
Guide to drafting jurisdiction clauses

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Foreword

Jurisdiction clauses should be a core part of commercial contract negotiations from the outset. Jurisdiction clauses can have major impacts on the cost, speed and outcome of a dispute – yet they are often treated as a boilerplate to a contract, or given insufficient attention. Allowing parties to choose the forum in which a future dispute will be resolved provides them with certainty and protection should any problems arise.

A poorly drafted or ill-considered jurisdiction clause can risk consequences like costly satellite litigation over forum selection and parallel proceedings in multiple jurisdictions. These risks are amplified in cross-border transactions, where differences in legal systems, procedural rules and enforcement regimes can materially affect the outcome of a dispute.

We have prepared this Guide to give practical guidance and help parties draft effective jurisdiction clauses that are both enforceable and aligned with the parties' commercial objectives. The Guide covers the essential and optional components of jurisdiction clauses, including exclusive, non-exclusive and asymmetric formulations, as well as governing law clauses. Alongside best practice, we have highlighted common difficulties and pitfalls parties encounter when negotiating and drafting jurisdiction clauses.

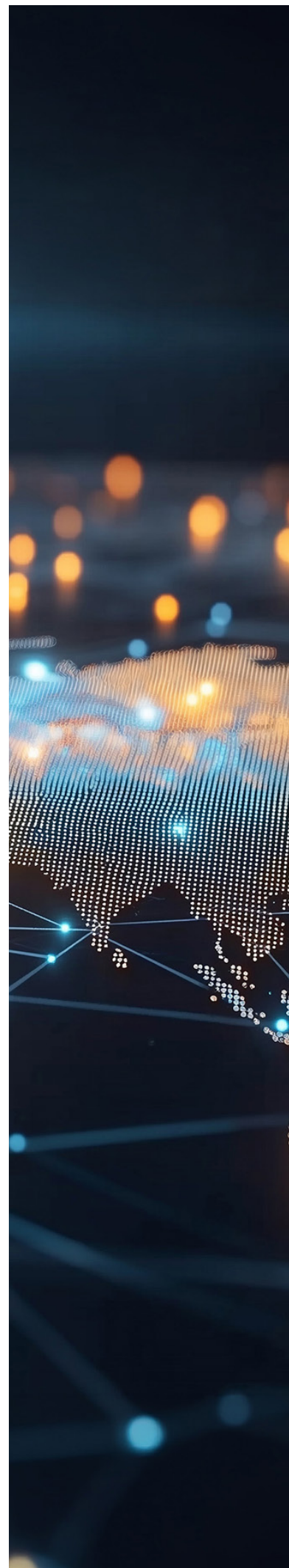
The Guide can be read as a standalone document or in conjunction with Corrs' Guide to Drafting Arbitration Clauses.

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This publication is introductory in nature. Its content is current at the date of publication. It does not constitute legal advice and should not be relied upon as such. You should always obtain legal advice based on your specific circumstances before taking any action relating to matters covered by this publication. Some information may have been obtained from external sources, and we cannot guarantee the accuracy or currency of any such information.

The information contained in this publication is current as at October 2026.



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Overview of jurisdiction clauses

Parties enter contracts expecting them to proceed smoothly. However, disputes can still arise. For that reason, parties should consider at the outset how any dispute will be resolved, including the forum in which it will be heard and the law that will apply.

The appropriate forum ultimately turns on whether a jurisdiction clause or an arbitration clause¹ respectively has been drafted into the contract. A jurisdiction clause is a contractual provision under which the parties agree that all disputes arising out of their contractual agreement are to be determined by the courts of the designated jurisdiction.²

Jurisdiction clauses generally fall into three main categories:

- **Exclusive jurisdiction clauses** require proceedings to be commenced only in the courts of the nominated jurisdiction, providing the greatest certainty and reducing the risk of parallel proceedings elsewhere.
- **Non-exclusive jurisdiction clauses** provide that the parties submit to the jurisdiction of a nominated court, but are not prevented from commencing proceedings in another jurisdiction where appropriate.
- **Asymmetric jurisdiction clauses** provide that one party is restricted to commencing proceedings in a particular jurisdiction, while the other party retains greater flexibility as to where it may commence proceedings. These clauses are commonly negotiated where there is an imbalance of negotiating power between the parties, as it leaves one party in a much more favourable position than the other.

This guide explores the various formulations of jurisdiction clauses, and the practical considerations underlying the choice of jurisdiction.



The value of a jurisdiction clause

Predictability and legal certainty

A well-drafted jurisdiction clause provides parties with certainty from the outset of their commercial relationship as to where any dispute will be determined. This delivers significant practical advantages, including that parties can:

- assess the applicable procedural framework, evidentiary rules and legal environment at an early stage,
- obtain advice from local counsel in advance, and
- more accurately anticipate the costs and risks associated with potential disputes.

Where a contract omits a jurisdiction clause or includes one that is poorly drafted, the appropriate forum will usually be determined by a court applying principles of private international law. This can result in costly and time-consuming interlocutory disputes about jurisdiction before the substantive issues are addressed.

