

# ***Choice of Law and Forum in International Commercial Contracts: Trends in Common Law Jurisdictions (A Non-European Perspective)***

By:

*Megan Richardson and Richard Garnett  
Melbourne Law School, the University of Melbourne*

In common law jurisdictions, it is often said, international contracting parties are generally free to decide the law and forum for resolving their disputes. For instance, in 1989 Cooke P of the New Zealand Court of Appeal observed that:<sup>1</sup>

It is well known that for a decade and more there has been a strong trend in common law countries towards giving greater rein to party autonomy, partly in emulation of other systems of law and especially in international commercial arbitrations.

In 1999 Peter Nygh wrote of the ‘triumph of autonomy’ as giving parties broad powers to select both the law and forum to resolve disputes.<sup>2</sup> In 2000 Friedrich Juenger also noted that the ‘policy of freedom of contract’ has been extended to freedom over matters of law as well.<sup>3</sup> However, it should be acknowledged that the principle of autonomy is a limited one, albeit less in the case of arbitration.<sup>4</sup>

In general, courts in common law jurisdictions (leaving aside the position of the UK under the Rome and Lugano Conventions and Brussels I Regulation):

- (1) accept that parties are free to select the law governing matters of substance which they are generally free contract about anyway, as well as matters of validity to the extent not qualified by (2) and (4) below;
- (2) refuse to cede ultimate control over matters they consider within their own domain as the forum for dispute resolution, including ‘procedure’ (broadly construed, although in many jurisdictions now statutes of limitations are not included), remedies (to some extent) and choice of law rules;
- (3) accept that parties may select the forum for resolution of their disputes but maintain their discretion to exercise jurisdiction in cases before them if they consider themselves the more convenient forum (or, in the case of Australia, a not clearly inappropriate forum) – and although it is said that strong reasons are

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<sup>1</sup> *CBI NZ Ltd v Badger Chyoda* [1989] 2 NZLR 669 at 675.

<sup>2</sup> *Autonomy in International Contracts* (Oxford, Clarendon Press, 1999) ch 1.

<sup>3</sup> ‘The Problem with Private International Law’, Jürgen Basedow, Isaak Meier, Anton Schnyder, Talia Einhorn and Daniel Girsberger (eds), *Private Law in the International Arena: From National Conflict Rules Towards Harmonization and Unification: Liber Amicorum Kurt Siehr* (TMC Asser Instituut 2000) 289 at 306.

<sup>4</sup> See generally Michael Whincop, *Policy and Pragmatism in the Conflict of Laws* (Aldershot, Ashgate/Dartmouth, 2001), Richard Garnett, ‘Book Review - Policy and Pragmatism in the Conflict of Laws by Michael J Whincop and Mary Keyes’ (2002) 26 *Melb U L Rev* 236; and Megan Richardson, ‘Policy versus Pragmatism? Some Economics of Conflict of Laws’ (2002) 31 *Com L W’ld Rev* 189.

required to do so in the face of an exclusive foreign court clause, in practice the approach may be ‘rather different’.<sup>5</sup>

- (4) maintain that, in any event, neither they nor parties can derogate from the mandatory laws and general public policies of the forum,<sup>6</sup> and in the absence of express pronouncements by legislatures take upon themselves to determine which laws fit within these categories.

The language in cases may vary. For instance, in the United States, under the influence of legal realism and its associated emphasis on policy, courts may talk of ‘government interests’ in resolving the disputes. However, since they generally place great weight on freedom of contract, they are bound to give this some accord (and not surprisingly, when it comes to actual cases, the government interests they are most concerned with are those of the forum).<sup>7</sup> In Commonwealth countries, the starting point is ostensibly the principle of freedom of contract but a similar result can be achieved through the language of (the forum’s) mandatory law and public policy as limiting factors – and the scope and malleability of the latter should not be underestimated.<sup>8</sup> Thus the principle of party autonomy is a principle that is significantly qualified by considerations of judicial control. In short, courts allow parties to international contracts to exercise only partial and incomplete autonomy when it comes to resolving their disputes.

