

REGULATION OF CONTRACTS IN CANADIAN PRIVATE INTERNATIONAL LAW

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I. INTRODUCTION

Legislatures regulate contracts for a variety of social, economic, and political reasons. The main goals of such regulation are to control the activity that is the subject matter of the contract or to protect one party to the contract from the untrammelled exercise by the other of its power to set the terms of the agreement. Such regulatory measures are constraints on the parties' freedom to agree on any terms they see fit or, in the case of standard form contracts, any terms that the drafter of the form succeeds in getting the other party to agree to.

The opposition between contractual freedom and regulation also plays out, of course, in private international law, which is just the inter-jurisdictional dimension of the relevant legal regimes. It pertains mainly to two of the three divisions of the subject. It affects the rules as to where parties can bring an action on a contract (jurisdiction) and which jurisdiction's law a court will apply to an issue in the contract (choice of law). So far, the dichotomy has played little role in relation to the recognition and enforcement of judgments from outside the jurisdiction.

If given unqualified effect in private international law – which it never is in domestic law – party autonomy, the parties' ability to agree as they wish, allows the parties to connect their contract and any litigation arising from it with whatever jurisdiction they like. This generally runs counter to the aim of any jurisdiction seeking to regulate their contract, which is to impose the regulation on the parties. Hence, private international law has had to accommodate two goals that can point in opposite directions. One is to give room to the fundamental principle of party autonomy, whereas the other is to give proper effect to the regulatory laws of affected states.

At least as far as the Anglo-Canadian common law is concerned,¹ it is fair to say that private international law has found the party autonomy side of this

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¹ This article confines itself to the Anglo-Canadian private international law system because, among other things, including the United States in its scope would have required discussion of a vastly larger range of case and statutory sources. I hope that American readers will nevertheless find the discussion useful because the conflict of laws in the United States deals with exactly the same issues.

task easier to deal with than the state regulation side. The aim of this article is to examine why this is so and how our private international law handles this tension between the two goals. Three main subject areas of contract regulation will be the focus of discussion because they have produced the most clearly articulated legislative or judge-made approaches to the problem. These are insurance contracts, contracts to buy securities or other investments, and consumer contracts.

Conflicts *aficionados* may immediately think of a fourth category of contract regulation that has been featured prominently in the case law, namely, contracts of carriage by sea or by air. This area is different, however, because it is dominated by efforts, more or less successful, to create an internationally uniform set of rules for the carrier's liability that are put in place by international conventions. If the cargo owner or passenger's rights against the carrier are the same throughout the contracting states, private international law is largely irrelevant. Essentially, all the states that have agreed to the rules have chosen to regulate the contract in exactly the same way. Private international law rears its head only to the extent that parties can exploit loopholes in the mutually enacted network of uniform rules.²

It is where states have regulated contracts differently that private international law comes fully into the picture. How far should the regulatory efforts of state *A* be allowed to be circumvented by parties choosing to be governed by the law of, or to litigate in, state *B*, which has a legal climate that the parties find more salubrious? Private international law functions as the referee in this contest, although it is not the only referee. If the dispute comes before a court in state *A*, the referee is that state's private international law, which may well differ from the private international law that a court in state *B* (or a third state's court) would apply to the same questions. This article will focus on the private international law of the Canadian common law provinces, but it will take an occasional comparative glance at the approach taken elsewhere.

One other dimension that needs to be raised at the outset is that any state may choose to take any issue out of the hands of the referee. This stems from the fact that private international law is, in the hierarchy of legal norms, at the same level as any other branch of domestic law and therefore can be changed or sidelined whenever the legislature so decides. In its largest sense, private international law embraces the specific exceptions as well as the general rules; it is the whole body of law by which inter-jurisdictional issues are decided.

However, the specific exceptions tend to introduce an asymmetry into the overall system. Where state *A* has a general private international law that would lead to result *X*, and it enacts a specific measure that dictates result *Y*, there is no question that a court in *A*, and the litigants in that court, must abide by result *Y*. A court in state *B*, however, is in a different position. It has its general private international law, which may be exactly the same as *A*'s, but it does not have the

² As they did (more or less by accident) in the most famous case on contract choice of law, *Vita Food Prods. Inc. v. Unus Shipping Co.*, [1939] 1 A.C. 277 (Can. N.S. P.C.).

exception. Thus, its court may decide for result *X*, not result *Y*, on the basis that this is what *B* private international law demands. The broad question this scenario raises is how far issues should be dealt with unilaterally, by each country making specific exceptions to their own private international law, and bilaterally, by changing the general rules of private international law to accommodate the measures in question.

A bilateral approach is much easier in a system of private international law that is less wedded than the Anglo-Canadian system to choice of law rules of the traditional type. The notable country in this respect is the United States. The approach of the Restatement (Second) of Conflict of Laws is to de-emphasize traditional “jurisdiction-selecting” choice of law rules in favor of “rule-selecting” methodology that analyzes the choice of law problem in terms of the particular domestic legal rules in play, whether those of the forum or those of another jurisdiction. In contracts choice of law, even a governing law chosen by the parties may yield to the law of a state that has a materially greater interest in the determination of the particular issue.³ Therefore, if the issue is one of contract regulation, the forum court can give weight to the fact that another state has an interest in having its regulatory rule apply to the transaction being considered, and in appropriate cases, that weight can be decisive.⁴

Thus, under a rule-selecting approach, either the forum’s regulatory interest or another state’s regulatory interest can, in an appropriate case, lead a court to apply the regulatory law in question. Choice of law is, to that extent, bilateral in the sense that it can operate both in favor of the *lex fori* and in favor of another state’s law. By contrast, a Canadian court can only apply this sort of logic in relation to the rules of its own jurisdiction. It does so when it gives effect to the perceived will of its own legislature that the rule be given a territorial scope different from the scope it would have under private international law generally. The court cannot do it in relation to the rules of a foreign jurisdiction because their application is mediated by the rules of private international law, which means that the territorial scope that the foreign legislature meant to give its regulatory rule is generally disregarded. If a solution is needed to the latter problem, it must be found in modifying the rules of private international law themselves.

³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971). This possibility is heavily circumscribed; the application of the chosen state’s law must “be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.” *Id.* The rule of Section 188 is the rule applying the law that has the “most significant relationship” to the transaction and the parties with respect to the issue in question. *Id.* § 188(1). “Fulfillment of the parties’ expectations is not the only value in contract law; regard must also be had for state interests and for state regulation.” *Id.* § 187, cmt. g.

⁴ “Absent state regulation of the subject matter . . . governmental-interest analysis therefore should have no place in choice of law in contract.” EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 1000 (4th ed. 2004) (emphasis added).

Therefore, for an American reader, the Anglo-Canadian private international law as discussed in this article may often seem to be struggling with the limitations of its own methodology, limitations that the United States approach to the conflict of laws (if one can generalize in terms of a single approach) has to some extent overcome. That is true enough, but the problems of how to treat contract regulation in an inter-jurisdictional setting make themselves felt equally in either system. It is only the pressure point that is different. In the American context, that point is the role to be given to state interest as a choice-influencing factor. In the Canadian one, it is the question of when general principles of choice of law should yield to the specific claims of a contract-regulating state to have its law applied.