In Australia, where parties to a cross-border dispute have not agreed on a forum and proceedings are commenced in an Australian court, the court will consider whether it should hear the dispute under the doctrine of *forum non conveniens*. Australian courts apply the 'clearly inappropriate forum' test from *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. A defendant seeking a stay must show that the Australian court is so inappropriate that continuing the proceeding would be oppressive or vexatious. Relevant connecting factors include where the contract was formed or relevant events occurred, the parties' domicile or residence, the location of witnesses and documents, any legitimate personal or juridical advantage available to the plaintiff, and the governing law of the dispute.

1 Arbitration is a consensual dispute resolution process. It requires the parties to enter into a valid and enforceable arbitration agreement, which records their agreement to resolve certain disputes by arbitration. For further information, see Corrs' [Guide to Drafting Arbitration Clauses](#).

2 Jurisdiction clauses are synonymously known as 'jurisdiction agreements', 'forum clauses' or 'choice of court agreements'. For convenience, this Guide will solely use the term 'jurisdiction clause'.

Without an agreed jurisdiction clause, parties may face satellite litigation over whether the chosen forum is appropriate. Agreeing on jurisdiction at the outset will help to minimise that uncertainty and cost. For example, although satellite litigation is still possible even with a jurisdiction clause, an Australian exclusive jurisdiction clause may assist a party in obtaining an anti-suit injunction from the Australian court to restrain the continuation of a foreign proceeding on the basis that it is a breach of contract. Further, the party may have a stronger basis for obtaining a stay of court proceedings in the foreign country on the basis of such clause.

A court might still apply the *forum non conveniens* doctrine even where there is an agreed jurisdiction clause. However, having a jurisdiction clause will give that court at least prima facie evidence that the parties have brought their dispute to an appropriate forum.

Minimisation of jurisdictional risk

Without a clear agreement on forum, parties may find themselves litigating in a jurisdiction that is unfamiliar, unpredictable or commercially disadvantageous. Some of the key risks include:

- **Divergent legal frameworks:** Legal principles that are well established in one jurisdiction may be underdeveloped, interpreted differently, or unavailable in another. Differences in legal systems, procedural rules and judicial approaches can lead to materially different outcomes, even where the same contractual language is in issue.
- **Political and institutional instability:** Jurisdictions subject to unstable political or economic conditions, or where the independence of the judiciary is compromised, introduce the risk of unpredictable judicial processes and sudden changes to the applicable legal framework.
- **Parallel proceedings:** Ambiguous or poorly drafted jurisdiction clauses may make competing proceedings commenced in multiple jurisdictions more likely. This situation can significantly increase costs, create procedural complexity, and give rise to inconsistent judgments concerning the same dispute.

A clear and precise jurisdiction clause mitigates these risks by confining (as far as possible) disputes to a known and stable forum.

Strategic advantage under laws and procedures

A jurisdiction clause is not merely a procedural provision. It is a strategic tool that allows parties to position themselves advantageously before any dispute arises. Choice of forum can have a significant impact on the cost, timing and outcome of litigation. A party should consider selecting a forum that offers lower litigation costs, efficient court processes, or substantive laws that are more developed or beneficial to that party in the relevant subject matter. A jurisdiction where the substantive law is well-established may also be less susceptible to novel or adverse interpretations.

Enforceability of judgments

When selecting a jurisdiction, parties should consider not only the remedies available in the chosen forum, but also whether any resulting judgment can be readily recognised and enforced against the counterparty and its assets in other jurisdictions. A favourable judgment has limited commercial value if the court lacks the power to grant appropriate relief or if enforcement is difficult in the jurisdictions where assets are located.

Unlike arbitral awards, which benefit from the widely adopted enforcement regime under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**), the international framework for recognising and enforcing court judgments is more limited. The Convention on Choice of Court Agreements (**Hague Choice of Court Convention**) has fewer contracting states (although Singapore, the United Kingdom and the European Union are parties) and Australia is not currently a party. Some jurisdictions have treaty or statute-based reciprocal enforcement arrangements, but these remain fragmented. For example, the *Foreign Judgments Act 1991* (Cth) recognises reciprocal arrangements in respect of judgments from only a limited number of foreign jurisdictions, including Hong Kong, Singapore and the UK. Major jurisdictions, including the United States and most of Europe, are absent from that regime.

Key points to consider before drafting a jurisdiction clause

The value of a jurisdiction clause depends on whether it is carefully drafted and aligned with the parties' commercial objectives. A well-drafted clause gives parties greater certainty about where disputes will be heard, the procedure that will apply and, in some cases, the likely course of the proceedings.

Because jurisdiction clauses are often treated as boilerplate, they may receive insufficient attention during negotiations. That can have material consequences once a dispute arises. The matters below should be considered before drafting the clause.

Nature of the relationship and dispute resolution forum

Parties should first decide which dispute resolution process best suits their relationship and the likely nature of any dispute. Depending on the circumstances, that may be litigation, arbitration or a tiered process involving mediation or another form of alternative dispute resolution.

Relevant considerations include confidentiality, technical or legal complexity, procedural flexibility, enforceability of the resulting decision and any statutory or regulatory limits on the available forum. Consumer protection, employment and financial services disputes, for example, may be subject to legislative or regulatory restrictions.

