Affaires générales et politique
General affairs and policy

Doc. prél. No 18
Prel. Doc. No 18

Octobre / October 2003

MÉCANISMES DE RENVOI DES AFFAIRES AU SEIN DE SYSTEMES FÉDÉRAUX
NOTE DE RECHERCHE

préparée par Andrea Schulz, Premier secrétaire

* * *

MECHANISMS FOR THE TRANSFER OF CASES WITHIN FEDERAL SYSTEMS
A RESEARCH PAPER

prepared by Andrea Schulz, First Secretary

Document préliminaire No 18 d'octobre 2003
à l'intention de la Commission spéciale d'avril 2004
sur les affaires générales et la politique de la Conférence

Preliminary Document No 18 d'octobre 2003
for the attention of the Special Commission of April 2004
on General Affairs and Policy of the Conference

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EXÉCUTION DES JUGEMENTS
ENFORCEMENT OF JUDGMENTS

Doc. prél. No 23
Prel. Doc. No 23

Octobre / October 2003

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HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ
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Document préliminaire No 23 d'octobre 2003
à l'intention de la Commission spéciale de décembre 2003
sur la compétence, la reconnaissance et l'exécution des jugements étrangers
en matière civile et commerciale

Preliminary Document No 23 of October 2003
drawn up for the attention of the Special Commission of December 2003
on Jurisdiction, Recognition and Enforcement of Foreign Judgments
in Civil and Commercial Matters

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TABLE OF CONTENTS

I. Introduction 5
II. Country-by-country analysis 8
A. Australia 8
1. Federal jurisdiction v. state and territory jurisdiction 8
a) Jurisdiction based on federal law 9
b) Diversity 9
c) State and territory jurisdiction 9
d) Cross-vested jurisdiction 9
e) Potential overlap 10
2. Transfer mechanisms 11
a) Transfer (change of venue) within federal courts 11
b) Transfer from the High Court to other federal and state courts 11
c) Transfer under the cross-vesting scheme 13
d) Transfer under the Corporations Law 13
3. Transfer and *forum non conveniens* 14
4. Jurisdiction clauses 15
5. Applicable law in case of transfer 16
a) Choice of law in federal jurisdiction 16
b) Choice of law in cross-vested jurisdiction 16
B. Canada 17
1. Federal jurisdiction v. jurisdiction of provinces and territories 17
a) The basic principles of the Canadian court structure 17
b) Potential overlap 18
2. Transfer mechanisms 18
a) Transfer within the federal court system 18
b) Transfer among provincial courts 19
i. Transfer within a province 19
ii. Transfer from one province to another 19
c) Transfer between provincial courts and a federal court 20
3. Transfer and stay of proceedings 20
a) The Federal Court 20
b) Provincial superior courts 21
4. Law applicable in the event of transfer or stay of proceedings 23
C. United States of America 23
1. Federal v. state jurisdiction 23
a) Federal question jurisdiction 24
b) Diversity Jurisdiction 24

c) Potential overlap 25
2. Transfer mechanisms 25
a) Transfer among federal courts 25
b) Transfer from state court to federal court 26
i. Federal question jurisdiction and transfer 26
ii. Diversity jurisdiction and transfer 27
3. Motion to remove from state to federal court and choice of court clauses 27
4. Applicable law in case of a transfer 28
III. Conclusion 28

I. INTRODUCTION

During the first meeting of the informal working group on the draft global Hague Convention on Jurisdiction, Recognition and Enforcement in Civil and Commercial Matters (the Judgments Project), which took place from 22-25 October 2002, the Permanent Bureau was asked to carry out some research. Participants asked for a paper describing which mechanisms and liberties might exist under national law to remove or transfer a case from the court exclusively chosen to another one within that same State in spite of the fact that the court chosen and seized had personal and subject matter jurisdiction as well as venue, and for a description of the relevant rules on the internal allocation of jurisdiction.

Cases where the chosen court lacks subject matter jurisdiction will not be covered by this paper. Whether a clause designating a specific court (and not only "the courts of country X"), which cannot be carried into effect because the court chosen lacks subject matter jurisdiction, can be "saved" through interpretation, thereby directing the parties to the court closest to their choice and having subject matter jurisdiction, is a question which also arises in purely internal cases. The same applies for national rules on venue, which may direct parties to one court while they have chosen another. How these cases are treated is an issue of the interpretation of contracts in a procedural context. It is not specific to the situation which gave rise to the request for this paper, *i.e.* the presence of two parallel court structures (*e.g.* state and federal) in a country which might enable a transfer from one to the other even where the chosen court *does* have personal and subject matter jurisdiction as well as venue and *could* in effect hear the case. This paper therefore focuses on transfer mechanisms existing for those latter situations.

Moreover, it concentrates on federal systems which do not only have more than one set of courts, but also more than one system of laws. Unitary legal systems where a transfer from one court to another could not affect the (substantive or procedural) law applicable will not be discussed here.

The background to the problem discussed in this paper is further described in Preliminary Document No 20 (Report on the first Meeting of the Informal Working Group on the Judgments Project – October 22-25, 2002) under "Personal v. subject matter jurisdiction" on page 13:

> "In 2001, there were some concerns that the Convention might force courts having jurisdiction under the Convention based on a valid choice of court clause, to hear a case although, under the internal system of allocation of jurisdiction in the State concerned, they lacked subject matter jurisdiction. Therefore, in 2001 it was suggested to insert into Article 4(1), 1st sentence, the words "provided the court has subject matter jurisdiction" (see footnotes 19 and 21 of the Interim Text) or to refer to "the courts of a Contracting State" instead of "a court of a Contracting State". As expressed in footnote 19 of the Interim Text, while the idea was generally accepted that a choice of forum clause could only confer jurisdiction over the person of the defendant and not in respect of subject matter outside the jurisdiction of the chosen court, there were doubts whether the proposals were either necessary or appropriate.
>
> For this reason, based upon a suggestion made by one participant of the 2001 Diplomatic Conference, the Permanent Bureau had suggested a general clause (see p. 14 of Preliminary Document No 19) as follows: "Nothing in this Convention shall affect subject matter jurisdiction", to be included either in Article 4 or, if there were to be more white list grounds of jurisdiction, as a general rule governing the whole chapter on jurisdiction.
>
> Some participants stressed the difficulty to define what is subject matter and what is personal jurisdiction. While it had always been stated that the Convention dealt with personal jurisdiction only, all of the former Article 12

on exclusive jurisdiction, for instance, to them related purely to subject matter.

> Therefore they suggested that the words "or the internal allocation of jurisdiction among the courts of a Contracting State" should be added to the proposal on p. 14 of Preliminary Document No 19.
>
> During the discussions, there were some doubts whether this would also allow a chosen court in a State which had two parallel systems of jurisdictions (*e.g.* state and federal courts) to remove a case to the other set of courts in a case where also the chosen court had subject matter jurisdiction. This was considered highly undesirable by most participants. To some of them it amounted to reintroducing *forum non conveniens* or a similar discretion not to exercise an existing jurisdiction. Therefore they want the rule only to apply where the chosen court lacks subject matter jurisdiction.
>
> The Permanent Bureau, assisted by contributions from the participants, was asked to investigate further which mechanisms and liberties might exist under national law to remove a case from the court exclusively chosen to another one in relation to the internal allocation of jurisdiction."

Three countries identified as having two parallel court structures throughout all the instances and more than one system of law, that are covered in this paper, are Australia, Canada and the United States of America, all having both state and federal courts. Although there may be more countries demonstrating these features, it is to be expected that the common principles drawn from these three examples will provide sufficient information for further consideration.

The questions examined with regard to these three countries are:

1. Are there cases where both state and federal courts have subject matter jurisdiction (*i.e.* an overlap of subject matter jurisdiction)?

2. Where an overlap of subject matter jurisdiction (and possibly venue) exists, does a court actually seized (no matter on what basis of jurisdiction), and, more particularly, a court (exclusively) chosen by the parties, have any discretion or other possibility to transfer the case to another court or dismiss and invite the parties to take their case to another court? Would this be an application of *forum non conveniens* or a separate issue? If there are criteria, which ones?

II. COUNTRY-BY-COUNTRY ANALYSIS

A. Australia

Australia is a federation consisting of six constituent states[1] and two self-governing internal territories. In respect of matters governed by state or territorial law, each state and territory in Australia is a distinct law area. Under the Constitution, the Commonwealth Parliament has concurrent legislative power in relation to such matters as bills of exchange, cheques, marriage, matrimonial causes and bankruptcy. Any Commonwealth law in the field will, to the extent of any inconsistency, prevail over any state law, but, if there is no "collision", state law can validly operate notwithstanding the existence of the Commonwealth law. All Australian states inherited the same English common law, and the High Court of Australia is the final arbiter on any differences in interpretation between state courts.[2]

1. Federal jurisdiction v. state and territory jurisdiction

Like other common law systems, Australian law distinguishes between personal and subject matter jurisdiction. Assuming that personal jurisdiction would be governed by the provisions of the Judgments Convention, the following description concentrates on the rules governing subject matter jurisdiction and venue in Australia with regard to a possible transfer of cases from a court having both subject matter jurisdiction and venue, to another court. Subject matter limitations on an Australian court's jurisdiction apply to cases irrespective of whether or not the case contains a foreign element.[3]

Under the auspices of the Australian Constitution, the ambit of jurisdiction of Australian courts can be defined by reference to the common law and partly by reference to statute.[4]

As a general rule, subject matter jurisdiction rests with the states and territories. As an exception, Chapter III of the Constitution identifies the matters that (may) fall within federal jurisdiction, either directly under the Constitution[5] or by virtue of a federal law.[6]

The Constitution contemplates that Parliament may establish federal courts to exercise "the judicial power of the Commonwealth". Meanwhile, the High Court (1901), the Family Court of Australia (1975), the Federal Court of Australia (1976) and the Federal Magistrates Court (1999) have been established.[7]

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[1] In Australia, the word "State" is spelt with a capital S when it refers to the States and Territories of Australia. In this paper, however, it will be spelt with a small s when used in that context, in order to distinguish the member states of a federation, like the Australian states (and territories), the states of the U.S., and the Canadian provinces and territories, from a "State" in the sense of a (possible) Contracting State to a Hague Judgments Convention, albeit a Federation.

[2] Peter Edward Nygh / Martin Davies (Conflict of Laws in Australia (2002), 7th ed., p. 10.

