

Parallel Proceedings — Converging Views: The *Westec* Appeal

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INTRODUCTION

In the jungles of transnational litigation,¹ there is probably nothing quite as savage as parallel litigation. It is savage because the commencement of a second proceeding on the same matter in a different forum almost inevitably represents some form of abuse. It is either an abusive tactic to avoid an orderly determination by the first forum of whether it is an appropriate forum or it is an act of despair at the opportunistic choice by the opposing party of a court that is either unwilling or incapable of making a principled determination of whether it is an appropriate forum. Parallel litigation is savage also because it can seem to pit courts against one another by requiring them to make determinations that threaten to impinge on each court's most basic entitlement — its inherent jurisdiction to control its own process and to determine its own jurisdiction.

It might be thought that the situation would be less egregiously bad when parallel proceedings are commenced in two courts

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¹ In *Airbus Industrie GIE v. Patel*, [1998] 2 W.L.R. 686, [1988] 2 All E.R. 257 (HL), at para. 12 [hereinafter *Airbus*], Lord Goff described the common law world as "a jungle of separate, broadly based, jurisdictions" in which "potential excesses . . . are generally curtailed by the adoption of the principle of *forum non conveniens* . . . [which] cannot, and does not aim to, avoid all clashes of jurisdiction."

that take similar, even-handed approaches to the determination of appropriate forum. Under such circumstances, the effects of the abuse would be less obvious because the matter would not be left to be determined in an *inappropriate* forum. However, the problem would remain a serious one because, in fact, it might be more difficult to resolve. If one forum was clearly inappropriate, a stay or an injunction might be available to resolve the multiplicity on the traditional grounds of *forum non conveniens* alone. However, where neither forum was clearly inappropriate and the multiplicity could not be resolved in that way, the parallel litigation will foster a race to judgment and the potential for one court to have its proceeding abruptly terminated by the tender of a judgment from the other court. The defendant in each forum would have a strong incentive to frustrate the resolution of the matter in that forum and little incentive to participate in good faith.

Abuse is almost inevitably present in situations of parallel proceedings, but the vexing question can be "which is the abusive party?"² Is it the party that has made the pre-emptive strike by being the first to commence an action or is it the party that has not sought to resolve the forum dispute in the first forum? Neither the way in which an action is framed, such as in the case of declaratory relief, nor the sequence in which the proceedings are commenced is determinative. It could be entirely appropriate to respond to the threat of litigation in an inappropriate forum by commencing an action in an appropriate forum for a declaration that the applicant is not liable. A pre-emptive strike could be warranted to prevent an imminent abuse. Similarly, where a principled determination of appropriate forum is not available in an inappropriate forum (or even where the defendant is simply incapable of travelling to the plaintiff's chosen forum for a determination of appropriate forum), it is hardly abusive to respond by commencing a proceeding in an appropriate forum instead of making the hopeless or heroic effort to seek a stay in the first forum. While it may

² It should be clarified at the outset that the situations of "parallel proceedings" considered in this article are not those in which a plaintiff commences claims against a defendant in the same matter in more than one forum or those in which more than one claimant seeks the same relief in a matter from one or more defendants (on which, see, for example, E Sherman "Antisuit Injunction and Notice of Intervention and Preclusion: Complementary Devices to Prevent Duplicative Litigation" (1995) *Brigham Young U. L. Rev.* 925). Furthermore, the question of what constitutes the same matter so as to establish the existence of parallel proceedings is also not addressed.

be hard to know which party has acted opportunistically, the elements of abuse and the threat to the efficient administration of justice are almost inevitably present. While both parties may have contributed to an abuse in that they have produced a situation that breaches the edict that “[a]s far as possible, a multiplicity of legal proceedings should be avoided,”³ it is also extremely unlikely that neither has done so. In short, with parallel proceedings, it’s a jungle out there.

And so it was with considerable interest that many individuals looked on as the hearing of the appeal in *Westec Aerospace Inc. v. Raytheon Aircraft Co.*⁴ approached in the Supreme Court of Canada. It was the first opportunity for the Court to consider directly the relevance of parallel proceedings in determinations of appropriate forum. Unfortunately, hopes for an authoritative pronouncement from the Court were disappointed when the appeal was dismissed without reasons. As the record shows, Raytheon had obtained summary judgment in its Kansas declaratory action and there was, therefore, no longer a situation of parallel proceedings on which to base the appeal. The challenges presented by parallel proceedings are likely to become more prevalent as litigants take advantage of the increased flexibility in jurisdiction selection that is made possible under the current Canadian law relating to jurisdiction and judgments. For this reason, despite the lack of an authoritative pronouncement by the Supreme Court on the issues, they are ripe for comment.

This article takes a bird’s eye view of the emergence of parallel proceedings as an issue in transnational litigation, and it considers the various approaches that have been taken, including the rules that have emerged to deal with them. It seeks to link these approaches with the views of comity that are held in particular legal systems and the particular conditions in which such situations arise in an effort to conceive of an approach that would be suitable for Canadian courts. While there is reason to be confident that Canadian courts will make sound decisions in individual cases, an awareness of the range of situations in which parallel proceedings may be commenced and of the implications of the various responses that have been established elsewhere to parallel proceedings could

³ Section 138 of the Courts of Justice Act, RSO 1990, c.34.

⁴ *Westec Aerospace Inc. v. Raytheon Aircraft Co.* (1999), 84 A.C.W.S. (3d) 479, leave to appeal granted, 86 A.C.W.S. (3d) 697, reversed (1999), 173 D.L.R. (4th) 498 (CA), appeal dismissed without reasons, 2001, S.C.C. 26 [hereinafter *Westec*].

assist in developing an approach that will reduce the opportunities for abuse without compromising fairness.

THE EMERGING CHALLENGE OF PARALLEL PROCEEDINGS

Given the seriousness of the problems that parallel proceedings represent, one might wonder why the issues that they raise have not yet been canvassed at length and why effective means for dealing with them have not yet been devised. Surprisingly, they are a relatively new phenomenon, which is the by-product of technological advances in communication and increased mobility.⁵ In the past, the logistics of commencing two proceedings in different fora in order to gain strategic advantages have militated against such proceedings.

Parallel proceedings are a relatively new phenomenon also because, until the advent of a liberal regime for the mutual recognition and enforcement of judgments, defendants with assets in countries applying the traditional Anglo-American enforcement rules generally had considerable *de facto* control over a plaintiff's choice of forum — indeed, in many cases, a virtual veto over many of the fora that a plaintiff might choose. Under the rules for the enforcement of judgments, a plaintiff was generally limited in pursuing an action that would yield an internationally enforceable judgment either to the defendant's home forum or to one to which the defendant has consented.⁶ It would seem relatively unusual for defendants to object to litigating in their home forum and to prefer to travel elsewhere to commence an action, and relatively unusual for them to object to litigating in a forum to which they had consented and to claim to be entitled to travel elsewhere to commence an action. If a plaintiff chose a third forum, the judgment would be enforceable only within it and a defendant would be free to wait until the plaintiff commenced another proceeding in one of the other two fora mentioned above, thus obviating the need for the

⁵ On the emergence of these issues in Canada, see H.P. Glenn, "The Supreme Court, Judicial Comity and Anti-suit Injunctions" (1994) 28 U. British Columbia L. Rev. 193.

⁶ That is, a forum to which the defendant either *implicitly* consented, as when the action was a counterclaim to an action begun by the defendant in that forum, or *explicitly* consented, as when the defendant had entered into an agreement to resolve disputes in that forum.

defendant to commence a parallel proceeding to pre-empt the result.

Defendant control over the scope of choice of fora available to the plaintiff in transnational litigation was standard in the law of most countries until fairly recently. It continues to be the norm in cases in which the judgments are enforced outside Canada or outside the federal or regional judgments regime in which they are obtained. However, there have been three notable exceptions.

First, when the United States was founded, the framers of the constitution felt that it was necessary to provide more favourable terms for the recognition and enforcement of judgments between states and so they included in Article IV.1 the requirement that the states give “full faith and credit” to the judicial proceedings of other states.⁷ In time, this requirement gave rise to the “minimum contacts” doctrine, which permitted plaintiffs to obtain an enforceable judgment in fora other than those in which the defendant could be served or to which the defendant had consented.⁸ Second, when the European Economic Community was established, it was provided in Article 220 that member states would simplify the formalities governing the reciprocal recognition and enforcement of judgments.⁹ In time, the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention) and the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and

⁷ Article IV.1 of the United States constitution provides in part that “[f]ull faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.” US Constitution, Art. IV, para. 1. A similar requirement to give full faith and credit is found in section 118 of the Commonwealth of Australian Constitution Act (Imp.), 1900, 63 and 64 Vict., c. 2, which provides, “[f]ull faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.”