Practical suitability of the chosen forum

The chosen forum should be commercially appropriate and workable in practice. Parties should consider:

- **Location of the parties:** place of incorporation, principal place of business, and location of key witnesses.
- **Place of performance:** where the contract's obligations will primarily be performed or where the subject matter is situated.
- **Procedural and substantive law:** the quality of the judiciary, procedural efficiency, availability of appeals, language of proceedings, favourable/unfavourable precedent and likely timeframes and costs.
- **Available causes of action and remedies:** whether the jurisdiction offers useful claims or remedies, such as injunctive relief or statutory damages.

- **Counterparty characteristics:** if the counterparty is a state or state instrumentality, whether sovereign immunity considerations may arise.
- **Neutrality:** the nomination of a neutral forum may assist in ensuring fairness and impartiality in resolving disputes. A neutral forum prevents either party from having a 'home advantage' (whether real or perceived), which can be particularly important in fostering a balanced resolution process. This factor is significant in contracts with nation states.

Assessing these matters at the drafting stage helps ensure the chosen forum is both commercially appropriate and practically effective if a dispute arises.

Scope of disputes and parties covered

To avoid uncertainty, the clause should clearly identify the disputes and parties it covers. Parties should consider whether:

- the clause should apply to both contractual and non-contractual claims;
- any aspect of the dispute must, by statute, be resolved in a particular forum;
- related disputes under multiple contracts or involving multiple parties should be heard in the same jurisdiction to avoid parallel proceedings;
- third-party beneficiaries or assignees should be bound by, or entitled to rely on, the clause; and
- the clause should preserve the right to seek urgent interim or injunctive relief from any court of competent jurisdiction.

Type of jurisdiction clause

Parties should decide whether the clause will be exclusive, non-exclusive or asymmetric. An exclusive clause provides the greatest certainty; a non-exclusive clause preserves flexibility to litigate elsewhere; and an asymmetric clause may offer commercial advantages but can raise enforceability risks in some jurisdictions.

Specialist or specific courts

If the chosen jurisdiction has a specialist court, division or list that might be suitable for the subject matter of their dispute, parties should consider whether to nominate it expressly.

Where a jurisdiction contains multiple states, provinces or regions with separate court systems, the clause should identify the relevant court with precision, such as the 'courts of New South Wales' rather than the 'courts of Australia' generally.

Alignment with governing law

The governing law and jurisdiction clauses should work together. Parties should ensure the chosen forum can apply the selected governing law effectively and that the clauses do not create inconsistency or uncertainty. Parties should take particular care to state whether the governing law clause includes or excludes the chosen jurisdiction's conflict of laws rules.

Enforcement

Enforcement is often the most important practical issue. Parties should assess:

- **Location of assets:** where are the counterparty's assets situated?
- **Recognition of judgments:** does the relevant jurisdiction recognise and enforce foreign judgments (and under what treaty framework, if any)?
- **Arbitral awards:** if arbitration is chosen, is the counterparty's jurisdiction a signatory to the New York Convention?
- **Practical barriers:** consider sovereign immunity, currency controls, and any restrictions that could impede recovery.



Essential components of a jurisdiction clause

Without certain essential components, a jurisdiction clause risks being unenforceable or subject to challenge by a counterparty seeking to litigate in a more favourable forum. Courts will scrutinise whether the parties genuinely agreed to submit to a particular jurisdiction, whether that submission is exclusive or non-exclusive, and whether the clause clearly identifies the relevant courts.

Omitting any of these core elements can lead to costly preliminary disputes over forum selection, potentially undermining the commercial objectives of the underlying agreement. The following components should therefore be treated as mandatory inclusions in any jurisdiction clause to ensure clarity, enforceability and alignment with the parties' intentions.

Choice of at least one jurisdiction

A jurisdiction clause must include an express choice of a jurisdiction for the resolution of disputes.

Exclusivity or not?

A jurisdiction clause should state clearly whether the parties intend for the nominated forum to be the only available forum or one available forum, or that different forums are available to each party. The distinction matters because it affects where proceedings may commence and how a court is likely to respond if proceedings are brought elsewhere.

Exclusive jurisdiction agreement

An exclusive jurisdiction clause is one by which the parties agree that disputes **must** be litigated only in the courts of the nominated place. An exclusive jurisdiction clause gives the highest level of certainty and reduces the risk of proceedings being started in another forum.

The following factors tend to suggest that a clause is an exclusive jurisdiction clause:

- the word 'exclusive' is used in the jurisdiction clause;
- disputes are stated to be 'referred to' the nominated court, rather than merely accepted by that court;
- the clause applies to 'all' or 'any' disputes, suggesting that the nominated court is intended to deal comprehensively with disputes under the agreement; and
- mandatory language is used, such as the parties 'shall' or 'must' submit disputes to the nominated court.

The surrounding contract may also support a conclusion that the parties intended the clause to be exclusive. Relevant contextual factors include:

- whether the nominated court would have had jurisdiction even without the parties' agreement;
- whether the contract also selects the law of the nominated court as the governing law of the contract, as discussed in section 5;
- whether the parties have selected a neutral forum, being a forum that is not the home jurisdiction of either party; and
- whether the subject matter of the contract suggests that disputes were intended to be concentrated in a single forum, such as in some insurance arrangements.

Non-exclusive jurisdiction agreement

A non-exclusive jurisdiction clause is one by which the parties submit to the jurisdiction of a nominated court, but do not prevent proceedings from commencing in another appropriate jurisdiction. A non-exclusive jurisdiction clause preserves flexibility.