II. JURISDICTION

As far as the rules of civil jurisdiction are concerned, there are no special rules for litigation in the areas being discussed in this article. The usual criteria apply for determining jurisdiction *simpliciter* (when a court has authority to hear the claim) and for deciding, as a matter of discretion, whether to decline jurisdiction. However, there are two ways in which, sometimes, the jurisdictional position is affected by the regulatory aspects of the contracts in dispute.

A. Ensuring Access to the Regulating State's Court

First, there may be a question as to whether the parties can keep a case out of a particular court. The policy issue is to what extent the parties, by putting a clause into their contract promising to litigate only in state *A*, can bind each other to stay away from a forum in state *B*, whose regulatory demands the parties (or at least the party insisting on the clause) would rather avoid. In order to protect the ambit of its regulatory scheme, state *B* may restrict or even eliminate the parties' ability to agree on an exclusive choice of forum in a contract of a particular type. State *B*, here, is ensuring that a party to such a contract will have access to the forum and so to the protection of the regulatory scheme.

To begin with, the Canadian law is clear that an exclusive choice of forum clause is not an absolute bar to a court taking jurisdiction. The court has discretion to do so if the party who wants to litigate in the forum shows "strong cause" for being permitted to do so in spite of having agreed not to.⁵ Showing "strong cause" is not easy. The relevant factors that are usually cited⁶ have more to do with the interests of the parties than the regulatory interests of the forum

⁵ See *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450 (Can.); *Momentous.ca Corp. v. Can. Am. Ass'n of Prof'l Baseball Ltd.*, 2012 SCC 9, [2012] 1 S.C.R. 359 (Can.).

⁶ See *Pompey*, 2003 SCC, ¶ 19 (quoting the list of factors from *The Eleftheria*, [1969] 1 Lloyd's Rep. 237, 242 (U.K.)).

state. I am unaware of a case in which a party succeeded in establishing “strong cause” on the basis that he or she wanted to invoke the protection of a regulatory statute of the forum. There is no reason in principle why it could not by itself supply strong cause, but a court might hesitate so to hold. The statute being invoked says nothing, *ex hypothesi*, to indicate that it overrides a choice of forum clause. To hold, nevertheless, that the statute supplies “strong cause” for dispensing with the clause might seem to be doing indirectly what the legislature deliberately refrained from doing directly.

A well-known instance where a court enforced an exclusive forum selection clause, despite the fact that doing so would deprive investors of protective local legislation, is *Ash v. Corporation of Lloyd’s*.⁷ This was one phase of the struggle of Ontario-resident “Names” (investor-members of Lloyd’s underwriting syndicates) to avoid mandatory capital contributions imposed by Lloyd’s on all its Names. The imposition had the force of law by English law and took priority over any claims that Names might have against Lloyd’s for misrepresentation, fraud, and the like (all of which were alleged by Names in multiple countries). The Ontario investors claimed that Lloyd’s had solicited their investments without complying with the prospectus requirements of Ontario securities law, and accordingly, their investment agreements with Lloyd’s were unenforceable in an Ontario court. Confining them to suing in England, as their contracts with Lloyd’s provided, would deprive them of this protection because an English court would not apply the Ontario Act. Therefore, they argued, the Ontario court should take jurisdiction over their claims against Lloyd’s for fraud and other breaches of obligation. The court enforced the exclusive choice of an English forum even though to do so had the effect of barring the Names from invoking their rights under Ontario securities legislation.⁸

Legislation that expressly nullifies the effect of a choice of forum clause is relatively rare, but examples can be found. The Arthur Wishart Act of Ontario regulates franchise contracts by, among other things, imposing disclosure requirements on the franchisor. It declares void, with respect to a claim otherwise enforceable under the Act, “[a]ny provision in a franchise agreement purporting to restrict the application of the law of Ontario or to restrict jurisdiction or venue to a forum outside Ontario”⁹

⁷ *Ash v. Corp. of Lloyd’s* (1992), 9 O.R. 3d 755 (Can. Ont. C.A.).

⁸ See also *infra* note 88 and accompanying text discussing the same court’s subsequent decision that the English judgment against the Ontario-resident Names was enforceable.

⁹ Arthur Wishart Act (Franchise Disclosure), S.O. 2000, c. 3, § 10. This model was followed in Section 11(1) of the Uniform Franchises Act adopted by the Uniform Law Conference of Canada in 2005. Franchises Act, S.N.B. 2007, c. F-23.5. Compare this common law position, under which the parties can agree to exclude the law of the jurisdiction that regulates franchise contracts, in favor of the law of a (reasonably connected) jurisdiction that does not, such as in *Nike Informatic Systems Ltd. v. Avac Systems Ltd.* (1979), 105 D.L.R. 3d 455 (Can. B.C. S.C.); see also *Pompey*, 2003 SCC, ¶¶ 37–38 (discussing Marine Liability Act, S.C. 2001, c. 6, § 46(1) and its express

Likewise, the Manitoba Consumer Protection Act makes void any term of a contract for cell phone services that restricts jurisdiction to a forum outside Manitoba.¹⁰ A provision in the British Columbia (B.C.) consumer protection statute making void “[a]ny waiver or release by a person of the person’s rights, benefits or protections under this Act”¹¹ was held by the Supreme Court of Canada to bar a supplier of wireless phone services from enforcing an arbitration clause against the consumer in respect of certain rights of action under the Act.¹² A choice of an extra-provincial judicial forum would undoubtedly meet the same fate.

Preventing parties from keeping each other out of the court of the regulating state has been accomplished by other means in automobile insurance. A reciprocal system prevails throughout Canada by which the regulatory authority in each jurisdiction recognizes, as compliant with local compulsory liability insurance requirements, the coverage provided by insurers of cars registered outside the jurisdiction. A condition of this recognition is that the insurer agrees to appear in the local forum and not to raise any defense that could not have been set up if the policy had been issued in that jurisdiction.¹³

Quebec, in the private international law provisions of the Civil Code, expressly denies effect to any waiver of the jurisdiction of a Quebec authority to hear an action involving a consumer contract or a contract of employment, if the consumer or worker is domiciled or resident in Quebec.¹⁴ In Europe, the Brussels

nullification of forum selection clauses in certain shipping contracts connected with Canada).

¹⁰ Consumer Protection Act, C.C.S.M., c. C200, § 209 (Can.).

¹¹ Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, § 3.

¹² *Seidel v. Telus Commc’ns Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531 (Can.). The court noted that Quebec and Ontario had decided to bar recourse to arbitration of consumer claims altogether and that Alberta made arbitration of consumer claims subject to Ministerial approval. *Id.* ¶ 40. The court restricted the nullification to arbitration of only some of the consumers’ rights under the B.C. Act, namely, those given by Section 172, because they had a public interest character that was incompatible with resolution by private arbitration. *Id.* In *Zwack v. Pocha*, a similar nullification provision in the Section 32 of Chapter C-30.1 of the Consumer Protection Act was held not to bar recourse to arbitration when the plaintiff’s claims were just damages for breach of the contract. 2012 SKQB 371, [2013] 3 W.W.R. 194 (Can. Sask. Q.B.). This statement should be compared with *Agro Company of Canada Ltd. v. The Regal Scout*, which interprets a differently worded nullification provision in The Hague Rules relating to contracts of carriage of goods by sea. (1983) 148 D.L.R. 3d 412 (F.C.T.D.).