[3] Michael Tilbury / Gary Davis / Brian Opeskin, Conflict of Laws in Australia (2002), p. 40.

[4] Nygh / Davis (*supra* note 2), p. 45.

[5] Constitution Section 75: "Original jurisdiction of the High Court exists in all matters (i) arising under any treaty; (ii) affecting consuls or other representatives of other countries; (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party, (iv) between States, or between residents of different States, or between a State and a resident of another State; (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth."

[6] Constitution Section 76: "The Parliament may confer original federal jurisdiction on the High Court by law in any matter (i) arising under the Constitution, or involving its interpretation; (ii) arising under any laws made by the Parliament; (iii) of Admiralty and maritime jurisdiction; (iv) relating to the same subject-matter claimed under the laws of different States." Section 77 enables the Parliament to confer federal jurisdiction concerning the matters listed in Sections 75 and 76 on any other federal court or on a state court, instead of on the High Court.

[7] Tilbury / Davis / Opeskin (*supra* note 3), p. 482.

Moreover, federal jurisdiction may also be invested in the court of a state by the federal Parliament.[8]

a) Jurisdiction based on federal law

In most cases where a court exercises federal jurisdiction it does so because a question of substantive federal law is involved such as a matter arising under the Constitution or involving the interpretation of a federal statute. In particular, federal jurisdiction may be created by Parliament for any of the matters arising under any laws made by Parliament. The scope of the federal Parliament's legislative powers as listed, *inter alia*, in Section 51 of the Constitution, is extensive.[9] An important example is the Corporations Law, which governs the incorporation, functions, powers and administration of Australian corporations. It operates throughout Australia and its territories as a unified system of law, thereby eliminating conflicts of law within Australia. Jurisdiction with respect to civil matters arising under the Corporations Law is conferred upon the Federal Court of Australia and the Supreme Courts of each state and territory, the Family Court of Australia and the Family Court of Western Australia.

b) Diversity

In addition, federal jurisdiction may exist in some situations where there is no question of substantive federal law involved, in particular in a situation of diversity, *i.e.* where federal jurisdiction is invoked by the mere fact that the parties are residents of different states.[10]

It has to be noted, however, that the High Court has held that the word "resident" can only refer to a natural person.[11] Hence, an action by or against a corporation, including a corporation sole consisting of a natural person, cannot qualify. Nor is it possible to join a corporate third party to an action between individual residents of different states.[12]

c) State and territory jurisdiction

Subject matter jurisdiction of states and territories continues to exist in those areas where no federal jurisdiction was created as well as in areas where the latter is not exclusive.

d) Cross-vested jurisdiction

Moreover, the subject matter[13] jurisdiction of each state or territory Supreme Court is cross-vested in every other state or territory Supreme Court (or, in other

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[8] See, *e.g.*, Section 39(2) of the *Judiciary Act 1903*: "The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in Section 38, and subject to the following restrictions: (…)" (The restrictions concern appeals and state courts of summary jurisdiction.). Section 38 reserves some areas to the exclusive jurisdiction of the High Court (see *infra*, p. 9).

[9] See Constitution Section 51 in the Annex.

[10] Nygh / Davies (*supra* note 2), p. 85.

[11] See *Australasian Temperance and General Mutual Life Assurance Society v. Howe* (1922) 31 CLR 290.

[12] Nygh / Davies (*supra* note 2), p. 86.

[13] While it was held in *Seymour-Smith v. Electricity Trust of South Australia (NSW)* (1989) 17 NSWLR 648 at 659 (in 2002 still supported by Tilbury / Davis / Opeskin (*supra* note 3), p. 485) that the scheme extends both personal and subject matter jurisdiction vested in one state or territory to the others, this view can now no longer be sustained in the light of *David Syme & Co Ltd v. Grey* (1993) 115 ALR 247 at 273-4 per Gummow J: Cross-vested jurisdiction embraces only jurisdiction as to subject matter. Personal jurisdiction, under Australian law, is established either by valid service of process under the *Service and Execution of Process Act 1992*, or by submission (see Nygh / Davies (*supra* note 2), p. 105).

words, being extended throughout Australia) by the so-called cross-vesting scheme (the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and the state and territory equivalents).[14] As a result, each state or territory Supreme Court may exercise subject matter jurisdiction over a case falling within the subject matter jurisdiction of any other state or territory Supreme Court.[15] The same is true for the state Supreme Courts which may exercise the jurisdiction of the Federal Court and the Family Court.[16] The cross-vesting scheme aims to avoid conflicts and gaps as between the jurisdiction of the states and territories.

e) Potential overlap

It is obvious that the various heads of jurisdiction may overlap. For the areas it covers, the subject matter jurisdiction of the federal courts extends throughout Australia, as does the subject matter jurisdiction of the Supreme Courts of states and territories through the cross-vesting scheme.[17] However, this does not necessarily mean that federal jurisdiction, where it exists, excludes the jurisdiction of state courts: with regard to the matters mentioned in Sections 75 and 76 of the Constitution, Parliament has the power to define by law to which extent the jurisdiction of any federal court is exclusive.[18] Hence, while the High Court cannot be deprived of its jurisdiction over areas mentioned directly in the Constitution, Parliament may well establish concurrent jurisdiction of other federal or state courts, and provide for mechanisms to transfer cases. Sections 38, 39, 39A and 39B of the *Judiciary Act 1903* (Cth) provide for some areas of exclusive jurisdiction for the High Court (for the High Court's remittal power see below), while other areas of jurisdiction are conferred concurrently on the High Court and state and territory courts or the High Court and the Federal Court. Diversity proceedings based on Section 75(iv) and involving residents of different States, *e.g.*, which would be likely to arise under the Judgments Convention, can under Section 39(2) of the *Judiciary Act 1903* (Cth) be brought in state courts as well as in the High Court. Moreover, a state or territory Supreme Court may exercise federal jurisdiction by reason of other specific legislation. The Federal Court may exercise jurisdiction in respect of state and territorial matters in its accrued[19] jurisdiction.

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[14] See *Bell Group Ltd v. Westpac Banking Corp* (2000) FCA 439.

[15] By virtue of Section 4(3) of each State Act the Supreme Court of another state or of a territory has and may exercise original jurisdiction with respect to 'State matters'. The jurisdiction so conferred may be exercised by a state Supreme Court under Section 9 of the Act. Likewise Section 4(2) of the Federal Act confers upon the Supreme Court of a state and of another territory the jurisdiction of the Supreme Court of a territory (other than the Northern Territory) with respect to civil matters. The jurisdiction conferred by the Federal Act or by the State Acts may be exercised by the Supreme Court of a territory under Section 9(2) of the Federal Act.

[16] Section 4(1) of the *Jurisdiction of Courts (Cross-vesting) Act 1987*. While the cross-vesting scheme initially covered cross-vesting between federal and state jurisdiction in *both* directions, the High Court case of *Re Wakim; ex parte McNally* (1999) 163 ALR 270 made significant changes to this by holding the legislative provisions conferring state jurisdiction on the federal courts (where the latter would not have original or accrued jurisdiction [on the doctrine of accrued jurisdiction, see *infra*, note 19] invalid under the Australian Constitution. The cross-vesting from the Federal Court and the Family Court of Australia to the Supreme Courts of the states and territories, on the other hand, remains possible, just like the cross-vesting among the Supreme Courts of the states and territories, and from the Supreme Courts of the states and territories to the state Family Court of Western Australia (see Nygh / Davies (*supra* note 2), p. 104).

[17] Personal jurisdiction is also nationwide: A state or territory Supreme Court may exercise personal jurisdiction over interstate defendants under Pt 2 of the *Service and Execution of Process Act 1992* (Cth). See *Schmidt v. Won* (1998) 3 VR 435 at 452 per Ormiston JA.

[18] Constitution Section 77(ii). Proceedings between the Commonwealth and a state fall within the exclusive jurisdiction of the High Court (*Judiciary Act 1903* (Cth) Section 38(c) and (d)).

[19] The doctrine of accrued jurisdiction was developed by the High Court in the 1940s (*Carter v. Egg & Egg Pulp Marketing Board* (1942) 66 CLR 557) and refined in the early 1980s. It entitles a federal court to adjudicate both federal claims and related claims that would otherwise be non-federal if the latter are attached to and inseverable from federal claims that do fall within the Court's statutory jurisdiction. The court's jurisdiction over the accrued 'non-federal' portion of the matter persists even though the federal claim is later abandoned or dismissed. See The Australian Law Commission, Discussion Paper 64, Review of the *Judiciary Act 1903*, paras 2.19 and 2.125, available at < www.austlii.edu.au >.

2. Transfer mechanisms

a) Transfer (change of venue) within federal courts

While in the United States of America, the Federal Courts are organised as different Federal District Courts on a territorial basis, in Australia the federal courts are nationwide and subdivided into different registries according to venue. In spite of this difference, the systems are very similar in the context discussed here.[20]

A federal court may direct that a proceeding continue in a place other than the place at which the proceeding was commenced when that other place is the most suitable place for the conduct of the litigation, taking into consideration the interests of all the parties, the ends of justice and the need for the efficient administration of the court.[21] A change of venue in the exercise of federal jurisdiction may therefore occur by removal of the case to another registry of the High Court, Federal Court or Family Court of Australia.[22]

b) Transfer from the High Court to other federal and state courts

There are provisions under which the High Court may remit matters to other courts. The High Court can, upon application by a party or on its own motion, remit proceedings within its original jurisdiction, including in particular diversity cases, under Section 44(1) of the *Judiciary Act 1903* (Cth) to any federal court, court of a state or territory that has jurisdiction with respect to the subject matter and the parties, with the exception of suits falling within its exclusive jurisdiction. However, even the latter can be remitted under Section 44(2) to the Federal Court or any court of a state or territory, although it would not be possible for parties to seize any of these courts directly because of the exclusive jurisdiction of the High Court. In addition, the High Court can remit any proceeding to which the Commonwealth is a party under Section 44(2A) to the Federal Court. The provisions overlap and are not mutually exclusive,[23] and consequently the choice between the Federal Court and a state or territorial court will be available in almost all cases,[24] either directly or after having seized the High Court in cases where the latter has exclusive jurisdiction.

