

# CHOICE OF LAW (GOVERNING LAW) BOILERPLATE CLAUSE

## Need to know

A choice of law clause (or governing law clause) enables contracting parties to nominate the law which applies to govern their contract. The clause is generally effective, although this is subject to some limitations.

A choice of law clause is distinct from a choice of jurisdiction clause, which nominates the forum in which disputes arising under or in relation to the contract may or must be determined.

Including a choice of law clause in a contract clearly demonstrates the parties' intention about which law they wish to govern their contract. This is particularly important if the transaction is likely to extend beyond the borders of different states or countries where different laws may apply and, should a dispute arise, the need for a Court to determine the proper law. Always include a choice of law clause in a contract, even when the transaction does not involve more than one jurisdiction.

From a practical perspective, the key consideration is whether the governing law chosen will provide the best protection for your client's legal rights and interests under the contract.

## THE SAMPLE CLAUSE

*This [deed/agreement] is governed by the laws of [New South Wales/[insert relevant jurisdiction]].*

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## 1 What is this clause and why is it used?

A choice of law clause (or governing law clause) is used to express the parties' intention about which law they wish to govern a dispute arising under their contract. It allows the parties to designate the specific country or State law which will apply to the construction and interpretation of their contract and may determine or affect the parties' rights and obligations under the contract.

Courts will respect a choice of law clause provided contracting parties have genuinely and validly (expressly or impliedly) selected a law to govern their contract. If no law has been selected, Australian Courts employ a two-stage test to determine the proper law of the contract (see 3.1 below).

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## 2 How effective is it?

When the parties to a contract make an express choice of law, ordinarily that choice will be held by the courts to be effective.<sup>1</sup> This will generally be the case even where the contract has no factual connection with the legal system which is chosen or the connection is tenuous.<sup>2</sup> However there are three situations outlined in sections 2.1 - 2.3 below in which a court may not give effect to the intentions of the parties in this respect.

### 2.1 Overriding forum statutes

Where a statute expressly or impliedly applies regardless of any contractual provisions, a choice of law clause will not be effective.<sup>3</sup>

In the leading Australian case on choice of law clauses, *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 (**Akai**), a majority of the High Court held that provisions of the *Insurance Contracts Act 1984* (Cth) precluded the evasion of the Act's regime by the choice of some other law.<sup>4</sup>

### 2.2 Contrary to public policy

A choice of law clause will be invalid if it is contrary to public policy. There are three ways in which public policy can override the validity of a choice of law clause. These are:

- (a) where the clause is contrary to an express or implied statutory prohibition (see 2.1 above);
- (b) where, although not directly contrary to such a prohibition, the clause offends the "policy of the law", which will be discerned from the scope and purpose of the particular statute or of the Constitution;<sup>5</sup> and
- (c) where the clause would apply a foreign law which is contrary to the court's notions of public policy<sup>6</sup> (eg the protection of Australia's interests domestically or internationally or the protection of universal moral interests).<sup>7</sup>

### 2.3 Lack of bona fides

A choice of law clause may also be invalid if the selection of the foreign law is not bona fide.<sup>8</sup>

While this requirement has been seemingly accepted in principle,<sup>9</sup> there has only been one reported instance in Australia where a choice of law clause has not been given effect to on the basis of lack of bona fides.<sup>10</sup> In that case it was found that the attempted selection of Hong Kong law was to avoid the operation of a Queensland statute and not a bona fide selection.

Nonetheless, the mere selection of a law unconnected or tenuously connected with the contract is unlikely to, of itself, evidence a lack of bona fides; as noted above, there are several cases in which such clauses have been given effect to.

Moreover, some genuine reason such as common business practice,<sup>11</sup> or the selection of a neutral but developed legal system,<sup>12</sup> would likely be sufficiently bona fide reasons for the selection of an otherwise unconnected jurisdiction.

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## 3 Drafting and reviewing the clause

### 3.1 Should I always include it, and what happens if I don't?

As a rule, always include a boilerplate choice of law clause in a contract, even if the transaction

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contemplated by the contract does not involve more than one jurisdiction.

A choice of law clause should certainly be included in all contracts that contemplate transactions which may or do involve a subject matter, place of performance, formation or parties in more than one jurisdiction.

If a choice of law clause has not been included in a contract, or if that clause is invalid, Australian Courts employ a two-stage test to determine the proper law of the contract.

