CHOICE OF LAW, FORUM NON CONVENIENS AND IMMOVABLES: RECENT PERSPECTIVES IN CANADA

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I. INTRODUCTION

The traditional choice of law rule in relation to proprietary or possessory interests in real property or immovables is the law of the *lex situs*. The courts in common law jurisdictions have historically adopted the view that matters concerning the determination of property interests, freehold or leaseholds, will be governed by the law of the place where the property is located. The choice of law rule evolved from the tenets that embody the classic principles of international private law, those of comity, reciprocity, order and fairness in the administration of justice, and public interests considerations prevalent in the domestic jurisdictions where the case is heard. It reflects the notion that the imperative for modern nations to trade among each other, to communicate and that the global circulation of goods and services requires people to engage daily in extra-territorial or international transactions in an orderly and fair manner. A determination of the law governing property interests in immovables requires a court seized of the matter to determine how the foreign court of the *situs* where the property is situated would have applied its own international law. Thus in effect, in determining the choice of law a court seized of the matter is engaged in determining the appropriate forum or jurisdiction where the disputes are to be resolved, and which law of the forum applies to the cause of action.

The law that governs a determination of title and possessory interests involving property situated in foreign lands is the *lex situs* principle. The *lex situs* principle which evolved from the House of Lords decision of *British South Africa Company v. Companhia de Moçambique* ¹ has been the guiding principle for courts in common law jurisdictions in resolving issues of choice of laws to determine rights and interests over property situated in foreign lands. The notion that disputes arising out of interest in immovable situated in foreign lands are best decided by the internal law of the place where the property is located reflects the long standing principle of comity in international law. It aims to provide predictability, consistency and convenience to litigants and help to prevent any judicial overreaching with respect to jurisdiction and forum shopping on the part of the litigants.

In contemporary times the principle of *lex situs* has become less significant as the existence of ancillary interests, such as for instance, contracts or torts, intrinsically attached to proprietary

interests which, by its very nature, often require the courts to determine substantive and procedural issues that go beyond the jurisdiction realm of the location where the property is situated. Hence courts in common law jurisdictions have increasingly been moving from the traditional application of the *lex situs* principle in the determination of conflict of laws issues, to a much more pragmatic approach that takes into consideration many factors, including the *lex situs* principle and the application of domestic laws and international covenants to determine the proper forum to litigate the party’s disputes.

As a result of this trend many domestic jurisdictions such as Canada and United States have adopted approaches to international private law which are consistent with the principle of comity, uniformity and reciprocity rather than being guided by *lex situs* principle, and have thus shaped their domestic laws to bring them in accord with contemporary international standards. However, the more this change from the traditional approach in conflict of laws has become a reality also the more evident that *lex situs* principle will continue to play significant role in the determination of proprietary interests related to immovable that arise across transnational boundaries. Thus, in the absence of shared jurisdiction to govern immovable and proprietary interests, the distinction between actions in *rem* and actions in *personam* would be crucial in the determination of the appropriate jurisdictional forum to resolve the disputes between litigants, and the enforcement of other interest which are intrinsically related to proprietary interests, such as the adjudication for damages and the enforcement of damage awards following the completion of the adjudication process, since in most cases actions for damages would be indirectly related to the property unit in itself rather than the tangible rights of individual personalities.

In Canada, the Courts have indicated while the real and substantial connection test may continue to apply as guiding principle to justify assumption of jurisdiction, the Court may also look into other factors to determine whether the assumption of jurisdiction is justifiable, including making assessment of the potential involvement of other parties in the litigation process and considering implicit national and social policy considerations. The courts in Canada have indeed long held the notion that there is exemption to the general principle that the courts will not exercise jurisdiction over issues of title ownership for land situated in foreign land, if the interests or rights at stake concern contract, trust or equity and the defendant is domiciled in Canada.

II. CHOICE OF LAW AND THE *MOÇAMBIQUE RULE* - A CANADIAN PERSPECTIVE

A. TRADITIONAL APPROACH

The general choice of law rule in relation to immovables is that property rights are to be determined by the law of the place where the property is situated. This means that property rights, obligations and the substantive law of the place where the property is situated will govern liabilities over an immovable situated in a foreign jurisdiction. The foundational basis of the common law principle of the law of the *situs* was outlined in the *British South Africa Company*
v. Companhia de Moçambique, a decision in which the House of Lords declined English courts from assuming jurisdiction in a matter concerning disputes over proprietary rights to immovables situated outside England. The case concerned an action brought by the plaintiff company claiming among other things a declaration that it was lawfully in possession and occupation of large tracts of land, mines and mining rights situated in [Mozambique] and an injunction to restraining the defendant company from continuing to occupy or assert any title to the lands in question and seeking quantum damages. The House of Lords dismissed the action on the grounds that the court had no jurisdiction to entertain an action for trespass or to grant judgement for damages for trespass to land situated abroad. The essence of the Moçambique Rule is that common law courts will not take jurisdiction in actions that seek a determination of rights to title ownership, possessory rights or interests concerning property situated in foreign lands.

The law of the situs requires the court to apply the law of the jurisdiction that has the most dominant interest in the immovable, and the place with the most substantial connection with the property in question. It could be said that by choosing the appropriate law, the court is in effect determining questions of appropriateness of jurisdiction where the matter is to be adjudicated. The Moçambique Rule seems to suggest that a choice of jurisdiction does not only circumscribe to a question of which law to apply, but also an assertion of the jurisdiction whose policies would be seriously most affected if the court does not apply its laws. By deciding jurisdiction over a particular issue, or by simple giving a reason to deny jurisdiction, the court is providing a statement that indicates whether the jurisdiction is a convenient forum or is vested with rights to exercise discretion over the matter. A problem could, however, arise in situations where the domestic court seized with the matter does not observe these rules or interpret them differently than common law courts have done so. Like any rule of law, domestic statutory law can upset these general prescriptions. Although such statutorily limitation may not affect the validity of the domestic court's jurisdiction over the subject matter in question, it may present some difficulties in the recognition of that jurisdiction beyond the courts' boundaries.

There is a question whether the Moçambique Rule should be interpreted broadly and liberally so as to apply not to actions in rem but also actions in personam, which aim to determine rights or liabilities arising out of property interests, attached to interests in lands, or whether it is only applicable in context of a determination of title to lands to property situated in a foreign jurisdiction. Assuming that the rule is merely an application of a more general principle of

2 Ibid.
3 See also Herperides Hotels Ltd. v. Muftizade, Infra note 21.
5 One of the first cases that adopted and applied the Moçambique Rule of assumption of jurisdiction by a foreign Court in Canada was the case of Brereton v. Canadian Pacific Railway Co. (1898), 29 O.R. 57 (HC)[hereinafter Brereton cited to O.R.]. However, the Brereton essentially extended the Moçambique Rule to apply for actions for damages arising out of negligence or omissions affecting interests related to lands situated in a foreign jurisdiction; Most recently, in the case of Tezcan v. Tezcan, [1988] 2 W.W.R. 264 (B.C.C.A.), B.C.J. No. 2450, 46 D.L.R. (4th) 176, 2 W.W.R. 264, [1987] 20 B.C.L.R. (2d) 253, 24
international private law that no court ought to give a judgement that is unenforceable beyond the court's authority, it would appear to limit the application of the rule to the jurisdiction where title or possession to property is in dispute. A broader or liberal interpretation of Moçambique Rule to include other forms of liabilities that arise in relation to property situated outside of the courts' jurisdiction would have the effect of bringing the court into conflict with the admitted authority of a foreign sovereign, and at the same time, the jurisdiction of a foreign court.

One of the cases the considered the conceptual constraint in the application of the lex situs in Canada is the Albert v. Frazer Companies Ltd. case. In Albert v. Frazer Companies Ltd. the New Brunswick Supreme Court held that it had no jurisdiction to entertain a claim of negligence and wrongful obstruction of waters even though the case did not involve disputes over registration or ownership of land title. The plaintiff owned land in Quebec, in a location near the border with New Brunswick. The plaintiff had claimed that defendant had interfered negligently and wrongfully with the inflow of river water, which consequently had resulted in damages to her land. The court declined to grant damages on the grounds that it had not jurisdiction to hear the case. The court in Frazer appears to have defended the view that irrespective of the fact that the matters to be decided do not involve issues of rights to title or possession, the Moçambique Rule has the implication of preventing a party from bringing an action for damages to lands in a jurisdiction other than where the property is situated. From the perspective of the law of the situs an interpretation of the Frazer court decision would appear to suggest that the Moçambique Rule would not apply to actions for damages in personam that occur in relation to foreign immovables, although the decision could also be seen as a case which basically followed and squarely interpreted the lex loci delitti tort principle that states that cases ought to be adjudicated in the jurisdiction where the case arose or damages were sustained.

While the question whether actions related to or arising from rights or interests attached to land will inevitable be characterized as action where the lex situs principle applies, the difficulty arise in circumstances where actions do not have their objects in rem, but nevertheless the proceedings

C.P.C. (2d) 13, 11 R.F.L. (3d) 113 [hereinafter Tezcan cited to W.W.R.] where the court held that a determination of the appropriate law that applied with respect to a matrimonial division of the property action, in a circumstance where the matrimonial property is situated in a foreign land, is based on the lex situs principle. In doing so, the court considered which one, the Turkish foreign law under which the marriage was celebrated and the British Columbia law under which the divorce proceedings were commenced, and the jurisdiction where the matrimonial property was situated. The court concluded that the British Columbia law was the proper law applicable to resolve the party’s matrimonial division of property disputes. The fact that the court in British Columbia would be applying foreign law to determine other aspects of the party’s disputes played a significant factor in deciding whether to decline jurisdiction. The court indicated that in such cases in deciding jurisdiction it would, depending on the circumstances of the case, take into account the value of the property to determine what may be an appropriate money judgement to be awarded between the parties. One important aspect of the case that might have had significant bearing in the courts' decision was the fact that the Turkish law provided for issues concerning property located in a foreign jurisdiction to be governed under the law of the place where the property is situated; See also Viswalingam v. Viswalingam, [1996] N.W.T.R. 342, 22 R.F.L. (4th) 372, N.W.T.J. No. 30 [hereinafter Viswalingam cited to N.W.T.R.].

are intrinsically related to ancillary rights and obligations associated with immovable property. It is conceivable that residents in one Canadian province or territory who suffer damages flowing from environmental pollution created by the actions undertaken by a party resident in another province, or disputes arising from the inactions or negligence of a party resident outside the territorial limits or their provincial or territorial domicile, which have a transplanting effect to their province or territory of domicile, may have grounds to pursue claims and seek remedies to stop the action or to recover damages within their provincial or territorial jurisdiction. In such cases, the local law of the place where the pollution or water contamination or diversion originated from will govern, and the polluter or tortfeasor would be subject to the procedural laws of the jurisdiction in which the case is adjudicated. This is a typical case where the statutory enactment provides for ways to resolve issues of choice of law, and jurisdictional forum. The principles of comity, fairness and order that govern international law would have been already enshrined in the legislative enactment, and disputes between the parties would be resolved through statutory interpretation, and lex fori, rather than on the application of the lex loci delicti principle or the Moçambique Rule of the lex situs.

