

CHOICE OF JURISDICTION BOILERPLATE CLAUSE

Need to know

A choice of jurisdiction clause enables parties to nominate the jurisdiction in which they wish to determine any contractual disputes. The clause can be drafted “exclusively” or “non-exclusively”. An exclusive jurisdiction clause imposes a contractual obligation on the parties to sue or be sued in the nominated jurisdiction, whereas a non-exclusive jurisdiction clause nominates the “preferred” jurisdiction (ie parties can still commence proceedings elsewhere should they wish to do so).

Careful drafting and unequivocal language are required in either case to avoid uncertainty and ensure that the parties’ intentions are adequately reflected in the contract. Critically, lawyers must consider the location of contracting parties, their assets and where the transaction takes place *prior* to selecting a jurisdiction and whether the parties will submit to it exclusively or non-exclusively.

Depending on the clause and the jurisdiction, an Australian court *may* grant a stay, transfer or anti-suit injunction where proceedings are commenced in a jurisdiction other than that nominated in a jurisdiction clause, whether exclusive or non-exclusive.

NB: A choice of jurisdiction clause is distinct from a choice of law clause, which nominates the governing law of a contract. The two clauses may nominate different legal systems to each other and should be considered together when drafting a contract.

THE SAMPLE CLAUSE

1.1 *Choice of jurisdiction*

Each party irrevocably and unconditionally submits to the [exclusive/non-exclusive] jurisdiction of the courts of [insert relevant jurisdiction] including, for the avoidance of doubt, the Federal Court of Australia sitting in [insert relevant jurisdiction].

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1 What is this clause and why is it used?

A choice of jurisdiction clause enables parties to nominate the jurisdiction (or “forum”) in which they wish to determine any contractual disputes.

A choice of jurisdiction clause is distinct from a choice of law clause, which nominates the governing law of a contract. The governing law of a contract can be different to the jurisdiction in which a dispute under it is litigated. As the governing law may be a factor when seeking to enforce a choice of jurisdiction clause (see 2 below), the two should be considered together.

The primary purpose of a choice of jurisdiction clause is to make a party amenable to a nominated jurisdiction, even if the party has no other connection to that jurisdiction. At common law, this can be established by “submission to the jurisdiction,” which will be satisfied by the parties employing a choice of jurisdiction clause.¹

Secondly, a choice of jurisdiction clause nominating an Australian jurisdiction will usually enable service on a party which is located outside Australia but which has submitted to an Australian jurisdiction via a choice of jurisdiction clause.²

The choice of jurisdiction may be nominated on either an exclusive or non-exclusive basis. An *exclusive* jurisdiction clause confines the parties to litigating only in the forum nominated. In this form the choice of jurisdiction clause is primarily used to mitigate the risk, cost and inconvenience of a party commencing proceedings in an unexpected forum or jurisdiction.

A *non-exclusive* jurisdiction clause acknowledges that the parties submit to a particular forum but does not prevent them litigating elsewhere. In this form the clause provides certainty that a party can be sued in the nominated forum, although they may be sued elsewhere.

2 How effective is it?

An Australian choice of jurisdiction clause will be effective to establish that a party is amenable to proceedings in an Australian jurisdiction and to enable service on that party outside Australia.³

The law in Australia is fragmented⁴ as to whether a choice of jurisdiction clause will be effective to ultimately confine or enable a party to litigate in a nominated Australian or foreign jurisdiction, although the Australian courts will almost always afford such a clause at least some weight.

How much weight, and the test which is employed to determine whether a particular clause should ultimately be given effect, will depend on a number of factors, including whether the clause nominates an Australian or a foreign jurisdiction and whether it is exclusive or non-exclusive. These issues are considered below.

2.1 Non-exclusive foreign jurisdiction clauses in Australia

A *non-exclusive* jurisdiction clause will not ordinarily prevent proceedings being commenced outside the nominated jurisdiction. Accordingly, where proceedings are commenced in Australia under a contract with a non-exclusive foreign⁵ jurisdiction clause and the Australian jurisdiction has been regularly invoked, a defendant can only request that the Australian court not exercise its jurisdiction on a discretionary basis.