- First, the Court will ask whether the parties have expressly or impliedly intended that a certain law should apply to govern the contract. This may be inferred from the contract itself and the general circumstances surrounding its formation.<sup>13</sup>
- Second, and if there is no evidence that a choice has been made, the Court will undertake an objective assessment to determine which legal system has the “*closest and most real connection to the contract*”.<sup>14</sup>

General matters that a Court may consider in making this assessment include:

- the place of residence and business of the parties;
- the place of contracting;
- the place of performance; and
- the nature and subject matter of the contract.<sup>15</sup>

The Court will also consider the general state of affairs that existed at the time of contracting.<sup>16</sup>

## 3.2 About the sample clause?

The sample clause is drafted in neutral terms. That is, parties can mutually agree to nominate and insert the geographical location of the law they wish to apply to govern their contract.

## 3.3 When, if ever, should I amend the clause?

You should amend the choice of law clause if there is a local mandatory statute governing the law of the contract ie, either the law prescribed by the statute should be included in the sample clause or a different forum should be selected.

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## 4 Enforcement

While the Australian courts will generally enforce a choice of law clause, consideration must be given to the difficulty and expense of enforcement before including a choice of law clause nominating a foreign law into a contract which may be sought to be enforced in Australia. The need to prove foreign law prolongs trials, takes time and increases costs.<sup>17</sup>

Choice of law clauses are typically pleaded not by plaintiffs but by defendants, often because the foreign law provides a defence that the Australian law does not, and which the parties may not have intended.<sup>18</sup> The consequences of pleading such a clause include:

- (a) full particulars of the case law, statute etc must be pleaded. It is not sufficient just to plead the conclusion of foreign law relied on;<sup>19</sup>
- (b) the presence of a foreign law element may make a court reluctant to strike out a defence or grant summary judgment;<sup>20</sup> and
- (c) depending on the court, this may trigger additional procedural requirements.<sup>21</sup>

Proof of foreign law in Australia is a question of fact.<sup>22</sup> The *Uniform Evidence Act* permits the proof of foreign statutes by tender, and the proof of foreign common law by producing books containing reports of foreign judgments.<sup>23</sup> Similar but more restrictive legislation applies in non-*Uniform Evidence Act* jurisdictions.<sup>24</sup> In addition, Australian courts can inform themselves about the provisions of New Zealand Acts and instruments in any way they see fit.<sup>25</sup>

In NSW, arrangements have been made for questions of the law of Singapore or the State of New York to be referred to local judges for

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determination.<sup>26</sup> The consent of the parties is not required.<sup>27</sup>

However in many cases it is still necessary to prove foreign law in the traditional way, which is by expert evidence. The necessity to do so may be influenced by the degree of connection the nominated governing law has with the Australian legal system.<sup>28</sup>

Expert evidence of foreign law may introduce complexity, uncertainty or expense because:

- it will be necessary to find an appropriate expert, who is likely to charge at their professional rate and who, if overseas, may need to be brought to Australia for the hearing of the proceedings;<sup>29</sup>
- court procedures and controls concerning expert evidence will apply, meaning the parties may need permission to obtain the evidence<sup>30</sup> and it may be subject to various procedural requirements;<sup>31</sup>
- the usual legal requirements that attend preparing an admissible and authoritative expert opinion in the form of a report will also apply,<sup>32</sup> and there is a risk that the expert will not perform effectively in court if cross-examined;
- the expert's opinion may involve an element of prediction about the foreign law, it being open to the expert to say that decisions standing in the foreign jurisdiction would ultimately be overruled;<sup>33</sup>
- where the foreign law is not in English, the need for translation may complicate proof;<sup>34</sup> and
- there is a higher risk that an appellate court will interfere with a trial judge's findings on foreign law than with other factual findings, and it is not uncommon for new evidence of foreign law to be received on appeal.<sup>35</sup>

An additional risk in seeking to enforce choice of law clauses in Australia is that the defending party can argue that a clause nominating a foreign legal system should not be enforced for one of the reasons set out in sections 2.1 – 2.3 above. While this will often be a difficult

argument, it is not impossible and it may lengthen or delay the proceedings.

The matters above suggest that a party which anticipates that, if necessary, they will likely sue on a contract in an Australian court in the event of a dispute, should think carefully before agreeing to a choice of law clause that nominates the law of a foreign jurisdiction.

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## 5 Other practical considerations

A choice of law clause should always be considered alongside a choice of jurisdiction clause, which nominates the forum in which disputes arising under the contract are to be litigated. Absent a clear choice of law clause, a choice of jurisdiction clause by which a party submits to the exclusive jurisdiction of a particular country may be taken as an indication that the intention of the parties is that the law of that country is to be the governing law of the contract.<sup>36</sup>