In Duke v. Andler the Supreme Court of Canada upheld the decision of the British Columbia Court of appeal in which it declined to exercise jurisdiction in a case involving multiple properties situated in British Columbia and California, on the grounds that the British Columbia was not the appropriate forum to determine the matter since the contract expelling out the party’s interests and obligations was signed in California and that the California court was seized of the matter and had already rendered a judgment in the case. The decision of the court rested on the application of the lex situs principle, that the court in British Columbia had no jurisdiction to recognize as final and enforce a judgment of the California Supreme court, as part of the general principle that a court of foreign jurisdiction is not a proper forum for the adjudication of issues regarding title and ownership of land situated outside its jurisdiction. When rendering its judgment, the court took into consideration the fact that the British Columbia court could not

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7 See Phillips v. Eyre (1870), L.R. 6 QB 1 (Ex. Ct.) [hereinafter Phillips Case cited to L.R.], where the court held that in order for a party to bring a suit in a commonwealth domestic court over a wrong that occurred in a foreign jurisdiction, two conditions must be met: (1) the wrong must have been of such nature that it would have been actionable had it occurred in the domestic jurisdiction; (2) the wrong must have been not justifiable under the laws of the foreign forum; See also Machado v. Fontes, [1897] 2 Q.B 231 (C.A.) [hereinafter Machado cited to Q.B]; Mclean v. Pettigrew, [1945] D.L.R 65 [hereinafter Pettigrew cited to D.L.R.]; Boys v. Chaplin, [1971] A.C. 356 (H.L.) [hereinafter Chaplin cited to A.C.]; Babcock v. Jackson 191 NE 2d 279 (NY Ct. Apps. 1963) [hereinafter Babcock cited to NE]; Schultz v. Boy Scouts of America, Inc. 480 NE 2d 679 (NY Ct. Apps. 1985) [hereinafter Boy Scouts cited to NE].


recognise and enforce in British Columbia the final order made in California, even though the California court’s decision had determined that the plaintiff had defaulted on the payment of the mortgages registered in California, therefore had failed to comply with the terms of the mortgage collateral, which entitled the defendants to recover against the mortgage default and reverse title ownership of the British Columbia property, which had been vested on the plaintiff as part of the mortgage scheme. The case involved a mortgage scheme entered in California for the purchase of property located in Victoria, British Columbia. Both the vendors and the purchasers were residents of California at the time they executed the agreement. The plaintiff had conveyed the British Columbia property to the defendant, to be secured by a collateral mortgage on the defendants’ property located in California, and which was guaranteed by a title insurance guarantee registered in California. The defendants took possession of the British Columbia property, but failed to pay the monetary consideration they had agreed to pay under the agreement of purchase and sale. The defendant then conveyed and registered title to the British Columbia property to his wife, without notifying the plaintiffs, and the wife subsequently placed a mortgage on the property. The plaintiffs and vendors brought an action in California claiming that the defendant had violated the escrow agreement and had obtained possession of the Victoria property without their knowledge. The California court ordered the defendant to register a new deed in British Columbia transferring title to the property in question to the vendors. In making its decision, the Supreme Court of Canada considered whether the California order entailed a transfer of title to property or was just a judgement for the collection of debt. The Court concluded that the order demanded the conveyancing of the property, and as such it was an order for the transfer of the property, and the court in British Columbia did not have jurisdiction to determine the case or to enforce the California judgment, because the California property was part of the judgement in question and the property was not situated within its jurisdiction.

The Andler decision illustrates that for all practical purposes the application of the law of the situs will depend on case by case, and on the set of circumstances that characterise each case, and in some situations its application may even be impractical. The effect of Andler dicta is that the rule of the lex situs is not only confined to the formalities of transfer of title, but also extends to all disputes touching the land, including debt, trust, succession rights, tort and contract.

The courts are indeed required to respond to the legal exigencies concerning the approach one gives to the lex situs law in the course of the litigation process, by adopting a broad or liberal interpretation of the rule. A broad or liberal interpretation of the Moçambique Rule may indeed prove necessary, as illustrated in the Tezcan case, where the court dealing with situations that mandates that a determination of the substantive question of law leaves no other forum but the domestic forum to decide on issues relating to land situated abroad. In fact in such circumstances, to decline jurisdiction could mean that the litigant is left no recourse and has been denied justice. Thus it could be said that in some instances the interpretation of the lex situs rule would require a balancing of interests between the parties involved in the litigation process. Where a party is not, for matter of law and objective facts or even for questions of judicial

advantage, able to bring litigation in any foreign jurisdiction but the domestic jurisdiction, an imposition of the rule of the *situs* may become tantamount to a decline of justice. The question that could be raised is when and how the courts will exercise or decline jurisdiction, and the consequent effects the decision may have on the continued application of the rule. In *Tezcan* the British Columbia court managed to overcome this dilemma by applying the Turkish law in relation to the express or implied terms of the marriage contract between the parties, in order to determine issue concerning the division of matrimonial property and trusts.\(^\text{11}\)

The courts in Canada have actually long held the notion that there is exemption to the general principle that the courts will not exercise jurisdiction over issues of title ownership for land situated in foreign land. The courts in Canada may assume jurisdiction to enforce rights affecting land situated in foreign jurisdiction if the issues to be determined relate to contract, trusts and equitable rights and the defendant is domiciled in Canada. In *Catania v. Giannattasio* the court of Appeal for Ontario listed four requirements that must be met before the court decides to exercise *in personam* jurisdiction over title and possessory interests related to a foreign situated immovable: (1) The Court has a de facto *in personam* jurisdiction over the defendant, because the defendant resides within the court’s jurisdiction, or because the defendant has been appropriately served and the defendant has appeared before the court; (2) Personal liability has been assumed by the parties, there are equitable obligations between the parties and notwithstanding the defendant’s legal position the defendant is in conscience aware of the existence of the liability; (3) the jurisdiction cannot be exercise without the supervision of the court; and (4) The order can be brought to effect in the *lex situs* of the property.\(^\text{12}\)

The decision of the court in *Catania v. Giannattasio* reflects the court’s recognition that although, in principle, the will not exercise jurisdiction over land situated abroad, it can nevertheless act upon the litigants living within the court’s jurisdiction. In doing so the court will in effect be exercising an *in personam* jurisdiction to enforce personal obligations instead of attempting to adjudicate over rights and interests in land situated in a foreign jurisdiction.

Thus there are many other instances where legal exigencies will require imposing limitations or exemptions on the application of the *Moçambique Rule*. The obvious one, of course, is a situation where *prima facie* the judicial question to be decided does not entail a determination of title to property, or and the litigation process relates to the enforcement of rights, interests, privileges and obligations attached to immovable property acquired under a foreign law if these rights, privileges and obligations arise from contract, fraud or trust. The issues of title ownership arise only with regard to the application of remedies and enforcement process. In these instances an exception to the *Moçambique Rule* may be particularly not only necessary but also desirable, either in the form of *Renvoi* or through the application of the principle of *Dépeçage* in situations where the question of jurisdiction has already been answered through governing statutory instruments or regulations.

However, it could be that as broadly as it can be applied to the extent of preventing of splitting judicial outcomes, the *lex situs* rule may fail to respond and address discernible social and

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\(^{11}\) *Tezcan*, *Supra* note 5.

\(^{12}\) *Catania v. Giannattasio*, *Supra* note 10, at para. 12.
policy interests that support the parties’ property rights. Thus property interests combine a set of values and normative ways of being that can be unique to each jurisdiction and characterize laws that regulate property interests. Different jurisdictions may have different laws regulating property interests, which could mean that sometimes the results of the extra-territorial litigation process might address issues of equity and justice from very different perspectives and ultimately yield incongruent outcomes. The choice of law of the *situs* may not allow the consideration of all the particular circumstances of each case, and consequently may have in many ways the unintended result of undermining the interests and policies of the intervening parties. The choice of law of the *situs* may also prove ineffective in situations where, by its very nature, property interests are intrinsically attached to other forms of interests, such as for instance, contracts or torts, which often require a determination of intrinsic substantive and procedural issues that go beyond the jurisdiction where the property is situated.

Take for instance a shareholder that invests capital through the buying of stocks in an immovable holding corporation. The holder of capital share stocks would usually have an equitable interest in the corporations' property. Although the holding of equitable interest would not necessarily afford the shareholder the right of ownership in the property *per se*, the legal effects of these rights could at any time extend and translate into rights to title to property and ownership should a need of distributing the corporations' assets arise due to liquidation, bankruptcy and insolvency proceedings.  

There are also some situations whereby the relationship between shareholders and the corporation is of such nature to confer shareholders certain rights that can be exercised against or in relation the corporations' property, whenever it may be situated. The legal effect of shareholder rights could arise from the terms and conditions established in the shareholders agreement or could be determined by virtue of common law precepts or the interpretation statutory instruments and regulations. But also the legal effect may arise out of judgment of the court, pronounced as part of a litigation process outcome. These rights are essentially contractual in nature.