¹³ Insurance Act, R.S.O. 1990, c. I.8, § 45(1) (Can.). The “not to raise any defense” part of the undertaking is discussed *infra* Part III.B. This system is open not only to Canadian, but also to foreign insurers. Many United States insurers include coverage in their policies that complies with the Canadian requirements if the insured drives in Canada and these insurers have filed the PAU with the Canadian provincial authorities.

¹⁴ Civil Code of Quebec, S.Q. 1991, c. 64, art. 3149. The Supreme Court of Canada held that this denial of effect did not extend to arbitration clauses. *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 (Can.). Legislation altered this result. *See* Consumer Protection Act, R.S.Q., c. P-40.1, § 11.1 (Can.).

I Regulation declares in its preamble: “In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favorable to his interests than the general rules provide for.”¹⁵ Part of this protection is that the consumer is guaranteed the right to be able to sue the other party either in the consumer’s domicile or the supplier’s domicile, with the ability to contract out of this rule only in very limited circumstances.¹⁶ Similar measures apply to contracts of insurance other than classes of insurance that are commercial in scale or nature.¹⁷

B. Confining Redress to the Regulating State’s Court

The other jurisdictional question that appears in some of the areas under discussion is subject matter jurisdiction. This, basically, is concerned with rights or remedies that are so closely tied to the regulatory scheme of state *B* that a court in state *A* cannot adjudicate them. In such a situation, a litigant not only *can* resort to the courts of *B*, he or she *must* do so in order to vindicate the rights or obtain the remedies sought. Of course, it is a matter for the private international law of state *A* as to whether a court of that state cannot adjudicate a case having to do with the relevant law of state *B*. But state *B* can frame its law in a way that more or less dictates the position that the private international law of *A* will take.

There is no systematic concept of subject matter jurisdiction in Anglo-Canadian private international law. A very old example is the rule that a court has no jurisdiction to adjudicate a question of title to foreign immovable property.¹⁸ To the extent that this rule has a rationale, it is that title to immovable property is so closely associated with the machinery of state authority that only a court in the state where the property is situated should deal with questions of title.¹⁹ Conversely, a decision of a foreign court adjudicating a question of title to immovable property in the forum jurisdiction will not be enforced.²⁰ The rule applies only to claims, the adjudication of which would or could have a quasi-*in rem* effect. It has never extended to claims based on contractual or equitable obligations arising out of dealings with foreign immovable property.²¹

¹⁵ Council Regulation 44/2001, pmb., ¶ 13 (EC).

¹⁶ *Id.* arts. 16, ¶¶ 1, 17 (the contracting-out rules).

¹⁷ *Id.* arts. 9, ¶¶ 1, 13 (the contracting-out rules), 14 (excluding certain classes of insurance).

¹⁸ *British S. Afr. Co. v. Companhia de Moçambique*, [1893] A.C. 602 (H.L.) (U.K.); *Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd.*, [1979] A.C. 508 (U.K.).

¹⁹ In the United Kingdom, the rule has been narrowed, eliminating from it the cases in which title is only hypothetically in issue, as in actions of trespass. See *Lucasfilm Ltd. v. Ainsworth*, [2011] U.K.S.C. 39, [2012] A.C. 208, ¶¶ 53–76 (U.K.).

²⁰ *Duke v. Andler*, [1932] S.C.R. 734 (Can.).

²¹ For a recent example, in which a British Columbia court awarded a constructive trust over a mining property in Argentina, see *Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2006 BCSC 1102, 58 B.C.L.R. 4th 217, *aff’d*, 2007 BCCA 319, 68 B.C.L.R. 4th 242 (Can. B.C. C.A.).

The same distinction – between claims that are strongly connected to a jurisdiction’s public regulatory functions and those that are more in the nature of personal claims – can be drawn in relation to statutes that regulate contracts. As part of the scheme, they may provide remedies that have more to do with the public aspect of the regulation than with the private rights of parties to the contract. A good example is found in the case mentioned above²² that held that certain claims under the British Columbia Business Practices and Consumer Protection Act were non-arbitrable. These were the claims under section 172 of the Act, namely, actions by the director (an authority appointed under the Act) or anyone else, regardless of interest, for a declaration that a supplier is engaging in an act or practice contrary to the Act, or an injunction against such an act or practice. The court emphasized that enforcing arbitration would frustrate the intent of the legislature, as expressed by section 172, to enlist B.C. consumers as “a whole host of self-appointed private enforcers” of the statutory standards of conduct.²³

The public interest aspect of section 172 of the Business Practices and Consumer Protection Act is reflected in the fact that it says that the relevant actions are to be brought in the British Columbia Supreme Court.²⁴ If someone tried to invoke section 172 in an action in, say, Alberta, the Alberta court would almost certainly hold that the specific conferral of jurisdiction on the Supreme Court, in the context of this type of regulation, means that jurisdiction is exclusive to that court and cannot be exercised by a court elsewhere.²⁵ This contrasts with the wording of section 171, which gives consumers the right to recover for damage or loss caused by a contravention of the Act. That provision does not restrict the forum and so very probably could be the basis for a claim in another province’s court. The section 172 claims are closely associated with the regulatory scheme as such, whereas the section 171 claims are more in the nature of private claims for damages and hence less tied to the adjudicatory mechanisms of the regulating state.

The further removed a remedy is from a standard claim for breach of contract or tort, the more likely it is to be seen as bound up with the enforcement mechanism of the regulating state and therefore as subject matter that is within the exclusive jurisdiction of that state’s courts. Statutes often make this explicit. Thus, the Ontario Business Corporations Act specifies that derivative actions and claims for an oppression remedy in relation to an Ontario corporation must be brought in the Superior Court of Justice.²⁶ These are closely tied with the regulation of corporations as such, and thus, it makes sense to require them to be litigated in Ontario. By contrast, the Securities Act provision on civil liability for misrepresentations in a prospectus is worded simply as giving the purchaser “a

²² Seidel v. Telus Commc’ns Inc., 2011 SCC 15, [2011] 1 S.C.R. 531 (Can.).

²³ *Id.* ¶ 6.

²⁴ Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, § 172.

²⁵ See the dicta about the Ontario corporate statute and its references to the Ontario court in *Swain v. MBM Intellectual Property Law LLP*, *infra*, note 30.

²⁶ Business Corporations Act, R.S.O. 1990, c. B.16, §§ 246, 248.

right of action for damages,” with nothing to confine that right to an Ontario court.²⁷ A British Columbia court held in a class action that it can adjudicate claims based on such provisions in the statutes of other provinces.²⁸

A British Columbia judge was recently asked to exercise the powers of dissolution of an Ontario limited partnership given by the Ontario Partnerships Act.²⁹ The respondents argued the court lacked subject matter jurisdiction, but the judge pointed to the fact that the Act defines the “court” to which application must be made “as including every court and judge having jurisdiction in the case.”³⁰ There was no reason to confine the meaning of the definition to courts in Ontario.³¹ The court in British Columbia had jurisdiction *simpliciter* based on the respondent’s ordinary residence in the province and thus was a “court” as contemplated by the relevant Ontario provision.³² The judge contrasted partnerships with corporations. Remedies concerning the “internal governance and status of the corporation”³³ were naturally confined to courts of the province under whose law the corporation was organized.³⁴ Remedies concerning a partnership, however, are more akin to the enforcement of rights under a private contract.³⁵ They are, therefore, not intrinsically tied to the court of the jurisdiction whose law is to be applied.