⁸ It must be acknowledged that these rules have also been applied to foreign judgments in many American states under the Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 263 (1962).

⁹ Article 220 of the 1957 Treaty Establishing the European Economic Community states, in part, that “Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals . . . the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.” Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 1973, Gr. Brit. T. S. No. 1 (Cmd. 5179 — II), art. 220.

Commercial Matters were established¹⁰ in order to permit bases of jurisdiction for reciprocally enforceable judgments other than the defendant's domicile or the defendant's consent. Third, following the Supreme Court of Canada's decision in *Morguard Investments Ltd v. De Savoye*¹¹ in which Canadian courts were required to recognize the jurisdiction of other courts issuing judgments not only where jurisdiction had been exercised on one of the traditional bases mentioned above (that is, the presence or consent of the defendant) but also where jurisdiction had been exercised on the basis of a real and substantial connection between the matter and the forum.

These departures from the traditional model of recognition and enforcement of judgments altered the conditions under which fora are chosen and thereby facilitated the prospect of parallel proceedings. By increasing the range of plaintiff choice in forum selection, they increased the opportunities for plaintiffs to manipulate the outcome of dispute resolution through the choices they made and they increased the range of opportunities for defendants to respond by choosing a different forum and commencing a parallel action. This increase resulted whether the choice was itself manipulative or a response to a manipulative choice by the plaintiff. Each of these departures from the traditional model has emerged in a slightly different federal or regional context, and each has given rise to a slightly different mechanism for dealing with parallel proceedings. A brief review of various mechanisms within the context of the schemes for the recognition and enforcement of judgments in which they have been developed will help to identify some of the considerations relevant to the development of a suitable mechanism for Canada.

Before embarking on this review, a clarification is in order. Each of these departures has occurred as part of a federal or regional

¹⁰ Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Official Journal of the European Communities, O.J.N.L. 304, October 30, 1978 and Cmnd. 7395 [hereinafter Brussels Convention], modified in 1995 to incorporate a reference to the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1989), 28 I.L.M. 620 [hereinafter Lugano Convention], which is now EC Regulation No. 44/2001 of December 22, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Official Journal L 12, 16/01/2001 p. 1 [hereinafter EC Regulation No. 44/2001].

¹¹ *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 [hereinafter *Morguard*].

regime and has thereby been a departure from the norm for the international recognition and enforcement of judgments for the purposes of facilitating that regime. While one approach to international parallel proceedings has been proposed by a committee of the International Law Association (ILA)¹² and another approach is contained in the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters,¹³ there is no established approach to international parallel proceedings yet in place. Indeed, it would not be expected that there would be one in the absence of a multilateral arrangement for the recognition and enforcement of judgments because it would be the arrangement itself that would foster parallel proceedings and necessitate such a response.

Nevertheless, the *Westec*¹⁴ appeal did involve international parallel litigation.¹⁵ To the extent that parallel proceedings are facilitated by special arrangements for the mutual recognition and enforcement of judgments, such as those found in federal and regional systems, it might be thought that the rules appropriate for international and inter-provincial parallel litigation would differ. Yet, the BC Court of Appeal made no distinction between them, possibly because the Canadian rules that were developed for inter-provincial recognition and enforcement of judgments have since been applied to international cases. Still, a distinction between inter-provincial and international parallel litigation might be a relevant consideration, and, despite the fact that the issues came before the Supreme Court of Canada in an international case, it could be helpful to begin by developing an approach based on parallel litigation in Canadian courts and then to consider the extent to which the

¹² International Law Association [hereinafter ILA], Committee on International Civil and Commercial Litigation, *Third Interim Report: Declining and Referring Jurisdiction in International Litigation*, which includes the Leuven-London Principles and which is available online at <<http://www.ila-hq.org>>.

¹³ Which was prepared as part of the negotiations under the auspices of the Hague Conference for a Multilateral Judgments Convention, entitled Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission, October 30, 1999, available online at <www.hcch.net/e/conventions/draft36e.html>.

¹⁴ *Westec*, *supra* note 4.

¹⁵ Although the precedent on which the British Columbia Court of Appeal relied — which was laid down in *472900 BC Ltd. v. Thrifty Canada* (1998), 168 D.L.R. (4th) 602 (BCCA) [hereinafter *Thrifty*] — involved *inter-provincial* parallel litigation

approach could apply to situations in which the other proceeding was underway in a foreign court. This is the process by which the Canadian approach to jurisdiction and judgments developed, and it focuses the analysis most effectively on the particular view of comity taken by the Canadian courts.

THE AMERICAN DIVIDE: THE COMITY AND VEXATIOUSNESS STANDARDS

The review begins with the American approach to parallel proceedings.¹⁶ The United States is the oldest common law federal system and it, therefore, represents the first approach to parallel proceedings that was developed. When the founders of the United States established the requirement that courts in the United States give full faith and credit to judicial decisions emanating from other states in the union, they also established, albeit unwittingly, the conditions that fostered parallel proceedings.¹⁷ The minimum contacts doctrine, which defines a generous scope for judicial jurisdiction, provides ample opportunity for the commencement of parallel proceedings, and the due process guarantees, which underlie the minimum contacts doctrine, have not been regarded as requiring restraints on parallel litigation.

Although Canadians might regard the wastefulness and the risk of inconsistent results in parallel litigation as fundamental concerns warranting action, there has been a marked ambivalence about the need to prevent parallel proceedings from going forward in the United States. This ambivalence seems to be a result of the nature of American legal tradition, in which there exists a tension

¹⁶ See generally, L. Teitz, "Parallel Proceedings and the Guiding Hand of Comity" (2000) 34 Int'l Lawyer 545.

¹⁷ Early on in the history of the law of jurisdiction in the United States, the United States Supreme Court determined that full faith and credit could be a source of unfairness to defendants if there were not some restrictions placed on the choice of forum available to plaintiffs: *Pennoyer v. Neff*, 95 U.S. 714 (1877). In time, these restrictions came to be associated with the due process clauses of the Fifth and Fourteenth Amendments of the US Constitution, which prohibited the deprivation of property without due process of law. Eventually, the due process requirements gave rise to the minimum contacts doctrine by which courts were constitutionally required to confine their exercise of jurisdiction in *in personam* claims to matters with "sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional notions of fair play and substantial justice to permit the state" to assume jurisdiction over the defendant. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 320 66 S. Ct. 154 (1945).

between the desire to avoid a multiplicity of proceedings and the obligation of courts to give effect to the policies of the forum in the course of adjudicating private party disputes. This tension has resulted in carefully circumscribed limits on the capacity of the courts to take steps to resolve situations of parallel proceedings. In considering whether to grant a stay to resolve a competition between fora, the United States Supreme Court has held that in cases in which the parallel proceedings are in federal and state courts in the United States, "federal courts have the power to dismiss or remand cases based on abstention principles *only where the relief being sought is equitable or otherwise discretionary*."¹⁸ Where the relief being sought is mandated by statute, the court must not abstain from hearing the case. There is some doubt about whether this should prevent a court in the United States from granting a stay in favour of a *foreign* proceeding that is already underway in international situations.¹⁹ Still, in deciding whether they should grant stays, American courts have rarely distinguished situations of parallel litigation from situations in which stays are sought on the basis of *forum non conveniens*.²⁰ The concerns raised for American courts by parallel litigation seem limited to the threat that it poses to judicial efficiency. While this limitation might seem to support a rule requiring deference to the forum in which the proceedings were first commenced, courts have tended to engage in a case-specific review, whereby they do not defer to a foreign proceeding that has been commenced first if the local proceeding has progressed further by the time the stay is sought.²¹

In considering whether to grant injunctions, courts in some parts of the United States have been more troubled by parallel litigation than courts in other parts. Two approaches have emerged: one that is based on "comity" and one that is based on "vexatiousness." In the comity-based approach, courts have avoided interfering whenever possible in proceedings before other courts, and

¹⁸ *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730-31 (1996) [emphasis added].

¹⁹ *Posner v. Essex Ins Co.*, 178 F 3d 1209, 1223 (11th Cir 1999); *Goldhammer v. Dunkan 'Donuts*, 59 F Supp 2d 248, 252 (D. Mass. 1999); *Evergreen Marine Corp. v Welgrow Int'l Inc.*, 954 F Supp 101, 104 n. 1 (S.D.N.Y. 1997); *EFCO Corp. v. Aluma Sys USA Inc.*, 983 F Supp 816, 824 (S.D. Iowa 1997); *Abdullah Sayid Rajab Al-Rifai & Sons v. McDonnell Douglas Foreign Sales Corp*, 988 F Supp 1285, 1291 (ED Mo. 1997).

²⁰ See *American Cyanamid Co. v. Picaso-Anstalt*, 741 F Supp 1150, 1154 (D. NJ 1990).