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14 Ibid.
B. MODERN APPROACH TO ASSUMPTION OF JURISDICTION IN CANADA

The choice of law of the *lex situs* requires a court seized of the matter to characterize the law that will govern over the subject matter. Characterization permits the court to determine whether the court has jurisdiction to decide on the judicial issues in question or to decline jurisdiction to a foreign court. The process of characterization entails the court in establishing a connecting factor between the court and the subject matter, determining whether the domestic or foreign law will apply and subsequently applying the appropriate law. The judicial principles for the determination of proprietary interests had been the subject of consideration in recent decisions of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*\(^\text{15}\) and *Hunt v. T & Nplc.*\(^\text{16}\) However, most recently in the cases of *Van Breda v. Village Resorts Ltd.*\(^\text{17}\) and *Breeden v. Black*\(^\text{18}\) the Supreme Court of Canada reviewed and clarified the analytic framework for the Court’s assumption of jurisdiction in Ontario and Canada over disputes which arose outside their territorial jurisdictions. The Court’s determination in these two cases essentially marks a turning point in the manner the courts have dealt with choice of law and *forum non conveniens* issues in Canada. Thus, the Court indicated that while the real and substantial connection test may continue to operate as guiding principle to justify assumption of jurisdiction, the Court may also look into multiple factors that exist in the specific circumstances of the case to determine whether the assumption of jurisdiction is justifiable. The factors to be examined include, but are not exhaustive of, the nature of the case, the respective litigants’ domicile, the place the action occurred or *lex loci delicti*, comparative convenience and expense for the parties and witnesses, the potential involvement of other parties, the fairness of assuming or refusing jurisdiction, the existence of a contractual instrument binding the parties, including making considerations about avoidance of multiplicity of legal proceedings.\(^\text{19}\)

In *Morguard* the Court emphasized that the rules of comity in international law required the courts to recognize the "need for adopting the law to the exigencies" of other jurisdictions. The Court indicated that there are two objectives sought by private international law in general and the doctrine of international comity in particular: they aim to uphold "order and fairness". Hence the Court stressed that in determining extra-provincial jurisdiction the Court will be guided by the three principles of comity, order and fairness that embodies private international


\(^{19}\) *Van Bread, Supra note 17,* at paras. 105-109.
law principles: jurisdiction simpliciter, forum non conveniens, choice of law, and recognition of foreign judgements. The Court noted that the assumption of jurisdiction will be guided by notions of "order and fairness", and the dictum that courts would assume jurisdiction where there is a "real and substantial connection" between the subject matter and the forum. The Court was unanimous in noting that when engaging in a determination of what is the appropriate law to apply to a particular case, and when conducting a forum non conveniens assessment, in order decide the appropriate forum in which particular legal disputes should be referred for adjudication, the Court will adhere to and be guided by the general legal standards principles of comity, recognition and enforcement and the encouragement for “uniformity or reciprocity” which shape private international law. Accordingly, the court held that when applying the “real and substantial connection” test, it is only appropriate to consider the substantive rights of the parties involved in relation to the foreign law’s standards of jurisdiction, and the whether the judgment of the court is capable of recognition and enforcement in the foreign jurisdiction.

The Morguard and Hunt concept of comity and choice of law was further reinforced in Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon20, where the court was asked to determine which law should govern in cases involving multiple insurance interests affecting more than one jurisdiction. The cases concerned tort actions for damages brought following injuries sustained by passengers in motor vehicle accidents. The two cases arose out of litigation proceedings commenced in Ontario and British Columbia courts. In Tolofson v. Jensen, the plaintiff passenger was seriously injured when the car owned and driven by his father collided with another vehicle being driven by the defendant Mr. Jensen. At the time of the motor vehicle accident the young litigant and his father were both residents of British Columbia, where the father’s motor vehicle was registered and was insured. The motor vehicle accident occurred while travelling in Saskatchewan, where the defendant resided and the other motor vehicle involved in the accident was registered and insured. The Plaintiffs brought the action in British Columbia, after a very significant delay, on the assumption that the action was statutorily barred in Saskatchewan. In addition, the Saskatchewan law did not allow a gratuitous passenger to recover damages for the injuries sustained in a motor vehicle accident, unless it could be proven that the accident occurred due to a willful or wanton misconduct of the motor vehicle drive. The question before the Court revolved around whether the Saskatchewan limitation period law should have been characterized as a substantive law, therefore denying the litigant’s right to bring the proceedings in another province, in favor of the place where the tort occurred, or it could be classified as procedural law and therefore not strictly binding on the trial court, which

meant that the court needed not scrutinize it during trial proceedings. The Court held that as a matter of general principle in private international law, the law of the place where the tortious action occurred, or the *lex loci delicti*, should govern. The Court reasoned that the preference to a territoriality approach when adjudicating on wrongs committed in another country or provincial jurisdiction worked to help maintain order, fairness, consistency and ultimately provided certainty and justice in international law. Thus the Court concluded that British Columbia was the appropriate jurisdiction to hear the action and that the Saskatchewan law was the appropriate law to govern the determination of the substantive rights of the parties.

In the *Lucas v. Gagnon* case, the court was again called to examine the application of choice of law principles in a motor vehicle accident situation involving motor vehicle insured in a jurisdiction different from where the accident occurred. Mrs. Gagnon brought an action, as a litigation guardian of her two children, against her husband for personal injuries sustained by the children when the car driven by him collided with a vehicle owned and operated by Mr. Lavoie. All members of the Gagnon family were all Ontario residents and the car involved in the accident was registered and insured in Ontario. Mr. Lavoie was a resident of Quebec and his vehicle was registered and insured in that province. The accident occurred in Quebec. The question was whether the Quebec no-fault insurance scheme could apply to situations where some or all the parties involved in the accident were non-residents of Quebec. After the plaintiff abandoned her claim, the husband, who was also a defendant in the litigation, instituted a cross-claim action against Mr. Lavoie. Applying the *lex loci delicti* rule the Court held that Ontario law applied to the main action for damages and that the cross-claim suit for contribution and indemnity could not be maintained under Ontario law. The cross-claim could only be brought under the Quebec law, and the Quebec non-fault insurance scheme would therefore apply. The Court, however, declined to apply the rule of *lex fori* on the ground that was unacceptable in situations whereby the court was adjudicating on matters that had occurred outside the domestic jurisdiction.

The Court in *Tolofson* held the view that a classification of law as procedural or substantial is crucial for the courts to determine which the appropriate foreign law to apply. The Court, however, recognized that such distinction between procedural and substantial law, which is based on distinction between rights and remedies, is not always a straightforward process. Writing for the majority of the Court, Justice La Forest pointedly concluded:

> The principal justification for the rule, preferring the *lex fori* to the *lex loci delicti*, we saw, has been displaced by this case. So far as the technical distinction between right and remedy, Canadian courts have been chipping away at it for some time on the basis of relevant policy considerations. I think this court should continue the trend. It seems to be particularly appropriate to do so in the conflict of laws field where, as I earlier stated, the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties.\(^\text{21}\)

\(^{21}\) Ibid. See also *Herperides Hotels Ltd. v. Muftizade*, [1979] A.C. 508 (H.L.) [hereinafter *Hesperides* cited to H.L.], where the court noted that actions for the enforcement of rights, privileges and obligations related to foreign land appear to affect more the foreign land than actions for damages for trespass, the
The Court conclusion in Tolofson suggests that jurisdiction in *personam* can be founded in context of any legal right, privilege and obligation attached to an immovable, whether the right arose in context of a determination of a procedural issue or whether the issue arose in context of a determination of substantive rights. It suggests that the *Moçambique Rule* of the law of the *situs* should be interpreted with a certain degree of flexibility. It is therefore conceivable to say that while the application of the law of the *situs* attempts to create uniformity, consistency and convenience, which in policy terms may make more sense with regards to local concerns for preserving public order or ordinance, particularly so in matters concerning a determination of title rights and interests, the complexity of issues that may arise in context of immovables requires the courts to maintain a flexible approach in applying the rule.

The Tolofson case has the effect of recognizing that in certain circumstances the courts may broadly and liberally interpret and apply the *Moçambique Rule* to entertain certain actions for remedial damages that relate to contractual or equitable interests associated with foreign immovable, even though the action as pleaded could be characterized as relating to objects rights *in rem*. The Tolofson decision illustrates the nature of problems and the complexity of issues presented to the court seized with the matter to determine rights in immovable. In order to discern the appropriate law that would apply to resolve a particular matter, a court seized to decide the matter is required to determine whether the proprietary or possessory rights in the propriety involved in the litigation is a movable or immovable issue.

The process of adopting the law of the *situs* involves a characterisation of the subject matter or category of issues posed to the court, and subsequently determining the appropriate law of the place that would apply. A choice of the applicable law requires the court to ask a series of questions or an incidental question so as to point to the questions of law that can apply to the particular set of circumstances of the case. With concern to rights in immovables such questions may not always be discernible, since property interests may be mixed with both movable and immovable interests. Thus property interests in immovable may relate to other interests in land, such as mortgage, security, debentures, guarantees, and other legal and equitable interests attached to certain rights of possession or title, such as business associations and charges, whose exercise of rights and obligations and the enforcement of these liabilities are inextricably attached to interests arising from the immovable unit. For instance, an interest in land could be attached to the immovable to the extent that a mortgagee of foreign in the land would have to claim against the ownership of the land or property to enforce the mortgagor's personal covenant to pay.\(^{22}\) It may be that these interests are easily ascertainable in situation where the matter
concerns two jurisdictions with similar or reciprocal legal systems, or where the claims arise by virtue of contract. But it would not be so easily ascertainable in situations where those rights have not been expelled out in the statute or through the interpretation of a contractual instrument entered between the parties.