Indicators of a non-exclusive clause include:

- the clause does not use the word 'exclusive' or other language indicating that the nominated court is the only available forum; and
- the parties simply 'submit themselves to' the jurisdiction of the nominated court, without saying that they must bring proceedings only in that court.

Considerations when deciding between exclusive and non-exclusive jurisdiction clauses

The inclusion of an exclusive jurisdiction clause enhances predictability. As outlined below, Australian courts will generally enforce exclusive jurisdiction clauses between commercial parties, absent strong reasons to the contrary. By contrast, non-exclusive jurisdiction clauses are considered one of several factors that an Australian court will take into consideration when determining whether to decline jurisdiction under the Voth principle.

Exclusive jurisdiction clauses also benefit from the protection of the *Hague Convention on Choice of Court Agreements* (**Hague Convention**). The Hague Convention aims to provide for worldwide recognition and enforcement of exclusive choice of court agreements relating to civil or commercial matters, and reciprocal enforcement of any resulting judgment. The Convention does not apply by default to non-exclusive jurisdiction clauses (unless a contracting state makes a declaration including those clauses) or to asymmetric clauses.

Although Australia has not yet acceded to the Hague Convention,³ the Convention will be relevant where the nominated jurisdiction has ratified it. Ratifying states include, among others, Singapore, the United Kingdom and the European Union (except for Denmark).⁴

Non-exclusive jurisdiction clauses offer parties the flexibility to commence proceedings in a court other than the nominated court. This flexibility can assist with enforcement, by allowing a party to bring proceedings in any appropriate jurisdiction in which the counterparty has, or may have, assets.

Proper scoping

A jurisdiction clause must be properly scoped to ensure that the appropriate subject matter and parties will be captured.

Subject matter scope

A jurisdiction clause should define the types of disputes that the parties intend to be brought before the chosen court. An unclear clause may result in related disputes being heard in different courts, increasing costs, delaying resolution and creating a risk of inconsistent outcomes.

If the parties intend for all disputes connected with their contract to be determined in the chosen court, the clause should be drafted broadly. Examples include clauses covering ‘any dispute or claim arising out of, relating to or in connection with this agreement, including any question regarding its existence, validity or termination’ or similarly broad language. Such clauses are likely to be read to capture not only contractual claims, but also related non-contractual claims, including claims in tort, equity or under statute.

Importantly, parties should avoid relying solely on the phrase ‘arising under’, which has historically given rise to disputes about the scope of jurisdiction clauses and may not extend to non-contractual claims. For example, in *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd* (1993) 43 FCR 439, a clause covering ‘[a]ny dispute ... arising under this agreement’ was held not to extend to pre-contractual misrepresentation claims.

Conversely, if parties intend for certain types of disputes to fall outside of the jurisdiction clause, those exclusions should be stated expressly. While carve-outs may be appropriate in some circumstances, such arrangements may create uncertainty about which forum should determine a particular dispute and increase the risk of preliminary jurisdictional disputes. Accordingly, any carve-outs should be considered carefully and drafted clearly.

Party scope

Apart from the types of disputes covered by the clause, parties should consider whether it is appropriate for the clause to extend beyond the contracting parties. This may be particularly relevant in transactions involving related entities or third-party service providers.

Where parties intend for certain non-parties to their contract to have the benefit of the jurisdiction clause, that intention should be addressed expressly in the contractual documents. For example, the contract may include a clause which identifies particular affiliates or categories of persons that are entitled to invoke or rely on the clause. Where the parties intend that a third party should have the benefit of their jurisdiction clause, they should take care when using limiting language (such as ‘between the parties’), which may narrow the clause or suggest a reading that it does not extend to disputes involving non-parties.



³ The Joint Standing Committee on Treaties recommended that Australia accede to the Hague Convention on Choice of Court Agreements in November 2016. However, a decade later it remains uncertain whether Australia will ratify the Convention.

⁴ See the [Status Table for ratification: Hague Conference on Private International Law](#), ‘Status Table: Convention of 30 June 2005 on Choice of Court Agreements’ (Web Page, 27 November 2025).

Separately, whether a jurisdiction clause may be enforced against a non-party will often depend on the nature of the claims and the non-party's connection to the underlying contractual arrangements. Enforceability by or against third parties may also depend upon the law governing the jurisdiction clause, which may not allow third party enforcement on privity grounds. Where this is commercially important, parties should deal with the issue at the drafting stage rather than leaving it to be resolved after a dispute arises. Where it is imperative that the jurisdiction clause be enforceable against the non-party, parties should consider making the relevant person a party to the agreement containing the jurisdiction clause.

Formalities and incorporation

A choice of jurisdiction should be clearly stated in the parties' agreement. To the extent that there are multiple parts to a contractual arrangement, it should operate consistently across all contractual documents. Parties should therefore consider not only the wording of the clause itself, but also how it is incorporated into the broader contractual framework.

The most straightforward approach is to include the jurisdiction clause in the formal written agreement signed by the parties. Contracts may also be formed without a formal signed agreement, for example through an exchange of emails. However, where a jurisdiction clause is not included in a signed agreement, disputes may arise as to whether the clause forms part of the parties' agreement. In those circumstances, the party seeking to rely on the jurisdiction clause may need to establish that reasonable notice of the jurisdiction clause was given before the contract was concluded. The resulting uncertainty and cost can often be avoided by including the clause in a signed agreement.