²¹ *Ibid.*

they have refrained from issuing anti-suit injunctions unless it is necessary to do so in order to protect the jurisdiction of the United States forum or to prevent the evasion of important public policies.²² Under the comity-based approach, the emphasis on non-interference in foreign proceedings has meant that parallel proceedings are often tolerated and are not regarded as a sufficient basis on which to issue anti-suit injunctions.²³ The version of comity that provides the rationale for this approach is one that requires deference to another court's obligation to discharge the policies of the forum with respect to the claim made by the plaintiff before it.

In the approach based on vexatiousness or oppressiveness, the courts are prepared to enjoin proceedings in other courts where those proceedings would frustrate local policies, where they are vexatious or oppressive, where they threaten the local forum's jurisdiction, or where they could produce delay, inconvenience, expense, inconsistency, or a race to judgment.²⁴ Under the vexatiousness-based approach, the duplicative nature of foreign proceedings and the potential for "unwarranted inconvenience, expense and vexation" are relevant considerations,²⁵ as is the potential for inconsistent results²⁶ in determining whether or not to grant an injunction, apart from the general considerations relating to appropriate

²² See, for example, *Laker Airways v. Sabena, Belgian World Airlines*, 731 F 2d 909, 926-27 (DC Cir. 1984) [hereinafter *Laker*]. This is the standard not only in the DC Circuit, as indicated in the *Laker* decision, but also in the Second, Third, and Sixth Circuits as indicated in *China Trade and Dev. Corp. v. Ssangyong Shipping Co.*, 837 F 2d 33, 35, 37 (2d Cir. 1987) [hereinafter *China Trade*]; *Compagnie Des Bauxites de Guinee v. Ins. Co. of N. America*, 651 F 2d 877 (3d Cir. 1981) cert. denied, 457 U.S. 1105 (1982); and *Gau Shan, Ltd. v. Bankers Trust Co.*, 956 F 2d 1349 (6th Cir. 1992).

²³ *China Trade*, *supra* note 22.

²⁴ See, for example, *Kaepa, Inc. v. Achilles Corp.*, 76 F 3d 624 (5th Cir. 1996) [hereinafter *Kaepa*]. This case is the standard not only in the Fifth Circuit as indicated by the *Kaepa* decision but also in the Seventh, Eighth, and Ninth Circuits, as indicated in the *Allendale Mutual* case, *infra* note 25, and in the decisions in *Cargill, Inc. v. Hartford Acc. and Indem. Co.*, 531 F Supp 710 (D Minn. 1982) [hereinafter *Cargill*] and *Seattle Totems Hockey Club v. The National Hockey League*, 652 F 2d 852 (9th Cir. 1982), cert. denied, 457 US 1105 (1982) [hereinafter *Seattle Totems*].

²⁵ *Kaepa*, *supra* note 24. See also *Allendale Mutual Ins. Co. v. Bull Data Sys.*, 10 F 3d 425, 431 (7th Cir. 1993) [hereinafter *Allendale Mutual*], which indicates that the difference between the two standards was the desire to have evidence of an impairment to comity arising from an anti-suit injunction before refusing an injunction on that basis.

²⁶ See *Seattle Totems*, *supra* note 24; and *Cargill*, *supra* note 24.

forum. It is not clear whether this approach is less concerned with comity *per se* or whether it is based on a different version of comity — one that is more like that which is found in the English jurisprudence discussed later in this article.

The approaches taken in the United States to parallel proceedings would appear to be very similar to those that are likely to be endorsed in Canada under the traditional rules, yet in many ways they are quite different. The approaches taken in the United States demonstrate confidence in the courts' ability to determine which is the more appropriate forum and to act, either by way of stay or injunction, to resolve a competition between proceedings as warranted. However, there is a perceived obligation of non-interference that is derived from the deep-seated commitment to forum independence and the recognition of the duty of the courts to assert local policies of the forum.²⁷ This seems to be far less compelling to Canadian courts, which are therefore less apt to tolerate parallel litigation. Indeed, the use of the term "comity" in the United States to describe a form of respect shown through non-interference seems different from the mutual support and cooperation that is normally associated with the term in Canada as it is used to describe, for example, the currently expanded scope with which to recognize and enforce judgments.²⁸ Therefore, it would seem likely that the higher level of interest in Canadian courts in resolving a

²⁷ An interesting analogue to this exists in the "public interest factors," which have been endorsed by the US Supreme Court as being relevant in deciding whether to grant a stay based on the doctrine of *forum non conveniens*. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). These factors included the need to manage court congestion, to prevent undue burden on the public for jury duty, to facilitate the local interest in having localized controversies decided at home, and to resolve a matter in a forum that will be in a position to apply its own law. The Canadian jurisprudence on the granting of stays based on the doctrine of *forum non conveniens* suggests that public interest factors such as this are unlikely to be considered, let alone to outweigh factors that relate primarily to the relative convenience to the parties and the relative logistical and administrative efficiency of resolving the matter in the alternative fora.

²⁸ See *Morguard*, *supra* note 11. See also *United States of America v. Ivey*, (1996) 26 O.R. (3d) 533 (Gen. Div.), *aff'd.* (1996) 30 O.R. (3d) (CA), leave to appeal to S.C.C. refused S.C.C. Bulletin, 1997, p. 1043. in which the court observed that the principle of comity should inform the development of the law in the area of the foreign public law exception to the enforcement of judgments and that "[i]n an area of law dealing with such obvious and significant transborder issues, it is particularly appropriate for the forum court to give full faith and credit to the laws and judgments of neighbouring states." This is a view of comity that emphasizes active support and cooperation more than restraint and deference.

multiplicity of actions and avoiding the risk of inconsistent results would prompt Canadian courts to search out a more orderly and certain means of resolving them. For a more orderly means, they might consider the European approach.

THE EUROPEAN "FIRST-SEISED" RULE

Once the drafters of the Brussels Convention, which is now the Brussels I Regulation,²⁹ decided to pursue a convention that provided both for the obligation to enforce the judgments of other members states and for the jurisdictional standards of member state's courts, it was clear that the resulting potential for parallel proceedings would need to be addressed. Numerous provisions in the regulation prohibit the exercise of forms of exorbitant jurisdiction that are available under the national laws of member states, but the remaining scope for jurisdiction continues to be broad. In the absence of a mechanism for declining jurisdiction on a discretionary basis, the obligation to give effect to the judgments of member states "without any special procedure being required" eliminates many of the ways in which courts might otherwise have prevented the inconsistent results of parallel litigation that is facilitated by the regulation. In order to address the concerns of multiplicity and inconsistent results, the Europeans established a simple rule for situations of parallel proceedings or "*lis pendens*." This rule requires all courts, other than the court first seized, to stay proceedings on the same matter before them of their own motion until the court first seized has decided the matter or has determined that it cannot decide the matter.³⁰

²⁹ EC Regulation No. 44/2001, *supra* note 10.

³⁰ Special accommodations are made for situations in which a forum other than the forum first seized has exclusive jurisdiction. The provisions for parallel litigation found in Articles 21-23 of the Brussels and Lugano Conventions, *supra* note 10, are now found in Articles 27-30 of the EC Regulation No. 44/2001, *supra* note 10:

Section 9 — *Lis pendens* — Related actions

Article 27

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.
2. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.

The “first-seised” rule is an effective means of eliminating both the potential for inconsistent results and the tactical manoeuvring that is associated with the race to judgment. In fact, the sequence in which courts are seized has been considered by Canadian courts to be a factor supporting the outcome in at least two cases involving parallel proceedings, but it has only been a supporting factor and not the decisive factor.³¹ The European experience with a prescribed rule, which requires automatic deference to the court first seized, is instructive. Without any principled means of assuring that cases are heard in the most appropriate fora, the “first-seised” rule has been criticized as replacing the unseemly race to judgment with an equally unseemly “race to the courthouse.” It has not prevented the underlying abuse that is associated with parallel proceedings in that it has encouraged pre-emptive strikes by litigants wishing to engage in forum shopping. As a result, the “first-seised” rule has

Article 28

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 29

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 30

For the purposes of this Section, a court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or
2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

³¹ See, for example, *Canadian National Railway Co. v. Sydney Steel Corp.* (1998), 167 N.S.R. (2d) 28 (S.C.), aff'd (1998), 164 D.L.R. (4th) 747 (NS CA) [hereinafter *Canadian National Railway*]; and *Thrifty*, *supra* note 15.

also been criticized for curtailing pre-litigation efforts to seek a negotiated result by diverting energy from such negotiations to the “race to file.” In sum, the benefits of order and certainty that would be gained by embracing a simple, mechanical rule such as the “first-seised” rule of the Brussels I Regulation could come at a considerable price in terms of the interests that Canadian courts have in discouraging opportunistic forum selection and ensuring that matters are determined in appropriate fora. It has been observed that the “first-seised” rule “achieves its purpose, but at a price. The price is rigidity, and rigidity can be productive of injustice.”³² There is at least one Canadian case in which a court was not persuaded to defer to the court first seized. This fact raises the question of whether it is possible to benefit from the assurances that are provided by the “first-seised” rule without its drawbacks.