A characterization of property as movables and immovable essentially entails the court to make a distinction between rights over the physical unit of the property, rights over realty and those rights which are not, or rights over personality. Although such distinction may work effectively in jurisdictions which have common or similar legal structures, it could be difficult to assert in situations where the two jurisdictions that have distinctive legal systems.23 Thus, different legal systems may characterize legal issues differently and affect their interpretation and application, so as to bring about completely different results when applied, and have consequently a tremendous impact on the transfer of rights, property, and on the determination of obligations and liabilities correlated to property interests. For instance, the owner of a house or a commercial building may hold a mortgage that gives the lender some interest in the property, leasehold and fixtures. A lender may have a registered secured interest against a particular property, while upon default the security interest on the mortgage certainly invites the mortgagor to commence proceedings in contract, thus to institute an action in personam, the action could also be characterized as an action in rem, since it entails the recovery of the property in which the mortgage collateral has been registered.

Indeed this approach is consistent with the notion generally held by Courts in Canada that while the court may not directly act upon the rights over lands situated in a foreign jurisdiction in the circumstances, it may nevertheless act upon the conscience of the litigants and assume jurisdiction to provide redress to the party’s disputes.24 In doing so, the Courts are in fact looking broadly into the circumstances of the party to determine whether the litigants have sufficient connection to the forum to warrant the court’s assumption of jurisdiction. Here the question that may highly weight on the court’s consideration is whether the action is merely an action for the possession of the property, by way of judgment enforcement, which could be characterized as an action for possession of title, which could be considered as matter of domestic law of the place where the property is situated, or an action for recovery of the security of the collateral registered against the property. On way of looking into the matter

dicey and morris on the conflict of laws, supra note 1, at p. 924; the supreme court of canada applied the doctrine of forum non conveniens to assert the power vested in the court to decline jurisdiction where it deems more appropriate for the case to be dealt with in another jurisdiction in amchem products inc. v. british columbia (workers' compensation board),[1993]1 s.c.r. 897, 102 d.l.r. (4th) 96 (s.c.c.), 14 c.p.c. (3d) 1, 77 b.c.l.r. (2d) 62, 3 w.w.r. 441 [hereinafter amchem cited to s.c.r.]; acme video inc. v. hedges, [1992] 10 o.r. (3d) 503, o.j. no. 1382 [hereinafter acme cited to o.r.].

23 dicey and morris on the conflict of laws, supra note 1, at p. 924; the supreme court of canada applied the doctrine of forum non conveniens to assert the power vested in the court to decline jurisdiction where it deems more appropriate for the case to be dealt with in another jurisdiction in amchem products inc. v. british columbia (workers' compensation board),[1993]1 s.c.r. 897, 102 d.l.r. (4th) 96 (s.c.c.), 14 c.p.c. (3d) 1, 77 b.c.l.r. (2d) 62, 3 w.w.r. 441 [hereinafter amchem cited to s.c.r.]; acme video inc. v. hedges, [1992] 10 o.r. (3d) 503, o.j. no. 1382 [hereinafter acme cited to o.r.].

24 catania v. giannattasio, supra note 10.
is by saying that such action is clearly raises object rights which entail an overall determination of rights to title to the property, which should be determined under the laws of the place where the property is situated, or, on the other hand, to characterize the entire action as involving rights of the enforcement of the collateral security. Depending on the manner the action is framed and on the issues of law raised in the claim, the court may regard the objects, capital investments, succession interests as part components of the immovable unit or may classify them as distinctive issues from ownership and possession of the immovable. The question whether the object of the action concerns movable rights or rights over immovable is a matter of law, determined from the court’s understanding of various aspects of the litigant’s circumstances and through the interpretation of law. The court will look into the substantive rights of the party’s to determine the appropriate choice of laws and the appropriate forum to determine the party’s disputes.

In a broader sense, it would appear that the Moçambique Rule would not apply to claim concerning the enforcement of rights and obligations arising out of purely contractual aspects of property transactions, such as, for instance, an obligation to restore a rented property to its original condition or for actions concerning rescission of a contract in a sale of land or for potential damages directly or indirectly accruing from such transaction. The question whether an action for a determination of interests attached to an immovable can either be squarely characterized into these prescribed categories or it can be characterized as actions crossbreed between the two types of actions, is a matter of law. While it may be easy to discern the legal issues, the appropriate choice of law and forum to determine the case in clear case such as in divorce and succession proceedings, where actions in rem are often inextricably related to some ancillary questions whose solution entails entertaining questions about a personality status or bringing an action in personam, there may not be easy answers in cases such as where the disputes arise out of claims over for instance, rights and obligations under leases and holidays rentals where often time party’s execute contracts with company or entities that are based in one location, different from the location of the property, and the contract includes not only the rights and obligations in a membership club, that entail the right to use a holiday property which is located in a hotel complex on time share basis, and holiday perks and leisure’s.

An attempt to place a clear distinction between realty and personality rights could prove to be inconsistent with principles of equity, and the notion that equity acts in personam rather than in rem, and thus may place limitations on a litigant seeking to enforce equitable interests arising from his or her property interests. The courts in common law jurisdictions have always acted

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25 *Dicey and Morris on the Conflict of Laws*, Supra note 1.
in conscience, operating *in personam* rather than in *rem*, and in some cases they interfered to exercise jurisdiction to compel a subject who is either resident or an ordinary domiciled within the boundaries of their jurisdiction to answer or be answerable to a legal action so as to preserve the integrity of the justice system. In certain circumstances, where a determination of rights to immovables involves more than one single set of issues, the court seized to determine questions of jurisdiction and choice of law will likely be inclined to opt for the application of the doctrine of dépeçage to split the litigation process or adopt the laws of the jurisdiction with the most substantial connection to the subject matters as the appropriate forum to adjudicate the bulk of the litigation, unless conflict of law rules prevent so doing. The House of Lords recognized the need of interpreting the *Moçambique Rule* with some degree of elasticity so as to preserve the equitable interest of the parties involved in the litigation process. While rendering his decision, Lord Herschell restated the need of adopting a broad approach in the in the application of choice of law principle in the following manner:

No nation can execute its judgments, whether against persons or movables or real property in the country of another. On the other hand, if the courts of a country were to claim, as against a person resident there, jurisdiction to adjudicate upon the title to land in a foreign country, and to enforce its adjudication in personam, it is by no means certain that any rule of international law would be violated ... Whilst courts of equity have never claimed to act directly upon land situate abroad, they have purported to act upon the conscience of persons living here.  

The decision of the Ontario Court of Appeal in *Granot v. Hersen et al.* resonates the kind of nuances that emerge in situations whereby an action in realty may be classified as a personality in certain circumstances and depending on the jurisdiction of the court seized with the task of making the determination, whether it considers the issue as one of personality or realty. In *Granot* the testator had left a will, leaving the residuary of his estate to be divided among his two children, who were the litigants in the case. The will, however, had failed to mention a condominium the deceased owned at the time of his death, situated in Switzerland. The question was whether the heirs would have taken the condominium under the will or under the Swiss law of forced heirship. Under the Swiss law, forced heirship rights applied so as to give

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29 [1999] 43 O.R. (3d) 421, O.J. No. 1302 [hereinafter *Granot* cited to O.R.]; A similar issue arose in *Re Berchtold*, [1923] 1 Ch. 192 [hereinafter *Berchtold*], where a testator died intestate in Hungary, while entitled to a freehold ownership in land situated in England. The land in question was held in trust for sale but was not yet sold. The question was whether the distribution of the estate should have been determined under the Hungarian law or the English law. Despite the fact the English law recognised the interests involved as personal property, the court held the view that the interest was related to the immovable and thus its transaction was to be determined by the law of the *situs*. See also *Succession Law Reform Act*, R.S.O. 1990, c. S. 26, as amended, sections 34 - 41 [hereinafter *Succession Law Reform Act*]; *Re Zilberman; Chochinov v. Davis*, [1980] 5 W.W.R. 614, 7 E.T.R. 187 207, 113 D.L.R. (3d) 715 (C.A.) [hereinafter *Davis* cited to W.W.R.], where a testatrix made a will in Manitoba and moved to Israel where she later died. The question before the court was whether the Manitoba or the law of Israel was the appropriate law to apply in an application to probate the will. The court held the law of Israel, the deceased's last domiciled jurisdiction, was the proper law to apply. Also see, *Antwerp Bulkcarries, N.V. (Re)*, [2001] 3 S.C.R. 951, S.C.J. 88, 207 D.L.R. (4th) 612, 30 C.B.R. (4th) 68, 279 N.R. 154 [hereinafter *Antwerp* cited to S.C.R].
Hersen a one quarter interest in the property, Granot a one half interest and a one eighth interest to be granted to the two of the deceased's grandchildren.

Although the court in Granot was not in general terms dealing with title or possessory rights to the immovable in question, it could be said that when making a determination of the disposition of the testator's interests in the property the court was in fact already determining equitable interests attached to the property, that in terms of equity, are both movable assets attached to and enforced against immovable.

In the recent decisions of Van Breda v. Village Resorts Ltd. and Breeden v. Black, the Supreme Court of Canada reviewed and clarified the analytic framework for the Court’s assumption of jurisdiction in Ontario and Canada over disputes which arose outside their territorial jurisdictions, and reviewed “real and substantial connection” and forum non conveniens as the primary common law tests for assumption of jurisdiction. In Van Breda the Court held that while the real and substantial connection test may continue as guiding principle to justify assumption of jurisdiction, the Court may also look into other factors to determine whether the assumption of jurisdiction is justifiable.

The Van Breda v. Village Resorts Ltd. concerned two actions heard together, brought for damages arising from personal injuries sustained by the two plaintiffs while on vacation outside Canada. In the first case, Ms. Morgan Van Breda suffered severe injuries while she was doing some exercises on a beach on in Cuba. On the second action, Mr. Claude Charron died while he was scuba diving in Cuba, as part of an all-inclusive tourist package. The hotel was owned by a Gaviota SA (Ltd.), a Cuban registered corporation, and was managed and operated by the defendant corporation, Club Resorts Ltd. The state of Mr. Morgan commenced the action seeking damages from the defendant corporation, Club Resorts Ltd., and other associated companies and individuals associated with Club Resorts Ltd. Both actions were commenced in Ontario. The defendant is a hotel management company incorporated under the laws of the Cayman Islands. The defendant thus moved to have the actions dismissed or otherwise quashed on the grounds that Ontario courts lacked jurisdiction to hear the actions. In the alternative, the defendants argued, the application of the doctrine of forum non conveniens principle pointed out Cuba as the more appropriate forum to determine the actions.

