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Title	Note on the concept of "Purposeful and Substantial Connection" in Article 5(1)(g) and 5(1)(n)(ii) of the February 2017 draft Convention	
Authors	Professor Ronald A. Brand and Dr Cristina M. Mariottini	
Agenda item		
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Annexes		
Related documents		

A. INTRODUCTION*

1. Article 5(1)(g) of the February 2017 draft Convention provides that a judgment is eligible for recognition and enforcement if:

[T]he judgment ruled on a contractual obligation and it was given in the State in which performance of that obligation took place, or should have taken place, in accordance with

- (i) the parties' agreement, or*
- (ii) the law applicable to the contract, in the absence of an agreed place of performance,*

unless the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State.

2. This provision originates from Article 5(1)(e) of the Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments drawn up by the Working Group on the Judgments Project.¹ In this respect, it is to be noted that, while the term "purposeful and substantial connection" was partially borrowed from the case-law of the US Supreme Court, it was nevertheless the result of a compromise and has no specific history in any one country.

3. Analogous terminology is found, in square brackets, in Article 5(1)(n)(ii) of the February 2017 draft Convention,² according to which a judgment is eligible for recognition and enforcement if:

[T]he judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and – [...]

- (ii) the law of the State of origin is expressly or impliedly designated in the trust instrument as the law governing the aspect of the trust that is the subject of the litigation that gave rise to the judgment[, unless the defendant's activities in relation to the trust clearly did not constitute a purposeful and substantial connection to that State]; [...]*

This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship.

4. As noted in paragraph 29 of the February 2017 Aide Memoire of the Chair of the Special Commission, during the discussions of the February 2017 Special Commission meeting "[s]ome concern was expressed about the phrase 'unless the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State' in Article 5(1)(g) [of the February 2017 draft Convention]".³

5. In the course of the Special Commission meetings it was remarked that Article 5(1)(g) and Article 5(1)(n)(ii), by including the term "purposeful and substantial connection", take into account the requirement, provided in some legal systems, for a fuller analysis of the contacts of the defendant with the jurisdiction before the defendant can be brought before a court of that jurisdiction.⁴ While sympathy towards the concept of requiring a substantial connection test between the defendant's activities and the forum was expressed,⁵ it was also noted that the concept of "purposeful and substantial connection" is foreign in many legal systems.⁶

* This note was kindly prepared by Professor Ronald A. Brand and Dr Cristina M. Mariottini. Professor Geneviève Saumier provided comments.

¹ Prel. Doc. No 1 of April 2016 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments. The documentation of the Special Commission is available on the Hague Conference website at < www.hcch.net > under "Judgments" and "Special Commission on the Judgments Project".

² See Work. Doc. No 161 (USA); see also Minutes No 9 of February 2017, paras 97-101 and Minutes No 10 of February 2017, paras 2-5.

³ See also the reference made to such term in para. 34 of the February 2017 Aide Memoire with respect to Art. 5(1)(n)(ii).

⁴ See Minutes No 4 of June 2016, para. 107 and Minutes No 9 of February 2017, para. 97.

⁵ See, e.g., Minutes No 4 of February 2017, para. 34 and Minutes No 9 of February 2017, paras 98-99.

⁶ See Work. Doc. No 110 (Australia) and Minutes No 4 of February 2017, paras 26 and 40. Discussion was directed to the change from "purposeful and substantial connection" to a "close connection", however consensus was not reached. See Minutes No 4 of February 2017, paras 27 and 33-40. See esp. para. 34 where

6. With a view to facilitating further reflection and discussions on the concept of “purposeful and substantial connection” this note examines:

- The US Supreme Court’s application of the Due Process Clauses of the Fifth and Fourteenth Amendments of the US Constitution to questions of judicial jurisdiction; and
- The Supreme Court of Canada’s “real and substantial connection” test, also applied to questions of judicial jurisdiction.

B. DUE PROCESS ANALYSIS IN THE US SUPREME COURT

Due Process Limitations on Jurisdiction

7. In the United States, a court must have both subject matter and personal jurisdiction in order to hear a case. The subject matter jurisdiction of federal courts is limited by Article III of the US Constitution, while state courts have broader subject matter jurisdiction.⁷ It is personal jurisdiction that is addressed by the rules of the draft Judgments Convention. Personal jurisdiction analysis, in both state and federal courts, begins with the application of the relevant jurisdiction statute of the state in which the court is located.⁸ While some state jurisdiction statutes contain lists of jurisdictional bases, others simply allow jurisdiction consistent with the limitations of the Fourteenth Amendment of the US Constitution.⁹ The Fourteenth Amendment provides in Section 1, that no state shall “deprive any person of life, liberty, or property, without due process of law”. This has been interpreted to limit the jurisdiction of courts to situations in which the state in which the court is located has a connection with the defendant sufficient to justify the exercise of the court’s authority over that defendant. Thus, ultimately, the question is whether the limitations imposed by the Due Process Clause allow jurisdiction over the party (the defendant). In this way, the Due Process clause protects an individual’s right not to be deprived of life, liberty, or property without the exercise of due process. It is thus a check on judicial power through the limitation of judicial jurisdiction over the person.

8. The Due Process limitation may be satisfied in a number of ways. For example, no due process concern is raised when a person explicitly consents to jurisdiction. Consent itself establishes due process.¹⁰ Citizenship or domicile – or, by analogy, incorporation or principal place of business for corporations – also demonstrates the relevant connection with the state to be subject to the jurisdiction of its courts.¹¹ Each of these examples reveals circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from the laws of the forum state in a manner that justifies being subject to jurisdiction.¹² These examples support exercise of the general jurisdiction of the state’s courts and allow the state to resolve both matters that originate within the state and those based on activities and events elsewhere.¹³

9. By its terms, the Due Process Clause applies to persons, not just citizens of the United States, or of a single US state. Thus, both natural persons and legal persons who live or exist primarily outside a US state have a Due Process right not to be subjected to the authority of that state’s courts without receiving due process. In this respect, in *International Shoe Company v. Washington*,¹⁴ the US Supreme Court acknowledged that the Due Process requirement could

it is reported that some experts (USA, EU, and Russian Federation) did not support the proposal noting that they considered it of fundamental importance to retain the “purposeful and substantial connection” because it captured the critical link between the defendant and the State of origin. A similar concern was raised by Australia during the June 2016 Special Commission meeting: a more abstract formulation that would allow the USA to apply its very specific constitutional test while not constraining States which do not have a similar concept in their legal system was advocated but consensus was not reached. See Minutes No 4 of June 2016, para. 111.

⁷ For a more detailed discussion of jurisdiction in US courts, see R.A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 *University of Pittsburgh Law Review* 661 (1999).

⁸ *Id.*, pp. 669-671.

⁹ U.S. Const. amend XIV. The Fifth Amendment also contains a Due Process Clause applicable to the federal government, but it normally is the Fourteenth Amendment Due Process Clause which is being applied. See R.A. Brand (*op. cit.* note 7), at p. 664.

¹⁰ *E.g.*, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982).

¹¹ *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915 (2011).

¹² *Cf. Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

¹³ *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414, and n. 9 (1984).

¹⁴ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

be based, not only on the formalistic concept of the physical presence of the defendant in the forum state, but also on the idea that the defendant, by choosing to engage in activities in the state, made itself subject to litigation there in regard to claims arising out of its activities in the state. In *International Shoe*, the Court recognised that modern developments in transportation and communication, as well as the development of concepts of legal personality prevented a strict formalistic approach to personal jurisdiction. More precisely, the Court ruled that, to exercise jurisdiction in a constitutionally proper manner (*i.e.*, in a manner that satisfies Due Process), a court may subject a defendant to judgment only so long as (i) there exist “minimum contacts” between the defendant and the forum state, *i.e.* only when the defendant has engaged in sufficient activity within the jurisdiction “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’”, and (ii) the relationship between the defendant and the forum must be such that it is “reasonable ... to require the corporation to defend the particular suit which is brought there”.¹⁵

10. In the *International Shoe* case, the need for rules accommodating the fiction of the corporate personality led the Supreme Court to focus on the conduct of those acting on behalf of the corporation. It noted two variables in determining the constitutionality of jurisdiction over non-resident defendants. The first is the extent and intensity of the defendant’s activities in the forum state, and the second is the connection between those activities and the cause of action.¹⁶ “Continuous and systematic” activity supports general jurisdiction over a defendant, allowing a court to consider actions against the defendant whether or not they arise out of those activities.¹⁷ A “single isolated” contact, on the other hand, will (at most) support only specific jurisdiction, and the action must arise out of the contact.¹⁸

11. More recently, the US Supreme Court Due Process analysis has brought concepts of general jurisdiction closely into line with those found in the concept of domicile as the principal basis for general jurisdiction in the Brussels I-bis Regulation of the European Union.¹⁹ In *Goodyear Dunlop Tires Operations, S.A., v. Brown*,²⁰ the Court reiterated a power-based concept of jurisdiction, stating that “[a] state court’s assertion of jurisdiction exposes defendants to the state’s coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment’s Due Process Clause”.²¹ In applying this power-based concept of jurisdiction to corporations, the Court went on to state that “[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the state are so ‘continuous and systematic’ as to render them essentially at home in the forum state”.²² Thus, the court concluded, “[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home”.²³ More recently, the *Goodyear* analysis of general jurisdiction was followed by the Supreme Court in *Daimler AG v. Bauman*, stating that “the inquiry under *Goodyear* is not whether a foreign corporation’s in-forum contacts can be said to be in some sense ‘continuous and systematic,’ it is whether that corporation’s affiliations with the state are so ‘continuous and systematic’ as to render [it] essentially at home in the forum state”.²⁴

¹⁵ *Id.* at pp. 316-317 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹⁶ *Id.* at pp. 316-320.

¹⁷ *Id.* at p. 317:

“Presence” in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorisation to an agent to accept service of process has been given. *St. Clair v. Cox*, 106 U.S. 350, 355, 1 S. Ct. 354, 359, 27 L. Ed. 222; ... Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation’s behalf are not enough to subject it to suit on causes of action unconnected with the activities there.

¹⁸ *Id.*

¹⁹ *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, OJ L 351, 20.12.2012, pp. 1–32.

²⁰ *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915 (2011).

²¹ *Id.* at pp. 918-919.

²² *Id.*

²³ *Id.* at p. 919.

²⁴ *Daimler AG v. Bauman*, 571 U.S. ____ (2014). See also, very recently, *BNSF Railway Co. v. Tyrrel*, 581 U.S. ____ (2017).

12. On the same day that it decided the *Goodyear* case, the US Supreme Court also addressed questions of specific jurisdiction in *J. McIntyre Machinery Ltd. v. Nicastro*.²⁵ Because it is specific (or “special” in the language of the Brussels I-*bis* Regulation) jurisdiction which is addressed in the provisions in question in the draft Judgments Convention, it is this context that is most relevant. Unfortunately, the *Nicastro* decision did not produce a majority opinion that can provide clear guidance on the current status of the application of the Due Process Clause to the question of specific jurisdiction. A four-Justice plurality opinion written by Justice Kennedy stated that “[t]he principal inquiry in cases of this sort is whether the defendant’s activities manifest an intention to submit to the power of a sovereign”, and “[t]he defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State”.²⁶ At the same time, a three-Justice dissenting opinion, written by Justice Ginsburg, stated that “the plurality’s notion that consent is the animating concept draws no support from controlling decisions of this Court”, and that “[t]he modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness”.²⁷

13. Finally, this year in *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty* the US Supreme court ruled that “for specific jurisdiction, a defendant’s general connections with the forum are not enough”.²⁸ Relying in particular on *Walden v. Fiore et al.* (“a defendant’s relationship with a... third party, standing alone, is an insufficient basis for jurisdiction”),²⁹ the majority of the Court held that, to assert specific jurisdiction, “a connection between the forum and the specific claims at issue” is needed and that “this remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents”.³⁰ The mere fact, as in the case at hand, that other (in-state) plaintiffs were prescribed, obtained, and ingested a medication in a state – and allegedly sustained the same injuries as did the non-residents – does not allow that state to assert specific jurisdiction over the nonresidents’ claims. Also, the fact that the defendant extensively advertised and marketed its product in the state and contracted with a state distributor is not enough to establish personal jurisdiction in that state.

“Purposeful and Substantial Connection” in Light of US Jurisprudence

14. The “purposeful and substantial connection” test included in the current draft Judgments Convention is intended to provide language that reflects the law of more than a single Hague Conference Member. To the extent, however, that it reflects some element of US Due Process jurisprudence, there are a number of phrases which have been used reasonably consistently in US Supreme Court opinions applying the Due Process Clause to questions of personal jurisdiction. These include:

- a. “minimum contacts” with the forum state;³¹
- b. activity by which the defendant “purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws”;³²
- c. “foreseeability”, but the “foreseeability that is critical to Due Process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there”;³³

²⁵ *J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 873 (2011).

²⁶ *Id.* at p. 882.

²⁷ *Id.* at p. 903.

²⁸ *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 582 U.S. ____ (2017) (Sotomayor, J., dissenting).

²⁹ *Walden v. Fiore et al.*, 571 U.S. ____ (slip op., at 8) (2014).

³⁰ *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 582 U.S. ____ (2017).

³¹ *International Shoe Co. v. Washington*, 326 U.S. 310, 316-317 (1945).

³² *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

³³ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

- d. a combination of these factors, such that “[t]he ‘substantial connection’ between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State”.³⁴

15. It is perhaps as important to understand what this language does *not* mean. The Due Process Clause is not in any way a grant of judicial jurisdiction. Under the jurisprudence of the US Supreme Court, it is a *limitation* on judicial jurisdiction. Moreover, as in the draft Convention text, the “purposeful and substantial connection” and the language of the US Supreme Court being considered here apply to matters of specific jurisdiction.

16. The US Supreme Court has held that a single sale to a customer who takes an accident-causing product to a different state (where the accident takes place) is not a sufficient basis for asserting personal jurisdiction.³⁵ And the Court, in separate opinions, has strongly suggested that a single sale of a product in a state does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place.³⁶ Thus, for US purposes, the “purposeful and substantial connection” language incorporates the idea that the defendant’s activity either in or directed at the forum state must be intentional and with substance, and not just be a formality. It must be with purpose.

C. CANADA’S “REAL AND SUBSTANTIAL CONNECTION” TEST

A Real and Substantial Connection as a Limitation on Jurisdiction

17. The development of fundamental jurisdictional jurisprudence in Canadian courts has tended to focus not so much on the purposeful nature of the defendant’s activity as on whether the defendant and the claim have a substantial connection with the forum State. This has resulted in a “real and substantial connection” test first suggested by the Supreme Court of Canada in *Moran v. Pyle National (Canada) Ltd.*³⁷ In *Moran*, the Court noted that developments in English courts seemed to be moving toward a focus on the need for a significant connection between the claim and the forum State for jurisdictional purposes, hinting at a “real and substantial connection test”, and then applied that test to the question of whether a Canadian province had jurisdiction in a products liability action.³⁸

18. The “real and substantial connection” test was formally adopted in *Morguard Investments Ltd. v. De Savoye*, where the Supreme Court of Canada applied it to the recognition by the courts in one province of a judgment of the courts in another province in a personal action brought when the defendant no longer lived in the province of the court of origin.³⁹ Recalling its decision in *Moran v. Pyle National (Canada) Ltd.*, the Court ruled that “if this Court thinks it inherently reasonable for a court to exercise jurisdiction under circumstances like those described, it would be odd indeed if it did not also consider it reasonable for the courts of another province to recognise and enforce that court’s judgment”.⁴⁰ In this context, the Court stated that “the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties. In a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from

³⁴ *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

³⁵ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

³⁶ See *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 111, 112, (1987) (O’Connor, J.) (requiring “something more” than simply placing “a product into the stream of commerce”, even if defendant is aware that the stream “may or will sweep the product into the forum State”); *id.*, at p. 117, 107 (Brennan, J., concurring in part and concurring in judgment) (jurisdiction should lie where a sale in a State is part of “the regular and anticipated flow” of commerce into the State, but not where that sale is only an “edd[y]” *i.e.*, an isolated occurrence); *id.*, at p. 122, (Stevens, J., concurring in part and concurring in judgment) (indicating that “the volume, the value, and the hazardous character” of a good may affect the jurisdictional inquiry and emphasising Asahi’s “regular course of dealing”).

³⁷ *Moran v Pyle National (Canada) Ltd.*, [1975] 1 SCR 393.

³⁸ *Id.*, para. 28.

³⁹ *Morguard Investments Ltd. v. De Savoye* [1990] 3 SCR 1077.