In considering such an application, an Australian court will rely on the private international law doctrine of *forum non conveniens*. This provides courts with a discretionary power to decline jurisdiction by staying proceedings where justice and convenience of the parties could be better served if the dispute is resolved elsewhere.⁶

Courts in Australia employ the “*clearly inappropriate forum*” test, which focuses on the suitability of the local jurisdiction to resolve the matter in dispute.⁷ It is often difficult for a defendant to show that an Australian court is a “*clearly inappropriate forum*.” In making this determination an Australian court may consider factors such as:

- the connection of the parties and the contract to the Australian jurisdiction, and the convenience or expense to the parties;
- the governing law; and
- the existence of any legitimate personal and juridical advantage to the plaintiff of litigating in the Australian forum (eg a

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limitation period or the location of the defendant's assets).⁸

In considering this issue, the court will start from the position that a plaintiff who has regularly invoked the jurisdiction of an Australian court has a prima facie right to insist upon its exercise.⁹ Ordinarily, in order to discharge its onus, a defendant must first identify some appropriate foreign tribunal to whose jurisdiction it is amenable and which would entertain the plaintiff's proceedings.¹⁰

A non-exclusive jurisdiction clause in favour of the foreign jurisdiction could assist in satisfying this threshold requirement.¹¹ However, the existence of such a clause is unlikely to be of further assistance in the application of the clearly inappropriate forum test because that test focusses on the suitability of the *local* forum.

2.2 Non-exclusive Australian jurisdiction clauses in Australia

The presence of an *Australian* non-exclusive jurisdiction clause will be a factor in a court declining to stay Australian proceedings on the grounds that the Australian court is a clearly inappropriate forum.¹²

2.3 Exclusive foreign jurisdiction clauses in Australia

An *exclusive* jurisdiction clause contractually restricts parties to the stipulated court or location such that commencing proceedings in another court or location would result in a breach of contract.¹³

While an Australian court has a discretion whether or not to stay a proceeding commenced in breach of an exclusive jurisdiction clause nominating a foreign¹⁴ jurisdiction, the case law clearly and unequivocally reflects the important policy consideration that parties should be held to their contractual bargain by a stay of the Australian proceedings being granted.¹⁵ Accordingly, it has been said that there is a "strong bias in favour"¹⁶ of maintaining the bargain by granting a stay, and that "strong reasons,"¹⁷ "strong cause,"¹⁸ "substantial grounds"¹⁹ or "strong countervailing circumstances"²⁰ would be required to overturn this position.²¹

This means that, where proceedings are commenced contrary to a foreign exclusive jurisdiction clause, it is not necessary for a party seeking a stay to rely on *forum non conveniens* principles; ie it is not necessary to show that the Australian jurisdiction would be a clearly inappropriate forum.²² Instead, the prima facie position is that an Australian court will enforce a foreign exclusive jurisdiction clause and grant a stay.²³

There has been a general trend in the Australian courts over the past 15 years towards upholding foreign exclusive jurisdiction clauses.²⁴ Circumstances in which a court might refuse a stay are limited but may include where there has been an unforeseeable change in court procedure, a radical change in the political situation or the impossibility of a fair trial in the nominated country.²⁵ Additionally a court may decline to grant a stay where to stay proceedings might involve the fragmentation of litigation between jurisdictions.²⁶

2.4 Exclusive Australian jurisdiction clauses in Australia

An Australian court may grant an "anti-suit injunction" restraining a party from continuing foreign proceedings in breach of an *Australian* exclusive jurisdiction clause.²⁷ Presumably the court will apply the same policy considerations as it would to enforcing foreign jurisdiction clauses in Australia.²⁸

2.5 Jurisdiction clauses nominating an Australian state jurisdiction: transfer of proceedings within Australia

The transfer of proceedings between Australian jurisdictions is governed by a legislative cross-vesting scheme.²⁹ Under the scheme a court *must* transfer proceedings to a more appropriate court in another jurisdiction where it is in the interests of justice to do so.³⁰ The existence of the scheme and its remedy of a transfer means that common law principles relating to *forum non conveniens* (and the associated remedy of a stay) do not apply to questions of appropriate state jurisdiction.³¹ One consequence of the scheme is that it is not always easy to assess whether a state jurisdiction clause will be enforced (or not enforced) by transfer.