As a final note on this topic, the practical effect of a rule of subject matter jurisdiction (you must go to a court in *B* to make a particular type of claim because a court in *A* will not have jurisdiction to grant it) is not very different from that produced by differential choice of law rules. If a particular law will be applied by a court in *B*, but not by a court in *A*, the litigant, even if he or she has access to the *A* court, will not meet success there. Success is only to be had in *B*. This situation is discussed in the next section.

²⁷ Securities Act, R.S.O. 1990, c. S.5, § 130(1) (Can.).

²⁸ *Pearson v. Boliden Ltd.*, 2002 BCCA 624, 222 D.L.R. 4th 453 (Can. B.C. C.A.).

²⁹ Partnerships Act, R.S.O. 1990, c. P.5, § 35(1) (Can.).

³⁰ *Swain v. MBM Intellectual Prop. Law LLP*, 2013 BCSC 1050, ¶¶ 12–14 (Can. B.C. S.C.) (citing Partnerships Act, R.S.O. 1990, c. P.5, § 2 (Can.)).

³¹ The court rejected an argument that exercising such jurisdiction would be extraterritorial and thus contrary to constitutional norms. Justice Kloegman said that it “is confusing the exercise of applying laws of another jurisdiction with the exercise of an adjudicatory function that belongs to another state.” *Id.* ¶ 20.

³² *Id.* ¶ 13 (alteration in original).

³³ *Id.* ¶ 10.

³⁴ *Id.* Not only naturally but also expressly, as noted above, and as the judge noted. *Id.*

³⁵ *Id.* ¶ 12. “Concerns about comity, or public policy, do not arise in the same way as they do for corporations.” *Id.*

III. CHOICE OF LAW

As noted in the introduction, the question of whether a court must apply the law of its own jurisdiction depends not only on the general rules of private international law, but also on any local statute that derogates from those rules. The question of whether a court must apply the law of an extra-provincial jurisdiction is, basically, a matter for the general rules of private international law alone. Therefore, in this part of the article, the choice of law issues relating to contract regulation will be reviewed, first from the point of view of the courts of the enacting jurisdiction and then from the point of view of courts elsewhere.

A. The Constitutional Aspect

As a subject of legislation, private international law is a provincial matter.³⁶ However, a province cannot exert its legislative authority beyond its territorial authority. The law on where that authority ends is unclear and, in some respects, unsatisfactory. As far as the pith and substance of legislation goes, a province legislates extraterritorially if the legislation is directed at altering civil rights outside the province. The precise basis on which a civil right is situated in or outside a province does not depend on any single criterion. It seems to involve consideration of where the right-holder is situated, where the holder can enforce the right, and what the subject matter of the right is. Thus, in the *Churchill Falls* reference, Newfoundland legislated extraterritorially because its termination of the company's right to exploit the river waters in Newfoundland was aimed at depriving Hydro-Québec of the benefits of a long-term contract, governed by Quebec law and subject to the exclusive jurisdiction of the Quebec courts, for the supply of electric power to it at a fixed price.³⁷

In recent years, the Supreme Court of Canada has developed an additional doctrine by which provincial legislation, even if valid in terms of its pith and substance, is inapplicable as a matter of constitutional power to factual situations that lack a sufficient connection with the province. The leading case, *Unifund Assurance Co. v. Insurance Corporation of British Columbia*,³⁸ concerned the regulation of insurance contracts and, in particular, the right of an insurer that has paid no-fault benefits to an Ontario resident under a motor vehicle

³⁶ *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, ¶ 71 (Can.).

³⁷ As was the Newfoundland water license legislation in *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 (Can.). The court has subsequently explained the decision on the basis that “the intangible civil rights constituting the pith and substance of the Newfoundland legislation at issue were not meaningfully connected to the legislating province, and could properly be the subject matter only of Quebec legislation.” *British Columbia v. Imperial Tobacco Can. Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, ¶ 35 (Can.).

³⁸ *Unifund Assurance Co. v. Ins. Corp. of B.C.*, 2003 SCC 40, [2003] 2 S.C.R. 63 (Can.).

policy to claim reimbursement from the liability insurer of a vehicle that caused the accident. The accident happened in British Columbia, and the vehicle that caused the accident was registered and insured in that province. The Ontario insurance legislation, held the court, could not oblige the liability insurer to reimburse the Ontario insurer that paid the victim no-fault benefits.

The British Columbia liability insurer had, it was true, signed the power of attorney and undertaking that any out-of-province insurer must agree to in order to have its coverage recognized in Ontario.³⁹ But consenting to be sued in Ontario for obligations arising out of its policy was not the same thing as agreeing to be bound by Ontario law as to reimbursement of the no-fault insurer.⁴⁰ That obligation could not be imposed by Ontario. The court stated: “What constitutes a ‘sufficient’ connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it.”⁴¹ The British Columbia liability insurer did not carry on business in Ontario, and the accident had occurred in British Columbia. There was nothing to bring the liability insurer within the legitimate ambit of the Ontario legislation. As the court stated: “The most that can be said for the [no-fault insurer] in this case is that the fact of a motor vehicle accident in British Columbia triggered certain payments in Ontario under Ontario law.”⁴² That was not enough to provide a sufficient connection to Ontario, the issue of reimbursement for no-fault benefits paid, and the British Columbia liability insurer.

This doctrine of “sufficient connection,” whatever its exact ramifications,⁴³ clearly amounts to a constitutional envelope inside which any provincial statutory regulation of contracts must operate. Looking at it in private international law terms, it functions as a negative choice of law rule. It indicates when the law of the forum province⁴⁴ must not be applied, no matter what the legislature says.

³⁹ See *supra* note 8 and accompanying text.

⁴⁰ *Unifund*, 2003 SCC, ¶¶ 92–105.

⁴¹ *Id.* ¶ 56.

⁴² *Id.* ¶ 83.

⁴³ See Elizabeth Edinger & Vaughan Black, *A New Approach to Extraterritoriality: Unifund Assurance Co. v. I.C.B.C.*, 40 CAN. BUS. L.J. 161 (2004).

⁴⁴ Since it is grounded in the territorial reach of provincial legislative authority, it applies only to a province imposing its own law without a sufficient connection. It is theoretically possible that province *A* would enact a choice of law rule requiring the *A* courts to apply the law of province *B* to a set of facts insufficiently connected with *B*. That would be a bad choice of law rule, but, presumably, not an extraterritorial assertion of authority by province *A*. It is to be noted, though, that the Supreme Court has said that territorial limitations on provincial power have two purposes: not only to ensure that the legislation has a meaningful connection to the enacting province, but also to ensure that it “pays respect to the legislative sovereignty of other territories.” *British Columbia v. Imperial Tobacco Can. Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, ¶ 36 (Can.). The latter expression could suggest that there may be constitutional constraints on rules that require the application of an insufficiently connected foreign law.