Similarly, a jurisdiction clause should not be introduced unilaterally after the parties have already entered into the contract. Attempts to do so through an invoice, order confirmation or similar document issued after contract formation are unlikely to be effective.

If, having already concluded their contract, the parties wish to add a jurisdiction clause, they should do so through a formal variation to the contract.

A jurisdiction clause may also be incorporated by reference to another document, such as standard terms or a master document within the transaction structure. Where this approach is used, the drafting should identify the relevant document and make it clear that the jurisdiction clause contained in that document applies. Where multiple versions of the referenced document exist, such as different editions of standard terms or different regional versions, the relevant version should also be identified specifically.

Parties should also take care where a transaction involves multiple documents. Unless there is a good reason for different arrangements, parties should avoid inconsistent jurisdiction clauses across the transaction documents. This may arise, for example, where parties exchange competing sets of standard terms, each containing different jurisdiction clauses. Parties should review the transaction documents as a whole and resolve any unintended inconsistencies in the respective jurisdiction clauses before the documents are signed. Failure to do so could lead to competing claims across multiple jurisdictions in the event of a dispute.

Consideration of enforceability

Enforceability of exclusive jurisdiction clauses

Australian courts will generally enforce exclusive jurisdiction clauses in commercial contracts. Accordingly, where parties have expressly elected a foreign court as the exclusive forum for litigation, an Australian court will typically stay the proceeding, absent strong reasons to the contrary.⁵

An Australian court may decide not to enforce an exclusive jurisdiction clause where there is a mandatory law applying to the dispute. Australian courts have found that where a mandatory law prohibits the contracting out of its application – for example, the *Australian Consumer Law* 2010 (Cth) (ACL), which provides that the consumer guarantees cannot be excluded, restricted or modified by contract⁶ – the party seeking a stay application would need to establish that the nominated court would apply the relevant provisions of the Australian statute.⁷

⁵ *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 79 ALR 9, 28.

⁶ ACL ss 64 and 67; see also *Insurance Contracts Act* 1984 (Cth) ss 8 and 52.

⁷ See *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418, where the High Court of Australia justified the non-enforcement of an exclusive jurisdiction clause in favour of English courts on the basis of a provision in the *Insurance Contracts Act* 1984 (Cth) which prohibits contracting out of the operation of the Act. See also *Epic Games, Inc v Apple Inc* [2021] FCAFC 122, where the court held that Australian public policy required competition law issues under the *Competition and Consumer Act* 2010 (Cth) to be heard by the Federal Court of Australia rather than the nominated United States courts. For a fuller discussion see Richard Garnett, 'Determining the Appropriate Forum by the Applicable Law' (2022) 71 *International and Comparative Law Quarterly* 589, 616-622.

The unfair contract terms provisions of the ACL may also invalidate a foreign exclusive jurisdiction clause in certain circumstances.⁸

Further, an exclusive jurisdiction clause may not be enforced if there are strong reasons justifying its non-enforcement. This may arise where the litigation in the Australian courts includes matters beyond the scope of the jurisdiction clause or there are third parties to the agreement. In such cases, non-enforcement may be justified by the public interest in avoiding parallel litigation, the possibility of conflicting outcomes and the inconvenience to third parties. Mere matters of convenience, however, are not sufficient to preclude enforcement of an exclusive jurisdiction clause, as these factors should have been considered by the parties at the time of negotiation of the clause.⁹

Australian courts are generally unlikely to enforce exclusive jurisdiction clauses in non-commercial agreements, such as in cases brought by consumers and employees against businesses. The discrepancy in bargaining power, together with the burden of foreign litigation on such parties, inclines against enforcement.¹⁰ Parties should also take care with the interaction between a commercial agreement and the *Corporations Act 2001* (Cth). For example, a court may consider directors' duties and internal corporate governance provisions to be mandatory laws.¹¹

In the case where parties select an exclusive jurisdiction clause stipulating an Australian court and the counterparty brings proceedings in a foreign court, the party seeking to enforce the clause typically has two options. The first is to apply to the foreign court for a stay of its proceedings. The success of this strategy will depend upon the approach taken under the law of the foreign country to enforcement of such clauses. The party may also seek an anti-suit injunction from the Australian court to restrain the counterparty's pursuit of the proceedings in the foreign forum. Australian courts are generally willing to grant such relief on the basis that suing in a foreign court in such circumstances is a breach of the party's obligation to litigate in Australia.¹² To grant such relief, however, the Australian court must have jurisdiction over the party commencing the foreign proceeding.

Enforceability of non-exclusive jurisdiction clauses

As a foreign non-exclusive jurisdiction clause does not prevent a party from suing elsewhere, Australian courts will only decline jurisdiction if Australia is a 'clearly inappropriate forum' for the dispute. The presence of such a clause is one of several factors that the court will take into account when assessing whether to stay local proceedings.¹³



⁸ ACL Part 2-3.

⁹ *Global Partners Fund Ltd v. Babcock and Brown Ltd* (2010) 79 ACSR 383; [2010] NSWCA 196.