The Court noted that a determination of what is applicable law and the appropriate legal forum to hear a case rests on the balance to be struck between the concept of legal jurisdiction simpliciter, on one hand, and the discretionary application of the forum non conveniens principle, on the other. The jurisdiction simpliciter test does not entail the court to make comparisons between two competing jurisdictions to determine the most compelling jurisdiction, but requires the court to assess a broad array of circumstances to determine whether the case has a real and substantial connection to the court’s territorial domain. The application of the real and substantial connection test requires the court to consider multiple presumptive factors that exist in the specific circumstances of the case, such as the respective litigants’ domicile, the nature of the case, the place the action occurred or lex loci delicti, comparative convenience and expense for the parties and witnesses, the fairness of assuming or refusing jurisdiction, the existence of a contractual instrument binding the parties, avoidance of multiplicity of legal proceedings, principles of comity and the encouragement of uniformity or reciprocity and respect for the standards of jurisdiction in private international law, recognition and enforcement of foreign
judgments prevailing in other jurisdictions, to determine the real and substantial connection the plaintiff’s claim has to the forum and the connection of the defendant to the forum.  

Moreover, the court in *Van Breda* held that the framework for the assumption of jurisdiction entails the court engaging in a two-prong test analysis. The first analysis involves a determination of whether the connecting factors favor the court’s assumption of jurisdiction. This means that in Ontario, for instance, a real and substantial connection would be *prima facie* presumed to exist for the purposes of assuming jurisdiction against a foreign Defendant, where the case falls within the categories in which a plaintiff commencing a legal suit in Ontario is permitted to effect service outside Ontario. However, if the legal threshold for real and substantial connection test is not established, the burden shifts to the plaintiff to show that there is strong connection between the litigants, the action and the Court’s jurisdiction. If a real and substantial connection is presumed to exist then the defendant bears the burden of showing that a real and substantial connection to the jurisdictional forum does not exist in the specific circumstances of the case. The second part of the analysis requires the Court to apply the *forum non conveniens* principle to determine whether the court should nonetheless decline to exercise its jurisdiction on the ground that a court of another jurisdiction is clearly a more appropriate forum to hear the action. Under the *forum non conveniens* analysis, the burden is on the party raising the issue to demonstrate that the court of alternative jurisdiction is a clearly more appropriate forum to decide the merits of the case.

In rendering its decision the Court cautioned against applying the real and substantial connection and the *forum non conveniens* analysis as two mutually distinctive and independent tests. Both tests should apply cumulatively in conjunction with all other objective presumptive factors which are present in the particular circumstances of the case, such as necessity for the court to assume jurisdiction, fairness and the application of law, to access the relevance, quality and strengths and weakness of the party’s connection to the forum, in “order to assess the “strength of the connections with the forum and “to determine whether assuming jurisdiction would accord with the principles of order and fairness”.

The *Breeden v. Black* case concerned six libel actions commenced by Lord Black of Crossharbour against ten former directors, advisers, associates and the vice-president of International, a public traded company incorporated under the laws of Delaware, in the United States, over statements posted on the company’s website in the United States, and subsequently published in the company’s annual report and later republished by three Canadian newspapers. Lord Black of Crossharbour commenced the actions simultaneously in Ontario claiming that the defendants had published or caused to be published press releases, and had posted on the company’s website defamatory statements that were downloaded, read and republished in Ontario by three newspapers. The action claimed that the statements published by the defendants had caused injuries to his reputation, and sought damages. The appellants brought motions to have the actions stayed on the grounds that the publication occurred at the

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30 *Van Breda*, Supra note 17, at paras. 82-109.
31 See Subrules 17.02(h) and (o) of the *Rules of Civil Procedure*, R.S.O., 1990, Reg. 194, Rule 17.02 [as amended].
32 *Van Breda*, Supra note 17.
33 *Van Breda*, Supra note 17, at para. 58.
headquarters of the corporation in Illinois, United States, and thus Illinois was the most appropriate forum, or, alternatively, New York or Illinois were the most appropriate forums where the actions should be decided. The motion judge dismissed the motion, finding that a real and substantial connection to Ontario had been established and that Ontario was a convenient forum to hear the actions. The Court of Appeal unanimously dismissed the appeal. It found that a real and substantial connection was presumed to exist on the basis that the tort was committed in Ontario, and that the appellants had failed to rebut this presumption. It also found that there was no basis on which to interfere with the motion judge’s exercise of discretion with regard to forum non conveniens.

When upholding the findings of the Court for Appeal for Ontario the majority of the Supreme Court of Canada stated that while the commission of the Tort of defamation occurred the moment the injurious statements were published in Illinois, established jurisprudence in Canada indicates that the Tort of defamation occurs when the defamatory statements are published to a third party. Accordingly, the court concluded, that in the case at bar the defamation occurred when the impugned statements were read, downloaded and republished by three newspapers in Ontario, and that while the original author may be held liable for the publication of the injurious statements if it is established he or she authorized the republication the Defendants can be equally found liable for damages caused by the republication of the defamatory statements, which in this particular case the republication resulted from the natural sequence of events following the original publication.  

Following its decision in Van Breda v. Village Resorts Ltd the court went on to say that the forum non conveniens analysis requires the party raising the challenged to demonstrate that the alternative court is really the most appropriate forum to determine the merit of the case. But the forum non conveniens does not require that there is only one appropriate forum, it is sufficient that the court finds that one forum ultimately stands out as the most appropriate forum, when all the presumptive factors are taken into consideration. The Court stated that the factors to be considered when applying the forum non conveniens test vary depending on the particular circumstances of the case, and are not exhaustive. The factors for examination may include: considerations about the location the evidence is located, the place of execution and formation of a contract, avoidance of multiplicity of proceedings to prevent conflicting outcomes, whether there are other proceedings involving the same parties pending in other jurisdictions and whether they have been completed or not, the location of the defendant’s assets, the law which applies for the determination of the merits of the case, the advantage the plaintiff has due to his or her choice of forum, the equitable interests of the parties, the viability that the judgment will be recognized in another jurisdiction, the overall interests of justice, among other factors.

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34 Black, Supra note 18, at para. 20.
36 Black, Supra note 18, at paras. 25-36.
Another conceptual constraint in the application of the *lex situs* principle concerns the application of specific rules of procedures, such as limitation periods. Limitation periods represent a legislative and procedural objective about the manner in which courts in a specific jurisdiction are going to proceed in litigation, and govern a broad array of issues from the simple filing of court documents, to the regulation on presentation of witnesses and cross-examination. Limitation periods are designed to defend the litigants, by providing them with an even-handed level playing in which to present their case in court. Limitation periods also serve to protect judicial economy and preserve integrity and predictability. It allows the judicial system to prevent the occurrence of elements that would undermine the prescribed policy guidelines, such as the existence of fraud, misrepresentation and deceit. When applying its choice of law rules to the issue of category of issues the court is in fact acquiring jurisdiction to regulate the matter substantively, as it sees appropriate in accordance with its conflict of law rules.

Thus when the court is exercising jurisdiction or declining jurisdiction in context of immovable, the court seized of the issue is applying its own international laws to determine whether it has jurisdiction or not to hear the substance of the matter in question. Such a determination may be inconsistent with the courts' underlying policies. In exercising jurisdiction the court is attempting to balance publicly expressed values and social directives that are reflected in the law, whether domestic or foreign, that would apply to a particular legal issue. For instance, the court may find out that the foreign jurisdiction has a shorter limitation period, which has already lapsed at the time of the determination of jurisdiction. As a result, the plaintiff may be denied his or her only chance to litigate and get judicial remedy to his or her case. In such case, to ignore the expiration of the foreign court's limitation period may be unfair to the litigant at same time not necessarily have the effect of advancing the prescribed policies upheld within the jurisdiction of the court making the finding. On the other hand, the granting of relief in a claim that is already been bared under the law of the *situs* will have the effect of frustrating the foreign jurisdictions' policy and run contrary to the *Moçambique Rule*.

The question is whether, from a procedural point of view, the *Moçambique Rule* does automatically compel a foreign court to surrender the exercise of jurisdiction to the jurisdiction where the property is situated. Does the law of the *situs* rule permit a consideration of the particular facts and circumstances of each case? The Supreme Court of Canada in *Morguard* suggested that it would not set any limitation, since the court could not always anticipate what constitutes a reasonable assumption of jurisdiction. When read broadly, the Court's position would have the effect of leaving the question of reasonable jurisdiction to be determined on a case by case basis. A determination on a case by case basis would afford some degree of flexibility to the courts, and would suggest that the *Morguard* principles of jurisdiction and choice of law would be applied according to the circumstances of the case. One premise the Court was unequivocal in stressing out though was the fact that any limit to be imposed on the court's assumption of jurisdiction would have to be made in accordance with the broad principles of territoriality, order and fairness in the administration of justice.\(^{37}\)

\(^{37}\) For further discussion of nature of problems, see Jean G. Castel, "Back to the Future! Is the "New" Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?" (1995) 33 Osgoode Hall L.J. 35-77; Celia Wasserstein Fassberg, "Rule and Reason in the Common Law of Foreign Judgments"
It could therefore be said that a discussion about title to property situated in a foreign jurisdiction is pointless, since the *Moçambique Rule* is only applicable to situations requiring a determination of title to the immovable and damage awards for trespass. One should not lose sight of the fact that any action involving preliminary or incidental issues related to property may in certain circumstances, soon or later, inevitably lead to a determination of ownership or possession of the property. A court decision involving a determination on the status of ownership and title holding, such as foreign judgement for debt, would act in personam, and would be made against the conscience of the parties within the jurisdiction of the court, and may stand on an entirely different footing in the courts of the country where the land is situated and which may be separate and distinct from the relief sought and the judgment granted by the Court. This situation arises from the fact that some of the issues the Court is asked to deal with sometimes spell over and born out other issues that can emanate from the very nature of the parties relationship, and other legal and economic interests, that cannot fit within a simple legal characterization. There have been occasions whereby the courts have extended jurisdiction to account for equitable interests between the parties in the litigation process, which are intrinsically related to other ancillary legal rights and interest or which may have arisen from the parties pre-existing legal relationships. Such exercise of jurisdiction may entail adjudication for damages to proprietary interests, privileges and obligations attached to foreign immovables.  