B. Territorial Application of Insurance Legislation

As far as private international law is concerned, a contract of insurance is governed by the proper law of the insurance policy, which is the law stipulated in the policy or, if no law is stipulated, the system of law that has the closest and most real connection with the policy.⁴⁵ Provincial legislation typically changes this for certain types of insurance by mandating the application of the statutory rules to any policy that is issued in the province.⁴⁶ This is supplemented, in many provinces, by a provision that deems the policy to be made in the province and requires the law of the province to be applied to it, if the policy insures property in the province or an insurable interest of a resident of the province and the policy is delivered to the insured in the province.⁴⁷

Therefore, these provisions modify the general private international law rule by making the law of the province apply on the basis, not of the proper law of the contract, but of the place in which the contract of insurance is entered into. The modification typically does not apply to accident, life, or marine insurance, which is subject to the general rules of private international law.⁴⁸

For motor vehicle insurance, the private international rules have been all but replaced by the reciprocal arrangements already referred to.⁴⁹ Although the basic rule is that the law governing the policy is that of the jurisdiction in which the car is registered, this is complemented by the insurer's power of attorney and undertaking given to the authorities in other jurisdictions in North America. The undertaking binds the out-of-province insurer not to raise any defence that could not have been raised if the policy had been issued in the province. This has the effect of ensuring that the insurance coverage of drivers of cars from outside the province will match the minimum coverage required of drivers of cars registered in the province.⁵⁰

⁴⁵ Imperial Life Assurance Co. of Can. v. Colmenares, [1967] S.C.R. 443 (Can.).

⁴⁶ See, e.g., Insurance Act, R.S.O. 1990, c. I.8, §§ 143 (fire), 172 (life), 291 (accident and sickness) (Can.).

⁴⁷ Insurance Act, c. I.8, § 123. The description is a simplification. The "deeming" is rebuttable. *Gray v. Kerslake*, [1958] S.C.R. 3 (Can.). British Columbia's version of Chapter 1, Section 9 of the Insurance Act is worded differently and has been construed not to dictate the applicable law. See *Cansulex Ltd. v. Reed Stenhouse Ltd.* (1986), 70 B.C.L.R. 273, 288 (Can. B.C. S.C.) (holding that the law of British Columbia was proper); *Pope & Talbot Ltd. (Re)*, 2009 BCSC 1552 (Can. D.C. S.C.) (same) (following the holding in *Cansulex Ltd.*); *Feser v. Prudential Ins. Co. of America* (1997), 45 B.C.L.R. 3d 371 (Can. B.C. S.C.) (same).

⁴⁸ See, e.g., Insurance Act, c.I.8, § 122 (Can.).

⁴⁹ See *supra* note 8 and accompanying text.

⁵⁰ "Defence" includes the absence of coverage, so, if coverage is compulsory, the bar against an out-of-province insurer's setting up a defense is effectively a positive obligation on that insurer to provide coverage. *Potts v. Gluckstein* (1992), 8 O.R. 3d 556 (Can. Ont. C.A.); *Schrader v. U.S. Fidelity & Guaranty Co.* (1987), 37 D.L.R. 4th 120 (Can. Ont. Div. Ct.) (involving compulsory uninsured motorist coverage). On the wide interpretation given to "defence" in order to "write up" the policy to conform with the law

The statutory provisions that make the Act apply to any contract made in the province are aimed presumably at protecting the residents of the province by ensuring that the standard provisions and the other rules of the province's own law will apply to a policy of insurance that they take out in the province. The motor vehicle rules, on the other hand, are aimed in addition at protecting the residents of other provinces (or U.S. states) who are the victims of accidents caused by the insured.⁵¹ Making the law of the place of the accident the criterion for the minimum required coverage also comports with the general Canadian choice of law rule that requires the law of the place of the accident to be applied to issues of tort liability.⁵²

C. Territorial Application of Investor Protection Legislation

Investor protection takes many forms, and the territorial scope for particular legal measures differs depending on the form.

1. Civil Remedies Under Corporations Legislation

In a sense, the law of corporations as a whole has investor protection as one of its aims. It has already been noted that jurisdiction to exercise remedial powers in corporations legislation, so far as they concern the relationship between corporation and shareholder, or between shareholders, is typically restricted by the statute to the courts of the incorporating jurisdiction.⁵³ A court in one province will not entertain claims for such remedies in respect to a company incorporated elsewhere, even if its own corporation's legislation gives it similar powers in respect to local corporations.⁵⁴ Thus, the remedies provided to shareholders by corporation legislations usually operate solely with respect to locally incorporated companies and their shareholders, wherever resident.

of the province where the accident occurred, see *Day v. Guarantee*, 2003 NSCA 13, 212 N.S.R. 2d 177, ¶ 44 (Can. N.S. C.A.).

⁵¹ These victims also may be non-residents of the province where the accident happens, but the place of the accident was chosen presumably as the criterion of coverage mainly to protect locals.

⁵² *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (Can.).

⁵³ See *supra* notes 20–22 and accompanying text.

⁵⁴ See *Ironrod Investments Inc. v. Enquest Energy Servs. Corp.*, 2011 ONSC 308 (Can. Ont. S.C.) (rejecting an argument that claims based on misrepresentations when the shares in an Alberta corporation were issued could be detached from Alberta law and the exclusive jurisdiction of the Alberta courts).

2. Civil Remedies Under Securities Legislation

Securities legislation is a mix of administrative regulation and statutory civil claims, the latter typically dealing with misrepresentations by the corporation when shares are first issued⁵⁵ or when they are bought on the secondary market.⁵⁶ They also typically provide for civil claims by purchasers or sellers of securities when the opposite party has undisclosed inside knowledge of the corporation's affairs.⁵⁷

Taking the Ontario statute as an example, the territorial ambit of the civil liability provisions of the securities legislation is carefully defined. It is partly tied to the territorial ambit of the regulatory provisions (notably the prospectus requirement), but also partly to the wrongful activity having a sufficient connection with Ontario. This is seen in each of the distinct sets of criteria that apply to the three sorts of liability just mentioned:

(1) Liability for misrepresentations in a prospectus applies wherever the Ontario prospectus requirement applies, which is to any "distribution."⁵⁸ That implicitly means a distribution that takes place in Ontario.

(2) Liability to purchasers and sellers on the secondary market applies to misrepresentations by or on behalf of "responsible issuers." These include "reporting issuers," the definition of which embraces not only issuers that have filed a prospectus, but also an issuer any of whose securities have at any time listed and posted for trading on any exchange in Ontario.⁵⁹ In addition to reporting issuers, secondary market liability extends to "any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded."⁶⁰

⁵⁵ See, e.g., Securities Act, R.S.O. 1990, c. S.5, §§ 130 (misrepresentation in prospectus), 130.1 (misrepresentation in offering memorandum), 131 (misrepresentation in take-over bid circular) (Can.).

⁵⁶ Civil liability to purchasers in the secondary market is dealt with in sections 138.3(1) (misrepresentation in document issued by or on behalf of the issuer), 138.3(2) (oral statements on behalf of issuer), 138.3(3) (documents or oral statements by influential persons), and 138.3(4) (failure to make timely disclosure) of the Securities Act.

⁵⁷ See *id.* §§ 134(1) (person or company in special relationship with issuer purchases or sells securities with undisclosed inside knowledge), 134(2) (right to claim against person who tipped off the seller or purchaser of the securities).

⁵⁸ *Id.* §§ 1 (distribution), 130(1) (civil liability for misrepresentation in prospectus), 53(1) (obligation to issue prospectus).

⁵⁹ *Id.* § 138.1 (responsible issuer).