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A wide variety of factors may be considered relevant in determining a transfer application under the cross-vesting scheme, depending on the particular case. These include the place where the parties reside or carry on business, the location and availability of witnesses, the place where the contract is performed and the law governing the transaction.³²

In making a determination there is no presumption in favour of the court whose jurisdiction has been invoked.³³ It is also not necessary that the first court be a "clearly inappropriate" forum. Instead it is both necessary and sufficient that, in the interests of justice, the second court is more appropriate.³⁴

In this context, the weight to be accorded to a jurisdiction clause is determined according to the particular circumstances of the case. The existence of the clause is relevant and it may be the critical factor in a particular case. But its importance will vary depending on the case.³⁵

This approach, which is now firmly entrenched in the courts,³⁶ can be contrasted with the position taken in earlier decisions under the cross-vesting scheme. In those decisions, an automatic bias³⁷ was given to maintaining the bargain where an *exclusive* jurisdiction clause was present,³⁸ and proceedings were often transferred accordingly.

The approach now taken by the courts means that it is not always possible to advise whether proceedings will be transferred (or not transferred) to give effect to an exclusive jurisdiction clause. It all depends on the circumstances. Further, the courts have held that the relevant circumstances for consideration can include the parties' subjective knowledge or "consciousness" of various matters concerning such a clause, including whether they took legal advice or contemplated the nominated jurisdiction deliberately.³⁹ Jurisdiction clauses have not been given effect to on the basis that an exclusive jurisdiction clause has less weight in a standard form contract than in a negotiated contract.⁴⁰ And any uncertainty may be compounded by the fact that decisions under the scheme cannot be appealed.⁴¹

A similar approach and uncertainty applies to transfers based on *non-exclusive* jurisdiction

clauses.⁴² The courts have doubted whether the distinction between exclusive and non-exclusive clauses actually matters for the purpose of deciding cross-vesting applications⁴³ and, while cases can be found showing consent to the non-exclusive jurisdiction of a court being regarded as a "critical and decisive" factor in refusing a transfer,⁴⁴ it depends, in each case, on the circumstances.

2.6 Foreign jurisdiction clauses where New Zealand is a more appropriate forum

Since the commencement of the *Trans-Tasman Proceedings Act 2010* (Cth), an Australian court can only stay a civil proceeding on forum grounds connected with New Zealand under that Act.⁴⁵ The Act provides that an Australian court:

- *must* stay proceedings where an exclusive jurisdiction clause designates a New Zealand court;⁴⁶
- *must not* stay proceedings where an exclusive jurisdiction clause designates an Australian court;⁴⁷ and
- *may* otherwise stay proceedings if satisfied that New Zealand is a more appropriate venue.⁴⁸ In making that determination the court must take into account certain factors, including any non-exclusive jurisdiction clause and the most appropriate law to apply to the case.⁴⁹ If so satisfied, a transfer seems almost inevitable.⁵⁰

2.7 Other issues of effectiveness

Particularly in financing transactions, "asymmetric" or "one-sided" jurisdiction clauses may be seen which grant more favourable choice of jurisdiction options to one party. It is likely that these will be enforceable under Australian law,⁵¹ but this is not the case in some foreign jurisdictions.⁵²

Finally, there are some instances where a Australian statute will invalidate or override a jurisdiction clause. These are relatively rare.⁵³

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3 Drafting and reviewing the clause

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

You should always include a jurisdiction clause in a contract. Failure to do so, particularly where there is potentially some foreign element to the transaction, may result in needing to bring or defend litigation in an undesirable forum, and to costly or lengthy disputes.⁵⁴