The power under Section 44(1) is very wide[25] - the requirement that the court receiving the case by remittal must have jurisdiction has been interpreted as meaning that the cause of the action is of a kind which that court can entertain[26] and the party is a person over whom that court would have jurisdiction if that party had been served within the jurisdiction.[27] The High Court does not have to enquire whether the state court would have had or could have exercised jurisdiction over the actual parties involved. It confers jurisdiction upon the state or federal court by remitting the case to it.[28] The first principle to be applied in selecting the court to which the matter should be remitted, is that the High Court should not by making a remitter alter the rights of the parties.[29] The Court considers not merely a difference in substantive rights but also the impact of procedural differences on such rights. If there is no conflict between the

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[20] See Tilbury / Davis / Opeskin (*supra* note 3), p. 503.
[21] See *Federal Court of Australia Act 1976* (Cth) Section 48 and *Federal Court Rules* O.1 rule 4, O.10 rule 1(2) and O.30 rule 6.
[22] Nygh / Davies (*supra* note 2), p. 97.
[23] *State Bank of NSW v. Commonwealth Savings Bank of Australia* (1984) 154 CLR 579.
[24] *Bowtell v. Commonwealth* (1989) 86 ALR 31.
[25] *Johnstone v. Commonwealth* (1979) 143 CLR 398.
[26] This relates to subject matter jurisdiction.
[27] This relates to personal jurisdiction.
[28] See *Weber v. Aidone* (1981) 36 ALR 345.
[29] *State Bank of NSW v. Commonwealth Savings Bank of Australia* (1984) 154 CLR 579 at 586 per Gibbs CJ.

potentially

applicable laws,[30] the Court will look for the most appropriate forum. Matters which have been considered important in this context include the place where the plaintiff was hospitalised, from where the witnesses would have to come, which court will be able to hear the matter earlier, the availability of legal aid, the place of residence of the defendant, and the place of incorporation of the defendant.[31]

c) Transfer under the cross-vesting scheme

This covers a transfer from the Federal Court of Australia and the Family Court of Australia to the Supreme Courts of the states and territories as well as transfers among the latter and from them to the Family Court of Western Australia.

Provision is made for the transfer of proceedings from one Supreme Court to another in Section 5(2) of the Federal and State Cross-Vesting Acts. It provides that such a transfer shall be ordered where it appears to the court in which the proceeding is pending that (a) the relevant proceeding arises out of, or is related to, another proceeding pending in the Supreme Court of another state or territory and it is more appropriate that the relevant proceeding be determined by that other Supreme Court, or (b) whether it is otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court of another state or territory. The section lists factors to which the court must have regard in deciding to transfer proceedings under the first option, in particular whether the matters at issue arise under or involve questions as to the application, interpretation or validity of the law of the other state and would, apart from the cross-vesting scheme, not be within the jurisdiction of the court first seized.

A court may under Section 5(7) transfer a proceeding on the application of a party, on its own motion, or on the application of the Attorney-General of the Commonwealth, a state or a territory. The two options for a transfer are not limited to the transfer of cross-vested jurisdiction. Any proceeding pending in a Supreme Court can be transferred.[32] Once a High Court matter has been remitted under Section 44,[33] it becomes a proceeding in the court to which it has been remitted, so that also rules enabling the latter court to transfer the case further will become applicable.[34]

When seized directly by a plaintiff on the basis of cross-vested jurisdiction, a court is not bound to accept cross-vested jurisdiction, even if neither party objects.[35] But if it wishes to decline jurisdiction in such a case, it must transfer the proceeding under Section 5(2) on its own motion to the more appropriate court.[36]

d) Transfer under the **Corporations Law**

The cross-vesting legislation does not apply to cases arising under the Corporations Law, which makes its own provision for the transfer of proceedings. Where such a case is pending in the Federal Court or a Supreme Court, proceedings may be transferred to another court, including a Family Court, having jurisdiction in corporation matters where it appears to the court in which the proceedings are pending that it is more appropriate for the proceeding or an application in the proceeding to be determined by that other court.

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[30] This does not necessarily mean that the *same* law will have to be applied.
[31] See *Weber v. Aidone* (1981) 36 ALR 345; *Crouch v. Commr for Railways (Qld)* (1989) 85 ALR 347; *Guzowski v. Cook* (1981) 149 CLR 128.
[32] Nygh / Davies (*supra* note 2), p. 107.
[33] *Supra*, p. 10.
[34] See *Dinnison v. Commonwealth* (1997) 74 FCR 184 at 188-9 per Foster J. The Federal Court transferred a case to a state court under the cross-vesting scheme which had been remitted to the Federal Court by the High Court under Section 44 of the *Judiciary Act 1903* (Cth).
[35] Nygh / Davies (*supra* note 2), p. 105.
[36] See *Bond Brewing Holdings Ltd v. Crawford* (1989) 1 WAR 517; in *Re Tolltreck Systems Ltd* (1991) 4 ACSR 701.

In the case of proceedings with respect to a civil matter arising under the *Corporations Law* pending in the Family Courts the assumption is that these courts are not courts with primary jurisdiction in corporations matters. Hence proceedings must be transferred to the Federal Court or a Supreme Court, if it appears to the Family Court either: (a) that the proceeding arises out of or is related to, proceedings pending in that other court; or (b) the proceeding or a substantial part thereof, is one over which the Family Court would not have had jurisdiction but for the provisions of the Corporations Act and in the interests of justice it is more appropriately dealt with in the Federal Court or Supreme Court; or (c) it is otherwise in the interests of justice that the Federal Court or Supreme Court determine the proceeding.[37]

In determining whether to transfer the court must have regard to the principal place of business of any corporation involved in the litigation, and the place or places where the events that are the subject of the proceedings took place.[38] These considerations are not exhaustive.[39] As with cross-vesting, it is uncertain whether the applicant for transfer carries any onus.[40] This depends on whether one sees Australian courts as components of a national system of justice, rather than distinct jurisdictions as in cross-vesting, and concludes accordingly that transfer issues should be determined with regard to matters such as costs and convenience.[41]

Personal jurisdiction over foreign corporations is acquired through service in accordance with the *Corporations Law* or Rules of Court. Under a future Hague Convention on Choice of Court in B2B cases, it would most likely be established through the Convention giving effect to the choice of court agreement.

3. Transfer and *forum non conveniens*

Where the question arises as to *which Australian forum* is the most appropriate for the trial of an action, the matter is regulated by statutory criteria that differ to some extent from the common law principles of *forum non conveniens*. In particular, the cross-vesting legislation lays down detailed criteria for the transfer of a proceeding from one participating federal, state or territory court to another. For state courts not covered by the cross-vesting scheme, Section 20 of the *Service and Execution of Process Act 1992* (Cth) enables a court in which proceedings are commenced to grant a stay if it is satisfied that another state court is 'the appropriate court' to determine the matter, having regard to criteria stated in Section 20(4) (place of residence of the parties and of likely witnesses; location of the subject matter of the proceeding; financial circumstances of the parties; the law which would be most appropriate to apply; related or similar proceedings pending somewhere, and – of particular importance in relation to the Judgments Project – any agreement between the parties about the court or place in which the proceeding should be instituted). All these statutory provisions are intended to ensure that legal proceedings in Australia are conducted in the most appropriate forum.[42] In other words, they are a statutory substitute for the doctrine of *forum non conveniens* for the internal allocation of jurisdiction in a particular case within Australia, and it may have to be decided whether they shall be covered by the "ban" on *forum non conveniens* under a convention dealing with exclusive choice of court clauses, or whether they will be regarded as permissible

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[37] *Corporations Act 2001* (Cth) Section 53A(2).
[38] *Corporations Act 2001* (Cth) Section 53B.
[39] *Acton Engineering Pty Ltd v. Campbell* (1991) 31 FCR 1; *J N Taylor Finance Ltd v. Bond Corp Finance Ltd* (1991) 4 ACSR 483 at 490-2 per Debelle J.
[40] *J N Taylor Finance Ltd v. Bond Corp Finance Ltd* (1991) 4 ACSR 483 at 490 per Debelle J.
[41] This approach was indeed taken in *Acton Engineering Pty Ltd v. Campbell* (1991) 31 FCR 1; *Re Terranora Leisuretime Sales Pty Ltd* (1991) 5 ACSR 382.
[42] In so doing, they demonstrate a greater sympathy for the House of Lords' approach to *forum non conveniens* in *Spiliada Maritime Corp v. Cansulex Ltd* [1987] 1 AC 460 at 482-4 per Lord Goff of Chieveley than the High Court was prepared to accept in *Voth*.

applications of an internal allocation of jurisdiction like rules on subject matter jurisdiction or venue. The same applies to the doctrine of *forum non conveniens*, as far the relationship among Australian courts not covered by the statutory rules on transfer is concerned.

While a transfer within Australia is thus governed to a large extent by statutory rules, Australian courts cannot transfer a case abroad but may decline jurisdiction under the doctrine of *forum non conveniens* in international cases. The principles enunciated in *Voth v. Manildra Flour Mills Pty Ltd* (1990)[43] govern the question of *forum non conveniens* in cases with *international* connections when deciding whether the case should be heard in Australia at all. However, this aspect need not be discussed any further here[44] because (1) declining jurisdiction in application of the doctrine of *forum non conveniens* in relation to foreign courts has been discussed at length during previous negotiations on the Judgments Project and (2) as long as the convention consists of only one white list ground of jurisdiction, namely an exclusive choice of court clause in a B2B case, the widely prevailing opinion in the informal working group on the Judgments Project[45] was that in such a case, the exercise of national discretion to decline jurisdiction in favour of foreign courts should be excluded.

4. Jurisdiction clauses

In the context of *non-exclusive* clauses, a number of cases have dealt with applications for transfers within Australia or stays of actions commenced in the forum stipulated by the jurisdiction clause. In these cases, some courts appear to have taken the view that Section 5(2) of the cross-vesting acts constitutes a statutory command addressed also to the chosen court to stay proceedings whenever the preponderance of evidence lies in another jurisdiction, regardless of the jurisdiction clause.[46] By contrast, where matters of cost and convenience are equally balanced as between the competing fora, an action brought in the forum designated by a non-exclusive clause would not be stayed.[47] It seems therefore that, in deciding whether to transfer a proceeding under the cross-vesting legislation, Australian courts will disregard a *non-exclusive* jurisdiction clause, where trial would be more convenient in another Australian forum.