¹⁰ See, eg. *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 79 ALR 9, 28; *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450, [19]; *Royal Caribbean Cruises Ltd v Browitt* [2021] FCA 653; *Carnival plc v Karpik (Ruby Princess)* (2022) 404 ALR 386. Note, however, that not every law directed primarily to consumer protection will be a 'mandatory law' in every context: see, eg. *Casaceli v Natuzzi SpA* [2012] FCA 691, [50], where Jagot J (dealing with the kindred issue of the public policy enforceability of an arbitration agreement) observed that the ACL prohibition on misleading or deceptive conduct under s 18 will not raise public policy issues 'when, in substance, the dispute is a commercial cause' arising from a business-to-business contract.

¹¹ See, eg. *Australian Securities and Investments Commission v Cassimatis* (No 8) [2016] FCA 1023, [456]–[457], where Edelman J said that the care and diligence rule for company directors codified in s 180 of the *Corporations Act 2001* (Cth) has both a private and public dimension, the latter imposing a 'public duty or duty which is owed at large'. In some situations, a safety mechanism may exist in a foreign jurisdiction own conflict of laws doctrines. Thus, under various versions of the 'internal affairs doctrine' in the USA, a court will apply only the law of the place of incorporation to a dispute relating to the affairs of a foreign company or company incorporated in another US State.

¹² *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

¹³ *Eurogold Ltd v Oxus Holdings (Malta) Ltd* [2007] FCA 811.

Optional components – tailoring your jurisdiction clause

Parties may wish to tailor their jurisdiction clause through the inclusion of optional components. These may include a multi-tiered dispute resolution mechanism, or a provision which allows one party more flexibility than the other in choosing a forum for dispute resolution (an asymmetric clause).

Multi-tiered dispute resolution clauses

Tiered dispute clauses provide parties with multiple cascading alternatives to resolve conflicts before resorting to litigation. These clauses typically require parties to first attempt to resolve their disputes through alternative dispute resolution (ADR) or principal-to-principal negotiations. These can be quicker, less expensive and more flexible, while preserving the right to litigate if ADR is unsuccessful. While failure to comply with the pre-litigation steps specified in a tiered dispute clause is unlikely to invalidate a jurisdiction clause,¹⁴ Australian courts have previously granted stays pending the completion of the required steps.¹⁵

Tiered dispute clauses are particularly useful where a contract involves ongoing negotiation, or where rigid time bars and procedural requirements in a single forum would be impractical. They are especially beneficial in long-term contracts requiring cooperation, such as major project or joint venture agreements.

However, issues can arise where tiered dispute clauses are drafted in a conflicting or otherwise unclear manner. For example, where the contract appears to require the same dispute to be resolved both in court and through ADR in parallel. Australian courts have not yet addressed this scenario. However, courts in other common law jurisdictions have previously addressed conflicting tiered dispute resolution clauses by either reading down the clauses (e.g. the obligation to arbitrate) based on an interpretation of the parties' intentions;¹⁶ or, where such an interpretation is not possible, requiring the courts to 'supervise' any ADR mandated by the contract.¹⁷

To avoid conflicting or otherwise unclear drafting, tiered dispute clauses should be drafted with the following factors in mind:

- the clause should specify what event triggers the commencement of the pre-litigation mechanism(s) (e.g. a written request to mediate);
- the clause should clearly define which disputes are subject to the pre-litigation mechanism(s);
- pre-litigation steps should be clearly defined and sequential, rather than parallel; and
- each pre-litigation step should be clearly outlined, including the procedure to be followed, who administers the ADR process, the timeframe for the process and the event that triggers the conclusion of the pre-litigation steps and permits the dispute to proceed to litigation (e.g. the expiry of a set period of time).

Binding dispute resolution (either litigation or arbitration) should be mandatory in instances where initial ADR fails, and not optional. The parties should use the words 'shall', 'will', or 'must', and not 'may'.

Only one form of binding dispute resolution (litigation or arbitration) should be chosen. If the parties wish to submit some disputes to arbitration and others to litigation, the drafting should clearly delineate which disputes will be referred to arbitration and which disputes will be referred to litigation.

14 Richard Garnett, 'Multi-Tier Dispute Resolution in Australia' in Anselmo Reyes and Weixia Gu (eds), *Multi-Tier Approaches to Resolution of International Disputes* (Cambridge University Press, 9 December 2021) 343, 348–9.

15 See, eg, *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd* [2012] QSC 290; *WTE Co-Generation v RCR Energy Pty Ltd* [2013] VSC 314, [39]; *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996, [26].

16 See, eg, *Melford Capital Partners (Holdings) LLP v Digby* [2021] EWHC 872 (Ch); *Surrey County Council v Suez Recycling and Recovery Surrey Ltd* [2021] EWHC 2015 (TCC).

17 See, eg, *Albion Energy Ltd v Energy Investments Global BRL* [2020] EWHC 301 (Comm); *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251; *H v G* [2022] HKCFI 1327.

Asymmetric jurisdiction clauses

Parties may include an asymmetric clause to build flexibility into their jurisdiction clause. Asymmetric clauses give one party more freedom than the other to choose the forum in which to bring a claim. This is useful where one party wishes to maintain maximum flexibility, often reflecting an imbalance of bargaining power.

Asymmetric clauses can be appropriate in many scenarios. They allow parties to select jurisdictions that are commercially relevant or more favourable for enforcement – potentially turning an otherwise unworkable arrangement into a practical solution for all involved.