3.2 About the sample clause

The sample clause is drafted so that it can be formulated as an “exclusive” or “non-exclusive” jurisdiction clause.⁵⁵ It is intended to apply to all disputes arising out of the contractual relationship, not just contractual claims.⁵⁶

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

A choice of jurisdiction clause will always need to nominate a jurisdiction and select between the exclusive and non-exclusive form of the clause. Matters that should be considered in nominating a jurisdiction include:

- the procedures and attributes of the courts in the proposed jurisdiction, including speed, integrity and commerciality (eg in granting interim relief);
- the resources and location of the parties, their assets and the transaction contemplated by the contract to ensure that the contract can be effectively enforced in the proposed jurisdiction; and
- the governing law of the contract. To avoid complexity, and to assist in some instances with enforceability, the governing law and jurisdiction clause should ideally nominate the same jurisdiction. Further, it will always be necessary to ensure that the jurisdiction clause is enforceable under the governing law of the contract.

A similar balancing exercise must be undertaken in determining whether the clause should be exclusive or non-exclusive. An exclusive

jurisdiction clause will provide some certainty, but at the expense of flexibility. It may be that your client cannot determine at the time of signing the contract where the optimal jurisdiction may be.

A non-exclusive clause will provide the necessary flexibility in these circumstances. However it may be used by another party to commence proceedings in a jurisdiction which will not suit your client. This may particularly be the case where the contract is with a foreign party, or with foreign ties. In those circumstances there may be an undesirable risk that litigation may be commenced against your client outside Australia if a non-exclusive clause is used.

3.4 Other practical considerations

Consider the inclusion of alternative dispute resolution clauses (such as an arbitration clause), which may provide an avenue for contractual dispute resolution with fewer jurisdictional complexities.

Also, where a transaction consists of multiple agreements, ensure that the jurisdiction clauses across those agreements are consistent.

ENDNOTES

¹ *Emmanuel v Simon* [1908] 1 KB 302 at 309 and *Vogel v Kohnstamm Ltd* [1973] QB 133 at 140-1, both cited in *Flaherty v Girgis* [1987] HCA 17; (1987) 162 CLR 574 by Brennan J. See *Nygh's Conflict of Laws in Australia* (M Davis, AS Bell, PLG Brereton, 9th edn, LexisNexis Butterworths, 2014) (Nygh) at 3.111.

² Court rules enable this in all jurisdictions except for Western Australia: see *FCR 2011* (Cth) r 10.42 (19); *UCPR (NSW)* Sch 6 (h) (see eg *Bulldogs Rugby League Club Ltd v Williams* [2008] NSWSC 822 at [31]-[32]); *SC(GCP)R* (Vic) r 7.01(1)(h). See *Nygh* at 3.111 for other jurisdictions.

³ But see the limitation in relation to service in Western Australia in note 2 above.

⁴ For a critique, see Allsop J, *Incoherence in Australian private international laws* [2013] FedJSchol 8.

⁵ Different considerations apply where the foreign jurisdiction is New Zealand; see below.

⁶ An alternate remedy, at least in some courts, is to have service of the originating process set aside on jurisdictional grounds: see eg *UCPR (NSW)* r 11(2)(b) and the discussion in Allsop J, *Incoherence in Australian private international laws* [2013] FedJSchol 8.

⁷ *Voth v Manildra Flour Mills* (1990) 171 CLR 538 (Voth); the test was re-stated in *Puttick v Tenon Ltd* (2008) 238 CLR 265.

⁸ In *Voth*, Mason CJ, Deane, Dawson and Gaudron JJ (Brennan J agreeing on the principles) stated that the

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principles are those stated by Deane J in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 241 at 247-8 (**Oceanic Sun**) and that, in the application of those principles, the discussion by Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460 (at pp 477-8, 482-4) of relevant "connecting factors" and "a legitimate personal or juridical advantage" provides valuable assistance. See also: *Henry v Henry* (1996) 185 CLR 571; *Agar v Hyde* (2000) 201 CLR 552; *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 (**Akai**). See *Nygh* at [8.19] for a summary.