However, it appears that despite the comments in *Aldred v. Australian Building Industries Ltd* (1987)[48] to the effect that *exclusive* jurisdiction clauses should have less weight in interjurisdictional conflicts within Australia, courts in recent decisions under the cross-vesting legislation have shown a preference for upholding at least *exclusive* agreements, even where the balance of convenience points to trial in another Australian forum.[49] If there is a choice of venue within a national court, the parties are equally held to their bargain unless there is a good reason not to do so also when considering a change of venue within a federal

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[43] *Voth v. Manildra Flour Mills Pty Ltd* (1990)171 CLR 538 at 559 per Mason CJ, Deane, Dawson and Gaudron JJ.

[44] For further information about the Australian approach to *forum non conveniens*, see, *e.g.*, Peter Prince, Bhopal, Bougainville and ok tedi: Why Australia's *forum non conveniens* approach is better, 47 ICLQ (1998) p. 573 *et seqq*.

[45] This also applies to the opinion of previous Special Commissions on the Judgments Project with regard to Article 4 of the 1999 and 2001 drafts, see Articles 21(1) and 22(1) of those texts. See also Prel. Doc. No 22, p. 6.

[46] *Nilsen Electric (WA) v. Jovista*, unreported, SC Vic, Byrne J, 8 March 1995; *Power and Water Authority v. McMahon Contractors*, unreported, SC NT, Angel J, 21 September 1995.

[47] See *Divinyls Holdings P / L v. Billboard*, unreported, SC NSW, Young J, 17 October 1995; *Queensland Tourist and Travel Corporation v. Western Australian Tourist Commission*, unreported, SC Qld, Ryan J, 1 November 1992.

[48] *Aldred v. Australian Building Industries Ltd* (1987) 48 NTR 59.

[49] See *Manietta v. National Mutual Life Association of Australasia*, unreported, SC Vic, McDonald J, 8 September 1995; *Bond Brewing Holdings v. National Australia Bank*, unreported, SC WA, Wallwork J, 16 February 1990; *National Dairies WA v. Westfarmers*, unreported, Fed Ct, Tamberlin J, 22 July 1996; *Air Attention WA v. Seeley International*, unreported, SC WA, Walsh J, 3 September 1996.

court.[50] Such clauses will not be determinative of an application to change venue, but will be a relevant consideration.[51] The precise terms in which the choice of forum is expressed are also of importance.[52]

5. Applicable law in case of transfer

a) Choice of law in federal jurisdiction

As stated above, a change of venue in the exercise of federal jurisdiction may occur by removal of the case to another registry of the High Court, Federal Court or Family Court of Australia.[53] The general principle is that a change of venue from one Australian law area to another before the hearing of the substance of the suit will have an effect on the applicable law both as to substance and procedure. A court exercising federal jurisdiction may have to determine issues which are not regulated by any federal law. Such a gap must be filled by state or territorial law. Under Sections 79 and 80 of the *Judiciary Act 1903* (Cth), the common law and the laws of a state or territory shall be binding on a court exercising federal jurisdiction in that state or territory. These provisions also apply to the High Court in the exercise of its original jurisdiction. Therefore, transfer to a different venue within a federal court will potentially have an impact. However, where a federal court commences the substantive hearing in a particular place and subsequently changes venue for reasons of convenience, *e.g.* to hear evidence or to deliver judgment, there is authority to support the proposition that the substantive law is not thereby changed.[54]

Moreover, a change of venue in the exercise of federal jurisdiction may occur by remittal pursuant to Section 44 of the *Judiciary Act 1903*.[55] Even a change of venue within the same law area from a federal court to a state court may affect the rights of the parties since it may make different procedural laws applicable.[56]

b) Choice of law in cross-vested jurisdiction

To assist a court in deciding what laws to apply when it is exercising jurisdiction which has been cross-vested to it,[57] Section 11(1) of the Federal and State Acts provides choice of law rules. The starting point is that the court seized shall apply its own law (including its choice of law rules). If a federal court transfers a proceeding to a state court under the cross-vesting scheme in respect of a matter over which the latter would also have jurisdiction by reason of a provision other than cross-vesting, the latter court will not be exercising cross-vesting jurisdiction and will therefore apply its own law. However, if the court would lack jurisdiction but for the cross-vesting scheme or if the subject matter of the case is a right of action arising under a written law of another state or territory, the court shall apply the written and unwritten law of that other state or territory.

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[50] *KC Park Safe (SA) Pty Ltd v. Adelaide Terrance Investments Pty Ltd* [1998] FCA 601. The parties had contractually agreed that proceedings were to be commenced in the South Australian Registry of the Federal Court if proceedings were brought in the Federal Court.
[51] See, *e.g.*, *Australian Cooperative Foods v. National Foods Milk Ltd* [1998] FCA 376.
[52] For example, a clause stating that 'the courts of Victoria shall have exclusive jurisdiction', in the Australian view, leaves unresolved the question whether such proceedings should be commenced in a state or federal court in Victoria, whereas a clause stating that 'the Federal Court shall have exclusive jurisdiction' leaves unresolved the question of which registry the proceedings should be commenced in.
[53] Nygh / Davies (*supra* note 2), p. 97.
[54] *Parker v. Commonwealth* (1965) 112 CLR 295.
[55] Nygh / Davies (*supra* note 2), p. 97.
[56] *State Bank of New South Wales v. Commonwealth Savings Bank of Australia* (1984) 154 CLR 579.
[57] *Waterhouse v. Australian Broadcasting Corp* (1991) 25 NSWLR 519; *Re an Alleged Incapable Person F C C and The Protected Estates Act 1983* (1990) 19 NSWLR 541; *Re H and the Adoption Act* [1990] ACLD 1005.

Moreover, in cross-vested proceedings, the court hearing the case need not apply its own rules of evidence and procedure but may select them as it considers appropriate in the circumstances from those applicable in other Australian law areas. This power, although potentially very broad in scope, is likely to be exercised in a quite restrained manner.

B. Canada

1. Federal jurisdiction v. jurisdiction of provinces and territories

a) The basic principles of the Canadian court structure

In Canada, the jurisdiction of courts of justice is determined to a large extent by the Canadian Constitution, which sets the allocation of powers between the federal Parliament and the provinces' legislatures. Each provincial legislative assembly may pass laws for the administration of justice in the province on an exclusive basis, including the creation, maintenance and organization of law courts for the province, with civil and criminal jurisdiction, including the civil procedure applicable in those courts.[58] There are in each province courts known as "superior" courts: at the top, a court of appeal, and on the next lower tier, a court of first instance having general jurisdiction. At a lower tier, there are in each province lower courts such as provincial courts, family courts, municipal courts and small claims courts.

On the other hand, under Section 101 of the Canadian Constitution,[59] the Canadian Parliament may take action to create, maintain and organize a general court of appeal for Canada, and create additional courts for the better administration of the laws of Canada. This was the provision under which the Supreme Court of Canada - the general appellate court for all Canada -, the Federal Court of Canada and the Tax Court of Canada were created.

The Canadian judicial system is, in general, a unitary system whereby the superior and lower provincial courts, having general jurisdiction in the first instance and on appeal, apply both the federal and provincial laws in force in the province according to a hierarchical structure capped by the Supreme Court of Canada. The main exception from this unitary system is the Federal Court of Canada.[60]

While the provincial courts are courts of general jurisdiction, the jurisdiction of the Federal Court is specialized.[61] The Federal Court of Canada was created on 1 June 1971 by means of the Federal Court Act. It succeeded the Exchequer Court of Canada, created almost a century before. The Federal Court consists of a Trial Division and an Appeal Division, and sits throughout Canada. By means of the Federal Court Act, the Exchequer Court's jurisdiction was inherited by this successor, the Federal Court, and extended. An amendment in 1992 provided further substantial changes. At present, the Federal Court has broad jurisdiction including relief against the Crown, immigration, citizenship, admiralty, customs, intellectual property, taxation, labour relations, transportation, communications, parole and penitentiary proceedings, and limited criminal jurisdiction. Jurisdiction is conferred on the Federal Court by federal statute.[62]

This paper takes into account the statutes and regulations with respect to judicial procedure of the courts of general jurisdiction - superior courts -, and the case law in 14 jurisdictions:

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[58] Canada Constitutional Act 1867, Section 92.14.
[59] Canada Constitutional Act 1867, Section 101.
[60] *P.Q. Ontario v. Pembina Exploration Ltd.*, [1989] 1 R.C.S 206, p. 215.
[61] See James McLeod, *The Conflict of Laws*, 1983 pp. 61,63.
[62] For a list of those statutes, see < http://www.fct-cf.gc.ca/about/jurisdiction/jurisdiction_e.shtml >.

- federal jurisdiction;
- the ten provinces (British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador); and
- the three territories (Yukon, North-West Territories and Nunavut).

The rules of procedure of the lower courts (provincial courts, small claims courts, etc.) or specialized tribunals, whether provincial or federal (Competition Tribunal, etc.) have not been considered, since they have not received by statute the subject matter jurisdiction allowing them to be seized by a choice of court clause.

b) Potential overlap

While the areas of federal jurisdiction have been extended significantly over the years, exclusivity has largely given in to concurrent jurisdiction: at present, in most cases, including (since 1992) relief against the Crown, federal jurisdiction is not exclusive,[63] except in areas where federal statutes expressly provide for exclusivity. In essence, the Federal Court's jurisdiction is exclusive only as regards the review of decisions by federal administrative tribunals,[64] areas reserved by specific federal statutes, and admiralty. In other cases, the Federal Court shares jurisdiction with the provincial superior courts.

2. Transfer mechanisms

The legislation - supreme as well as subordinate - and the case law both indicate that the courts have three[65] main ways of controlling which court a claimant may seize:

- transfer of cases;
- stay of proceedings;
- anti-suit injunction.[66]

Having regard to the principles for determination of the jurisdiction of Canadian courts, it is necessary to consider the mechanisms for transfer of cases:

- within territorial jurisdictions (provincial and federal)
- and between territorial jurisdictions (between provinces, or between provinces and federal Courts).

a) Transfer within the federal court system

Transfers of cases are possible both within the Federal Court, which performs its duties throughout Canada, and between provincial superior courts when they also perform pan-Canadian judicial duties through delegations of authority by the Federal Parliament. Thus, for instance, provincial superior courts are responsible for implementation of the Bankruptcy Act, a federal statute, and their orders with respect to bankruptcy are enforceable throughout Canada.[67]

According to paragraph 49 of the Rules of the Federal Court, a judge at that Court may order the transfer of a case brought before one Division of the Court to the other.

