁶ In respect of English common law, it had been suggested “that the common law ... require[s] an express agreement on jurisdiction.”¹²⁷ Dicey, Morris, and Collins had also suggested that as a general rule “an agreement to submit to the jurisdiction of a foreign court must be express: it cannot be implied.”¹²⁸

¹²⁴ See GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 463–73.

¹²⁵ Regional and international instruments such as the Brussels I Regulation (Recast), *supra* note 12, art 25, and *Hague Convention on Choice of Court Agreements*, *supra* note 59, art 3(c)(i), impose a writing requirement on jurisdiction agreements. An oral jurisdiction agreement leaves plenty of room for uncertainty, especially in commercial transactions. Given the value judicially placed on certainty in jurisdictional rules in Canadian private international law, one may argue that a formal requirement of writing for jurisdiction agreement could have advanced that objective. A writing requirement could have practical benefits. Where a jurisdiction agreement is not expressly written into the parties’ contract, difficult evidentiary issues could arise with respect to whether the agreement exists, what the specific terms of the agreement are, and how courts should interpret the agreement. Admittedly, a strict writing requirement may fail to account for circumstances where it is common commercial practice for parties to orally agree on terms. However, such a practice seldom prevails in international and interprovincial transactions where some evidence in writing is always essential. The trend in international law and in Europe towards a “relaxed” formal writing requirement appears to be a useful compromise, which Canadian legislators may follow.

¹²⁶ *Mattar v Alberta (Public Trustee)*, [1952] 3 DLR 399 at 404, 1952 CanLII 210 (Alta SC); Halsbury’s *Laws of Canada, Conflict of Laws* (Markham, Ont: LexisNexis Canada, 2011) (noting that “under certain circumstances the agreement may be inferred from the circumstances surrounding the transaction” at HCF-29).

¹²⁷ Maria Hook, “The Choice of Law Agreement as a Reason for Exercising Jurisdiction” (2014) 63:4 ICLQ 963 at 974.

¹²⁸ Mapesbury, *supra* note 72 at para 14–079.

The Judicial Committee of the Privy Council rejected these lines of authority in the recent case of *Vizcaya Partners Ltd v Picard*.¹²⁹ One of the central issues before the Court was “whether at common law an agreement or consent to submit to the jurisdiction of the foreign court can be implied or inferred, and, if so, how the implication or inference can arise.”¹³⁰ After a comprehensive survey of the existing academic and judicial authorities,¹³¹ it was held that given it is commonplace that a contractual agreement or a consent may be implied or inferred, “there is no reason in principle why the position should be any different in the case of a contractual agreement or consent to the jurisdiction of a foreign court.”¹³² It is submitted that given the importance of jurisdiction and the consequences of concluding that parties to a dispute are also parties to jurisdiction agreement, a jurisdiction agreement should not be lightly implied into international and interprovincial contracts.¹³³

To conclude this section, it is worth recalling that one of the primary functions of courts in interpreting a contract is to give effect to the self-imposed obligations of the parties. The approach to interpretation can have the effect of either enhancing or undermining a given contractual provision. How courts choose to interpret jurisdiction agreements is important to the overall effectiveness of the latter. Jurisdiction agreements have been recognized as important in Canadian law because they create certainty and order in private international and interprovincial transactions. Predictable and consistent rules for the judicial interpretation of jurisdiction agreements will help ensure these functions are fulfilled. However, the flexibility found in the Canadian approach to interpretation, devoid of hard and fast rules, may also work to make jurisdiction agreements more effective by signalling to parties to draft agreements that do not leave room for interpretive discretion. In this way, party autonomy and fairness are encouraged by the Canadian approach to interpretation of jurisdiction agreements.

5. Conclusion

Jurisdiction agreements are undeniably important in international and interprovincial commercial transactions; they are important instruments for managing legal risk, especially litigation risk. They are an expression of party autonomy and create certainty, order, and fairness, which are vital to interprovincial and international commercial transactions, as well as to

¹²⁹ [2016] UKPC 5, [2016] 3 All ER 181. For a brief discussion of the case see Hayk Kupelyants, “Implication of Jurisdiction Agreements” (2016) 75:2 Cambridge LJ 216.

¹³⁰ *Ibid* at para 32.

¹³¹ *Ibid* at paras 32–55.

¹³² *Ibid* at para 56.

¹³³ See *ibid* at para 58 for a discussion on matters from which, viewed alone, an agreement cannot be implied or inferred.

private international law. Canadian jurisprudence has evolved in favour of increasing support for jurisdiction agreements; in numerous cases, courts have affirmed the importance of jurisdiction agreements. There are many ways through which courts ensure jurisdiction agreements are effective and Canadian law appears to be successful in applying many of these. On many issues, the law relating to jurisdiction agreements is fairly well settled in Canada. However, there remain some gaps in the existing jurisprudence and issues on which the law is unsettled or underdeveloped. This paper has revealed and discussed a number of these areas where the law is unsettled or underdeveloped and may need further development. These areas include the validity of unilateral jurisdiction agreements; damages for the breach of jurisdiction agreements; and aspects of interpretation of jurisdiction agreements, including the extent to which they may be implied into contracts, and the law that governs the interpretation of jurisdiction agreements. This paper has argued that in addressing issues related to jurisdiction agreements, courts should aim to advance their effectiveness and that the comparative experiences of other countries and regions, some of which have been highlighted in this paper, will prove useful.