The partial exception is arbitration where the prevailing philosophy, since at least the mid 1990s, and under the influence of the New York Convention and UNCITRAL Model Law,<sup>9</sup> has been more one of giving effect to the parties’ agreement and reducing the control of national law and courts. Thus in this context at least parties may be allowed to choose their own procedural law, may be permitted at least some control over the range of remedies to be awarded and enforced if need be by courts, have limited recourse to national courts, and are generally unconstrained by the substantive law of the particular place in which the arbitration may happen be held (except in cases where mandatory law may actually invalidate the arbitration clause itself).<sup>10</sup> Moreover, parties’ autonomy on substantive law may include the freedom to choose rules of law that have no correspondence in national law but rather accord with principles of law that have

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<sup>5</sup> As noted by Adrian Briggs, ‘Jurisdiction Clauses and Judicial Attitudes’ (1993) 109 *LQR* 382, 383. See also Richard Garnett, ‘The Enforcement of Jurisdiction Clauses in Australia’ (1998) 21 *UNSWLJ* 1 and generally Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP, 2003) ch 5.

<sup>6</sup> Including via jurisdiction clauses: *Akai Pty Ltd v People’s Insurance Company Ltd* (1996) 188 CLR 418.

<sup>7</sup> See, for instance, Symeon Symeonides, ‘Choice of Law in the American Courts in 2000: As the Century Turns’ (2001) 49 *Am J Comp L* 1 at 37-38 (few cases of choice-of-law clause not enforced in 2000, the two most notable where chosen law was repugnant to the public policy of otherwise applicable law of forum).

<sup>8</sup> Cf Garnett above n 4 at 238 (interest groups seek protective legislation and governments provide such protection, supported by courts who see their role as implementing legislative purpose).

<sup>9</sup> The first (adopted by the UN in 1958) setting standards for recognition and enforcement of arbitral awards in 142 member states, the second (adopted in 1985) a basis of legislation in *inter alia* Australia, New Zealand, Canada and some US states and influential on standards in other states, including the Arbitration Act 1996 (UK). It has also been incorporated to some extent in the rules of the American Arbitration Association and London Court of International Arbitration (as well as the ICC Court of Arbitration in Paris).

<sup>10</sup> See especially Model Law Art 5 (extent of court intervention), Art 8 (arbitration agreement and substantive claim before court), Art 19 (rules of procedure), 28 (rules applicable to substance of dispute), 34 (setting aside) and 36 (recognition and enforcement); and also Convention Arts II, III and V.

been developed specifically for international commercial contracts, as for instance the UNIDROIT principles of international commercial contracts<sup>11</sup> – something that is less clearly the case for court-based dispute resolution.<sup>12</sup> The exceptional treatment of arbitration derives both from its history as a method of dispute resolution that predated and operated independently of nation states, and its widely acknowledged benefits in permitting a flexible and neutral system of dispute resolution to flourish for international commercial contracts.<sup>13</sup> That said, neither nation states nor their courts have been nearly so willing – at least in the experience to date - to accord similar freedom when it comes to deferring to the courts of other nation states and the laws which those courts might apply, seeing this as more clearly a matter of derogating from national sovereignty.

Do recent cases show the balance between party autonomy and judicial control shifting in favour of autonomy in the non-arbitral context? Certain decisions of New Zealand, Australian and Canadian courts might seem to suggest so:

- 1 *Rimini Ltd v Manning Management and Marketing Pty Ltd*<sup>14</sup> – in an action for breach of a commercial cleaning franchise contract made between parties based in New Zealand and Sydney, to be performed in East Sydney and specifying New Zealand law but silent on jurisdiction, Randerson J in the New Zealand High Court declined to exercise jurisdiction on the basis that the natural forum was New South Wales. As to whether the provisions of the Contractual Remedies Act 1979 (NZ) could be applied by a New South Wales Court, Randerson J said:<sup>15</sup>

I do not consider in this day and age that Courts in New Zealand or Australia should shy away from applying the laws of the other country, including statute law. There are very substantial commercial dealings between the two countries and, as far as possible, Courts should seek to give effect to the laws of the other country unless it would be contrary to the law and policy of the *lex fori* to do so.

In the process, an argument that remedies would be viewed by a New South Wales Court as forum law was rejected on the basis that they could equally construed as part of substantive law of the contract. Moreover, Randerson J rejected an argument that the Contractual Remedies Act must be applied, pointing out that the Act does not purport to be a code and allows parties to determine remedies, as had been done in this case.

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<sup>11</sup> See Model Law Art 28(1) and further Art 28(3) (choice of *ex aequo et bono* or *amiable compositeur*) and, for a detailed discussion of the options afforded, Gonzalo Parra-Aranguren, 'Choice of Law Applicable to the Dispute in Recent Legislation on International Commercial Arbitration' in Basedow *et al* above n 3 557.