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[63] See < http://www.fct-cf.gc.ca/about/history/history_e.shtml >.
[64] There is exclusive federal jurisdiction, for instance, as regards the judicial review of decisions by federal boards, commissions and other tribunals.
[65] But the courts have also used circuitous means of exercising this review. For instance, in *Holo-Deck Adventures Ltd v. Orbotron Inc.* [1996] OJ 4417 (SC Ont. Gen. Div.), the defendant claimed and obtained an order annulling the service of an originating instrument, under Section 17 of the Rules of Procedure on service outside Ontario, on the grounds that the agreement, breach of which was claimed, contained a choice of court clause.
[66] The latter will not be considered in this paper.
[67] Sections 187 and 188 of the Bankruptcy Act.

And in provincial superior courts, a party wishing to obtain a transfer of its bankruptcy case to another territorial bankruptcy division needs to prove the existence of "sufficient cause" to obtain it. The need to apply the laws of another province is not sufficient cause per se.[68]

b) Transfer among provincial courts

i. Transfer within a province

Transfers of cases are possible within provinces, either between jurisdictions of the same court, or between courts at different levels, by order of the judge seized.[69]

That jurisdiction will be based on:

- either the general inherent jurisdiction of the courts, by common law, to govern their own procedure in order to direct and control the trial, or
- the courts' Rules of procedure,[70] which are passed in most cases pursuant to a delegation of authority by the provincial legislature to the Rules committee of the provincial superior court, by means of the province's Courts of Justice Act.[71]

As a general rule, lower courts have very limited inherent jurisdictions compared with the superior courts. Their powers with respect to transfers of cases are governed by their own rules of procedure, unless required by the interests of justice.[72]

ii. Transfer from one province to another

In the area of transfers of cases, it is interesting to note that Saskatchewan is the only province having adopted rules on transfers of cases in its Rules of procedure pursuant to the Court Jurisdiction and Proceedings Transfer Act (which received the Royal Assent on April 28, 1997).[73] This very detailed statute goes beyond courts' inherent jurisdiction and provides, in particular, for transfer from one province to another, provided that the court addressed has territorial and subject matter jurisdiction to deal with the case. In order to determine whether a court outside

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[68] *Sam Levy & Associates v. Azco Mining Inc.* [2001] SCC 92 (SCC).

[69] This research deals only with general provisions, and not the provisions relating to transfers of cases in family matters.

[70] In Quebec, the Code of Civil Procedure. The sources of the provisions cited below are usually the Rules of Procedure in force for the province's superior court.

[71] For instance, the Rules of Procedure of Alberta, British Columbia, Prince Edward Island and Nova Scotia contain more or less explicit provisions allowing transfer of a case without setting requirements such as a motion by one of the parties or otherwise (Alberta, AR 390/68 Section 12; B.V. Reg. 149/99, s. 1, Rule 8A(2); Prince Edward Island, Rule 57.19; Nova Scotia, Rule 39.01). Other Rules expressly mention transfer upon the defendant's motion (Manitoba, Rules 14.08(1), (3) and (6); Quebec, Rule 163). Only the Manitoba, Nova Scotia and Saskatchewan Rules of Procedure contain criteria to be considered: Manitoba's Rule 14.08(1) mentions the location where, as the case may be, the cause of action originated wholly or in part; the defendant resided at the time when the action was brought; or the defendant engaged in commercial activities at the time when the action was brought. This rule does not apply, however, if the action has been transferred once already (Rule 14.08(2)). In the Rules of Procedure of Alberta (Rule 229), New Brunswick (Rule 6.01), Nova Scotia (Rule 39.02) and Saskatchewan (Rule 41(2)), an explicit reference is made to the merger of parallel proceedings related in law or in fact.

[72] *Re Thompson et Beaulieu* (1987), 3 OR (2d) 171, Ont. Ct. (Prov. Div.).

[73] See Annex II. This statute is based on the uniform law of the same name drafted by the Uniform Law Conference of Canada, whose website is at < www.ulcc.ca >. Yukon passed the same uniform law under the title Court Jurisdiction and Proceedings Transfer, LY 2000 ch. 7, but this had not yet been enacted on December 31, 2000, the latest date documented on the site < http://www.lex-yk.ca/ >.

Saskatchewan has territorial and subject matter jurisdiction to try the case, the Court of Queen's Bench is to apply the laws of the province or State where the designated court is located.

Such a transfer is possible either in cases where the court first seized has itself territorial and subject matter jurisdiction, or in cases where it lacks one or two aspects of this jurisdiction.[74] However, for such a transfer to be available to it, when the court seized has itself territorial and subject matter jurisdiction, and therefore could try the case, it needs to be convinced that the receiving court would be a more appropriate jurisdiction: this is a codification of *forum non conveniens*. In addition, in the order that it delivers to request a court outside Saskatchewan to accept the transfer, the Court is required to set out the grounds for the request.[75] The court to which the request for acceptance of a transfer from another province is made retains its discretion to deny acceptance of the transfer on any grounds that it considers appropriate, even if it has the territorial and subject matter jurisdiction required to try the case.[76]

c) Transfer between provincial courts and a federal court

Apart from the area of implementation of the uniform law allowing a transfer to cases from one province to another, there is no possibility of transferring cases either between courts of different provinces or between provincial courts and federal courts. The court seized may, however, stay proceedings in favour of a more appropriate jurisdiction, if applicable, according to the following rules:

3. Transfer and stay of proceedings

a) The Federal Court

Sections 50 and 50.1 of the Federal Court Act (FCA) govern stays of proceedings. In particular, sub-section 50(1) of the FCA confers a general jurisdiction on the Court to stay proceedings on the grounds that the claim is pending before another court, or if, for any other reason, the interest of justice so requires.[77] These sections make no distinction between stays in favour of a provincial or a foreign court.

The Federal Court's decision is discretionary.[78] The Federal Court shall grant, however, a motion for a stay based on implementation of a choice of court clause, unless the plaintiff is able to prove convincingly that it would not be fair or reasonable in the case in point to enforce that clause.[79] The *prima facie* rule is that a

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[74] Rule 13(1) and (2).
[75] Rule 14(1).
[76] Rule 15(1).
[77] In addition, sub-section 50(2) FCA provides as follows: "The Court shall, on application of the Attorney General of Canada, stay proceedings in any cause or matter in respect of a claim against the Crown if it appears that the claimant has an action or proceeding in respect of the same claim pending in any other court against a person who, at the time when the cause of action alleged in the action or proceeding arose, was, in respect thereof, acting so as to engage the liability of the Crown." Having regard to the aims of this research in the context of a possible Hague Convention relating to choice of court clauses in B2B contracts, this provision will not be considered in depth.
[78] For instance, the Federal Court will not grant a stay of proceedings if a provincial court is seized concurrently in a case over which the Federal Court has sole jurisdiction; see *Muchalat Indian Band v. Canada* (1992), 54 FTR 99; *Radil Bros. Fishing Co v. Canada (Dept of Fisheries and Oceans)* (2001), 207 DLR (4th) 82 (FCA).
[79] See the very recent decision of the Supreme Court of Canada dated 1 May 2003 in the case *ECU-Line N.V. v. Z.I. Pompey Industrie,* [2003] CSC 27, which reinforces choice of court clauses. See also the discussion in depth of the rulings by the lower courts (*Z.I. Pompey Industrie v. ECU-Line N.V.* (2001), 268 N.R. 364, [2001] F.C.J. No. 96, [2001] 2 F.V. D-23 (C.A.)) and of the Canadian case-law in this area by Paul Michell, 36 Canadian Business Law Journal (2002), No. 453; also available at < http://www.torytory.ca/publications/pdf/AR2002-5T.pdf >.

court grants a stay of proceedings brought in breach of a contractual commitment.[80] In making a decision, the Federal Court may rely on the following facts:[81]

- the country of location of the evidence relating to issues of fact, and the effects of that situation as regards the convenience and cost of the case, both before the Federal Court and before the other courts involved;
- applicability of the law relating to the other action and the differences between that law and the law applied before the Federal Court;
- the nature and closeness of relations of each of the parties with each of the courts;
- the genuineness - as opposed to seeking a procedural advantage - of the defendant's intention to seize the other court;
- the damage suffered by the other party owing to the obligation that would be imposed on it to seize the other court, due to the fact that -
    - it would forfeit security;
    - it would be unable to enforce a foreign judgment;
    - its action would be time-barred;
    - it could not obtain a just and fair trial, for political, racial, religious, or other reasons.

b) Provincial superior courts

Outside the scope of implementation of the uniform law allowing the transfer of proceedings from one province to another, the principle of territoriality of jurisdiction of the superior courts, unless seized pursuant to federal statutes, prevents them from transferring proceedings outside their provinces.

Accordingly, the claimant may wish to seize several superior courts, either *concurrently* or *successively.*[82] In order to facilitate proceedings or to obtain a preliminary ruling required to exercise its own jurisdiction, one of the courts seized may, *sua sponte* or upon the motion of a party, order a stay of proceedings, on a temporary or permanent basis, in order to allow the other court the time required to issue a ruling. There is a dual source to this court jurisdiction of a procedural nature:

- the inherent jurisdiction of courts to govern their own procedure; and
- the Rules of procedure of superior courts.

The Courts' inherent jurisdiction allows them to order on their own authority a stay of proceedings.[83] Certain provincial Rules of procedure contain general declaratory clauses in this respect.[84] Others mention a motion from one of the parties,[85] or in particular the existence of parallel proceedings that could give rise to a stay.[86] A provincial superior court may also stay proceedings pending the outcome of an

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[80] *Seapearl v. Seven Seas Dry Cargo Shipping Co* [1982] 2 FC 161 (FCA) (stay of proceedings ordered on appeal on the basis of an arbitration clause).

[81] *Burrard-Yarrows Co. v. Hoegh Merchant* [1982] 1 FC 248 (Trial Div.) (stay of proceedings ordered by the Federal Court of Canada on the basis of a non-exclusive choice of court clause designating Norwegian courts; upheld on appeal [1982] F.C.J. No 822); *Seapearl v. Seven Seas Dry Cargo Shipping Co* [1982] 2 FC 161 (FCA) (see previous note). See also *Holt Cargo Systems Inc. v. ABC Containerlines (Trustee of)* [1997] 3 FC 187 (FC Trial Div.) upheld on appeal, [2001] SCC 90, in which theses rules were applied to the relationship between the Federal Court and a provincial court, and to the relationship between the Federal Court and a foreign court.