For example, asymmetric clauses can be useful tools for bond issuances and loan syndications, allowing a creditor to bring claims in jurisdictions where the borrower's major assets are located, improving the prospects of enforcement. Where a counterparty is in financial difficulty, this flexibility can be a decisive factor in a creditor's willingness to proceed with the transaction. Asymmetric clauses can also deter parties from deliberately moving assets out of a jurisdiction to avoid liability.

Asymmetric clauses can also be useful in situations:

- where legal developments may result in the initially contemplated jurisdiction no longer being a suitable forum for the dispute, especially for long-term contracts;
- where there is ambiguity as to whether only one jurisdiction is appropriate for anticipated disputes between the parties, or the wider interests of the parties as a whole;
- in jurisdictions that impose temporal legal restrictions (e.g. time bars / statutes of limitations) that restrict parties from pursuing valid legal claims; and
- where one of the contracting parties is a State that wishes to be (or must be) sued in a special court in its own jurisdiction for certain claims, such as the United States Court of Federal Claims.

Asymmetric clauses fall into three main categories:¹⁸

- **Rothschild clauses:** Party A is restricted to the exclusive jurisdiction of the nominated forum, while Party B has the option to sue in that same jurisdiction or elsewhere.

An example includes:¹⁹

'This agreement, and any dispute, controversy or claim arising out of or in connection with this agreement or its formation (including any non-contractual disputes or claims), shall be governed by and construed in accordance with the laws of Victoria, Australia.'

This clause is for the benefit of [Party B] only and nothing shall prevent [Party B] from pursuing proceedings relating to a dispute in any other courts with jurisdiction. To the extent allowed by law, [Party B] may take concurrent proceedings in any number of jurisdictions.'

- **Unilateral non-exclusive clauses:** Party A submits to the non-exclusive jurisdiction of the nominated forum, while Party B may bring a claim in the nominated forum or elsewhere. For example:²⁰

'[Party A] agrees for the benefit of [Party B] that the courts of Australia will have non-exclusive jurisdiction to settle any dispute which may arise in connection with this engagement.'

Or, by way of a more detailed example:

'Party A submits to the non-exclusive jurisdiction of the courts of the State of Victoria to settle any dispute which may arise in connection with this engagement.'

For the avoidance of doubt, this submission does not limit the right of Party B to issue proceedings in any other court of competent jurisdiction, nor does it preclude the issuing of proceedings in any one or more jurisdictions simultaneously, whether concurrently or not.'

- **Unilateral indeterminate jurisdiction clauses:** Party B has full discretion to nominate the jurisdiction. Party A must litigate in whatever forum Party B selects, whether bringing or defending a claim. For example:²¹

'[Party A] accepts and agrees that this agreement, and any dispute, controversy or claim arising out of or in connection with this agreement or its formation (including any non-contractual disputes or claims), shall be governed by and construed in accordance with the laws of the jurisdiction nominated by [Party B] from time to time and agrees that the resolution of all disputes shall be decided in accordance with the laws of that nominated jurisdiction.'

¹⁸ Based on the framework set out in Brooke Marshall, *Asymmetric Jurisdiction Clauses* (Oxford University Press, 2023), 17 [1.37] – 22 [1.54].

¹⁹ Loan Market Association, 'Investment Grade Loan Market Association Single Currency Term and Revolving Facilities Agreement' (English law version), quoted in Brooke Marshall, *Asymmetric Jurisdiction Clauses* (Oxford University Press, 2023), 18 [1.41].

²⁰ *Perella Weinberg Partners UK LLP v Codere SA* [2016] EWHC (Comm) 1182 [14], quoted in Brooke Marshall, *Asymmetric Jurisdiction Clauses* (Oxford University Press, 2023), 19 [1.48].

²¹ André Huet, 'Cour d'appel de Paris, 5 July 1989, No 89-4373' (1990) 117 *Journal du Droit International* 152, translated by and quoted in Brooke Marshall, *Asymmetric Jurisdiction Clauses* (Oxford University Press, 2023), 19 [1.52].

Parties should exercise caution when using asymmetric clauses under Australian law. While Australian courts have encountered Rothschild clauses and unilateral non-exclusive clauses, they have not directly examined the enforceability of the asymmetric element itself, tending instead to focus on other issues.²² There is also a risk under Australian law that an asymmetric clause could be challenged as an unfair contract term under Part 2-3 of the ACL.²³ Jurisdiction clauses cannot be used to override the unfair contract term regime where it would otherwise apply.²⁴ However, the unfair contract term regime is only relevant where the asymmetric clause appears in a standard form consumer or small business contract.²⁵

Internationally, asymmetric clauses have received mixed treatment. Asymmetric clauses have been consistently upheld in England²⁶ and Singapore,²⁷ both of which are jurisdictions with strong similarities to Australia. However, courts in France,²⁸ the European Union²⁹ and India³⁰ have raised concerns about the enforceability of asymmetric clauses, citing inequity under statute and longstanding reciprocity principles,³¹ as well as uncertainty in the clauses themselves.³² Accordingly, parties should only use an asymmetric jurisdiction clause to bring proceedings in jurisdictions that either recognise such clauses as enforceable, or where their enforceability has not been ruled out. Where enforceability in a given jurisdiction is unclear, parties may consider combining an asymmetric clause with a tiered dispute clause (outlined on page 12).

