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## Choice of Law in Contract

Following *Macmillan v Bishopgate* (Staughton LJ), the first step to find the *lex causae* is to characterise the issue before the Court. Here, the issue is [e.g. “whether XYZ amounts to breach of contract”].

Secondly, the court will select the choice of law rule which lays down a connecting factor for the issue. Thirdly, the court will identify the applicable law which is tied by the connecting factor in stage 2 to the issue characterised in stage 1.

### Choice of law rule for interpretation, performance, variation, and discharge issues

The *lex causae* which governs a dispute in contract is the proper law of the contract. Any interpretation of the contract must fall under its proper law.

For all issues of performance, variation, and discharge, apply the proper law of the contract: *Merwin Pastoral Co v Moolpa Pastoral Co*

- However, where performance concerns an interest in land, the *lex situs* (law of the place where the land is situated) governs proprietary consequences: *Merwin Pastoral Co v Moolpa Pastoral Co*
  - o [Contract expressly selected Victorian law, but related to the sale of property in NSW. Proprietary consequences were governed by NSW law].

### General approach to determine the proper law of the contract:

#### 1. Is there an express choice of law?

- o The proper law of the contract is “the law which the parties intended to apply.” Pursuant to the principle of party autonomy, the first step is to look for an express choice of law in the contract itself: *Merwin Pastoral Co (HCA)*; *Vita Food Products v Unus Shipping Co (Privy Council)*
- o NB: distinguish between:
  - i. Choice of law clause (declaratory; cannot be breached) – e.g. “NSW law governs this contract”
  - ii. Choice of jurisdiction clause (promissory; can be breached) – e.g. “Parties can only sue in France”
- o There is arguably a requirement that the selection is **bona fide** (genuine / good faith): **Lord Wright in *Vita Food Products; Golden Acres v Queensland Estates***
  - i. E.g. the dominant purpose of the choice of law was to circumvent a certain law.
    - o For the argument that a party was not acting bona fide, you would need to point to a specific provision which would have applied but for the parties’ attempt to evade it: *Golden Acres*
  - ii. However, in *Golden Acres v Queensland Estates*, the ‘good faith’ argument was ultimately unnecessary due to overriding legislation.
  - iii. Argument was also unsuccessful in *BHP Petroleum Pty Ltd v Oil Basins Ltd*: not bad faith merely because there was no connection to the chosen jurisdiction [**obiter**: if there is absolutely *no connection whatsoever*, the court might question why – are the parties trying to circumvent a law?]

#### 2. If not, is there an inferred choice of law?

- o NB: This step is about construction. If you are not given contract terms in the exam, move on.
- o The question is whether the “court may properly infer that the parties intended their contract to be governed by reference to a particular system of law”: *Akai v People’s Insurance Company*
- o The inference must be clear and compelling, such that the contract points “ineluctably” to a particular system of law: *Amin Rasheed Corporation v Kuwait Insurance Co*
- o The only considerations are the objective features of the contract itself: *Amin Rasheed Corporation v Kuwait Insurance Co*
- o Relevant factors:
  - i. **Exclusive jurisdiction clauses** are a very strong indicator: *Akai v People’s Insurance Company* [but here, the *Insurance Contracts Act* overrode the choice as a mandatory forum