CHAPTER ONE

INTRODUCTION

I. THE NATURE OF THE SUBJECT

Private international law deals with three central questions. The first is the question of jurisdiction. In what situations will the courts of the forum have jurisdiction to resolve a dispute involving a foreign element? Do they have jurisdiction over the parties? Do they have jurisdiction over the subject matter? If they have jurisdiction, should they decline to exercise it so that the dispute may be heard more appropriately elsewhere?

The second is the question of the recognition and enforcement of the decisions of foreign courts or tribunals. If in a tort claim an injured person obtains a judgment in Saskatchewan, under what circumstances will that judgment be enforced in another province? If a spouse obtains a divorce decree from the courts of another country, will that decree be recognized in the forum as validly dissolving the marriage?

The third is the question of choice of law. The court hearing a dispute usually applies its own law in resolving that dispute, but it does not always do so. In some circumstances it will instead apply a foreign law. How will the court determine when it should apply foreign law? How does the court come to know the content of that law?

In a given dispute, all three of these questions may be raised. For example, an Ontario corporation and an Alberta resident may enter into a contract in Alberta to be performed in Ontario. The Ontario corporation may later start an action for breach of contract against the Alberta resident in Ontario. Should it fail in that action, it might start a separate action against the Alberta resident in British Columbia, where the Alberta resident owns assets. The British Columbia court would first have to decide whether it has jurisdiction to hear the action against the defendant. Second, the court would have to determine whether it should recognize the Ontario decision in the defendant's favour as a possible defence to the plaintiff's action in British Columbia. Third, if the limitation periods differ in British Columbia, Ontario, and Alberta, the court might have to decide which province's limitation period is the appropriate one to apply to the facts of the case.

It is important to appreciate that these three fundamental questions are procedural rather than substantive. Rules of private international law do not resolve disputes between parties in the same way that rules of contract or tort law do. They regulate the process by which the dispute will ultimately be resolved. In a sense, they are civil procedure rules for cases in which there are factual connections to one or more jurisdictions other than the forum.

Some issues of terminology should be noted. First, private international law is also widely known as the conflict of laws, and these should be treated as synonyms. Second, neither term is ideal. Private international law is not international, but rather is domestic—each system of law establishes its own private international law rules. And the notion of a conflict of

laws, in which two legal systems have rules that reach different results on the same set of facts, makes some sense in the context of choice of law—one of the three central questions—but does not seem to have much descriptive force in the context of the other two questions. Third, private international law uses a special meaning of "country" or "state" to refer to a geographical entity that has its own legal system. So while France and New Zealand are countries, so are Ontario, New South Wales, and Michigan.

This book concentrates on the conflict of laws rules as applied in the common law provinces and territories of Canada, although it does draw comparisons with and insights from the civil law position in Quebec. In common law Canadian jurisdictions, the principles of private international law have traditionally been developed by the courts with little statutory innovation. But this is changing. In particular, three provinces and one territory now have a statutory framework for taking jurisdiction, having enacted and brought into force the *Court Jurisdiction and Proceedings Transfer Act*. Also, traditionally the work of legal scholars has influenced judicial decision-making in this area. This influence continues.

While the Canadian common law principles are derived from principles developed by the English courts, substantial differences now exist between the Canadian and English positions. This occurred partly as a result of the United Kingdom's membership, until very recently, in the European Union. It is also due to the recognition by Canadian courts that Canada's economic, social, cultural, and constitutional framework is markedly distinct from England's and that different solutions to conflict of laws problems are therefore often required. This independent Canadian approach has been highlighted by a series of decisions in the Supreme Court of Canada that have drawn from principles of Canadian constitutional law and have changed the landscape of Canadian private international law: see, e.g., *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077, 76 DLR (4th) 256; *Hunt v T&N plc*, [1993] 4 SCR 289, 109 DLR (4th) 16; *Amchem Products Inc v British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897, 102 DLR (4th) 96; *Beals v Saldanha*, 2003 SCC 72; *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52; *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon*, [1994] 3 SCR 1022, 120 DLR (4th) 289; and *Club Resorts Ltd v Van Breda*, 2012 SCC 17. Extracts from all of these cases feature prominently in this book. The ramifications of the most recent of these decisions, *Club Resorts*, for several important issues across the entire field of private international law are still being worked out.

The recognition of the constitutional dimension to the subject area and the importance of Canada's federal structure has also focused attention on the fact that the principles that apply on the interprovincial level will often differ from those at the international level.

Another feature of Canadian conflicts law has been the adoption by Canada and the implementation by the provinces of several international conventions, especially those proposed by the Hague Conference on private international law: see, e.g., the 1958 New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*; the 1985 *UNCITRAL Model Law on International Commercial Arbitration*; the 1980 *United Nations Convention on Contracts for the International Sale of Goods*; the 1985 Hague *Convention on the Law Applicable to Trusts and on Their Recognition*; the 1980 Hague *Convention on the Civil Aspects of International Child Abduction*; and the 1993 Hague *Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*. There is currently debate about whether Canada will adopt the 2005 Hague *Convention on Choice of Court Agreements*.

II. ORGANIZATION OF THIS BOOK

As noted, private international law can be divided into three central questions. However, some important topics relate to all three questions. Four such topics are the historical and theoretical underpinnings of the subject, its constitutional implications, the concept of public policy, and the personal connecting factors of domicile and residence. Because of their overarching nature, these topics are considered first, in Part One.

The book then turns to consider the three central questions. Part Two addresses the question of jurisdiction. As a practical matter, this may be the most important topic in the field, in part because it arises in more cases than any other topic. Part Two examines the rules on taking jurisdiction in detail. It also discusses the judicial discretion to decline to exercise jurisdiction and the potential to restrain foreign proceedings.

There is room for legitimate debate about which question should be considered next. On one hand, the question of choice of law is naturally subsequent to having determined that the court has jurisdiction. On the other hand, there are important conceptual links between the rules on taking jurisdiction and the rules on recognition and enforcement of foreign judgments. Primarily because of these links, in this book this latter question is considered next, in Part Three.

Part Four introduces the reader to the third central question, choice of law. It analyzes the judicial approaches to this issue and some of the pervasive problems it poses, examines the methods through which foreign law is presented to a Canadian court, and investigates the important distinction between substance and procedure. These issues apply to choice of law for all areas of law. Part Five then examines choice of law for three specific areas of law: tort, contract, and unjust enrichment.

The final parts of the book deal with areas of law that raise particular issues within each of the three central questions. Notably, the approach to jurisdiction and to recognition and enforcement of judgments differs in some key respects from the analysis in earlier parts of the book. Part Six considers property law and succession. Part Seven considers marriage and cohabitation, dissolution of marriages and other unions, support, and matrimonial property.

III. SELECTED BIBLIOGRAPHICAL REFERENCES

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