[82] See for instance *Holt Cargo Systems Inc. v. ABC Containerlines (Trustee of)* [1997] 3 FC 187 (FC Trial Div.) upheld on appeal, [2001] SCC 90.

[83] *Mackin, PCJ v. New Brunswick (Minister of Justice)* (1997), 187 NBR (2d) 224 (CA).

[84] Alberta (Rule 80(5)); Ontario (Rule 106; see *Empire-Universal Films Ltd v. Rank* [1947] OR 775 (HC)).

[85] Prince Edward Island (Rule 17.06).

[86] In the Rules of Procedure of Alberta (Rule 229), New Brunswick (Rule 6.01), Nova Scotia (Rule 39.02) and Saskatchewan (Rule 41(2)), an express reference is made to the stay of one of parallel proceedings connected in law or in fact.

action brought previously before the Federal Court.[87] In sum, it can be observed that the courts' discretion seems hardly limited at all. Considerations of convenience seem to dominate.[88]

In general, in the case of a motion for a stay of proceedings on the grounds of contractual designation of a *foreign* court by an exclusive choice of court clause, the court will comply with the clause unless the applicant convinces it - with a very heavy burden of proof - that the choice of court should not be observed for the reasons asserted in the *The Eleftheria* case.[89] Even though it does not appear clearly whether this is an application of the doctrine of *forum non conveniens*, it is clear nonetheless that if there is an exclusive choice of court clause, a *plaintiff* seeking to seize a court other than the chosen court bears the burden of convincing the first court of the desirability of the application for seizing this court.[90] In a *forum non conveniens* situation and in the absence of a choice of court clause, on the other hand, the *defendant* bears the burden of proof.

In the *internal* matters to be considered in this paper, however, Canadian courts - like the Australian courts - sometimes seem to attach less weight to a choice of court clause designating the courts of another province. When the rulings observe a choice of court agreement even though the court seized and the designated court are both located in Canada, though in different provinces, this is sometimes due to factors unrelated to the choice of court clause, such as comity.[91] The *Avenue Properties v. First City Development Corp.* (1986)[92] case, on the other hand, involved an agreed choice of court in Ontario and circumstances creating a close link between the parties and British Columbia, where the action was brought. Despite the choice of court clause designating the Ontario courts, the British Columbia court imposed on the defendant the onus of proof for a stay, and denied it. In the same vein, the Superior Court of Ontario denied a stay in favour of the Federal Court of proceedings of which it was seized, because it had concluded that it was better suited than the Federal Court to determine a dispute arising out of a settlement before the Tax Court of Canada.[93]

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[87] *Brick's Fine Furniture Ltd v. Brick Warehouse Co*. (1988), 19 CIPR 258 (Man. CA).

[88] See Prince Edward Island, Rule 17.06(2)(c); *Dudnik v. Canada (CRTC)* (1995), 41 CPC (3d) 336, 61 CBR (3d) 129 (Ont. Ct., Gen Div.) (when the Federal Court exercises concurrent jurisdiction, the Trial Division may stay proceedings if it finds that the Federal Court is the more suitable forum).

[89] *The Eleftheria* [1970] 94, at 100 per Brandon, J.. In Canada, the court accordingly takes account of all the circumstances, and in particular the location of evidence of the facts and the effects of this situation on the convenience and cost of the proceedings; the applicability of the foreign law and the major differences between the latter and the *lex fori*; the nature and importance of the points of contact between the parties and the countries concerned; the voluntary nature of the defendant's choice of court; the damage that the plaintiff would suffer if required to bring proceedings before a foreign court owing to the inability to obtain enforcement of the judgment rendered; the loss of security in relation to the claim, a time-bar before the foreign court, or the impossibility of obtaining a fair trial for political, racial, religious or other reasons (*Crockett v. Society of Lloyd's* [2000] PEIJ No 54 (PEISC Trial Div.). The Supreme Court of Prince Edward Island ordered a stay of proceedings in favour of action to be brought before the English Courts, designated by an exclusive choice of court clause.
See also *Sarabia v. Oceanic Mindoro (The)* [1996] BCJ No 2154 (BC CA) ; *Morrison v. Society of Lloyd's* [1999] NBJ No 2 (NB CQB) (the court may stay proceedings on a conditional basis if the parties have agreed by contract to seize a foreign court); *Ash et al. v. Corp. of Lloyd's et al.* (1991), 6 OR (3d) 235) (stay of proceedings granted in the event of an exclusive choice of court contractual clause).

[90] *Crockett v. Society of Lloyd's* [2000] PEIJ No 54 (PEISC, Trial Div.). The court nonetheless explicitly left unanswered the issue of applicability of *forum non conveniens* in the presence of a choice of court clause, by making reference to contradictory decisions of other Canadian courts.

[91] See *472900BC Ltd v. Thrifty Canada Ltd* [1998] BCJ N0 2944 (BC CA): enforcement, by the British Columbia Court of Appeal, of a non-exclusive choice of court clause in favour of the Ontario courts and of a decision by the Ontario Superior Court also recognizing that clause. The latter quashed a decision by the Superior Court of British Columbia which granted priority to the unilateral choice of court by one of the parties over their contractual choice of court clause. In order to grant a stay, the British Columbia Court relied, however, to a lesser extent on the choice of court clause. Considerations of comity, and in particular the fact that proceedings were already pending before the chosen court, and that the latter had already denied a stay of proceedings, were determining factors.

[92] *Avenue Properties v. First City Development Corp.* (1986), 7 B.C.L.R. (2d) 45 (BC CA).

[93] *Ho-A-Shoo v. Canada (PG),* 47 OR (3d) 115, [2000] 2 CTC 155. In the same vein, the Superior Court of Quebec denied a stay of proceedings in favour of a contractual choice of court clause that it considered to be ineffective because the decision of the foreign court chosen by the parties would have been ineffective in Quebec owing to the fact that Quebec legislation in that case (action *in personam* of a patrimonial nature) would confer exclusive jurisdiction on Quebec courts pursuant to the so-called

It seems, therefore, that it is not necessary to consider here in further detail the aspect of declining jurisdiction on the basis of *forum non conveniens* in relation to foreign courts, since (1) it has been discussed at length during the previous negotiations of the Judgments Project; and (2) as long as the Convention consists of a single white-list ground of jurisdiction, to wit, an exclusive choice of court clause in a B2B case, the opinion largely prevailing among the informal working party on the Judgments Project[94] was that in such a case, the exercise of the discretion arising out of domestic law to decline jurisdiction, in favour of foreign courts, ought to be excluded.

It will be necessary, however, to discuss how to deal with situations in which the court designated and seized wishes to stay proceedings in favour of the jurisdiction of another Canadian province or territory (or transfer them to it), for one of the reasons described in this paper, as currently permitted by Canadian domestic law.

4. Law applicable in the event of transfer or stay of proceedings

The procedural law is always the law of the court actually hearing the case.[95] In the event of transfer of the case, the applicable procedural law would accordingly change.

As regards substantive law, here also, the court actually hearing the case would apply its own conflict of laws rules (and as a result, in most cases, its own substantive law also).[96] Considerations of comity may, however, cause a court to give some consideration to the law of another province.[97]

C. United States of America

1. Federal v. state jurisdiction

In the United States, there is a federal system of courts, while each state is free to establish its own judicial system as it sees fit. At the federal level, the Federal District Courts are courts of first instance, and there is at least one in every state.[98] Federal appeal courts are the existing thirteen Circuit Courts of Appeals.[99] The U.S. Supreme Court is the highest court of the country. In addition, there are a number of specialized federal courts, including the Court of International Trade and the bankruptcy courts. The court systems in the individual states, on the other hand, vary. Generally states have two, others three instances.

The federal courts are courts of limited subject matter jurisdiction, as defined by the Constitution. The trial courts of each state collectively have general subject

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"mirror" principle (*Opron Inc. v. Aero System Engineering Inc.* [1999] JQ No 420 (SC Que. Civil)). This proves that, even under the aegis of a Hague Judgments Convention providing for enforcement of choice of court clauses and securing recognition and enforcement of judgments based on this ground of jurisdiction, it will be necessary to settle the relationship between the Convention and domestic rules of exclusive jurisdiction in the Contracting States in order to avoid the repetition of such a decision.

[94] This also reflects the opinion of the earlier Special Commissions on the Judgments Project in relation to Article 4 of the 1999 and 2001 drafts, see Articles 21(1) and 22(1) of those drafts. See also Prel. Doc. No 22, p. 6 and 16-18.

[95] See J.-G. Castel, Canadian Conflict of Laws (1994), 3d ed., p. 119.

[96] See J.-G. Castel (*supra*, note 95), p.5.

[97] See J.-G. Castel (*supra*, note 95), p.13 *et seq.*

[98] 28 U.S.C. § 133.

[99] Among these thirteen, is the Court of Appeals for the Federal Circuit, which is the nationwide court of appeals for, among other things, the United States Court of Federal Claims, the United States Court of International Trade, and appeals in which the underlying action arose under federal patent law. 28 U.S.C. § 1295. The remaining twelve Circuit Courts are regional courts, which hear appeals from the Federal District Courts located in their respective circuit, as well as decisions of federal administrative agencies.

matter jurisdiction. They can hear any cognisable claim with rare exceptions (exceptions include some areas of exclusive federal subject matter jurisdiction: admiralty proceedings, bankruptcy matters, patent and copyright infringement claims and cases arising under federal antitrust and securities law). In other words, the presumption is that the state court has subject matter jurisdiction.

However, there are two ways to take a case before a federal court in the U.S.: via a "federal question" and via "diversity."

a) Federal question jurisdiction

A "federal question" is one where the complaint alleges a right or duty that "arises under" the U.S. Constitution, a federal treaty or a federal statute.[100] The Supreme Court has held that, in order for a federal question to exist, it must be the case "either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law".[101] The "federal question" is, for the most part, established by the plaintiff's claim under what is known as the "well-pleaded complaint rule". A few statutes allow removal from a state court on the basis of a federal defence, but federal defence removal is generally not available to either party.