THE ILA AND THE HAGUE CONFERENCE PROPOSALS: COMBINING THE “FIRST-SEISED” RULE AND *FORUM NON CONVENIENS*

Last year, the Committee on International Civil and Commercial Litigation of the ILA³³ presented a report proposing the “Leuven-London Principles.” The Leuven-London principles contain an approach to parallel proceedings that combines the orderliness of the European “first-seised” rule with the case-specific sensitivity of appropriate forum analysis, which is undertaken by common law courts under the doctrine of *forum non conveniens*. The principles require courts in different jurisdictions that are seized with the same matter to give the court first seized exclusive carriage of the matter, but only for the purposes of determining appropriate forum³⁴ — a determination that would be undertaken in the way

³² *Airbus*, *supra* note 1.

³³ The ILA is an international non-governmental organization established for the “study, elucidation and advancement of international law, public and private, the study of comparative law, the making of proposals for the solution of conflicts of law and for the unification of law, and the furthering of international understanding and goodwill.” Its work is carried on primarily through international committees that present reports at biennial conferences for discussion and endorsement. This report was presented at the sixty-ninth biennial conference in London in July 2000. Information about the ILA is available online at <<http://www.ila-hq.org>>.

³⁴ Pursuant to Article 4.1, “[w]here proceedings involving the same parties and the same subject-matter are brought in the courts of more than one state, any court other than the court first seized shall suspend its proceedings until such time as the jurisdiction of the court first seized is established, and not declined under this

that *forum non conveniens* determinations are made in common law courts. A similar proposal for resolving situations of parallel proceedings, though more elaborate and detailed, was included in the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, which was published in 1999 by the Special Commission of the Hague Conference on Private International Law as part of the process of negotiating a multilateral convention on the recognition and enforcement of judgments. The Special Commission's proposal also involved a combination of the "first-seised" rule and the case-specific determination of appropriate forum, based on factors ordinarily found in the common law determinations of *forum non conveniens*.³⁵

Principle, and thereafter it shall terminate its proceedings. The court first seised shall apply Principle 4.3 [appropriate forum analysis]. Should that court refer the matter to a court subsequently seised in accordance with Principle 4.3, the latter court will not be obliged to terminate its proceedings." The commentary explained that "the Committee gave anxious consideration to whether it ought to preserve a formal *lis pendens* rule, or whether it should simply include the existence of parallel litigation as one of factors to be considered by the court as a ground for referral of jurisdiction. In the end, it concluded that the special complexities of parallel litigation, which carry with it the problems of conflicts between courts, justify a separate rule. But the Committee desired to avoid some of the rigidity, and the potential for forum shopping, which could be the result of the strict operation of a 'first past the post' rule . . . But it departs in the result radically from the automatic priority on the merits vouchsafed to the court first seised under the Brussels Convention . . . [because what] it does is to give priority to the court first seised in the determination of the appropriate court for the determination of the merits of the matter. In this way, the Committee considered that the potential for the abuse of a *lis pendens* system by a race to the courthouse could be curbed, whilst a specific regime for the determination of priorities between competing actions was still preserved." ILA, *supra* note 12.

³⁵ Article 21 — *Lis pendens*

1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 or 12.
2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.
3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.

Adopting these proposed methods would go a long way towards resolving the difficulties that have been encountered when using the mechanisms for resolving parallel proceedings that are used in the American and European systems. On the one hand, these proposed methods would supply the orderliness lacking in the common law system — an orderliness that would prevent the race to judgment in most situations. On the other hand, these methods would entail a principled determination of appropriate forum that is lacking in the European system — a determination that in most situations would operate to discourage the race to file. If this approach was to be adopted in a reciprocal international regime, whether bilateral or multilateral, it might afford the best results that could presently be obtained in situations of international parallel litigation. Indeed, such a mechanism would seem to be a necessary adjunct to any international regime of enhanced recognition and the enforcement of judgments. As explained earlier, such a regime would increase the scope of forum selection used by litigants and thereby increase the potential for problems associated with parallel litigation. Moreover, as the commentary on these

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4. The provisions of the preceding paragraphs apply to the court second seised even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.
 5. For the purpose of this Article, a court shall be deemed to be seised:
 - a) when the document instituting the proceedings or an equivalent document is lodged with the court, or
 - b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant [as appropriate, universal time is applicable].
 6. If in the action before the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seised:
 - a) the provisions of paragraphs 1 to 5 above shall not apply to the court second seised, and
 - b) the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of being recognised under the Convention.
 7. This Article shall not apply if the court first seised, on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.

See Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, *supra* note 13, which has since been revised to accommodate other developments in the negotiations.

proposed methods suggests, they would virtually eliminate the friction caused by the more aggressive remedy — namely, the anti-suit injunction — by eliminating the need for one court to take unilateral steps to prevent multiplicity by enjoining the plaintiff from proceeding in the other forum.³⁶

Still, there is a sizeable and increasing minority of situations in which the mechanisms described in these proposals might not succeed in eliminating the underlying unfairness and abuse. For instance, in one situation, unfairness might arise because although both courts have ostensibly applied a principled approach to the determination of appropriate forum, their standards for granting stays of proceedings differ enough, either in stringency or in the nature of the factors considered, for one court not be content to be bound by the determination of the other. While a less generous approach to the granting of stays might be suitable in one legal system, it could still be frustrating to a court faced with a parallel proceeding in another legal system that would grant a stay if presented with the situation faced by the first court. For example, although a stay may be granted pursuant to Article 3135 of the Québec Civil Code³⁷ on a discretionary basis on considerations resembling those that apply in motions for stays based on the doctrine of *forum non conveniens*, the standard for doing so is more stringent than that which applies in common law jurisdictions. Accordingly, a situation could arise in which a Québec court would refuse a stay in circumstances in which another court in Canada would regard a stay of a Québec proceeding to be warranted. Under circumstances in which the other Canadian court regarded itself to be a clearly more appropriate forum, should that court decline to exercise jurisdiction merely because the Québec court had refused to grant a stay?³⁸

³⁶ See ILA, *supra* note 12.

³⁷ Article 3135 of Book 10 of the Québec Civil Code, which deals with the International Jurisdiction of Québec Authorities, provides that “[e]ven though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.”

³⁸ Courts in Ontario and in Nova Scotia on at least two occasions have not been willing to grant stays solely on the basis that Québec courts have refused to grant stays in parallel proceedings. See *Guarantee*, *infra* note 63; and *Canadian National Railway*, *supra* note 31. However, it should be noted that the Québec proceedings in *Guarantee*, were subsequently stayed by the Québec Court of Appeal and the dispute in *Canadian National Railway* was ultimately settled by the parties. See C. Richter, “Living with Multi-Jurisdictional Litigation,” in CBAO Conference Proceedings, see first unnumbered note.

In another example, although the courts of both the United States and the United Kingdom apply the doctrine of *forum non conveniens*, their views of what constitutes an appropriate forum and which factors are relevant for determining which forum is appropriate differ in ways that have sometimes given rise to rather heated trans-Atlantic debates.³⁹ As mentioned earlier in this article, the obligation to serve the interests of the forum might prevent the granting of a stay in a court in the United States under circumstances in which a stay would be thought to be warranted by an English court.

In another situation, unfairness might arise because the defendant cannot travel to the jurisdiction in which the matter has been commenced in order to seek a stay in that forum. Concerns about the hardships of litigating in distant fora have usually been raised in cases involving plaintiffs who find it difficult to travel to commence a claim. But the hardships of responding to a notice of a distant proceeding and of retaining and instructing local counsel to defend against a claim in a distant forum are also capable of producing unfairness in the determination of appropriate forum. Moreover, being aware of the difficulty that an opposing party might have in responding to a notice of a distant proceeding could encourage an opponent to seek an unfair advantage. Even among the common law provinces of Canada, where the harmonizing effect of the Supreme Court of Canada tends to ensure that the doctrine of *forum non conveniens* is applied in a fairly uniform manner, there could still be a risk that the difficulty of responding to a claim commenced in a court thousands of miles away could be used to secure a default judgment in an unmeritorious claim simply because the defendant is not able to challenge the choice of an inappropriate forum from such a distance.