⁴⁰ *Id.* at p. 1107.

province to province, it is simply anachronistic to uphold a 'power theory' or a single situs for torts or contracts for the proper exercise of jurisdiction".⁴¹

19. The constitutional role of the "real and substantial connection" test in Canadian law was later confirmed in *Hunt v. T&N plc.*⁴² The Court stated that, "[i]n *Morguard*, a more accommodating approach to recognition and enforcement was premised on there being a 'real and substantial connection' to the forum that assumed jurisdiction and gave judgment. Contrary to the comments of some commentators and lower court judges, this was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction".⁴³ The Court went on to add that "[t]he exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these", and that "courts are required, by constitutional restraints, to assume jurisdiction only where there are real and substantial connections to that place".⁴⁴

20. In *Beals v. Saldanha*,⁴⁵ the Supreme Court of Canada extended the "real and substantial connection" test, originally applied to the recognition of interprovincial judgments, to apply equally to the recognition of foreign judgments.⁴⁶ In doing so, the Court stated:

The "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.⁴⁷

This language suggested that the "connection" which is relevant may be found either between the cause of action and the court of origin or between the defendant and the court of origin.

21. In *Club Resorts Ltd. v. Van Breda*,⁴⁸ the Canadian Supreme Court built upon an earlier opinion of the Ontario Court of Appeal in *Muscutt et al. v. Courcelles et al.*,⁴⁹ to further modify the "real and substantial connection" test. The Court described the test as having "evolved into an important constitutional test or principle that imposes limits on the reach of a province's laws and courts", and "reflects the limited territorial scope of provincial authority under the Constitution".⁵⁰ Justice LeBel, writing for the Court stated the importance of the test:

[A] clear distinction must be maintained between, on the one hand, the factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the principles and analytical tools, such as the values of fairness and efficiency or the principle of comity. These principles and analytical tools will inform their assessment in order to determine whether the real and substantial connection test is met.⁵¹

The importance of a connection between the claim, the defendant, and the forum State, was further noted as the opinion continued:

The purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such

⁴¹ *Id.* at p. 1109.

⁴² *Hunt v. T&N plc.*, [1993] 4 SCR 289.

⁴³ *Id.* at p. 325.

⁴⁴ *Id.*

⁴⁵ *Beals v. Saldanha*, [2003] 3 SCR 416, 2003 SCC 72 (Iacobucci, Binnie and LeBel JJ. dissenting).

⁴⁶ While *Morguard* did not decide whether that test applied to foreign judgments some courts extended the application of *Morguard* to judgments rendered outside Canada: *Moses v. Shore Boat Builders Ltd.* (1993), 106 D.L.R. (4th) 654 (B.C.C.A.), leave to appeal refused, [1994] 1 S.C.R. xi; *United States of America v. Ivey* (1996), 30 O.R. (3d) 370 (C.A.); *Old North State Brewing Co. v. Newlands Services Inc.*, [1999] 4 W.W.R. 573 (B.C.C.A.).

⁴⁷ *Id.*, para. 32.

⁴⁸ *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 SCR 572.

⁴⁹ *Muscutt et al. v. Courcelles et al.* 60 O.R. (3d) 20.

⁵⁰ *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 SCR 572, para. 69.

⁵¹ *Id.*, para. 79.

a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.⁵²

Justice LeBel then provided a list of presumptive connecting factors that may indicate the existence of a real and substantial connection.

22. Justice LeBel's opinion in *Van Breda* concluded with a list of presumptive connecting factors. When one of the presumptive connecting factors exists, the court will assume jurisdiction unless the defendant can demonstrate the absence of a real and substantial connection. If, on the other hand, none of the presumptive connecting factors is found to exist, the onus rests on the plaintiff to prove that a sufficient relationship exists between the litigation and the forum. In a tort case such as *Van Breda*, Justice LeBel stated that:

the following factors are presumptive connecting factors that, prima facie, entitle a court to assume jurisdiction over a dispute:

- (a) the defendant is domiciled or resident in the province;
- (b) the defendant carries on business in the province;
- (c) the tort was committed in the province; and
- (d) a contract connected with the dispute was made in the province.⁵³

23. While the *Van Breda* opinion repeatedly used the phrase "real and substantial connection", very few times did it expressly state what must be connected. The language of the *Beals* decision suggested that the connection could be between the forum state and either the cause of action or the defendant.

24. In its 2015 decision in *Chevron Corp. v. Yaiguaje*,⁵⁴ the Supreme Court of Canada reviewed the real and substantial connection test in addressing the question of recognition jurisdiction, that is, whether a Canadian court must have a real and substantial connection to the claim or defendant in order to recognise and enforce a judgment from a foreign court. In doing so, it reaffirmed the application of the test in indirect jurisdiction cases, citing *Beals* for the understanding that "the real and substantial connection test should also apply to the money judgments of other countries' courts."⁵⁵ Thus, while the Supreme Court applied the same test for indirect jurisdiction purposes that it applies for direct jurisdiction purposes, it did not carry that test forward to the matter of recognition jurisdiction.