⁹ *Voth* at 559.

¹⁰ *Oceanic Sun* at 28.

¹¹ See section 1 above.

¹² See eg *HIH v Meadows Indemnity Co Ltd* (1988) 14 NSWLR 507 and *Eurogold Ltd v Oxus Holdings (Malta) Ltd* [2007] FCA 811.

¹³ *Austrian Lloyd Steamship Co v Gresham Life Assurance Society* [1903] 1 KB 249.

¹⁴ Different considerations apply where the foreign jurisdiction is New Zealand; see below.

¹⁵ See *Global Partners Fund Limited v Babcock & Brown Limited (in liq)* [2010] NSWCA 196 (**Global Partners**) at [84].

¹⁶ *Huddart Parker Limited v The Ship "Mill Hill"* (1950) 81 CLR 502.

¹⁷ *Oceanic Sun* at 259 per Gaudron J; *Akai* at 429 and 445.

¹⁸ *The Eleftheria* [1970] P 94 at 99.

¹⁹ *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* (1997) 41 NSWLR 559 (**FAI**) at 569; *Incitec Ltd v Alkimos Shipping Corporation* [2004] FCA 698 at [42].

²⁰ *Incitec Ltd v Alkimos Shipping Corporation* [2004] FCA 698 at [43].

²¹ The authorities in support of these phrases are set out in *Global Partners* at [89].

²² *Global Partners* at [91] citing *Oceanic Sun* at 230, *Akai* at 428 and *FAI* at 569.

²³ *Global Partners* at [88] whereas, where forum non conveniens applies, the prima facie position is that the plaintiff has a right to insist on the exercise of the court's regularly invoked jurisdiction: *Voth* at 559.

²⁴ R Garnett, *Jurisdiction Clauses Since Akai* (2013) 87(2) ALJ 134.

²⁵ *Nygh* at 7.82-7.93.

²⁶ *Nygh* at 7.89-7.93 citing the example of where third parties might also be involved in the litigation and might not be amenable to suit in the nominated jurisdiction.

²⁷ See eg *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724.

²⁸ R Garnett, *Jurisdiction Clauses Since Akai* (2013) 87(2) ALJ 134.

²⁹ The Commonwealth and each State and Territory have their own cross-vesting legislation: *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT), *Jurisdiction of Courts (Cross-vesting) Act 1987* (NT), *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW), *Jurisdiction of Courts (Cross-vesting) Act 1987* (Qld), *Jurisdiction of Courts (Cross-vesting) Act 1987* (SA), *Jurisdiction of Courts (Cross-vesting) Act 1987* (Tas), *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic), *Jurisdiction of Courts (Cross-vesting) Act 1987* (WA) (**Cross-Vesting Acts**).

³⁰ s5 of the *Cross-Vesting Acts* explained in *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 (**Schultz**).

³¹ See *River Gum Homes Pty Ltd v Meridian Pty Ltd* [2010] QCA 293 from [6], and the authorities there cited.

³² See generally *Schultz*. See also *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 and *James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357, seemingly approved by the

plurality in *Schultz* at 424. *Ritchie's Uniform Civil Procedure NSW* at [44.5.20]-[44.5.25] lists other factors and authorities.

³³ *Schultz* at 421, 437, 465, 468 and 492.

³⁴ *Schultz* at 421, 430 and 462.

³⁵ *World Firefighters Games Brisbane v World Firefighters Games WA Inc* [2001] QSC 164; Since *Schultz*, the courts have consistently adopted this position as consistent with the balancing exercise mandated by that case: see eg *Sedman & Associates v Morgan Stanley* [2013] VSC 549 (**Sedman**); *River Gum Homes Pty Ltd v Meridian Pty Ltd* [2010] QCA 293; *Re Huntingdale Village* [2009] FCA 1323; *Slater & Gordon v Porteous* [2005] VSC 298.