⁶⁰ *Id.* c. S.5, § 130 (Can.); see *Abdula v. Can. Solar Inc.*, 2012 ONCA 211, [2012] 110 O.R. 3d 256 (Can. Ont. C.A.), *leave to appeal to S.C.C. refused*, [2012] S.C.C.A. No. 246 (Can.) (indicating that shares be publicly traded in Canada or issuer be subject to continuous disclosure obligations in Canada).

(3) Liability for buying or selling with insider knowledge applies only in respect to securities of “reporting issuers,”⁶¹ but here that includes an issuer of shares traded on the TSX Ventures exchange, which is in Alberta, if the issuer has a real and substantial connection to Ontario.⁶²

In addition to these forms of civil liability, failure to file a prospectus may render the contract for the issuer of the securities unenforceable on the basis that trading in the security without a prospectus is illegal. The Real Estate Act of British Columbia used to impose a prospectus requirement on vendors of certain real estate and expressly made the contract unenforceable by the vendor if the prospectus requirement was not observed. The British Columbia Court of Appeal, in a jurisdiction case, *Avenue Properties Ltd. v. First City Development Corp.*,⁶³ upheld the purchaser’s right to sue in British Columbia for a declaration that the Act rendered a contract for purchase of real estate in Ontario unenforceable. The main reason for refusing to stay the proceeding was that in a British Columbia court, the plaintiff would have a good argument that the statutory provision mandatorily applied to the contract. That view was based, apparently, on the fact that the purchaser’s dealings with the vendor had taken place in British Columbia. That argument could not have been made in an Ontario court, which would not be bound by the British Columbia legislation.

3. Alberta Guarantees Acknowledgment Act

To the disapproval of Professor Vaughan Black,⁶⁴ among others, the Alberta courts have not attributed any intrinsic territorial scope to the application of the Guarantees Acknowledgement Act,⁶⁵ which imposes a notarization requirement for guarantees given by individuals. The evident purpose of the legislation is to impose a requirement of deliberation and formality in order to encourage people to think twice before they promise to answer for the obligations of another. The courts have decided on the Act’s application using only the general choice of law rule for the formal validity of a contract, which upholds the

⁶¹ *Id.* §§ 134(1)–(2) (liability for buying or selling, or tipping), (7) (“reporting issuer” “includes an issuer that has a real and substantial connection to Ontario and whose securities are listed and posted for trading on the TSX Venture Exchange”).

⁶² *Id.* § 134(7) (reporting issuer). *But see* *Torudag v. British Columbia* (Sec. Comm’n), 2011 BCCA 458, [2011] 343 D.L.R. 4th 743 (Can. B.C. C.A.) (upholding the B.C. Securities Commission’s jurisdiction to penalize insider trading by a non-resident person of shares of a B.C. reporting company listed on the TSX Venture Exchange. Jurisdiction was based on the subject matter of the Commission’s actions having a real and substantial connection to B.C.).

⁶³ *Ave. Props. Ltd. v. First City Dev. Corp.*, [1986] 32 D.L.R. 4th 40 (Can. B.C. C.A.).

⁶⁴ Vaughan Black, *The Strange Cases of Alberta’s Guarantees Acknowledgement Act: A Study in Choice-of-Law Method*, 11 DALHOUSIE L.J. 208 (1988).

⁶⁵ Guarantees Acknowledgment Act, R.S.A. 2000, c. G-11 (Can.).

contract if it complies with the formalities either of the place of contracting or the proper law of the contract. The result is that Albertans are unprotected by their province's law, even if they sign a guarantee in Alberta, if that guarantee is governed (often by express agreement) by the law of another jurisdiction that has no notarization requirement (which few do).⁶⁶

These cases illustrate that where the protective legislation looks like a rule of contract law, rather than a regulatory measure to alter contract law, even a court in the enacting jurisdiction will tend to see the issue as a conventional choice of law question, not one of giving a mandatory territorial scope to the provision.

4. Restrictions on the Rights of a Secured Creditor

The same is true of debt-relief statutes that bar a secured creditor's right to sue the debtor for a deficiency after the creditor has realized on its security. These usually have been held to be a matter of the substantive rights arising from the contract, and applicable only if the law of the enacting jurisdiction is the proper law of the contract.⁶⁷

5. Real Estate Broker Licensing Schemes

Where real estate brokers and the like are required to be licensed, and the statute buttresses the licensing requirement by depriving the unlicensed broker of the right to claim its commission, the latter provision has typically been held applicable if the contract of agency has its closest connection with the enacting jurisdiction, which usually means the jurisdiction where the agent's services were

⁶⁶ Greenshields Inc. v. Johnston, [1981] 131 D.L.R. 3d 234 (Can. Alta. C.A.), *aff'g* [1981] 119 D.L.R. 3d 714 (Can. Alta. Q.B.) (proper law that of Ontario); O'Donovan v. Dussault, [1973] 35 D.L.R. 3d 280 (Can. Alta. C.A.) (proper law that of Saskatchewan); Kenton Natural Res. Corp. v. Burkinshaw, [1983] 47 A.R. 321 (Can. Alta. Q.B.) (proper law that of Tennessee); Bank of Montreal v. Snoxell, [1982] 143 D.L.R. 3d 349 (Can. Alta. Q.B.) (proper law that of B.C.); Jorges Carpet Mills Inc. v. Bondar, [1981] 4 W.W.R. 470 (Can. Alta. Q.B.) (proper law of the contract was that of Alberta); *see also* Canaccord Capital Corp. v. 884003 Alta. Inc., 2003 BCSC. 1565 (Can. B.C. S.C.) (guarantee signed in Alberta, but governed by law of B.C.); Sharn Imp. Ltd. v. Babchuk, [1971] 21 D.L.R. 3d 349 (Can. B.C. S.C.) (guarantee signed in Alberta, but governed by law of Quebec).

⁶⁷ Traders Fin. Corp. v. Casselman, [1960] S.C.R. 242 (Can.) (discussing the right to sue for balance of purchase price after exercising vendor's lien); Livesley v. Clemens Horst Co., [1925] 1 D.L.R. 159 (Can.) (deciding whether seller had right to claim for deficiency after exercising lien over the goods); Sigurdson v. Farrow, [1981] 121 D.L.R. 3d 183 (Can. Alta. Q.B.) (discussing the right to sue on personal covenant after foreclosure of mortgage); Canada Acceptance Corp. v. Matte, [1957] 9 D.L.R. 2d 304 (Can. Sask. C.A.) (discussing the right to claim deficiency after exercising right to repossess goods sold); Alberta Treasury Branches v. Granoff, [1984] 15 D.L.R. 4th 295 (Can. B.C. C.A.) (discussing rule barring chattel mortgagee's right to sue for deficiency held procedural).

to be performed.⁶⁸ In this way, the territorial operation of the statute is consistent with its purpose, which is to protect the broker's client, who would normally expect the broker to be licensed in the province where the broker was active.

D. Territorial Application of Consumer Protection Legislation

The natural reading of a consumer protection statute, purporting to regulate the supplier's conduct is that it applies to conduct in the province. This interpretation is reinforced by the constitutional incapacity of provinces to attach liability to conduct that is insufficiently connected with the province. In *Jones v. Zimmer GMBH*,⁶⁹ a class claim was made by hip replacement patients that a component in the artificial joint had been negligently designed or manufactured. One of the claims was based on the manufacturer engaging in a deceptive act or practice, as provided under the British Columbia consumer protection legislation, in its marketing of a product.⁷⁰ The court for granted that the Act, as a provincial statute, could not apply to acts or practices occurring outside the province.⁷¹ Therefore, it was a proper claim to make in relation to the class members who were residents in the province.