There are two types of federal questions: (1) those where the federal courts have exclusive jurisdiction, and (2) those where the federal and state courts have concurrent jurisdiction. The exclusive jurisdiction areas are limited and enumerated by statute; they include admiralty, bankruptcy, intellectual property, antitrust, consular and diplomatic issues, and forfeitures.[102] When one of these exclusive federal questions is the source of the cause of action, the case can only be brought in federal court. The parties cannot contract into state court for an exclusive federal question, and indeed if it is filed in state court that court must dismiss the action or remove it to the federal court.[103]

For all other federal questions, the case may be brought either in state or in federal court.

When the federal court has jurisdiction over a federal question claim, it may (but need not) hear any state claims that are integral to the federal claim by means of supplemental jurisdiction.[104]

b) Diversity Jurisdiction

The second way to get into federal court is through "diversity" jurisdiction. Here, the heart of the claim is *not* based on federal law, but rather on state law. Because it is based on state law, the claim *could* be brought in state court. The two elements that must be satisfied for federal diversity jurisdiction are: (1) the parties must be citizens of different states[105] and (2) the amount in controversy must

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[100] 28 U.S.C. § 1331.
[101] *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1(1983).
[102] 28 U.S.C. §§ 1333, 1334, 1338, 1351, 1355, 1364.
[103] If the federal law defence or counter-claim does not qualify under the well-pleaded complaint rule to establish federal question jurisdiction, then even highly specialized areas of federal law like patent law will have to be dealt with in state courts.
[104] 28 U.S.C. § 1367.
[105] In 1990 this statute was amended to provide that an alien admitted to the U.S. for permanent residence shall be deemed for diversity purposes to be a citizen of the state in which he / she is domiciled. Therefore diversity jurisdiction would not be satisfied if a defendant of foreign nationality were admitted to the U.S. for permanent residence and he or she was domiciled in the same state as the plaintiff. In addition, if both parties are citizens of a foreign state, there is no diversity jurisdiction.

reasonably be alleged to be over 75,000 US$.[106] The federal courts interpret diversity of citizenship very strictly to include *only* "total diversity" – no plaintiff can be a citizen of the same state as any defendant.[107] There are numerous rules governing the diversity of citizenship of aliens, ex-patriate Americans, foreigners, class actions, and corporations, but the most important principles are those of "total diversity" and the fact that the claims are based on state law.

c) Potential overlap

In sum, there is no overlap of subject matter jurisdiction for federal questions falling under the exclusive jurisdiction of the federal courts (provided that the federal question is presented in federal court consistent with the well-pleaded complaint rule), but there is overlap for those federal questions falling under the concurrent jurisdiction of federal and state courts as well as for any supplemental jurisdiction claims that arise before federal courts under state law. Moreover, there is overlap of jurisdiction for diversity jurisdiction between the state and federal courts. In other words, a federal court can hear a state law claim if the suit is between parties from different states within the U.S., between a citizen of a U.S. state and a citizen of a foreign State, or if the state law claim is closely related to a federal law claim, while state courts can hear most federal law claims.

For the ordinary civil and commercial cases most likely to arise under the Judgments Convention, diversity will probably be of the most importance unless the federal government were to implement the Judgments Convention through legislation which would create subject matter jurisdiction by way of federal question jurisdiction in the federal courts over any action covered by the treaty.

2. Transfer mechanisms

In the U.S., there are two different methods by which a case can be transferred within the legal system that are relevant to the question at issue: (1) moving from a federal court located in one state to a federal court located in another state; and (2) moving from a state court to a federal court.[108] There are also instances where a federal court will defer to a state court proceeding – usually called "abstention". It is important to note that a state court that concludes that the action before it ought to be litigated in another state cannot transfer the case to that state directly. Instead it will dismiss the case, and one of the parties must file the action in the other state. This could be a result of, for example, a lack of personal jurisdiction over the defendant or *forum non conveniens*.[109]

a) Transfer among federal courts

Congress has enacted venue statutes, which specify where within the federal system particular types of cases must be filed.

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[106] 28 U.S.C. § 1332.

[107] *Strawbridge v. Curtis*, 3 Cranch 267 (1806).

[108] A transfer from one court to another within the same state (as within any State with a unitary court structure) would be based on venue rules or rules on subject matter jurisdiction (which must exist in the court seized in the cases examined in this paper) or, where both are vested in the court seized, a transfer can be based on (in)convenience. It would have to be determined whether such transfers should be prohibited by the Convention.

[109] If the Judgments Convention were to prohibit the application of any national doctrine of *forum non conveniens* while creating personal jurisdiction based on a choice of court clause, it would have to be determined whether only international or also internal *forum non conveniens* transfers should be covered by such a prohibition.

Certain federal statutes permit the transfer of civil actions from one federal district to another.[110] Section 1404, which is of the most importance for the present research, permits the transfer of a case to any district where the suit might have been brought (*i.e.* one in which venue and personal jurisdiction is proper). This section is essentially a statutory substitute for the doctrine of *forum non conveniens*, although of course federal courts continue to apply the doctrine of *forum non conveniens* to cases in which the alternative forum resides outside of the United States. Section 1404 expressly provides that in deciding whether to transfer a case to another district, the court shall consider the convenience of the parties, convenience of the witnesses, and the interest of justice. The standard for a domestic 1404 transfer is generally more permissive than the *forum non conveniens* standard for international cases.

b) Transfer from state court to federal court

Many cases will satisfy the subject matter jurisdiction of both state and federal courts. Where the two overlap, a plaintiff will have a choice of where to file the claim. If he chooses the state court, the defendant will have the option to file a motion to remove the case to federal court on the basis of diversity between the parties or on the basis of a federal question. While a case can only be removed from a state court to a federal district court in a district that covers the location where the state action was pending, the federal court can subsequently transfer the case to another federal district court pursuant to the federal rules of civil procedure.[111]

i. Federal question jurisdiction and transfer

For all federal questions with the exception of those where the federal courts have exclusive jurisdiction, the case can be filed either in state or in federal court. If the plaintiff files the case in state court, the defendant may request a removal to the Federal District Court; if the plaintiff files the case in federal court, the defendant cannot obtain its removal to state court (removal is a "one-way" action).[112] Once the case has been removed from state to federal court, the federal court has the discretion to remand back to the state court any part of the case in which state law predominates.[113]

Moreover, a federal court *may* decline to exercise supplemental jurisdiction over related state law claims under 28 U.S.C. § 1367(c) if the state claims raise novel or complex issues of state law, if the state claim predominates, if the federal claims have already been dismissed, or for other exceptional circumstances.[114] In addition, there are various abstention doctrines under which the federal courts defer[115] to state courts (Pullman abstention,[116] Colorado River abstention[117] or

[110] 28 U.S.C. §§ 1404, 1406, 1407.
[111] See *supra*, p. 23 *et seq.*
[112] 28 U.S.C. § 1441.
[113] 28 U.S.C. § 1441(c).
[114] 28 U.S.C. §1367(c).
[115] While these abstention doctrines are in many cases described as mandatory, there is some uncertainty as to whether the federal court might not, in an appropriate case, retain some discretion to abstain or to exercise jurisdiction.
[116] The Pullman abstention was created by the Supreme Court in *Texas v. Pullman*, 312 US 496 (1941). A standard case involves a situation in which a plaintiff alleges constitutional violations and closely related state law claims. Although there is no parallel state proceeding yet, the federal court abstains to obtain a definitive ruling by the state court on ambiguous state law issues, which could prevent the federal court from having to decide on the constitutional issue. The plaintiff reserves the right to return to federal court on the constitutional issue, if he or she is unsuccessful in state court.
[117] This abstention also applies in diversity cases. See *infra* note 122 for further details.

stays, and Younger abstentions[118]). These doctrines are not frequently applied and deal with unusual situations in which, for example, resolving an ambiguous question of state law could avoid the need to decide a constitutional issue; the federal court determines that deferring to a state serves the interests of comity and respect for important state interests; or it would be in the interest of judicial administration to abstain from exercising federal jurisdiction. Nevertheless, such doctrines have been known to be applied even in cases involving a federal question. For example, there have been a few decisions involving the 1980 *Hague Convention on the Civil Aspects of International Child Abduction*, in which the federal courts have abstained in favour of state custody cases, utilizing either the Colorado River[119] abstention doctrine or the Younger[120] abstention doctrine.

ii. Diversity jurisdiction and transfer

As stated above, if a diversity case is first filed in state court, the defendant can request the removal of the case to federal court if the rules for diversity jurisdiction are satisfied.[121] However, even where federal diversity jurisdiction exists, the federal court has the discretion to decline jurisdiction under the "abstention doctrine" (*e.g.* due to congestion in the courts, difficult questions of state law, or related litigation in state court).[122]

3. Motion to remove from state to federal court and choice of court clauses

A motion for removal can be brought by a defendant whether or not there is a choice of court agreement identifying the state court as the chosen forum.

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[118] This doctrine began with *Younger v. Harris*, 401 US 37 (1971), but has undergone a considerable evolution since the original case in which the Supreme Court held that a federal court should not enjoin a pending state prosecution without a showing that the state court's prosecution was initiated in bad faith, for reasons of harassment, or that the state court would be inadequate to address the litigants' constitutional claims. It used to be that the Younger doctrine involved only criminal proceedings, but now it also applies to civil proceedings. A typical case involves a pending state proceeding, implicating an important state interest, along with the opportunity to challenge the state statute's constitutionality, and a plaintiff seeking equitable relief restraining the state proceeding. The federal court abstains out of principles of comity and federalism to avoid interfering with the state proceedings.

[119] *Copeland v. Copeland*, No. 97-1665, 1998 U.S. App. LEXIS 1670 (4th Cir. Feb. 6, 1998) (per curiam).

[120] *Bouvagnet v. Bouvagnet*, 2001 WL 1263497 (N.D. Ill. Oct 22, 2001).

[121] 28 U.S.C. § 1441.

[122] The so-called Burford Abstention is generally invoked in diversity cases. It was founded in *Burford v. Sun Oil*, 319 US 315 (1942). A typical case involves a situation in which a plaintiff alleges a state law claim, important state regulatory issues are implicated, the state courts are part of the regulatory process, and the federal court therefore abstains out of considerations of comity and respect for the paramount state interest. *E.g.*, in *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38, 42 (2nd Cir. 1986), cert. denied, 481 U.S. 1017, 107 S.Ct. 1896, 95 L.Ed.2d 503 (1987), the plaintiff asserted a claim against a defunct insurance company that was under the control of a "rehabilitator" appointed by a state court at the request of the state department of insurance. Finding that the state courts were 'active partners' in the regulatory process, the federal court affirmed dismissal of the complaint, stating that "the structure of the New York system serves the state's strong interest in centralizing claims against an insolvent insurer into a single forum where they can be efficiently and easily and consistently disposed of."