How should the potential for such situations of unfairness be addressed? The experience of the English courts could assist since they are the only common law courts within a regional system otherwise comprised of civil law jurisdictions that entails a multilateral judgments regime. The English courts have needed to develop ways to respond to parallel litigation involving other courts that take a different approach to the issue of appropriate forum. The English courts have also needed to develop responses to parallel litigation in a multi-jurisdictional regime in which the logistics of travelling to challenge an exercise of jurisdiction could affect a defendant's

³⁹ See *British Airways Board v. Laker Airways Ltd.*, [1985] A.C. 53 and *Laker*, *supra* note 22.

ability to ensure that a proceeding does not go forward in a forum that should decline jurisdiction.

THE ENGLISH EXPERIENCE WITH PARALLEL PROCEEDINGS IN EUROPEAN COURTS

The general approach to parallel proceedings that is taken by the English courts is fairly standard for common law courts. In motions for stays of local proceedings in situations of parallel litigation, English courts, like the courts of the United States, Australia, and, at one time, Canada, have treated the existence of foreign proceedings as merely one more factor in the analysis of appropriate forum.⁴⁰ They have acknowledged that the commencement of parallel proceedings in another country could constitute a form of interference in local proceedings that could warrant the granting of an injunction.⁴¹ However, the analysis in cases of parallel proceedings remains focused, as it does in the United States, on the determination of appropriate forum, and the existence of parallel proceedings operates simply as another factor to be considered. Where the foreign proceedings are well advanced,⁴² the existence of parallel proceedings could warrant a stay, but where the parties have agreed in their contract to resolve disputes in the local forum⁴³ or where important issues of local public policy are likely to be resolved appropriately only in the local forum,⁴⁴ a stay will not be granted. What is notably different from the approach under the Brussels and Lugano regimes, however, is that while it is recognized that foreign parallel proceedings might be instituted as an abusive tactic, one that would warrant an injunction, they are not otherwise

⁴⁰ See L. Collins, ed, *Dicey and Morris on the Conflict of Laws*, 13th ed. (London: Sweet and Maxwell, 2000) at 400; *The Abidin Daver*, [1984] A.C. 398 at 411-12; and P. North and J.J. Fawcett eds, *Cheshire and North's Private International Law*, 13th ed. (London: Butterworths, 1999) at 347-50. Although, there seems to be some recognition that in matters such as those involving divorce decrees the potential for inconsistent results presents a greater concern. *de Dampierre v. de Dampierre*, [1988] A.C. 92 (HL) and *Henry v. Henry* (1995), 185 C.L.R. 571 (Aus. HC).

⁴¹ *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provinciën"*, [1987] A.C. 24, 40-41. And see *CSR v. Cigna Insurance Australia Ltd.* (1997), 189 C.L.R. 345 (HC).

⁴² See *Cleveland Museum of Art v. Capricorn Art International SA*, [1990] Lloyd's Rep. 166.

⁴³ See *Akai Pty Ltd v. People's Insurance Co. Ltd.*, [1998] 1 Lloyd's Rep. 90.

⁴⁴ See in *EIDu Pont de Nemours & Co. v. Agnew and Kerr*, [1987] 2 Lloyd's Rep. 585 (Eng. CA).

considered sufficiently problematic *per se* to warrant steps to eliminate them. Accordingly, in situations of parallel litigation when another court has refused a stay, it does not necessarily follow that the multiplicity should be resolved by an injunction.

However, the experience of the English courts in addressing situations of parallel proceedings within the Brussels and Lugano regimes — which involves other courts within a regional regime that take a different approach to the question of appropriate forum — is more instructive. As discussed earlier, the Brussels regime contains its own mechanism for eliminating parallel proceedings, but, in rare cases, where litigants demonstrate the potential to evade the effects of this mechanism, the existence of the enhanced regime for the recognition and enforcement of judgments will tend to exacerbate the effects of the abuse underlying the parallel proceedings. As the decision of the English Court of Appeal in *Turner v. Grovit*⁴⁵ demonstrates, the response that can be evoked by such abuse reflects a version of comity quite different from the deferent version contemplated by the American jurisprudence.⁴⁶

In *Turner*, the Court of Appeal granted an injunction to prevent the continuation of proceedings that were commenced in Spain by Turner's employer after Turner had made a claim for relief for constructive dismissal before the Industrial Tribunal in London. Ordinarily, under the "first-seised" rule, the Spanish court would have been required to defer to the English tribunal, but the employer had argued that the Industrial Tribunal was not a court, that the two sets of proceedings differed from one another and so were not duplicative, and that, in any event, the English court did not have authority under the Brussels Convention to issue an anti-suit injunction to restrain the pursuit of proceedings in the courts of another member state. On upholding the injunction, the English court rejected these propositions and observed that where proceedings are "launched in another Brussels Convention jurisdiction for no purpose other than to harass and oppress a party who is already a litigant here," the court has the power to enjoin the plaintiff in the foreign proceeding from continuing the abuse, and the granting of an injunction "entails not the slightest disrespect to the Spanish court" because it "would underpin and support the proper application of the Brussels Convention."⁴⁷

⁴⁵ *Turner v. Grovit*, [2000] 1 Q.B. 345 (CA) [hereinafter *Turner*].

⁴⁶ See discussion under the heading "The American Divide: The Comity and Vexatiousness Standards" earlier in this article.

⁴⁷ *Turner*, *supra* note 45 at paras. 29 and 43.

In the *Turner* case, the English court was faced with an abuse that drew on both of the concerns about unfairness mentioned earlier in this article. In the view of the English court, the Spanish court was obliged to stay its proceeding (pursuant to the Brussels Convention) and so there was no reason to wait to find out whether the Spanish court would do so. As a result, it was unfair to put Turner to the trouble of going to Spain to seek this result. The result in the *Turner* case illustrates a view of comity in the granting of injunctions that reflects a different alignment of the underlying relationships between litigants and courts. In this view of comity, the granting of an injunction is not a matter of choosing between the local court's obligation to grant a hearing to the plaintiff that is before it over the foreign court's obligation to do the same for the plaintiff that is before it. Rather, the injunction is granted on the strength of the courts' common interest in preventing an abuse — one that could affect proceedings before either court and one that should be resolved either by a stay or an injunction — once it is determined which proceedings are abusive — by whichever court is better placed to do so.

The lesson for Canadian courts as they develop an approach to parallel proceedings is an interesting one. Where courts operate within a regime of enhanced recognition and enforcement of judgments — one in which they take the same approach to the determination of appropriate forum — their shared interest in cooperating to eliminate parallel proceedings could reduce their concern to determine appropriate forum independently. Thus, Canadian courts might be more willing to defer to determinations by other Canadian courts of appropriate forum and they might even be prepared to regard litigants as bound by such determinations. For example, where another Canadian court has already denied a stay, that determination might be regarded as sufficient to warrant a stay of the local proceeding.⁴⁸ Similarly, one Canadian court might be less likely to take affront to the granting of an injunction by another Canadian court to restrain a parallel proceeding. Historically, Canadian courts have demonstrated considerable reluctance about taking such pre-emptive steps in matters that they feel should be decided by other courts,⁴⁹ but this could

⁴⁸ As was the case in *Thrifty*, *supra* note 15. However, see *Canadian National Railway*, *supra* note 31.

⁴⁹ See *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 [hereinafter *Hunt*], in which the British Columbia courts hesitated to pronounce on the constitutionality of a

change should such a step seem warranted⁵⁰ to prevent an abuse — for instance, situations in which the approach to comity taken in *Turner v. Grovit* would seem applicable.

The lessons for Canadian courts that can be found in the experience of the English courts could extend beyond refining the approach to injunctions. Developing appropriate responses to parallel proceedings might also help in refining the approach to determining which proceeding should be eliminated. For example, it was once thought that an action for a declaration that the plaintiff was not liable to the defendant (a “negative declaration”) was likely to be commenced only as a pre-emptive strike on forum selection, that is, as a means to secure a trial in a forum other than the one likely to be chosen by the party to the dispute who would seek substantive relief (the “natural plaintiff”).⁵¹ Clearly, negative declarations could be particularly effective as a tactic of this sort in a regime such as exists in Europe, where the court first seized has carriage of the matter. But they could also be effective in situations where the “natural plaintiff” was not in a position to travel to challenge the choice of forum by the applicant for the declaration. In either situation, it would constitute an abuse. Accordingly, negative declarations were once treated with considerable suspicion. However, as the recent English experience demonstrates,⁵² it might be appropriate to seek a negative declaration in a situation in which the opposing party was about to commence a proceeding in a forum that was less appropriate but that might not relinquish jurisdiction in a forum that was less appropriate but that would be

Québec blocking statute that impeded litigation before them. On appeal to the Supreme Court of Canada, the court found that the British Columbia courts had jurisdiction to make such a determination and that the statute was constitutionally inapplicable to litigation in Canadian courts.