E. Quebec Civil Code and Rome I

The Quebec Civil Code, in article 3117, paragraph 1, provides that no express choice of law by the parties to a consumer contract can deprive the consumer of the protection of the mandatory provisions of the law of the consumer's country of residence, provided that (to simplify slightly) the consumer was responding to the supplier's special offer or advertisement made in that country, or the supplier received the consumer's order in that country. There is also a general rule, in paragraph 3, that in the absence of party choice, the law that governs a consumer contract is that of the consumer's country of residence. The Rome I Regulation in the European Union has a provision that likewise makes the law of the consumer's habitual residence applicable in the absence of party

⁶⁸ *Ross v. McMullen*, [1971] 21 D.L.R. 3d 228 (Can. Alta. S.C.); *Block Bros. Realty Ltd. v. Mollard*, [1981] 122 D.L.R. 3d 323 (Can. B.C. C.A.). No Canadian case has involved a contract that expressly chose the law of another jurisdiction, but such a choice was ignored in favor of the law of the jurisdiction in which the services were to be performed. See *Freehold Land Invs. Ltd. v. Queensl. Estates Pty. Ltd.* (1970), 123 CLR 418 (Austl.).

⁶⁹ *Jones v. Zimmer GMBH*, 2013 BCCA 21, 358 D.L.R. 4th 499 (Can. B.C. C.A.).

⁷⁰ *Id.*; see also *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, § 4. (Can.).

⁷¹ *Id.* ¶ 53.

choice, and preserves the protections for the consumer under that law even if there is an agreed choice of law.⁷²

These are bilateral choice of law rules tailored to consumer contracts, with the result that they determine not only the territorial operation of the *lex fori*, but also the application of foreign consumer protection laws. From the point of view of the *lex fori*, local residents are protected if, essentially, the supplier solicited their business in the forum jurisdiction. From the point of view of foreign law, a foreign resident could file a claim against a local supplier based on the protections of the plaintiff's country of residence against those who solicit their business in that jurisdiction.

F. Applying the Protective Legislation of Another Jurisdiction

The common law, unlike the Quebec and Rome I regimes just mentioned, has not developed any bilateral choice of law principles relating to the statutory regulation of contracts. It was suggested above that one of the challenges for choice of law is to accommodate both the principle of party autonomy and the regulatory purposes of the state. Where the state is the forum it can require the court to give effect to mandatory rules that may run counter to the parties' wishes, as discussed in the previous sections. Where the state is a foreign (or extra-provincial) country, however, the principle of party autonomy, together with the all-embracing scope of the proper law concept, has left little room for courts to enforce mandatory rules from systems of law other than the proper law.

Vita Foods Productions Inc. v. Unus Shipping Co. is the leading case on this issue. The question was whether bills of lading issued in (the then independent Dominion of) Newfoundland were subject to the Hague Rules on the limitations of a carrier's liability to cargo owners. A Newfoundland statute imposed the Rules mandatorily, but the Privy Council said that the Nova Scotia court must apply the agreed proper law of the contract, English law, which did not impose the Rules on those bills of lading. Thus, the court must ignore the regulatory legislation of Newfoundland.⁷³ The same logic has been applied by a British Columbia court to deny an Alberta franchisee the protection of Alberta franchise legislation on the ground that the contract with the British Columbia-based franchisor was governed expressly by the law of British Columbia.⁷⁴

The only common law exceptions to the exclusive hegemony of the proper law relate to the law of the place of performance. Irrespective of its proper law, a contract will not be enforced to the extent that performance of it would be

⁷² Regulation (EC) No. 593/2008 of 17 June 2008, art. 6, 2008 O.J. (L 166) 6.

⁷³ *Vita Food Prods. Inc. v. Unus Shipping Co.*, [1939] 1 A.C. 277, 298–300 (Can. N.S. P.C.) (disagreeing with *The Torni*, [1932] P. 78 (Can. C.A.)).

⁷⁴ *Nike Informatic Sys. Ltd. v. Avac Sys. Ltd.*, [1979] 105 D.L.R. 3d 455 (Can. B.C. S.C.).

illegal in the jurisdiction where it was to be performed.⁷⁵ One Canadian case has extended this principle to a case in which real estate brokerage services were performed in another jurisdiction by a British Columbia company that was not licensed in the other jurisdiction to perform the services. The court held that the fact that the services were performed illegally, according to the law of the place where they were performed, barred a claim to be paid for them.⁷⁶

A contract that can be performed legally, but which is in fact part of a plan to contravene the law of another country, has been held unenforceable on the ground that to enforce it would be against international comity and thus violate the public policy of the forum. A contract for the sale of goods originating in India to be delivered to a European port was held, though governed by English law, to be unenforceable because the parties' intent was that the goods should be shipped onwards to South Africa, with the aim of circumventing an export prohibition under Indian law.⁷⁷

Beyond the role given to prohibited conduct under the law of a country where the contract is to be performed or at which performance is aimed, the common law has resisted any general principle that would give effect to contractual regulation that is imposed by a country other than the forum itself or the country of the proper law. In cases in which a regulation of the forum was at issue, it has uniformly been assumed that a court elsewhere would not apply the

⁷⁵ *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287 (Can.) (paying freight in excess of maximum permitted under local price control legislation); *Zivnostenska Banka Nat'l Corp. v. Frankman*, [1950] A.C. 57 (H.L.) [79] (U.K.) (Lord Reid) ("I think it is now settled law that, whatever the proper law of the contract, an English court will not require a party to do an act in performance of a contract which would be an offence under the law in force at the place where the act has to be done."). The rule was applied to determine a bank's obligations in *Libyan Arab Foreign Bank v. Bankers Trust Co.*, [1989] 1 Q.B. 728 (Can. Q.B.). But the rule did not apply in *Serpa v. Confederation Life Ass'n*, [1974] O.J. No. 1812, 43 D.L.R. 3d 324 (Can. Ont. H.C.), *rev'd*, [1974] O.J. No. 1905, 46 D.L.R. 3d 641 (Can. Ont. C.A.), because the contract permitted the insurer to perform its obligation to the insured outside Cuba, in which performance would have been illegal.

⁷⁶ *Gillespie Mgmt. Corp. v. Terrace Props.*, [1989] B.C.J. No. 1768, 62 D.L.R. 4th 221 (Can. B.C. C.A.).