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## ENDNOTES

- <sup>1</sup> See *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 442; *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd* (1989) 18 NSWLR 172 at 185 and the cases there cited; *Proactive Building Solutions v Mackenzie Keck* [2013] NSWSC 1500 at [14].
- <sup>2</sup> *Re Bulong Nickel Pty Ltd* (2002) 42 ACSR 52 at [39]; *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725 at 747–8; *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd* (1989) 18 NSWLR 172 at 185.
- <sup>3</sup> Examples of overriding statutes include: the *Carriage of Goods by Sea Act 1991* (Cth) s 11(1), the *Bills of Exchange Act 1909* (Cth) ss 77(a) and 77A and the *Building and Construction Industry (Security of Payment) Act 1999* (NSW) s 34.
- <sup>4</sup> By Toohey, Gaudron and Gummow JJ, Dawson and McHugh JJ dissenting, relying on s 8(2) and s 52(1) of the Act.
- <sup>5</sup> *Akai* at 447, where it was held that the policy of the law and of the Constitution militated against enforcing the choice of law clause. On the issue of the policy of the law, see also *Miller v Miller* (2011) 242 CLR 446 and *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498.
- <sup>6</sup> In *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277. Lord Wright, delivering the judgment of the Privy Council referred to there being no “reason for avoiding the choice on the ground of public policy.” In *Akai*, the majority referred to a decision of the Supreme Court of the United States and categorised such clauses as offending “the public policy of the forum... declared by judicial decision.” Although the scope of this prohibition is perhaps unclear,

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there have been no reported Australian cases which indicates that it would be rarely invoked.

<sup>7</sup> The examples are taken from *Australian Corporate Finance Law*, LexisNexis, Chapter 10 [10.050]; cf *Choice of Law* [1992] ALRC 58 at [8.15].

<sup>8</sup> *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 per Lord Wright.

<sup>9</sup> see eg *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724 at [52].

<sup>10</sup> *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd R 378 where Hoare J stated that the lack of bona fides was contrary to public policy; affirmed on other grounds *Freehold Lands Investments Ltd v Queensland Estate Pty Ltd* (1970) 123 CLR 418.

<sup>11</sup> As was the case in *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277.

<sup>12</sup> As was the case in *Akai*.

<sup>13</sup> In *Akai* at 442, the majority of the High Court held that the question to be asked is whether “upon the construction of the contract and by the permissible means of construction, the court properly may infer that the parties intended their contract to be governed by reference to a particular system of law”. See also generally in relation to construction of contracts: *Woodside Energy Ltd v Electricity Generation Corporation* 306 ALR 25 at [35] and cases citing the authority; See also *KaL Research – Interpretation / Construction – Boilerplate Clause* (Doc ID 29962279).

<sup>14</sup> *Akai* at 434.

<sup>15</sup> *Akai* at 437.

<sup>16</sup> *Fleming v Marshall* (2000) 279 ALR 737.

<sup>17</sup> Brereton J, *Proof of Foreign Law – Problems and Initiatives* [2011] NSWJSchol 13 (Brereton J).

<sup>18</sup> J McCormish, *Pleading and Proving Foreign Law in Australia* (2007) 31 Melbourne University Law Review 400 (McCormish) at 404-5.

<sup>19</sup> *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 517-8; see McCormish at 410.

<sup>20</sup> See McCormish at 407 and the authorities there cited.

<sup>21</sup> See eg UCPR (NSW) r 6.43 which requires the filing of a “foreign law notice” and, potentially, a “notice of dispute as to foreign law” in response.

<sup>22</sup> Itself this has been described as a “peculiarity” manifesting in several “anomalies”: see Brereton J p 1.

<sup>23</sup> *Uniform Evidence Acts* ss 174 and 175.

<sup>24</sup> See McCormish at 422-7 for the relevant legislative provisions (although Victoria has adopted the *Uniform Evidence Act* since that article). See also *Nygh’s Conflict of Laws in Australia* (M Davis, AS Bell, PLG Brereton, 9th edn, LexisNexis Butterworths, 2014) at 17.10 – 17.16.

<sup>25</sup> *Trans-Tasman Proceedings Act 2010* (Cth) s 97.

<sup>26</sup> See Brereton J at 10.

<sup>27</sup> *Marshall v Fleming* [2013] NSWSC 566 at [20].

<sup>28</sup> Brereton J at 4 where it is suggested that, in the case of the law of England and Wales, “resort to expert evidence is rarely necessary.”

<sup>29</sup> Brereton J at 3 points out that “experts are usually expensive.”

<sup>30</sup> In NSW see eg Practice Note SC Eq 5.

<sup>31</sup> eg conferences in NSW: see Practice Note SC Gen 11.

<sup>32</sup> eg the requirement to set out reasons for the opinions expressed: see eg s 5(1)(c) of the Expert Witness Code of Conduct under the UCPR (NSW).

<sup>33</sup> See the authorities discussed in McCormish at 428.

<sup>34</sup> See the authorities discussed in McCormish at 429.

<sup>35</sup> See the authorities discussed in McCormish at 415.

<sup>36</sup> *Akai* at 425 and 442.