⁵⁰ It is arguable that the act of certifying a multi-province plaintiff case in a class action — an act that has gained the approval of a number of courts — has virtually the same preclusive effect (subject of course to the plaintiff class members' entitlement to exclude themselves from the class). See *Harrington v. Dow Corning* (1997), 29 B.C.L.R. (3d) 88, aff'd (2000), 193 D.L.R. (4th) 67 (BCCA) leave to appeal to S.C.C. refused, S.C.C. Bulletin 2001 at 1540; *Wilson v. Servier Canada Ltd* (2000), 50 O.R. (4th) 219, leave to appeal to Div. Court, refused 52 O.R. (4th) 20, leave to appeal to S.C.C. refused, S.C.C. Bulletin 2001 at 1539.

⁵¹ See *The Volvox Hollandia*, [1988] 2 Lloyd's Rep. 361 at 371 (CA).

⁵² On negative declarations, see *Messier Dowty v. Sabena*, [2000] 1 Lloyd's L.R. 428 (CA). See also L. Collins, *Essays in International Litigation and the Conflict of Laws* (Oxford: Clarendon Press, 1994).

logistically difficult for the defendant to challenge. In other words, in developing a mechanism to respond to parallel proceedings, it might be necessary to review the assumption that it is abusive to attempt to secure access to a particular forum by seeking a negative declaration.⁵³ There might be nothing abusive about commencing an action for a declaration in an appropriate forum where there is a genuine risk that a claim might otherwise be commenced in a less appropriate forum from which the proceeding could not be dislodged. In addition, there might be nothing abusive about a party who has been repeatedly threatened with proceedings (whether or not in an inappropriate forum) taking the step of commencing an action for a declaration in order to resolve outstanding issues of liability.

In time, Canadian courts will develop sophisticated responses to the various strategies that emerge from the greater flexibility in forum selection that is available under the current enhanced rules for the recognition and enforcement of judgments. These responses will include a means of identifying which of the proceedings should go forward and a means for terminating the proceedings that should not go forward. Still, as they refine their approach, Canadian courts are likely to come to regard the traditional mechanisms of independent fora — stays, injunctions, and negative declarations — as being, in the final analysis, fairly crude tools for addressing the increased complexity of the issues of jurisdiction and forum that give rise to parallel litigation. This perception could provide fresh impetus to develop a mechanism for transfers of proceedings, such as that which operates in the Australian cross-vesting scheme, as a more effective means of addressing many of the concerns that give rise to parallel proceedings and make them difficult to resolve.

TRANSFERS OF PROCEEDINGS — THE AUSTRALIAN CROSS-VESTING LEGISLATION

Initially developed to address the jurisdictional complexities of the Australian federal judicial system, the cross-vesting scheme emerged from the proposals formulated for the Australian Constitutional Conventions in the 1970s and early 1980s, and taken up by

⁵³ Or one seeking a declaration that a judgment in a particular proceeding would not be enforceable.

the Solicitors-General who prepared the legislation.⁵⁴ The scheme is composed of concurrent enactments of the states, territories, and the Commonwealth and is entitled the Jurisdiction of Courts (Cross-Vesting) Act 1987, which vest every other Australian court to the largest extent possible with the jurisdiction of the enacting jurisdiction's courts.⁵⁵ In achieving the maximum flexibility in choice of jurisdiction, it became necessary to develop a mechanism to ensure that this flexibility was not abused and that matters were disposed of in appropriate fora. This was achieved by providing for the transfer of matters to more appropriate fora either upon the application of a party or by the court itself.⁵⁶

The cross-vesting scheme mandates the transfer of a proceeding in situations involving related proceedings in different courts, situations in which the receiving court would have had jurisdiction without the cross-vesting scheme, situations involving the interpretation of another jurisdiction's law, and when it was otherwise in

⁵⁴ Jurisdiction of Courts (Cross-Vesting) Act 1987, (Cth). The cross-vesting initiative was all the more effective for having been undertaken by the solicitors-general of the Australian states led by the Solicitor-General of Australia, Dr. Gavan Griffith, Q.C., because, as the senior counsel for the governments in Australia, they had the procedural expertise and experience necessary to craft a scheme that would work well within the Australian judicial system.

⁵⁵ Unfortunately, the seamless efficiency of the operation of the cross-vesting scheme was impaired by a 1999 High Court determination in *Re Wakim; Ex parte McNally* (1999), 163 A.L.R. 270 that the state courts were constitutionally incapable of vesting their jurisdiction in the Federal Court. Still, the vesting of jurisdiction between state courts, which is the feature of the model of primary relevance for the Canadian federation, remains intact.

⁵⁶ The operative provision in the cross-vesting legislation reads as follows:

5(1) Where-

(a) proceeding (in this sub-section referred to as the "relevant proceeding") is pending in the Supreme Court of a State or Territory (in this sub-section referred to as the "first court"); and

(b) it appears to the first court that-

- i) the relevant proceeding arises out of, or is related to, another proceeding pending in . . . [another Australian court] and it is more appropriate that the relevant proceeding be determined by . . . [the other Australian court];
- ii) having regard to-

...

(c) the interests of justice-

it is more appropriate that the relevant proceeding be determined by . . . [the other Australian court], as the case may be; or

- iii) it is otherwise in the interests of justice that the relevant proceeding be determined by . . . [the other Australian court];-

the first court shall transfer the relevant proceeding to . . . [the other Australian court], as the case may be.

See Jurisdiction of Courts (Cross-Vesting) Act, *supra* note 54.

the interests of justice. There is no onus on the application for a transfer, the principles of *forum non conveniens* do not apply, and no appeal is available following a decision to transfer,⁵⁷ as this was not intended to be the kind of cumbersome deliberative exercise properly reserved for judicial determinations of the merits, but rather an administrative decision — “a ‘nuts and bolts’ management decision.”⁵⁸

The Australian cross-vesting scheme is not the only example of a mechanism for transfers of proceedings that has been proposed or developed. A similar scheme operates in the American federal system. The diversity jurisdiction of the Federal Courts was created to enable those courts to act as neutral fora for disputes between persons of different states, and the transfer mechanism in section 1404 of the United States Code permits changes of venue between districts or divisions in the Federal Court system.⁵⁹ In addition, in Canada, the Uniform Law Conference of Canada proposed a transfer mechanism in Part 3 of the Uniform Court Jurisdiction and Proceedings Transfer Act.⁶⁰ This proposal was, in some ways, even more ambitious than the cross-vesting scheme. Not only would it permit courts to send or to receive a transfer of the whole of a matter or a part of a matter, it would also permit international transfers between participating courts. However, the act is not yet been proclaimed in force in any of the Canadian provinces. Finally, the Leuven-London Principles, which were discussed earlier in this article, also contain a mechanism for transfer, which is described as “referral” for dealing with matters commenced in the wrong forum.⁶¹

⁵⁷ See A. Mason and J. Crawford, “The Cross-Vesting Scheme” (1988) 62 Admin. L.J. 328; G. Griffith, D. Rose, and S. Gageler, “Further Aspects of the Cross-Vesting Scheme” (1988) 62 Admin. L.J. 1016. While there was no appeal, it would seem that an error could be corrected by sending the matter back from whence it came, which could occur either on motion of a party or on the receiving court’s own motion.

⁵⁸ *Bankinvest AG v. Seabrook* (1988), 14 N.S.W.L.R. 711 at 714.

⁵⁹ 28 U.S.C.A. para. 1404.

⁶⁰ Uniform Law Conference of Canada, “Uniform Court Jurisdiction and Proceedings Transfer Act” in Proceedings (ULCC, 1994), which can be found online at <<http://www.ulcc.ca>>.

⁶¹ Principle 5 provides

5.1 On the hearing of an application under Principle 4.3 [for *forum non conveniens*-like relief], and subject to any terms of referral under Principle 5.3, the applicant shall satisfy the originating court that the alternative court:

- (a) has and will exercise jurisdiction over the matter; and
- (b) is likely to render its judgment on the merits within a reasonable time.

There is a great deal to recommend the establishment of a transfer mechanism within Canada for proceedings that could more suitably be determined in fora other than those in which they have been commenced. Such a mechanism would be an effective means of preventing or resolving instances of parallel proceedings. Perhaps, in time, Part 3 of the Uniform Court Jurisdiction and Proceedings Transfer Act, which deals with transfers of proceedings, will be considered for adoption even if Part 2, which codifies court jurisdiction is not.

**EMERGING ELEMENTS OF A CANADIAN APPROACH:
A "SECOND-SEIZED" RULE?**

The foregoing survey of the experiences of federal and regional systems with mechanisms for parallel litigation has identified some of the concerns that might apply to Canadian courts and some of the features of the models to which Canadian courts might refer in developing an approach tailored to their needs. When these concerns and features are considered in the context of the growing jurisprudence on parallel proceedings in Canada, the significance of certain elements begins to emerge.