Another complex aspect in the application of the law of the *situs* concerns the integration of national public policy factors in the determination of the litigation outcome. Laws represent in most cases, if not in all cases, an expression of state or public and moral interests within the geographic contiguity of the particular jurisdiction. These social and cultural assumptions in some cases are unique to one jurisdiction, and in many cases would vary from jurisdiction to jurisdiction. Property laws are not an exception to this precept. The regulation of property in many ways will be consonant to the overall regulation of other aspects of civil rights within the specific jurisdiction, which permeates a sense of cultural and social belonging and public market participation. Thus an application of the law of *situs* may or may not frustrate the values and principles aimed to achieve by the enactment of the legislation. Perhaps this is in part the cornerstone of the *Moçambique Rule*, in a sense it reflects crucial recognition that the domestic authorities of the place where the property is situated must have full discretion to exercise control and to assign rights, privileges and liabilities in relation to the immovable. However, an unqualified application of the law of the *situs* may have in some circumstances the unintended consequence of frustrating the objectives of uniformity, convenience and coherence, as well as undermine the principle of comity that is the pillar of conflict of laws.


It is also the case that, unless a party seeking to enforce a judgement obtained in a foreign jurisdiction has complied with the laws of the forum, the domestic court would have serious difficulties in enforcing a judgement that would stand contrary to the promotion of expressed policy considerations promoted within the jurisdiction. The Courts in Canada have indicated that they will decline to recognize and enforce a foreign judgement, if the judgement offends public policy considerations. Canadian courts may exercise discretion to refuse jurisdiction or set aside judgements rendered by a foreign court where it is proven that the order was obtained by fraud, against principles of natural justice, failure to comply with procedural requirements, is contrary to public policy and in situations where it is demonstrated that the foreign law offended principles of morality or universal justice.

Most recently, in *Beals v. Saldanha* the Ontario Court of Appeal declined to allow the defendants to re-litigate their claim in Ontario, on the ground of fraud and public policy. The plaintiff had sued in Florida alleging inducement of fraud and misrepresentation by the defendant

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39 See for instance, the reasons of the court in *Boardwalk Regency Corp. v. Maalouf*, [1992] 6 O.R. (3d) 737, O.J. No. 26 [hereinafter *Maalouf* cited to O.R.]; *Society of Lloyd's v. Meinzer*, [2002] I.L.R. I-4047, 13 C.P.C. (5th) 71 (C.A.), (2001) 55 O.R. (3d) 688, 210 D.L.R. (4th) 519, 148 O.A.C. 362, (sub. nom. *Society of Lloyd's v. Saunders*), [2000] I.L.R. I-3788, 44 C.P.C. (4th) 246; *Ash v. Lloyd's Corp.* (1992), 9 O.R. (3d) 755, 94 D.L.R. (4th) 378, 7 C.P.C. (3d) 364, 60 O.A.C. 241 (C.A.), involving several actions concerning disputes over the manner Lloyd had acted to conceal the magnitude of risks from asbestos exposure claims that arose in the mid-1980's in the United States. The Plaintiffs alleged that Lloyd's had acted fraudulently and sought to prevent Lloyd from drawing down on their letters of credit, contending that the contracts between the parties were void *ab initio* as having being induced by fraud made on the part of Lloyd's, in contravention to the Ontario Securities Act, and therefore sought rescission of the contracts. The Ontario actions were part of a series of actions brought against Lloyd's in the United Kingdom, Australia, Belgium, Canada, United States, and in the European Union, following the downfall of Lloyd's insurance and financial companies. Lloyd's counter-claimed in Ontario and in the meanwhile successfully secured a judgement against the Defendants in England. When it tried to enforce it in Ontario de Plaintiffs argued it was against public policy to enforce a judgment in Ontario obtained in a foreign jurisdiction which could not be obtained in Ontario due to fraud. When deciding to stay the Plaintiffs action on the basis of forum non conveniens the Ontario Court of Appeal cited the fact that contracts contained an exclusive jurisdiction clause to effect that any disputes were to be resolved under English law and in English Courts, the contracts were therefore performed in England even though some of the parties were not domiciled in England, the wrongful action was attributable to a number of English citizens and that the case had an “overall affinity” to England. With regard to the issue of enforcement of the English judgment in Ontario, the court held that while a failure to comply with prospectus requirement under the Ontario Securities Act may make a foreign judgment unenforceable in Ontario in certain circumstances, a refusal to enforce the English judgement in Ontario under the current circumstances would have the effect of undermining the credibility of the judicial system, and therefore ordered the judgment enforceable in Ontario. See also, *The Society of Lloyd's v. Jaffray*, [2000] E.W.J. No. 5731 (Q.B.D.) [hereinafter *Lloyd's v. Jaffray* cited to E.W.J.]; Also see, *Moreno et al. v. Norwich Union Fire Insurance Society*, [1971] I.L.R. P1-390 [hereinafter *Moreno* cited to I.L.R.].

with concern to the purchasing of a Florida lot owned by the defendants. The plaintiff obtained a
default judgement in Florida for damages in the amount of U.S. $260,000.00 and proceeded to
file the Florida order for enforcement in Ontario. The defendants objected to the enforcement
proceedings in Ontario on the grounds that the enforcement of the Florida judgment run contrary
to public policy, because the evidenced showed that the Florida judgment had been obtained by
fraud and through the supply of misleading information. The trial judge held that the Florida
judgment had been obtained by fraud and that public policy considerations precluded its
enforcement in Ontario. The majority of the Court of Appeal, however, held that both the
defenses of fraud and public policy had been narrowly construed and that the correctness of the
Florida courts' decision was immaterial to the question whether the judgment could be enforced
in Ontario. In order to rely on the defense of fraud the defendant had to show there were new
material facts, or newly discovered material facts, that had not been available to the Florida court
when it rendered its decision. The Court defined newly discovered material facts as information
that existed at the time the decision was made but was not discovered through the ordinary
exercise of appropriate due diligence. Justice Doherty J.A., writing for the majority of the Court,
disagreed with the trial Judge’s interpretation which stated that the “substantial connection”
approach provided a broad public policy defense to the enforcement of foreign judgments, and
concluded that the rationale behind the “substantial connection” test was consonant with a
narrow application of the defenses of public policy and natural justice. The courts’ reasoning
was based on the notion that Conflict of Laws principles of comity, reciprocity and consistency
requires courts in foreign jurisdiction to enforce valid decisions rendered by courts in another
jurisdiction, unless there are legitimate questions of law that prevents the enforcing court to
recognize the court’s judgment.

It could be argued that it is somewhat inappropriate to expect foreign made judgements to
comply with the public policy values and moral interests of the foreign jurisdiction where they
are enforced. Especially since such requirements would have not applied to the enforcement of
local judgments. Thus it is trite law, or rather a matter of procedure, that local judgments, once
they have exhausted all the avenues provided for in the judicial systems and have been finally
disposed of are not subject to review, and only in very exceptional circumstances may be
attacked on the grounds that they were obtained by fraud. A refusal to enforce foreign
judgements by a domestic court for public policy reasons seem to prioritize the respect of the
jurisdiction's own public policy directives, but will do very little to advance the policies of the
jurisdiction that made the order.41

Nonetheless, the public policy consideration in the enforcement of foreign judgements may
present the courts with difficulty choices to make, and pose serious questions to the principle of
comity. Since public policies and morality in the judicial system derives from societal value
system, much of the courts' adjudication process would vary according to the social norms of the
place where the issue arose. For instance, one jurisdiction may permit the marriage of persons of
same-sex, with full legal implications to the union such as property division, succession and
inheritance rights. Although the status of this marriage would be determinable by the law of the
couple's domicile or the place where they were ordinarily resident, the application the law of the
situs doctrine would force the couple to subject themselves to the law of the place where the

41 Jean-Gabriel Castel, Supra note 1, at pp. 103-4.
property is situated, but which does not recognize the validity of same sex marriages. Moreover, even if the couple was able to secure judgment concerning interests related to property situated in another jurisdiction, a foreign court could choose to decline to enforce the order simply on the grounds that it is against public policy in its own jurisdiction to hold valid and to enforce the order within its jurisdiction.

The decisions of the Supreme Court of Canada in *Van Breda v. Village Resorts Ltd.* and *Breeden v. Black* shows the willingness by courts in Canada to continue holding the *Moçambique Rule of lex situs* and the *Muscutt forum non conveniens* principle as important principles, while recognizing the need of expanding these principles to ensure a more thorough examination of other factors that can help the court make a more comprehensive assessment of the litigants’ real and substantial connection to the forum.

III. CHOICE OF LAW, ENFORCEMENT OF FOREIGN JUDGEMENTS AND ARBITRAL AWARDS

The choice of law governing international commercial transactions represent a combination between conflict of law rules, the parties agreement and the law of the arbitral forum. For the most part grievances submitted to international dispute settlement forums derive from breaches or interpretation of terms specified in commercial contracts entered between individual corporations or between corporations and state entities. The original contract will typically indicate how the disputes should be resolved and point to the appropriate forum where the disputes ought to be decided, and the law to be applied. If the dispute in question concerns the manner in which the state has treated a foreign corporation, the same factual information in support of an action for breach of contract, but also may form basis for a claim of state’s breach of international public law. The claim for breach of contract will be brought in the forum the parties had selected to resolve their disputes, while the issues concerning the state’s violation of international covenants can be pursued through inter-state mechanisms and procedures available in the international legal system. The contractual issues arise due in part to the fact that the parties to the contract may choose or omit to specify in the contract the manner in which the chosen forum to determine any dispute arising out of their contractual relationship. A determination of the law governing the agreement between the parties is easily discernible in a situation where the parties have already chosen the appropriate law to govern any disputes to arise from their agreements.