In this case, interestingly, the court also found that a Colorado River abstention was appropriate. This abstention rests on "considerations of wise judicial administration" and was developed in *Colorado River Water Conservation Dist. v. United States*, 424 US 800 (1976). A typical case involves a pending state proceeding, a reactive federal case involving similar (the same or functionally similar) claims and parties, and no constitutional or federalism problems presented.

4. Applicable law in case of a transfer

Generally speaking, if the basis of jurisdiction in federal court is diversity jurisdiction, the state law will be applied to the substantive legal issues, although federal procedural law applies in federal court.[123] Therefore, a transfer from state to federal court would, in these cases, not have any impact on the substantive law that applies to the case, but on the procedural law (federal instead of state). If the federal jurisdiction were based upon a federal question, federal law would have to be applied in any case, so that again, a transfer from state to federal court would not change the substantive law applicable.

Should a case in which the basis for subject matter jurisdiction is diversity, be transferred from one federal district court to another pursuant to 28 U.S.C. § 1404, the receiving court must apply the law that would have been applied by the court of origin, including its choice of law rules. In other words, if, *e.g.*, a New York plaintiff were to sue an Indian defendant before a New York state court, and the Indian defendant removes the case to a New York district court (a federal court) on the basis of diversity jurisdiction, and the case is subsequently transferred to a Kentucky district court pursuant to 28 U.S.C. § 1404 (*e.g.* in case of a tort action in which the injury occurred in Kentucky, the events leading up to the injury occurred in Kentucky, and all of the relevant witnesses are in Kentucky), the law the Kentucky district court will apply is New York law, including its choice of law rules.

In sum, transfer from one federal court to another will neither change the substantive nor the procedural law applicable. The substantive law will be state law (in case of diversity) or federal law (in case of a federal question), and the procedural law will be federal.

III. CONCLUSION

In the introduction to this paper, it was stated that common principles could probably be drawn from the analysis of the three legal systems discussed here. In fact, the research carried out has revealed both common features and differences. The common features are the following:

- In Federal States with a non-unified legal system, there is always some overlap in the jurisdiction of the Federal State on the one hand, and its territorial units on the other hand.
- In all legal systems examined, some possibilities for a "real" transfer of cases from one court to another exist.[124] They are normally based on written rules such as statutes or Rules of Court.
- In addition or alternatively, in the large majority of cases the court seized has the possibility to dismiss or stay the proceedings and invite the parties to take the case to a more appropriate forum. This would normally be an application of the doctrine of *forum non conveniens*. The statutory rules mentioned before are normally a codified substitute for this common law doctrine.

[123] See further on this issue note 63 of Prel. Doc. No 18 and the adjoining text.

[124] In addition to these common features, there are also differences. In one State, a transfer operates only from state to federal courts and among federal courts; in another, a transfer is also possible from federal to state courts under certain circumstances; and in addition there may be the possibility to transfer a case from one state or province directly to another. Where the latter would not be possible, due to the lack of a statute overcoming the barrier of territoriality between separate jurisdictions, a dismissal or stay of the proceedings before the court seized would lead to a similar result if the court invites the parties to take their case to another state.

- The legal systems examined normally give the court a wider discretion in cases where the more appropriate forum is located within the same State than in international cases involving a possibly more appropriate foreign forum.
- A choice of court clause would normally be one very important element to be taken into consideration when balancing the appropriateness of the forum seized – in particular where the clause is exclusive -, but it would not necessarily be decisive.
- In most cases, the transfer will have an impact on the procedural law which would govern the proceedings; in many cases also on the substantive law applicable.

For the sake of completeness, it is worth mentioning that civil law systems normally do not possess legal provisions providing for a transfer from one court having personal and subject matter jurisdiction as well as territorial competence, to another court. The concept of a court exercising discretion in a similar case is even more alien to them: In many civil law States, it is seen as an inherent part of the concept of "the natural judge"[125] that a court having (personal, subject matter and territorial) jurisdiction according to the law, and which is being seized, *has to hear* the case and may neither refrain from this nor transfer the case elsewhere. Priorities are thus set differently in civil and common law systems when striking the balance between general foreseeability and appropriateness in the individual case.

[125] In Germany, for instance, this is even a Constitutional principle, protected and required by Article 101 of the Basic Law.

A N N E X E S

Annex I

Australia: The Constitution

Chapter I Part V – Powers of the Parliament

Section 51 – Legislative Powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: -

(i) Trade and commerce with other countries, and among the States;

(ii) Taxation; but so as not to discriminate between States or parts of States;

(iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;

(iv) Borrowing money on the public credit of the Commonwealth;

(v) Postal, telegraphic, telephonic, and other like services;

(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;

(vii) Lighthouses, lightships, beacons and buoys;

(viii) Astronomical and meteorological observations;

(ix) Quarantine;

(x) Fisheries in Australian waters beyond territorial limits;

(xi) Census and statistics;

(xii) Currency, coinage, and legal tender;

(xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;

(xiv) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned;

(xv) Weights and measures;

(xvi) Bills of exchange and promissory notes;

(xvii) Bankruptcy and insolvency;

(xviii) Copyrights, patents of inventions and designs, and trade marks;

(xix) Naturalization and aliens;

(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;

(xxi) Marriage;

(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;

(xxiii) Invalid and old-age pensions;

(xxiiiA) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances;

(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;

(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;

(xxvi) The people of any race, for whom it is deemed necessary to make special laws;

(xxvii) Immigration and emigration;

(xxviii) The influx of criminals;

(xxix) External affairs;

(xxx) The relations of the Commonwealth with the islands of the Pacific;

(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

(xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth;

(xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;

(xxxiv) Railway construction and extension in any State with the consent of that State;

(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;

(xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides;

(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;[126]

(xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia;

(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

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[126] The following Acts have been passed by the Parliaments of the States to refer matters to the Parliament under Section 51 and are still in force:
New South Wales: No. 48, 1983: Commonwealth Powers (Meat force inspection) Act, 1983;
Victoria: No. 4009: Debt Conversion Agreement Act 1931 (No. 2);
Queensland: No. 2: The Commonwealth Powers (Air Transport) Act of 1950;
South Australia: No. 2061, 1931: Commonwealth Legislative Power Act, 1931;
Tasmania: No. 46, 1952: Commonwealth Powers (Air Transport) Act, 1952.

Annexe II

Canada - Saskatchewan

Court Jurisdiction and Proceedings Transfer Act, based on the uniform law bearing the same name:

General provisions applicable to transfers

12(1) The Court of Queen's Bench, in accordance with this part, may:

a) transfer a proceeding to a court outside Saskatchewan;

b) accept a transfer of a proceeding from a court outside Saskatchewan.

(2) A power given pursuant to this Part to the court of Queen's Bench to transfer a proceeding to a court outside Saskatchewan includes the power to transfer part of the proceeding to that court.

(3) A power given pursuant to this Part to the Court of Queen's Bench to accept a proceeding from a court outside Saskatchewan includes the power to accept part of the proceeding from that court.

(4) If anything relating to a transfer of a proceeding is or ought to be done in the Court of Queen's Bench or in another court of Saskatchewan on appeal from the Court of Queen's Bench, the transfer is governed by the provisions of this Part.

(5) If anything relating to a transfer of a proceeding is or ought to be done in a court outside Saskatchewan, the court of Queen's Bench, despite any differences between this Part and the rules applicable in the court outside Saskatchewan, may transfer or accept a transfer of the proceeding if the Court of Queen's Bench considers that the differences do not:

a) impair the effectiveness of the transfer; or

b) inhibit the fair and proper conduct of the proceeding.

Grounds for an order transferring a proceeding

13(1) The Court of Queen's Bench may, by order, request a court outside Saskatchewan to accept a transfer of a proceeding in which the Court of Queen's Bench has both territorial and subject-matter competence if the Court of Queen's Bench is satisfied that:

a) the receiving court has subject-matter competence in the proceeding; and

b) pursuant to section 10,[127] the receiving court is a more appropriate forum for the proceeding than the Court of Queen's Bench.

(2) The Court of Queen's Bench may, by order, request a court outside Saskatchewan to accept a transfer of a proceeding in which the Court of Queen's Bench lacks territorial or subject-matter competence if the Court of Queen's Bench is satisfied that the receiving court has both territorial and subject-matter competence in the proceeding.

(3) In deciding whether a court outside Saskatchewan has territorial or subject-matter competence in a proceeding, the Court of Queen's Bench shall apply the laws of the state in which the court outside Saskatchewan is established.

[127] In the official French version available at < www.qp.gov.sk.ca/documents/archive/chaptes/1997/C41-1.pdf >, the reference is indeed to section 11 while the English version available at that same address correctly refers to section 10.

Provisions relating to the transfer order

14(1) In an order requesting a court outside Saskatchewan to accept a transfer of a proceeding, the Court of Queen's Bench shall state the reasons for the request.

(2) The order may:

a) be made on application of a party to the proceeding;

b) impose conditions precedent to the transfer;

c) contain terms concerning the further conduct of the proceeding; and

d) provide for the return of the proceedings to the Court of Queen's Bench on the occurrence of specified events.

...

Court's discretion to accept or refuse a transfer

15(1) After the filing of a request made by a court outside Saskatchewan to transfer to the Court of Queen's Bench a proceeding brought against a person in the transferring court, the Court of Queen's Bench may, by order:

a) accept the transfer, subject to subsection (4), if both of the following requirements are fulfilled:

(i) either the Court of Queen's Bench or the transferring court has territorial competence in the proceeding;

(ii) the Court of Queen's Bench has subject-matter competence in the proceeding; or

b) refuse to accept the transfer for any reason that the Court of Queen's Bench considers just, regardless of the fulfilment of the requirements of clause (a).

(2) The Court of Queen's Bench must give reasons for an order pursuant to clause (1)(b) refusing to accept the transfer of a proceeding.

(3) Any party to the proceeding brought in the transferring court may apply to the Court of Queen's Bench for an order accepting or refusing the transfer to the Court of Queen's Bench of the proceeding.

(4) The Court of Queen's Bench may not make an order accepting the transfer of a proceeding if a condition precedent to the transfer imposed by the transferring court has not been fulfilled.