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- 5.2 The originating court may communicate directly with the alternative court on any application for referral in order to obtain information relevant to its determination under Principle 4, where such communication is permitted by the respective states. States are encouraged to permit their courts to make, and respond to, such communications. Any such communication shall be either on the application of one of the parties or on its own motion. Where the court acts on its own motion it shall give reasonable notice to the parties of its intention to do so, and hear the parties on the information to be sought. The originating court shall either communicate in writing or otherwise on the record. It shall communicate in a language acceptable to the alternative court.
- 5.3 The parties and the originating court are encouraged to consider appropriate terms of referral. These may deal in particular with:
- (a) the applicant's submission to the jurisdiction of the alternative court;
 - (b) the terms on which the applicant may assert a defence of limitation or prescription of action in the alternative court.
- 5.4 Save where the international convention provides otherwise, the originating court, if satisfied of the matters in paragraph 5.1, shall on an order to decline jurisdiction either suspend further proceedings at least until the jurisdiction of the alternative court has been established, or, where national law provides, terminate its proceedings.

ILA, *supra* note 12.

In the Canadian common law jurisprudence on parallel proceedings, five decisions stand out: two involving parallel proceedings in a common law province and in Québec, a third involving parallel proceedings in Ontario and Japan, and two other decisions involving the courts of British Columbia and Ontario. Taken in chronological order, they seem to follow the same pattern similar to that indicated by the various issues and concerns outlined earlier in this article.

In 1994, in *Guarantee Co. of North America v. Gordon Capital Corp.*,⁶² which involved a dispute over a claim on an insurance bond, the Ontario courts refused to stay a proceeding that was commenced two weeks after a proceeding on the same matter had been commenced in Québec. The court held that the prior commencement of proceedings in Québec was not a reason *per se* to grant a stay and that a stay should be refused because it had not been shown that Québec was clearly the more appropriate forum. The court saw no reason why both proceedings could not continue. Significantly, there was no suggestion that the granting of an injunction restraining the Québec proceedings necessarily followed from the refusal of a stay of the Ontario proceedings. This decision appears to reflect the traditional approach taken in common law courts and, in particular, the “comity”-based approach that is followed by some of the United States courts in which parallel proceedings are generally tolerated. Interestingly, the Québec Superior Court had refused a stay sought on the grounds of *forum non conveniens* in November 1993, because the Civil Code provision in Article 3135 for the granting of discretionary stays on this basis had not yet come into force, but in 1995 the Québec Court of Appeal relied upon the authority in this article to stay the matter.⁶³ Also worth noting is the fact that the Québec Civil Code contains a provision in Article 3137 specifically recognizing the independent significance of parallel proceedings.⁶⁴ Unlike the provision in the Brussels I

⁶² *Guarantee Co. of North America v. Gordon Capital Corp.* (1994), 18 O.R. (3d) 9 (Gen. Div.), leave to appeal to Div Ct refused, leave to appeal to S.C.C. refused, [1994] S.C.C.A. No. 304 [hereinafter *Guarantee*].

⁶³ *Gordon Capital Corp. c. Garantie, Cie d'assurance de l'Amérique du Nord*, C.S.M. 500-05-009714-930, [1995] R.D.J. 537 (C.A.).

⁶⁴ Article 3137 provides: “On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action between the same parties, based on the same facts and having the same object is pending before a

Regulation, Article 3137 permits a Québec court to stay its proceeding but does not require it to do so.

In 1997, in *Hudon v. Geos Language Corporation*,⁶⁵ the Ontario Divisional Court upheld the granting of an anti-suit injunction to restrain proceedings commenced in Japan by Geos Language Corporation for a declaration that it was not liable to Hudon. Hudon had commenced an action in Ontario, and Geos had sought a stay of the proceeding. The Divisional Court was not prepared to hold that the determination by the Ontario court that Ontario was an appropriate forum was a decisive factor in determining whether an anti-suit injunction should be issued, but it did hold that it was not necessary for Hudon to seek a stay of the Japanese proceeding in order to qualify for an order restraining Geos from continuing it. Thus, the possibility of treating one court's determination of appropriate forum as binding on the litigants in both proceedings was raised. Further, the court seemed moved by considerations that were similar to those in the *Turner* case⁶⁶ in that it regarded the subsequent Japanese proceedings as an effort to take advantage of a forum that was either unlikely to be persuaded to relinquish jurisdiction or that would be a difficult forum for the plaintiff to reach to seek a stay.

In 1998, in *Canadian National Railway Co. v. Sydney Steel Corp.*,⁶⁷ which involved a dispute over the supply of steel rails, the Nova Scotia Court of Appeal upheld a decision of the Chambers judge refusing to stay a local proceeding in favour of a proceeding commenced subsequently in Québec. The Court of Appeal made this decision despite the fact that the Québec courts had refused a stay and they had decided that they should determine which forum was the appropriate forum because they had determined that Québec law should apply.⁶⁸ The Nova Scotia Court of Appeal was not persuaded that estoppel applied to the determination of appropriate forum by the Québec courts (which was interlocutory under Québec law) or that comity required the Nova Scotia courts to defer

foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority."

⁶⁵ *Hudon v. Geos Language Corporation* (1997), 34 O.R. (3d) 14 (Div. Ct) [hereinafter *Hudon*]

⁶⁶ *Turner*, *supra* note 45.

⁶⁷ *Canadian National Railway*, *supra* note 31 at para. 22.

⁶⁸ *Sydney Steel Corp. c. Canadian National Railway* (Sept 8, 1997) 500-05-026912-962 (C.S.), appeal dismissed (March 13, 1998) 500-09-005566-971 (C.A.).

to that determination. Instead, the Court of Appeal observed: “[I]f any deference is to be shown, it would be to the jurisdiction in which proceedings were first commenced.” While the Court of Appeal permitted the multiplicity to continue, it demonstrated sensitivity to the kinds of concerns that could ultimately lead to the development of a mechanism for resolving parallel proceedings. Implicit in its reasoning was the recognition of the importance of resolving a multiplicity of proceedings as well as the importance of establishing a common standard for determining appropriate forum so that it would be suitable for one court to defer to the decision of another.

The real breakthrough for the common law courts in Canada, however, came in the 1998 decision of the British Columbia Court of Appeal in *472900 BC Ltd v. Thrifty Canada*,⁶⁹ when it overruled a leading precedent⁷⁰ that had emphasized the traditional approach of forum independence. In the *Thrifty* case, a dispute had arisen over the franchise agreement between 472900, a British Columbia company, and Thrifty, an Ontario company. Thrifty sued 472900 in Ontario, and, five days later, 472900 sued Thrifty in British Columbia. 472900 asked the Ontario court to stay its proceeding in favour of the British Columbia proceeding but this request was refused because there was a clause in the parties’ agreement attorning to the Ontario courts and the case could be tried in either forum “without great difficulty for either side.” An application for leave to appeal the Ontario decision was denied. Thrifty then sought a stay of the British Columbia proceeding and, on appeal to the British Columbia Court of Appeal, the stay was granted as a matter of comity between the provinces of Canada, with the explicit acknowledgment that the matter of appropriate forum had already been considered by the Ontario courts and that this point was a relevant factor in the determination. Although the decision in *Thrifty* focused primarily on providing reasons for the result that the court had reached rather than on the method that might be adopted by courts in the future for resolving situations of parallel proceedings, the result would appear to advocate a process resembling that which was proposed in the Leuven-London principles.⁷¹

⁶⁹ *Thrifty*, *supra* note 15.

⁷⁰ Which was set in *Avenue Properties Ltd v. First City Development Corp.* (1986), 32 D.L.R. (4th) 40 (BC CA).

⁷¹ See the discussion under the heading “The ILA and The Hague Conference Proposals: Combining the ‘First-Seised’ Rule and *Forum Non Conveniens*” earlier in this article.

The *Thrifty* decision is a particularly compelling precedent because it was established in a situation in which a court was *ceding* jurisdiction to another court explicitly for the purposes of resolving a multiplicity and not a situation in which a court was *claiming* jurisdiction for itself.