The law governing substantive issues concerning rights, privileges and obligations arising in relation to property situated in a foreign jurisdiction is the law of the *situs*. The procedural law and institutional policy guidelines of the place the parties had chosen to arbitrate their disputes will provide ways in which the arbitration process will occur and the powers vested on the arbitrators and the respective law to apply. In situations where the parties to a contract have not specified under which law their contractual obligations are to be governed or had not agreed on the effective jurisdiction, the arbitral tribunal will apply the law of the State party and relevant
international law, according to conflict of law rules.\(^{42}\) Where, however, the parties have not specified the law and forum to litigate their disputes, the parties will be at liberty to seek recourse from their domestic courts or agree to submit their disputes to international arbitration. However, in the absence of clear guidance established by the parties under the contract issues over fairness of the arbitration process may arise, and further disputes over impartiality and independence of the arbitrators may be brought, which could cast some shadows on the credibility of the arbitration process.

The question of fairness revolves over the ability of the arbitrators to make a decision that is acceptable for both parties and that fall within the perimeters of international law. Fairness in arbitration is a matter of procedure as well as substance. It will not only be circumscribed to a determination of whether the decision rendered complied with precepts of procedure, discovery and the right to know the adversary's case, probity and rules of evidence but also a sense of credence in the process. It may easy for the parties to comply with the results of the arbitration process if they have participated in selecting the arbitration and the preference of the law and forum of arbitration, whether satisfactory and unqualified. But if the choice of arbitrators and on the appropriate law to apply has been placed on another entity, there could be some uneasiness over the process, especially so in situations where the effect of the contract is subject to multiple interpretations and multiple jurisdictions are availability as potential appropriate forums to conduct the arbitration process. If the parties have certain reservations about the arbitration process been conducted at a particular forum, they may refuse to participate in the process, or may feel unhappy about the outcome of the arbitration process, which in turn means that further litigation before a national court or before an international tribunal will be required. For instance, Article V (2)(b) of the New York Convention permits a country to refuse the recognition and enforcement of arbitral awards if the principles considered in rendering the decision is incompatible with the forum's public policy. Moreover, from a procedural perspective, the domestic court is free to decline the execution of an arbitral agreement and therefore declare void and null and thus render unenforceable within the courts' jurisdiction if it deems that the decision was not taken in compliance with procedural and substantive rules of the forum, such as the furnishing of evidence, the adequacy or inadequacy of witnesses, and proper cross-examination methods.

The New York Convention does not impose any restrictions on the choice of law applicable to resolve disputes between the parties, although where there is a conflict between domestic law and international law, the Convention will favour the application of international law principles. The courts, however, are the ones to determine the appropriate law to apply and much attention is paid to the operation of the laws of the country where the decision is to be enforced. Courts

also have the authority of implying terms stipulated in the parties' agreement to infer the jurisdiction and choice of law the parties intended to govern their contractual arrangement.\footnote{See for instance, Imperial Life Assurance Co. of Canada v. Colmenares, [1967] S.C.R. 443, 1 O.R. 553, 54 D.L.R. (2d) 386 [hereinafter Imperial Life cited to S.C.R.]; Star Shipping As v. China National Foreign Trade Transportation Corp., [1993] 2 Lloyd's Rep. 445 (C.A.) [hereinafter Star Texas cited to Lloyd's Rep.].} International commercial arbitrators are perceived to be rendering decisions \textit{ex aequo et bono} or as \textit{amiabiles compositeurs}, as agents working to help conciliate both sides in reaching an agreement, and the authority of the tribunal itself derives its mandate from the parties' agreement.\footnote{See Emmanuel Gaillard, ed., \textit{Transnational Rules in International Commercial Arbitration}, (Paris: International Chamber of Commerce Publishing S.A., 1993) at p. 92; for further discussion of questions of fairness in International Commercial Arbitration process see, for instance, E.D.D. Tavender, "Considerations of Fairness in the Context of International Commercial Arbitrations" (1996) 34 Alta. L. Rev. (No. 3) 509; J.B. Casey, \textit{International and Domestic Commercial Arbitration} (looseleaf) (Scarborough: Carswell, 1993) at para. 7 - 17.} This gives the arbitrators significant room to take matters into their own hands and to render decisions as they see fit as the parties had provided under their contract. This would appear to have the effect of insulating the arbitral tribunal and the arbitrators from the requirements of the rules of natural justice that accord Judges into ensuring that the decisions they make represent an impartial and neutral assessment of the facts transpired in the case and that most importantly is taken within the bounds and limits of law. However, one should say that an arbitral tribunal decision that oversteps fundamental legal principles would invite the intervention of the courts' judicial supervision to ensure that justice is served.

The court will set aside or declare void or null an arbitral award made with no consideration of the canons of justice. Otherwise, the courts will usually observe judicial deference to arbitration decisions that are not replete with indications that the arbitral tribunal had overstepped its authority or acted unfairly, and where a domestic statute had not expressly or impliedly abrogated the use of the arbitration mechanism to resolve the disputes.\footnote{See Compagnie Nationale Air France c. Mbaye, [2003] J.Q.No. 2900 [hereinafter Air France Case cited to J.Q.]; Mexico v. MetalClad Corp., [2001] B.C.J. No. 950, 89 B.C.L.R. (3d) 359, 38 C.E.L.R. (NS) 284 [hereinafter Mexico Case cited to B.C.J.]; Sport Mask Inc. v. Zitrer, [1988] 1 S.C.R. 546, 83 N.R. 322, 13 Q.A.C. 241 [hereinafter Sport Mask cited to S.C.R.], where the court held that parties can only make submissions on the question whether or not to arbitrate where there is an actual dispute and did not apply to a potential dispute that did not yet occur. Thus there could be no arbitration without an existing dispute.} Thus, it is likely that the arbitral decisions will not departure much from the ordinary court decisions when scrutinized in terms of impartiality, fairness and independence of the decision maker.

The New York Convention invites the parties to stipulate the choice of law to govern their contractual agreements. Article V (1)(a) of the Convention provides that issues concerning substantive law are to be governed by the law specified by the parties under the arbitral agreement, or where the parties had not referred to any preference of choice of law and forum, the law of the place where the award was made. Article V (1)(e) of the Convention provides that where the parties have not specified a choice of law, al procedural aspects of the
agreement are to be determined by the law to the national, or rather internal, law of the place of arbitration. This notion appears to be consonant with the principles of choice of law that emanates from Justice La Forest's judgement in Jensen v. Tolofson, Lucas v. Gagnon\textsuperscript{46} where he adopted the \textit{lex loci delicti} as an otherwise necessary corollary linkage to the Morguard "real and substantial connection", as the governing principle in the adjudication of tort cases involving multiple territorial jurisdictions and the interpretation of foreign legislation.

Similarly, Article 33 of the UNCITRAL Arbitration Rules provides that where the parties have expressly stipulated their preferences for choice of law and jurisdiction "the arbitral tribunal shall apply the law designated by the parties." Article 19 of the UNCITRAL Arbitration Model Law of 1985 allows the parties to agree on the procedures to apply in the arbitration of their case, falling which the arbitral tribunal may decide to conduct the arbitration "in such manner as it considers appropriate". The authority vested on the arbitral tribunal to determine the procedure, under which the hearing is going to be conducted, includes "the power to determine the admissibility, relevance, materiality and weight of any evidence." For instance, Article 28 of the UNCITRAL Arbitration Model Law of 1985 states that the choice of law indicated by the parties refers to the law which is applicable to the substance of the case. In the event the parties have not specified the choice of law to apply to their contractual agreement, the arbitral tribunal will adopt conflict of law rules as it sees applicable to the merit of the case at stake.\textsuperscript{47} Moreover, Article 7 (2) of the Vienna Convention on the Sale of Goods provides that where the parties have not expressly stipulated, issues arising under the Convention are to be resolved in accordance with the general principles stated by the parties' contractual agreement or in accordance with private international law rules. Under Article 1120 of the North American Free trade Agreement (NAFTA) the parties have a choice of three sets of arbitration rules to govern their transnational business agreements: the law and forum specified by the parties in the contract, the internal law of the forum where the parties have chosen to hold the arbitration proceedings and international law. Article 1101 of Chapter 11, Section A, provides that each party entering the agreement shall treat the investment and trade interests of another party in accordance with the principles of international law, including having to afford it "fair and equitable treatment and full protection and security.\textsuperscript{48}

It could be said that in context of \textit{Moçambique Rule}, the existence of multiple laws and forums has already been eliminated, since \textit{prima facie} the law of the \textit{situs} of the property would apply, unless there is an exception that said otherwise. The \textit{Tezcan}\textsuperscript{49} decision illustrates the nature of such exception that would force the court to depart from the main premise of the \textit{Moçambique Rule}, because adhering strictly to the rule would have left the litigant with no where to adjudicate the case since the Turkish statute already provided a mechanism for a determination of the appropriate law and forum. The opposite could also have happened, that the laws of a foreign state or jurisdiction may disallow the arbitration order, and through the invocation of judicial

\textsuperscript{46} Tolofson, Supra note 20.
\textsuperscript{49} Tezcan, Supra note 5.
disadvantages, breach of principles of natural justice, and public policy directives decline to allow the enforcement of a foreign judgement. Indeed, domestic courts may feel that by enforcing or denying a validation of an arbitral award on the grounds of contravention of public policy, they are protecting the integrity of their judicial system and at the same time shielding national contractors from their own imprudence in dealing with their transactions. Of course, it is expected that the courts would not grant special protection to experienced and savvy commercial players in international business transactions, when the evidence suggests that all transactions at stake occurred within the ordinary course of business as prescribed under the general principles of law, *lex mercatoria* and international law. But perhaps the most challenging situation may arise in circumstances where the parties have specified a choice of law in their contractual agreements, which addresses all aspects of their personality interests except for those concerning the control of property interests or liabilities attached to an immovable. Moreover, the parties to a contract, by including a clause that is contrary to public policy, may prevent the ability to seek arbitration in a certain jurisdiction or may render parts of the contract unenforceable or force the adjudicators to remove or sever the specific clause from the arbitration proceedings.

