

TOPIC 6: CHOICE OF LAW IN CONTRACT

A) CONCEPT OF THE PROPER LAW AND ITS IDENTIFICATION

Proper/ governing law of the contract – governs most matters such as breach of contract etc.

Although proper law of contract most SIGNIFICANT legal system relevant to contract, other legal systems need to be taken into account.

- e.g. *Oceanic Sunline v Faye* – whether a term is an express term of a contract, in the course of formation of a contract, is determined by the *lex fori*.
- Capacity
- Illegality
- Formation

PROCESS OF IDENTIFYING THE PROPER LAW OF THE CONTRACT

Every K has a proper law which *must be identifiable at the point of formation of the K* – cannot refer to events after.

- 1) Express choice? If NO:
- 2) Inferred choice? If NO:
- 3) Objective proper law of K.

Gummow refers to only 2 stages – merges first 2 into “a choice by the parties” (either express or inferred).

Historically, choice of law in K governed by *lex loci contractus* – place where the K was made.

IN contract, can **foreclose the possibility of the renvoi doctrine applying** in the contract of choice of law of contract, by saying “excluding the laws of PIL” in choice of law clause.

i) Express choice of law and limitations on party autonomy

Starting point: **Party autonomy** – Parties can select whatever legal system they think is appropriate as proper law of K – no requirement of any connections (*Vita Food Products*)

So long as choice

- 1) is a Bona fide choice (*Golden Acres v QLD estates*)
- 2) is *Legal* – likely that means so long as does not conflict with statute of forum aht doesn't allow
- 3) is not contrary to forum public policy

* *Vita Food Products v. Unus Shipping Co [1939] AC 277 (Supplementary Materials)*

- Carriage of goods on ship registered in Nova Scotia (ship registered there)
- Ship ran aground on coast of Nova Scotia – cargo damaged
- Cargo owner brought proceedings in NS against shipowner
- K of carriage included exclusion clause for negligence on part of shipowner

HELD: Even though parties had no connection with England, and K no connection, express choice of English law upheld.

Non-bona fide choice

Golden Acres v. Queensland Estates [1969] Qd R 378; affd on other grounds (1970) 44 ALJR 329

- K of agency – principle: Qld party, appointed agent in HK to negotiate sale of land in QLD

- HK agent did so – took proceedings in QLD to recover unpaid agent’s commission
- HK agent not registered as real estate agent in QLD
 - In all states – can’t get commission if not registered
- Choice of law here was HK law

HELD: Choice of law made for *non-bona fide purpose*, only to EVADE the application of QLD real estate law, therefore choice of law REJECTED.

- Must *construe the statute*: ASK: what was the intended scope of the statute?
- Here – intended to apply to all sales of land in QLD, regardless of choice of law in agency agreement

Overriding forum statutes

Carriage of Goods by Sea Act 1991 (Com) s 11(1), (2)

- Applies to carriage of goods by sea from any place in Aus to any place outside Aus
- Choice of law for these contracts = *law of the Aus Port*
- Any choice of law in K to the contrary is VOID

Contracts Review Act 1980 (NSW) s17(3)

- Confers power on the NSWSC to set aside a J where there was unconscionable dealing
- The operation of this act hinges on the CL rules of PIL.
- In particular, s17(3) provides that the Act applies and *only* applies to a K, the proper law of which is NSW or which would be the law of NSW but for the selection by the parties of another legal system as the proper law.
- Meaning that the parties, in the context of this Act, *cannot* select another law to be the proper law of the K where objectively, the proper law of the K should be the law of NSW

Insurance Contracts Act 1984 (Com) s 8(1), (2)

- Applies to any Insurance K – the objective proper law of which is any Aus state of territory (closest and most real connection)
- If this is the case, the express or inferred choice of law of *another place* is VOID
 - Making sure the statute applies to all insurance Ks.

**Akai v. The People's Insurance Co (1996) 188 CLR 418 (Toohey, Gaudron and Gummow J)*

Express choice of Eng law was overridden by provisions of Insurance Contracts Act 1984.

- Insurance K b/w D in Singapore and Akai in NSW;
- Insured A in respect of certain credit risks in its operations in NSW;
- Objectively the proper law of that K was the law of NSW however the parties had expressly agreed that English law was the law of the K

HELD: Express selection of English law set aside b/c objectively NSW law was the proper law of the K; English law as the proper law of the K was negated by s 8 of the *Insurance Contracts Act* (above)

NB: this case is also an example of an exclusive foreign jurisdiction clause not being applied as **contrary to forum public policy**. The particular provision in the Insurance K provided for

- (1) The express choice of English law; and
- (2) the express choice of English jurisdiction.

The HCA said that the express jurisdiction agreement was contrary to Aus public policy because it would mean that the Insurance Contracts Act would, in effect, not be able to apply.

ii) Inferred choice of law

- A matter of construing the K as a whole for the purpose of seeking to identify in the terms of the K a clear agmt by the parties on a particular legal system as the proper law of the K
- Best way of doing this is if the K includes an exclusive foreign jurisdiction clause

Exclusive jurisdiction clause

Lewis Construction Co v. M Tichauer [1966] VR 341

Principle: An exclusive foreign jurisdiction clause may indicate an inferred choice of law

- Recall facts (French crane case);
- K b/w the D (France) and P (Vic) included an exclusive jurisdiction clause but did not include an express choice of proper law (bad practice).
- Said that in the event of dispute, the Commercial Court of Lyon had exclusive jurisdiction.

HELD: This was determinative of French law being the inferred choice of law for proper law of the K

Contract points “ineluctably” to an agreed choice of law

Where to understand a contract, reference can only be had to one particular system of law, “from which there is no escape”

Amin Rasheed Shipping Corp v. Kuwait Insurance Co [1984] AC 50 (Lord Diplock)

- D was an insurer based in Kuwait;
- P was a shipping company w headquarters in Dubai;
- K of marine insurance to insure the P in respect of marine risks; entered in Kuwait;
- Provided that claims payable by insurer (the D) were payable in Kuwait in local currency.
 - So far all rounds point to Kuwait.
 - However, the marine insurance policy was in a standard form and v short doc which was the statutory form of marine policy set out as a Schedule to the *Marine Insurance Act 1906* (UK).
- Constructive total loss of the ship; insurer denied claim by P;
- P commenced proceedings in England seeking indemnity under the policy.

HELD: We are drawn ineluctably (=‘from which there is no escape’) to the conclusion that English law is the proper law of the K.

- To understand this marine policy, reference can only be had to English law.
- It must be that the parties had in mind English law as the proper law of the K.

iii) Objective proper law

“the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection”

- The Court will objectively determine the proper law of the K by reference to all relevant facts and circumstances when the K was made

You really want an express choice, and failing that, an inferred choice. Plan C is not a place you want to be.

It is NOT permissible to reference facts or events which have occurred AFTER the K was made

- (e.g. it may be highly material that the K provided that the place of performance was a particular country; but it will be quite immaterial that the place of breach is the place of a particular country)

Test from *Bonython*: