

The Most Appropriate Forum: Assessing the Applicable Law

Another issue in the recent Supreme Court of Canada decision in *Haaretz.com v Goldhar* (available [here](#)) involves the applicable law as a factor in the *forum non conveniens* analysis. It is clear that one of the factors in determining the most appropriate forum is the applicable law. This is because it is quite easy for the forum to apply its own law and rather more difficult for it to apply the law of another jurisdiction.

So if the defendant can show that the forum would apply not its own law but rather the law of another jurisdiction, that points to a stay of proceedings in favour of that other jurisdiction. In contrast, if the plaintiff can show that the forum would apply its own law, that points against a stay of proceedings. In *Haaretz.com* the plaintiff was able to show that the Ontario court would apply Ontario law, not Israeli law. So the applicable law factor favoured Ontario.

Not so, argued the defendant, because an Israeli court would apply Israeli law (see para 88). So as between the two jurisdictions neither was any more convenient than the other!

In the Supreme Court of Canada, four of the judges rejected the defendant's rejoinder. The dissenting judges held that "[i]t is entirely appropriate, in our view, for courts to only look at the chosen forum in determining the applicable law. Requiring courts to assess the choice of law rules of a foreign jurisdiction may require extensive evidence, needlessly complicating the pre-trial motion stage of the proceedings" (para 207). In separate concurring reasons, Justice Karakatsanis agreed with the dissent on this point (para 100). So because Ontario would apply Ontario law, this factor favours proceedings in Ontario rather than proceedings in Israel.

In contrast, Justice Cote, with whom Justices Brown and Rowe agreed, stated that "I am concerned that disregarding the applicable law in the alternative forum is inconsistent with the comparative nature of the *forum non conveniens* analysis" (para 89). She cited in support an article by Brandon Kain, Elder C. Marques and Byron Shaw (2012). The other two judges did not comment on this issue, so the

court split 4-3 against looking at the applicable law in the alternative forum.

There is force to the practical concern raised by the dissent, and even with the assistance of the parties in many cases the court will be unable to form a sufficiently strong view as to what law the foreign forum would apply. But conceptually it does seem that if it is established that the foreign forum will apply its own law, that should go to negate the benefits of the plaintiff's chosen forum applying its own law. Neither is any more convenient where compared against the other.

Perhaps because of the novelty of the approach, Justice Cote's application of it may have missed the mark. She held that "[a]s each forum would apply its own law, the applicable law factor cannot aid Haaretz in showing that it would be fairer and more efficient to proceed in the alternative forum" (para 88). But the true point flowing from establishing that Israel would apply Israeli law, it would seem, should be that the applicable law factor cannot aid Goldhar (the plaintiff) in showing that it would be fairer and more efficient to proceed in Ontario. If it cannot aid Haaretz.com that Israel would apply its own law, then how is the factor relevant and why is the court indicating a willingness to consider it? It surely could not aid Haaretz.com that Israel would apply some other law.

On a motion for a stay, if the court did know what law would be applied in both the chosen forum and the alternative forum, we would have four possible situations. On Justice Cote's approach, if both forums would apply their own law, this is a neutral factor. Similarly, if both forums would apply law other than forum law, this is also a neutral factor. In the other two situations, the applicable law factor favours the forum that would be applying its own law. With the court splitting 4-3 against looking at the applicable law in the alternative forum, this is not the approach - but should it be?