Finally, in *Westec Aerospace Inc. v. Raytheon Aircraft Co.*,⁷² which involved a commercial dispute between Westec, a British Columbia company, and Raytheon, a Kansas company, over a contract to supply computer software and hardware. While Westec's offer to settle was still outstanding, Raytheon commenced an action in Kansas for a declaration that it had not breached its contract with Westec and that Westec had not suffered any damage caused by Raytheon. Westec then commenced an action in British Columbia against Raytheon for breach of contract. Raytheon sought a stay of the British Columbia proceedings, which was refused by the Chambers judge but granted by the Court of Appeal. Citing the decision in *Thrifty*, the Court of Appeal endorsed the following test:

Where parallel proceedings are alleged, as they are in the case at bar, *Thrifty Canada* invites the following analysis:

1. Are there parallel proceedings underway in another jurisdiction?
2. If so, is the other jurisdiction an appropriate forum for the resolution of the dispute?
3. Assuming there are parallel proceedings in another appropriate forum, has the plaintiff established objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the British Columbia action that is of such importance that it would cause injustice to him to deprive him of it?⁷³

Like the *Thrifty* decision, the decision of the British Columbia Court of Appeal is a compelling one in that it invokes comity not merely to encourage tolerance of multiplicity but to resolve it. The decision in *Westec* goes even further than the decision in *Thrifty* in two respects. First, the court was prepared to cede jurisdiction to a *foreign* court and not just to another Canadian court and, second, the court deferred to a proceeding in which the applicant was not seeking substantive relief but rather a negative declaration. The court explicitly rejected arguments concerning "unstated and unsavoury assumptions about the quality of American justice," which it would not accept "without cogent proof that Westec could not get fair treatment" in the Kansas court. The court also explicitly rejected arguments that the Kansas proceedings were to be regarded

⁷² *Westec*, *supra* note 4.

⁷³ *Ibid.* at 507.

as abusive simply because they were commenced while an offer was outstanding and because they sought only declaratory relief. The court found the allegations regarding the deleterious effect of this approach on the settlement process overstated, and it observed that both of these arguments were answered by the fact that Kansas was an appropriate forum.

Despite the fact that the *Westec* appeal was dismissed without reasons by the Supreme Court of Canada,⁷⁴ it would seem that certain fundamental principles are emerging from the jurisprudence, which, when compared with other federal and regional systems, seem likely to form the foundation for a *Canadian* approach to parallel litigation. First, the common law courts in Canada seem to be converging on a view that, rejects the traditional tolerance for parallel litigation and that regards multiplicity as inherently at odds with the principles of order and fairness that underlie the constitutional imperatives for the law of jurisdiction and judgments in Canada.⁷⁵ Given such a view, multiplicity would not be just another factor in the analysis of appropriate forum but one that could provide an independent basis for granting a stay or an injunction. To be sure, this view would also imply a recognition of the necessity of a rapprochement of standards between the common law provinces and Québec. Further, it would imply a reconsideration of some of the *dicta* in the 1993 decision of the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*,⁷⁶ which suggested that the consequences of the commencement of parallel litigation "would not be disastrous"⁷⁷ and should be tolerated where both fora are appropriate.

Second, the view of inter-provincial comity that seems to be emerging in Canada is one that calls for collegiality and cooperation among courts rather than deference in the form of non-interference.⁷⁸ It is one in which it should not matter which court decides the issue of appropriate forum, provided that both courts apply the same test for determining appropriate forum. Under these circumstances, it might be possible to develop a unique

⁷⁴ See the description of the appeal process in this case in the text surrounding note 3.

⁷⁵ See *Morguard*, *supra* note 11.

⁷⁶ *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897.

⁷⁷ *Ibid.* at 914.

⁷⁸ See, generally, *Hunt*, *supra* note 49.

approach to resolving situations of parallel litigation — one that relied on the court *second* seized to determine whether it, or the court first seized, was the more appropriate forum. This approach would be in contrast to the European approach and the methods proposed by the Committee of the ILA and the Special Commission of the Hague Conference, which required the court first seized to make this determination. While a “second-seized” rule would obviate the concerns about the “race to file” that were raised in the *Westec* case, it would need to be couched in specific terms that would reduce the potential for abuse. For example, deference to the court second seized in making the determination of appropriate forum might be accompanied by requiring the plaintiff in the second proceeding to show that he or she could not, or should not, have to defend in the first forum. Permitting a challenge to a plaintiff’s choice of forum to proceed in this way could accommodate concerns raised by the fact that some defendants cannot travel to request a stay from the first forum.⁷⁹ Indeed, it might make the commencement of a second proceeding function simply as a preferable means of dealing with those situations rather than an application for an injunction. It would be preferable because it would operate in a context in which the courts had acknowledged the importance of cooperating to resolve the dispute over forum (and so would not risk raising sensitive issues of comity), and it would involve the commencement of a proceeding that thereby demonstrated the availability of the proposed alternative forum.

Finally, further procedural requirements might need to be introduced to protect against abuse. They could include, for example, the requirement that a plaintiff commencing a parallel proceeding seek a determination of the issue of appropriate forum as a prerequisite to making the claim and that the plaintiff notify the first court of the second proceeding to apprise the first court of the determination ongoing in the second court. To be sure, the mechanism would benefit from refinement as courts became more experienced with it. In addition, it could be improved by enhanced mechanisms for direct communication and cooperation between courts such as have been suggested by the Uniform Law Conference’s proposed transfer process,⁸⁰ which would, for example, permit the trial of an issue in an alternative forum, thereby securing trial in the most

⁷⁹ Which would raise issues of access to justice that were simply the obverse of those canvassed in *Oakley v. Barry* (1998), 158 D.L.R. (4th) 679 (N.S.C.A.).

⁸⁰ See the discussion under the heading “Transfers of Proceedings under Australian Cross-Vesting Legislation” earlier in this article.

appropriate forum even in situations where it might vary within a single case, for example, in respect of liability and of damages.

CHALLENGES AHEAD: ADAPTING A CANADIAN APPROACH TO INTERNATIONAL CASES

As noted in the introduction, Canadian courts have tended to apply the approaches to jurisdiction and judgments that they developed in inter-provincial cases to international cases. To what extent will that be likely to occur in the Canadian approach to parallel proceedings? It seems likely that Canadian courts will carry over to international cases the principle that multiplicity is not just a factor in the analysis but also an independent basis for a judicial response.⁸¹ However, they are unlikely to regard it as being necessary to avoid multiplicity at all costs, for instance, forcing a local plaintiff to resolve the matter in an inappropriate foreign forum. Canadian courts have shown that they are prepared to consider the issuance of an injunction as a logical corollary to the refusal of a stay,⁸² but it is not clear whether this result would occur in every case or only in cases where the court determined for other reasons that the commencement of the foreign proceeding was an abuse.

In addition, it seems likely that Canadian courts will often be prepared to respect a foreign court's determination of which proceeding should go forward, as they did in *Westec* when the denial of the stay in Kansas was cited as being a reason for granting a stay in British Columbia. In this regard, it is possible that the rule of sequence that might develop in Canada in international parallel litigation between common law courts will not relate to the order in which the courts are seized but will relate instead to the order in which they are asked to determine which is the more appropriate forum. However, in the absence of a multilateral judgments regime that establishes harmonized standards for jurisdiction, there will probably always be a residual category of international cases in which the approach of the foreign court to jurisdiction is sufficiently at odds with the Canadian approach, that it will not be suitable to forego more primitive mechanisms, such as those involving the refusal to enforce foreign judgments, the issuance of anti-suit injunctions, and even the tolerance of parallel proceedings. There is hope, though, that, in time, instances of parallel litigation entailing real savagery will become relatively rare.

⁸¹ As seemed evident in *Westec*, *supra* note 4.

⁸² In *Hudon*, *supra* note 67.

Sommaire

Procédures parallèles — des vues convergentes? L'appel Westec

La flexibilité offerte par les nouvelles règles canadiennes sur la compétence et les jugements crée des opportunités pour les parties adverses à former des recours parallèles l'une contre l'autre. Dans la mesure où les parties à un litige commencent à recourir à ces opportunités, les tribunaux canadiens font face à des problèmes spéciaux relatifs aux procédures parallèles et à l'éventualité d'obtenir des résultats contradictoires. Plusieurs mécanismes ont été développés dans d'autres systèmes juridiques pour résoudre ces questions, mais certains de ces mécanismes n'empêchent pas la course au jugement ou la course au dossier. Une revue des expériences résultant de ces mécanismes, et des décisions canadiennes rendues jusqu'à maintenant, peuvent aider à formuler des règles correspondant à l'appréciation canadienne de la règle de courtoisie et cherchant à prévenir les abus sans compromettre la justice.

Summary

Parallel Proceedings — Converging Views? The Westec Appeal

The flexibility afforded by the new rules in Canada for jurisdiction and judgments creates opportunities for opposing parties to commence parallel proceedings against one another in different jurisdictions. As litigants begin to take advantage of these opportunities, Canadian courts are faced with the special concerns associated with parallel proceedings and the potential for inconsistent results. Various mechanisms have been developed in other legal systems for addressing these concerns but some of these mechanisms do not prevent the "race to judgment" or the "race to file." A review of the experiences with these mechanisms, and of the Canadian decisions to date, can help in formulating rules that accord with the Canadian appreciation of comity and that seek to prevent abuse without compromising fairness.