<sup>12</sup> As noted by Juenger above n 3 at 306 (suggesting this is a reason why arbitration may be preferred).

<sup>13</sup> See Richard Garnett, 'International Arbitration Law: Progress Towards Harmonisation' (2002) 3 *Melb J Int L* 400 and, as to a distinctive 'legal culture' of international commercial arbitration, Leon Trakman, "'Legal Traditions' and International Commercial Arbitration' (2006) 17 *Am Rev Int'l Arb* 1.

<sup>14</sup> [2003] 3 NZLR 22.

<sup>15</sup> *Ibid* [47].

- 2 *Neilson v Overseas Projects Corporation of Victoria Ltd*<sup>16</sup> – in an action in tort by an Australian national against an Australian company for an injury sustained in Wuhan, China in accommodation provided for plaintiff's husband (who was employed as a consultant by defendant on a two year project), a majority of the Australian High Court held that Australian law governed the parties' relations. The basis was that although Australian choice of law rules referred the matter to Chinese law as *lex loci delicti*, this law included Chinese choice of law rules which allowed the matter to be determined under Australian law. (Thus a Chinese limitation period which would have precluded the claim did not apply.) As Gleeson CJ said, consistent with the premise that different outcomes should not follow from the selection of forum, 'the objective ought to be to have an Australian court decide the present case in the same way as it would be decided in China'.<sup>17</sup> However, it was left open whether parties should be held to the same result in a contract case. Gummow and Hayne JJ suggested rather that the issue could be determined by the contracting parties:<sup>18</sup>

Choosing a single overarching theory of renvoi as informing every question about choice of law would wrongly assume that identical considerations apply in every kind of case in which a choice of law must be made. But questions of personal status like marriage or divorce, questions of succession to immovable property, questions of delictual responsibility and questions of contractual obligation differ in important respects. Party autonomy must be given more emphasis in questions of contract than in questions of title to land. Choice of governing law may be important in creating private obligations by contract but less important when the question is one of legal status.

(In fact it is common practice for contracting parties in Australia, as elsewhere, to exclude renvoi in their choice of law provisions.)<sup>19</sup>

- 3 *Impulsora Turistica de Occidente SA de CV v Transat Tours Canada Inc*<sup>20</sup> – in an action seeking an injunction in aid of enforcement of a contract between Quebec and Mexican parties for the lease of rooms in a Puerto Vallarta hotel, which specified Quebec as the jurisdiction and Quebec law as the choice of law, the Supreme Court of Canada held that jurisdiction should not be declined by a Quebec court as forum non conveniens on the basis that Canadian courts lacked the power to issue injunction orders with extraterritorial effects. To the contrary, the Court agreed with Dussault JA in the Quebec Court of Appeal that the Superior Court, District of Montreal, had power to grant an injunction and other incidental relief (and whether such an order might be enforced in Mexico was a separate question) and therefore that jurisdiction could be exercised.

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<sup>16</sup> (2005) 221 ALR 213.

<sup>17</sup> Ibid [13]. Query what that signifies for application of the forum's mandatory law.

<sup>18</sup> Ibid [99]. Contrast *O'Driscoll v J Ray Mcdermott, SA* [2006] WASCA 25 where it was assumed that the *Neilson* position on renvoi applied in a contract case as well. But there both parties accepted this for the purposes of the appeal and there was no contractual choice of law provision. Thus the question of excluding (or including) renvoi by agreement of the parties did not clearly arise in the circumstances of the case.

<sup>19</sup> And the UNCITRAL Model Law expressly provides for this as the default position: see Art 28(1).

<sup>20</sup> 2007 SCC 20.

These cases can indeed be taken to show some acceptance by the courts concerned of two broad policies – *first*, that the same law should apply regardless of forum to the maximum possible extent (including on procedure, remedies and choice of law); and, *second*, that contracting parties should be free to make their own decisions on the law and forum for their disputes and courts should strive to give such decisions (especially as to law) maximum possible effect. Whether they can be taken to indicate a more general trend remains to be seen. Perhaps it is to be expected, given the truly multi-jurisdictional character of many modern contracts. But it also depends upon courts conceiving themselves as participants in a global network of adjudication and not simply as functionaries of nation states.<sup>21</sup> And so far there are only patchy indications of that.

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<sup>21</sup> See Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harv Int'l L J* 191, also arguing (perhaps optimistically) that modern courts are in the process of re-conceiving themselves in this way.