The question of choice of law in international commercial arbitration will be determined from the interpretation of the terms and words as used by the parties in the contract agreements or through statutory interpretation. In *The Queen in Right of British Columbia v. Tener et al.* the Supreme Court of Canada held that a provincial statute that restricted the respondents the ability to exploit mineral rights in land situated in a provincial park, and the devaluation of the land following the Crown's expropriation of the lands entitled the holders of title to compensation. The case concerned a parcel of land expropriated by the Crown for the establishment of the Wells Gray Provincial Park in 1939. The respondents, Mr. Tener and his wife had acquired a fee simple in the lands by conveyance from the original grantees or successors in title. The original grant gave grantees the right to exploit and remove the minerals that were found in the lands. After the creation of the park, the respondents were denied a permit to exploit the mineral resources found in the land, and were prohibited from conducting new explorations or developments in the lands in question and were required to specify a quit claim price. The respondents subsequently claimed compensation for the losses to be incurred as a result of the expropriation process, which had direct impact on their rights to exploit the minerals that existed in the lands. The trial judge held that the respondents had no valid claim because they had agreed to the Crown’s expropriation process. The British Columbia Court of Appeal reversed the trial decision and held that the respondents were entitled to compensation, even though the Crown derived no commercial benefit for the use of the expropriated lands. The Supreme Court of Canada found that the respondents had retained a profit *a prendre* in the lands, since the Crown had acquired title to their fee simple interest in the land through a permanent

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50 *Granot*, Supra note 29, at paras. 91.
refusal to issue a permit for the exploitation of the mineral resources in the land. The Court moreover concluded that this was a case of expropriation under the British Columbia Park Act for which compensation was payable.

In Automatic Systems Inc. v. Bracknell Corp. (c.o.b. Canal Contractors)\textsuperscript{52} the Ontario Court of Appeal held that public policy considerations required parties which have agreed by contract that disputes arising out of their agreement are to be resolved by an arbitrator to abide by their covenants instead of resorting to the courts. The case concerned a Missouri based company, which had entered into a contract with an Ontario company for the supply and installation of conveyor system in an auto-maker plant. The Missouri company subcontracted part of the work to be done to another Ontario based company. The subcontract provided that any claims arising out of the subcontract had to be resolved by way of arbitration and to be held in Missouri in accordance with Missouri law. The Missouri company commenced action against the Ontario contracting and subcontracting companies, and registered a lien claim under the Construction Lien Act to enforce the claim. The Ontario subcontracting company served the Missouri company a demand for arbitration as required in the subcontract agreement. When the Missouri company refused to submit the disputes to arbitration the contracting company brought an application for an order staying the lien claim and referring the parties to arbitration. The trial judge held that given that the appellant's place of business was Missouri, the arbitration stated in the subcontract was of an international nature and although the Construction Lien Act made provisions for the holding of domestic arbitrations, it did not regulate on subject matters involving issues of international arbitration nature. The Court of Appeal found that it was rather an issue of non-arbitrability, and the question was whether the Construction Lien Act had made the dispute non-arbitrable and expressly forbade the exercise of the right to international arbitration. The Court concluded that in conformity of the principle of international comity, and considering the commitment shown by the Ontario legislature to the policy of international commercial arbitration through the adoption of the ICAA and the UNCITRAL Model Law on International Commercial Arbitration, a domestic statute required a very clear language to preclude the application of international commercial arbitration. The construction Lien Act contained no such language that could be considered to lend to interpretation that it governed to regulate international commercial arbitration cases. Thus, as a matter of policy, there was no reason to try to draw a distinction between domestic and international arbitration clauses, when these cases are governed by two distinctive legal regimes.

One main reason why the parties may fell uneasy about a choice of law and arbitration forum is confidence in the justice system. The international arbitration often times involves a broad array of judicial systems, that are complex and varied and which reflect a multitude of laws, legal and socio-economic values, cultures and languages. This is may be the case not only in context of single international jurisdictions but also among nations with multi-jurisdictional

forums, such Canada and the United States. An arbitral tribunal in a common law jurisdiction may conduct hearings, and handle relevant evidence, examination and cross-examinations in a different ways a tribunal in a civil law jurisdiction, for instance, would have done.\(^{53}\) At the same time, an arbitrator may have a much more participatory role, in conducting the investigation on behalf of the parties to distil the truth from the material facts to achieve justice, in an inquisitorial system, while in an adversarial system such role will be reserved to the legal representatives on both sides and the adjudicator's role would be to take a neutral and impartial role.

The existence of essential differences between jurisdiction might have the effect of creating a cloud of suspicion, whether conscious or unconsciously, on the parties to the arbitration about the credibility of the entire process, making it difficult for them to identify the rules that will govern their contract so as to make some predictions on how to resolve disputes to arise during following a default in the performance of the contract. This in turn could translate in serious repercussions and reservations about the overall arbitration process and lead to disagreements over material facts and expert opinion, especially in complex cases where the party's stakes stand very high. Such level of uncertainty and unpredictability would not be much of a question in situations where the parties had either tacitly or by agreement already specified the choice of law and forum to arbitrate their disputes, since in this case they had already anticipated it, irrespective of whether the governing law of the forum proves to be ineffective in addressing their claims.

On the other hand, as it was illustrated in the Saldanha case,\(^{54}\) the existence of difference jurisdictions could also mean that each judicial system works under its own award regime. One regime may award damages that are far more or less from the standards uphold in the other judicial system, making it tempting for the parties to entertain forum shopping or appealing the courts to decline the recognition and enforcement of damage awards ordered by a foreign court. This could also tempt the courts in engaging in damage edging to increase or reduce the award to comply with its own jurisdictional standards.\(^{55}\) However, such reduction and increase is unlikely to occur since doing so would mean that the court would have to engage in a substantive determination of the damage award in its entirety, something which would result in unfairness for the successful party, pose questions about finality in the arbitration process and stand contrary to the principle of res judicata.

IV. CONCLUSION


\(^{54}\) Saldanha, Supra note 40.

\(^{55}\) The question of damages was the subject of court discussion in Waste Management, Inc. v. United Mexican States (2000), Case No. ARB (AF)/98/2 (ICSID), online: World Bank. <http://www.worldbank.org/icsid/cases/waste-award.pdf> [hereinafter Waste Management]. This case dealt with the extent of enforcement of the conditions precedent in Article 1121 and 1122 of NAFTA; See also Mark A. Luz, Supra note 48.
According to the *Moçambique Rule* the choice of law rule to govern property or immovable situated in a foreign jurisdiction is the law of the *lex situs*. The application of the law of the situs requires the court seized of the matter to characterise the subject matter so as to determine the appropriate law to apply, domestic or foreign. In determining the appropriate law, the court engages in scrutiny that entails it applying its own internal laws, or rather its own conflict law rules, to determine whether the issue fell within its jurisdiction. In case of immovables, the question would much depend on the court characterises the issue at stake. If it characterises it as a matter of determination of title to the property the *Moçambique Rule* would apply. Where a problem may arise is in situations where the question in the preliminary action may not directly go at the core of title determination, but title is indeed an incidental part of the action. Thus there may be other rights, privileges and obligations attached to the property or immovable. Although it would be alright for the court not to deal with the issue of title, in some case the evolution of the action may inevitably lead to a determination of the ownership status to the property, in such cases as creditor rights, bankruptcy and insolvency, winding-up of a corporation.

The question is whether the Moçambique Rule should be interpreted narrowly or liberally so as to accommodate situations where the application of the rule is incompatible with the principle announced in *British South Africa v. Compania de Moçambique* case. In certain circumstances it would be appropriate and desirable to broaden the scope of application of the rule to encompass consideration of multiple factors in the determination of the appropriate forum is essential because it allows the Court to assess the relevancy, quality and strength the parties have to the forum. Of course, one shall ask, rather rhetorically, what the impact of such broadening of the rule would entail. On one hand, it could mean the end of the rule, on the other it could mean that the courts have full discretion to determine when the rule should apply. The problem with this proposition is that it would leave the application of the rule subject to circumstantial facts, and vulnerable to forum shopping practices. It could also lead to too much uncertainty, unpredictability and inconsistency in judicial outcome and run contrary to conflict of law principles.

As Justice La Forest stressed in *Tolofson*, it would appear that depending on the nature and complexity of involved in property litigation, a flexible approach to the *Moçambique Rule* is in some circumstances inevitable. To apply strictly the rule so as there are no exceptions would be in conflict with the degree of flexibility envisaged by Justice La Forest's real and substantial connection, which accords some degree of respect for the forum with the most interest in the matter, and would have the effect of forcing a forum to decline applying its own domestic law in a situation where the forum of the situs of the property would give no remedy. This is much the case where a foreign status was already provided for the choice of law and jurisdiction to apply in certain situations, forcing the court to apply foreign law within its own forum. In such case, the use of *renvoi* and the doctrine of *dépeçage* are unavoidable necessities in determining the choice of law that governs an immovable situated in a foreign jurisdiction.

However, as decisions of the Supreme Court of Canada in *Van Breda v. Village Resorts Ltd.* and *Breeden v. Black* show, the courts in Canada are willing to continue holding the *Moçambique Rule* of *lex situs* and the *Muscutt forum non conveniens* principles as guiding principles, while at the same time recognizing the need to expand these principles to ensure a more thorough
examination of presumptive factors that can help the court make a more comprehensive assessment of the litigants’ real and substantial connection to the forum.
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