



GOVERNING LAW AND JURISDICTION CLAUSES

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In our last edition of CK Construct, we published an article on “Contract Negotiation Pitfalls”, which focussed on the important considerations for parties when they first negotiate the terms in their contracts. This article focuses on governing law and jurisdiction clauses that will routinely be included in your contracts and some important issues about their effect if a dispute arises.

GOVERNING LAW

Governing law clauses are important in any contract, but particularly in contracts where the parties are based in different States within Australia or different countries. A clear choice of governing law brings certainty to the terms of the Contract.

Here are our top 5 tips when considering the effectiveness of your governing law clause:

1. CONSISTENCY

Ensure there is consistency between both the governing law and jurisdiction clauses in your contract. If the two are inconsistent, then a Judge may decide the terms are uncertain and deem both clauses to be invalid. The parties will then not have any clauses that outline the appropriate jurisdiction governing the contract and the common law will apply

2. TECHNICALITY

There may be a technical reason as to the choice of law you select. For example, one Forum’s court interpretation of clauses is more liberal than others and you will get a better result in any interpretation of

contract dispute. Review the Contract and consider whether there are any specific technical aspects. Then, ensure that the law you select, actually recognises the law surrounding that technical aspect. An example is where English law recognises the concept of Trusts, as in family Trusts, unit trusts and discretionary trusts, but many European countries do not recognise this concept.

3. CERTAINTY

Ensure the clause is clear. This may seem straightforward but clauses are given their ordinary meaning in Contracts, so parties should ensure the wording is not overly technical or ambiguous. “The law of New South Wales governs this contract” should be sufficient.

4. SCOPE

You should consider whether the clause cover both pre-contractual and post-contractual dealings. For example, if the clause covers pre-contractual dealings, then this may include the parties “duty to act in good faith” or whether any claims might arise from the negotiation of the contract. If you are induced to enter into a contract based on statements or facts which you later discover are untrue, then you should consider whether you want there to be a contractual remedy available to you.

It would also be prudent for the parties to consider whether the governing law selected will extend to alternative methods of dispute resolution including arbitration, negotiation and/or mediation. It is particularly important to consider whether you want to engage in

alternative dispute resolution or if you want the right to commence proceedings. You can agree on a hybrid, so the parties may agree the law of Queensland governs the contract but the *Commercial Arbitration Act 2010* (NSW) governs the arbitration.

5. STATE OR COUNTRY

Ensure the legal system in which you elect to enforce the terms of the contract will give effect to the governing law clause. If it is an international contract, then the law of a country is required to be clearly identified in the Contract.

JURISDICTION

Jurisdiction clauses are included in contracts to determine the place in which proceedings must, or should, be commenced. A clause outlining jurisdiction of the contract is primarily included for convenience.

Jurisdiction clause can either give exclusive jurisdiction to the Courts in a particular place, or non-exclusive jurisdiction, meaning the parties can still choose to litigate a dispute in another jurisdiction.

The parties should consider where the parties (businesses or individuals) are located, where the transaction is being done, the potential costs of the action and where all the primary witnesses would be if a dispute arose. If all the witnesses are in New South Wales (for example), then it makes sense to have the proceedings there.

You should also consider the location of any assets of the parties to the contract. If you commence an action in

Court and subsequently obtain judgment, then there should be accessible assets in the jurisdiction to satisfy the judgment.

SUMMARY

As with any clause of a contract, the choice of jurisdiction will be highly dependent upon the specific circumstances of the parties, the transaction and the contractual rights and obligations agreed to.

Parties should consider the following before agreeing to a governing law and jurisdiction clause:

1. The location of the parties, witnesses and transaction;
2. The cost of commencing proceedings in any given location; and
3. The location of the assets of the parties for the purposes of enforcing any judgment obtained.

Please do not hesitate to contact us if you have further queries about governing law and jurisdiction clauses in your contracts.

FOR MORE INFORMATION, PLEASE CONTACT:



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