25. The judicial development of the "real and substantial connection" test in Canada has been accompanied by legislative developments. The Uniform Law Conference of Canada prepared the *Court Jurisdiction and Proceedings Transfer Act* ("CJPTA") to provide rules governing jurisdiction and the doctrine of *forum non conveniens* in provincial courts.⁵⁶ CJPTA Section 3(e) ("Proceedings *in personam*") provides that a court may assume jurisdiction if "there is a real and substantial connection between [enacting province or territory] and the facts on which the proceeding against that person is based". Section 10 ("Real and substantial connection") lists a variety of circumstances in which such a connection would be presumed to exist. For example, it provides factors that would presumably provide the relevant connection when proceedings are brought against a trustee in relation to the performance of trust obligations (section 10(d)), factors applicable to proceedings based on property rights or rights related to a contract (section 10(e)), and factors applicable to tort claims (section 10(g)). The list of connecting factors found in Section 10 is not closed and other circumstances might be proven in order to establish a "real and substantial connection".

⁵² *Id.*, para. 99.

⁵³ *Id.*, para. 90.

⁵⁴ *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, 2015 CSC 42.

⁵⁵ *Id.*, para 32.

⁵⁶ Uniform Law Conference of Canada, *Court Jurisdiction and Proceedings Transfer Act* (available online at < <http://www.ulcc.ca> >).

Purposeful and Substantial Connection in Light of Canadian Jurisprudence

26. The “substantial” term in the “purposeful and substantial connection” language in the current draft Judgments Convention derives from the “real and substantial connection” test which defines the constitutional limitation on jurisdiction in Canadian courts. The decisions which have defined the contours of the “real and substantial connection” test have dealt with both direct and indirect jurisdiction, thus making clear that the test applies to recognition and enforcement of foreign judgments as well as to jurisdiction in the court of origin.

27. Like the due process limitation in the United States, the “real and substantial connection” test must be applied in addition to any single connecting factor in order to determine whether the exercise of jurisdiction, by either the Canadian court of origin or by a foreign court whose judgment is presented for recognition and enforcement, is within constitutional limits. However, the Canadian limitation clearly is less stringent than the US limitation on at least two points. First, while the US connection must be between the forum State and the defendant, the Canadian connection appears that it may be between the forum State and either the claim or the defendant. Second, in the United States, the burden is on the party claiming jurisdiction to demonstrate that the constitutional test is met. In Canada, at least in a tort case, once the proponent of jurisdiction has established one of the presumptive connecting factors, the burden shifts to the other party to rebut the existence of a real and substantial connection.⁵⁷ This shift in the burden is captured in the double negative text of both Article 5(1)(g) and 5(1)(n)(ii) of the February 2017 draft Convention. For example, Article 5(1)(g) provides that a judgment is eligible for recognition and enforcement if the court of origin was in the State of the place of performance of the contractual obligation “unless the defendant’s activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State.” This shift of the burden reflects the Canadian application of the real and substantial connection test.

D. FINDING LANGUAGE THAT CAPTURES A CONSENSUS APPROACH FOR INDIRECT JURISDICTION TESTS IN CONTRACT AND TRUST CASES (Article 5(1)(g) and 5(1)(n)(ii))

28. Both the United States and Canada, in their approach to both direct and indirect jurisdiction, rely on something more than a simple list of connecting factors. In each of these two legal systems, there are statutes which contain lists of connecting factors used for jurisdictional purposes. While in the United States, the connection must be between the forum state and the defendant, the Canadian connection appears that it may be between the forum State and either the claim or the defendant. The purpose of the test in both systems is to establish the fairness of the exercise of judicial jurisdiction over a foreign defendant. The language of decisions applying this test in the United States has often included reference to the purposeful conduct of the defendant in or directed at the forum state as a necessary element. The language of decisions applying the test in Canada has focused on a substantial connection as a necessary element. The Canadian test has also provided for the type of shift of burden of proof that is found in the draft Convention text. Thus, the language contained in the current draft Convention text draws from both legal systems in an effort to provide a rule that can be applicable in a multilateral text.

⁵⁷ *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 SCR. 572, para. 100.