³⁶ See note above.

³⁷ This has been expressed in various ways. In *West's Process Engineering Pty Ltd v Westralian Sands Ltd* (NSWSC, unreported, 6 August 1997, BC9703418) Rolfe J gave "substantial weight" to an exclusive jurisdiction clause for this reason. In *Jovista Pty Ltd & Ors v Bateman Project Engineering Pty Ltd* [1998] WASC 148 it was suggested that "strong grounds" or a "good reason to the contrary" would be required to prevent a transfer to the nominated jurisdiction. In *Wholesome Bake Pty Ltd v Sweetoz Pty Ltd* [2001] NSWSC 248, Bryson J went further still, saying that "the interests of justice require that if parties make an agreement, they should keep to it, in the absence of extreme considerations such as fraud or duress." Subsequent authorities have held that the interests of justice do not necessarily align with the interests of the parties: see *Sedman* at [34].

³⁸ broadly equivalent to the approach the courts take to *foreign* exclusive jurisdiction clauses; see above.

³⁹ See *Sedman* at [41].

⁴⁰ See *Zmudzinski v Cheapa Campa Pty Ltd* [2011] NSWSC 996 for an exclusive jurisdiction clause; some of the cases cited there at [15] are non-exclusive clause cases.

⁴¹ s 13(a) *Cross-Vesting Acts*. An appeal to the High Court is possible with special leave: see *Schultz* at [55] (Gummow J).

⁴² See eg *World Firefighters Games Brisbane v World Firefighters Games WA Inc* [2001] QSC 164 at [27].

⁴³ *Asciano Services Pty Ltd v Australian Rail Track Corp Ltd* [2008] NSWSC 652; *Patrick Badges Pty Ltd v Commonwealth of Australia* [2002] NSWSC 221.

⁴⁴ This was the case in *Taurus Funds Management Pty Ltd v Aurox Resources Ltd* [2010] NSWSC 1223.

⁴⁵ s 21 *Trans-Tasman Proceedings Act 2010* (Cth).

⁴⁶ s 20(1)(a) *Trans-Tasman Proceedings Act 2010* (Cth).

⁴⁷ s 20(1)(b) *Trans-Tasman Proceedings Act 2010* (Cth).

⁴⁸ s 19 (1) *Trans-Tasman Proceedings Act 2010* (Cth).

⁴⁹ s 19 (2)(d) and (e) *Trans-Tasman Proceedings Act 2010* (Cth). In *Re: Featherston Resources Limited* [2014] NSWSC 1139 at [53] Brereton J at said the test "mirrors" that under the *Cross-Vesting Acts*; cf *Nygh* at 8.24.

⁵⁰ In *Re: Featherston Resources Limited* [2014] NSWSC 1139 at [51] Brereton J stated that "notwithstanding that the power is discretionary, it would be an exceptional case, if there is one at all, in which being satisfied that the New Zealand court had jurisdiction and was the more appropriate one, the Court would not stay the Australian proceedings."

⁵¹ As is the case in England: see *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] EWHC 1328 at [42]-[43]; see also *Reinsurance Australia Corporation Limited v HIH* [2003] FCA 56 at [343]-[346].

⁵² Including Russia and France: see McNair Chambers, *Drafting and Interpreting Governing Law and Jurisdiction Clauses – a Practical Guide*, 25 February 2015 at www.mcnaichambers.com.

⁵³ Most notably, ss 8 and 52 *Insurance Contracts Act 1984* (Cth), considered in *Akai* (and the equivalent provision in s 67 *Australian Consumer Law*) and s 11(2)(c) *Carriage of*

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Goods by Sea Act 1991 (Cth). See the discussion in *Nygh* at 7.40-7.50.

⁵⁴ See eg the comments of Mann J in *Apple Corps Ltd v Apple Computer Inc* [2004] EWHC 768 at [5].

⁵⁵ See *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724 at [32]-[33] as to the use of this language.

⁵⁶ See *Global Partners* at [56]-[70].