⁷⁷ *Regazzoni v. K.C. Sethia (1944) Ltd.*, [1950] A.C. 301 (H.L.) (referring to public policy at 319 and 323, respectively). The *Regazzoni* Court applied *Foster v. Driscoll*, [1929] 1 K.B. 470 (Can. C.A.), a decision where the court refused to enforce a contract for the sale of whisky f.o.b. a Scottish port because the parties planned to smuggle it into the United States, contrary to the then-American prohibition laws. *Foster v. Driscoll* was also applied in *Shiesel v. Kirsch*, [1931] O.J. No. 390, 2 D.L.R. 791 (Can. Ont. C.A.), which was another action in which the contracts were tainted because they were part of an arrangement to sell liquor into the United States. The allegation of a conspiracy to use a warehouse to export liquor to the United States failed for want of proof in *Westgate v. Harris*, [1929] O.J. No. 59, 4 D.L.R. 643 (Can. Ont. C.A.). A case that severed the tainted contract from other contracts with which it was connected is *United City Merchants (Investment) Ltd. v. Royal Bank of Can.*, [1982] Q.B. 208 (Can. Que. C.A.).

regulation.⁷⁸ If the regulatory legislation is from a foreign jurisdiction whose law is not the proper law, the legislation has not been applied. The *Vita Foods* case stands in the way of any argument that the regulatory provisions of, for instance, the law of the place of contracting, have any claim to be applied if the proper law is that of another jurisdiction.⁷⁹

The one context in which a Canadian court has devised a choice of law rule that is not based on the proper law is a class proceeding. In *Pearson v. Boliden Ltd.*, the British Columbia court held the securities legislation of various “foreign” provinces was applicable to certain plaintiffs’ claims, not on the basis that the relevant law governed the contract, but on the basis that the plaintiff had bought the securities in the course of a distribution in the other province.⁸⁰

The common law is hardly alone in finding this a difficult issue. European law included, in the Rome Convention, article 7(1), which would allow a court to apply the mandatory rules of a country with which the situation had a close connection.⁸¹ This choice of law rule was so controversial that member states were allowed to opt out of it, and Germany and the United Kingdom, among others, did.⁸² The provision disappeared altogether when the convention was superseded by the Rome I Regulation, which only has a narrow rule geared to unlawfulness by the law of the place of performance.⁸³ The Quebec Civil Code includes an article that was modeled on the now defunct article 7(1),⁸⁴ but I am unaware of any case in which the Quebec courts have applied it.⁸⁵

⁷⁸ For example, in *Avenue Properties Ltd. v. First City Development Corp.*, [1986] 32 D.L.R. 4th 40 (Can. B.C. C.A.), it was assumed that the Ontario court, in which the developer was suing the investor, would not apply the B.C. prospectus requirements. Similarly, in *Ash v. Lloyd’s Corp.*, [1992] 9 O.R. 3d 755 (Can. Ont. C.A.), it was assumed (correctly) that the English court would not apply the Ontario prospectus requirements for the benefit of Ontario-resident investors. See generally *Soc’y of Lloyd’s v. Meinzer, rev’d sub nom. Soc’y of Lloyd’s v. Saunders*, [2001] 210 D.L.R. 4th 519, at 77–79 (Can. Ont. C.A.), *leave to appeal refused*, [2001] S.C.C.A. No. 527, 212 D.L.R. 4th vii (Can.).

⁷⁹ See *supra* note 73 and accompanying text.

⁸⁰ *Pearson v. Boliden Ltd.*, 2002 BCCA 624, 222 D.L.R. 4th 453 (Can. B.C. C.A.).

⁸¹ Convention on the Law Applicable to Contractual Obligations, art. 7(1), 1980 O.J. (L 266) 1.

⁸² Even in the countries in which it did apply, it was never used. See Ole Lando & Peter Arnt Nielsen, *The Rome I Regulation*, 45 COMMON MKT. L. REV. 1687, 1722 (2008); Andrea Bonomi, *Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts*, 10 Y.B PRIV. INT’L L. 285, 296–97 (2008).

⁸³ Regulation (EC) No. 593/2008 of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 6, 2008 O.J. (L 166) 6.

⁸⁴ Civil Code of Quebec, S.Q. 1991, art. 3079.

⁸⁵ Foreign bank secrecy law was sought to be made applicable under this article in *Arab Banking Corp. v. Coopers & Lybrand*, [1996] Q.J. No. 1436, [1996] R.J.Q. 1715 (Can. Que. S.C.), by way of objection against giving evidence, but the court overruled the objection. See also *Globe-X Mgmt. Ltd.*, 266 D.L.R. 4th 493, 2006 QCCA 290 (Can. Que. C.A.).

IV. ENFORCING EXTRA-PROVINCIAL JUDGMENTS

The rules for recognizing and enforcing foreign judgments do not concern themselves with whether the judgment does or does not apply a regulatory statute that deals with a contract differently from the way the *lex fori* of the enforcing court would do. That issue plays out at the choice of law stage, not at the recognition or enforcement stage. Two classic instances may be mentioned. In *Huntington v. Attrill*,⁸⁶ a New York judgment was enforced although the New York legislation that imposed personal liability on a corporate director for misstatements in a corporate document had no equivalent in Ontario. Also, in *Beals v. Saldanha*,⁸⁷ there was no objection to enforcing the Florida judgment for breach of contract and associated torts that included statutory treble damages that, again, had no counterpart under Ontario law. The merits of the foreign decision, including the foreign court's application of its own regulatory rules, are not reviewable. For the same reason, it is no objection to enforcing a foreign judgment that the foreign court refused to apply the regulatory law of the forum (enforcing) jurisdiction for the benefit of residents of the forum.⁸⁸

V. CONCLUSION

Anglo-Canadian private international law deals reasonably well with the application of contract regulation that is imposed by the *lex fori*, but, especially as far as choice of law is concerned, has hardly budged from the view that the only foreign regulation to be applied is that of the proper law. This arguably gives party autonomy, which underlies the proper law, an undeserved priority over the regulatory interests of other affected jurisdictions.

In time, it is possible that we will develop choice of law rules like the *de facto* one in *Pearson v. Boliden Ltd.*, applying a foreign regulatory regime to certain class plaintiffs on the basis that the facts bring the plaintiffs' contracts legitimately within the territorial scope of that regime, whether or not the proper law is that of the regulating state. What stand in the way of such a development is the diversity of regulatory regimes and the territorial criteria employed for them.

A choice of law rule must be geared to the juridical nature of the rights and obligations at stake. It is that nature (the basis for the process of "characterization") that makes a particular choice of law solution appropriate. In principle, the territorial application of the legal rules is made to comport with the relevant characteristics of the rules. Thus, we can have a choice of law rule for "contract" because "contract" rights and obligations are a category with certain, more or less generally accepted, characteristics. The choice of law rule based on

⁸⁶ *Huntington v. Attrill*, [1893] A.C. 150 (Can. Ont. P.C.).

⁸⁷ *Beals v. Saldanha*, [2003] 3 S.C.R. 416 (Can.).

⁸⁸ *See generally* Soc'y of Lloyd's v. Meinzer, *rev'd sub nom.* Soc'y of Lloyd's v. Saunders, [2001] 210 D.L.R. 4th 519 (Can. Ont. C.A.), *leave to appeal refused*, [2001] S.C.C.A. No. 527, 212 D.L.R. 4th vii (Can.).

proper law of the contract – whether chosen or objectively determined – has been devised as the best approach, given those characteristics.

But, as yet, a choice of law rule for “contract regulation” cannot draw on any analogous understanding. There is no generally accepted notion of the salient juridical characteristics of “contract regulation,” seen as a genus of legal rights and obligations. This means it is difficult to frame a suitable choice of law rule for “contract regulation.” Thus, we have a choice of law rule for “contract,” but no countervailing rule for “contract regulation.” Whatever the imbalance in private international law between party autonomy and state regulation of contracts, it is hard to see the picture changing very much any time soon.