Under this approach, the asymmetric clause applies in the first instance or to certain disputes, with a fallback to a fixed jurisdiction in all other cases (including in the event the court or tribunal determines that the asymmetric clause is unenforceable). This provides an enforceability 'safety net' if a court declines to uphold the asymmetry.

Courts have also differed on whether to construe asymmetric clauses as exclusive or non-exclusive jurisdiction clauses, depending on how the clause is drafted. For example, an English court has held that exclusivity is not diminished by the fact that the clause only binds one party.³³ The classification matters practically, as an exclusive jurisdiction clause is more likely to result in a stay of proceedings in favour of the dispute being heard in the nominated forum (see *Enforceability of exclusive jurisdiction clauses* on page 10).

When drafting asymmetric clauses, parties should keep the following guidance in mind:

- clearly specify which party has the jurisdictional flexibility and in what circumstances that right can be exercised;
- consider integrating a tiered dispute clause structure to preserve the enforceability of the clause, should a court deem any asymmetry unenforceable;
- indicate clearly whether the asymmetric clause is intended to be exclusive or non-exclusive for each party; and
- consider the risk of unenforceability due to public policy concerns, and seek up-to-date advice, particularly if regulatory restrictions like the ACL are relevant.

22 *Reinsurance Australia Corporation Ltd v HIH Casualty and General Insurance (in liq)* (2003) 254 ALR 29. See also *Venter v Ilona MY Ltd* [2012] NSWSC 1029, in which a cross claim in NSW was permanently stayed in favour of the exclusive jurisdiction of Bochum, Germany; *Telesto Investments v UBS AG* [2013] NSWSC 503, in which proceedings were permanently stayed in favour of a final judgment that had been handed down in Singapore (the AJ Clause having provided for the non-exclusive jurisdiction of Singapore). Neither case dealt expressly with the asymmetry of the jurisdiction clause.

23 ACL sch 2 pt 2-3.

24 *Karpik v Carnival plc* (2023) 98 ALJR 45.

25 ACL sch 2 pt 2-3, s 23.

26 See, eg, *Barclays Bank plc v PJSC Sovcombank* [2024] EWHC (Comm) 1338.

27 *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] SGCA 32.

28 An AJ Clause was enforced in Cour de cassation [French Court of Cassation], 72-14.706, 15 May 1974 reported in Bull civ I n°143. However, the same court decided to not enforce another AJ Clause in Cour de cassation [French Court of Cassation], 11-26.022, 26 September 2012 reported in Bull civ I n°176.

29 *Società Italiana Lastre SpA (SIL) v Agora SARL* (Case C 537/23).

30 *New India Assurance Co Ltd v Central Bank of India* [AIR 1985 Cal 76]. However, note that there have been conflicting rulings on the enforceability of AJ Clauses, including courts which have struck down clauses for lack of mutuality: cf *Union of India vs Bharat Engineering Corporation* [ILR 1977 Delhi 57].

31 See, eg, Cour de cassation [French Court of Cassation], 11-26.022, 26 September 2012 reported in Bull civ I n°176, where the court stated AJ Clauses were 'potestative' (ie. a condition where one party has the discretion to decide whether it is satisfied). However, this decision has subsequently been cast into doubt: see, eg, *Società Italiana Lastre SpA (SIL) v Agora SARL* (Case C 537/23).

32 See, eg, *Società Italiana Lastre SpA (SIL) v Agora SARL* (Case C 537/23) [42].

33 See *Commerzbank AG v Liquimar Tankers Management Inc* [2017] EWHC (Comm) 161, [9], [64].

Governing law clause

Parties should include a governing law clause identifying the substantive law governing their contract. In contrast with a jurisdiction clause, where parties choose the forum in which their dispute will be resolved, a governing law clause allows the parties to choose which laws will govern the interpretation, performance, and enforcement of their agreement.

In the absence of an express governing law clause, a court may need to determine the applicable law by reference to choice of law rules in the forum dealing with the dispute. This can increase cost, delay and uncertainty, particularly where the contract or the parties have connections with multiple jurisdictions. An express governing law clause therefore provides greater certainty and reduces the risk of disputes about which law applies.

Selecting the governing law

As a general rule, parties should select a governing law that is the law of their chosen jurisdiction (i.e. a choice of the laws of the State of Queensland as the governing law, paired with a choice of the courts of Queensland in the jurisdiction clause). This is because the chosen court will usually be better placed to apply its own law. Where a court is required to apply a foreign law, that foreign law will generally need to be pleaded and proved by the parties, usually through expert evidence. This can increase the time and cost of resolving the dispute. It may also create additional uncertainty, including because the court must determine the foreign law on the evidence before it, and there may be limited scope to correct errors on appeal. For these reasons, aligning the governing law and jurisdiction will generally reduce cost, complexity and uncertainty.

There may nevertheless be commercial reasons for selecting a governing law that differs from the chosen court. It is common for commercial parties located in different jurisdictions to choose what might be considered a neutral, stable governing law for their contract – often the law of England and Wales, or the law of the State of New York – even if they choose the courts of the jurisdiction of one or other of the parties as the forum for dispute resolution.

The potential benefits of such an approach should be weighed against the additional cost, time and uncertainty discussed above. Where a different governing law and jurisdiction are proposed, parties should obtain advice from local counsel in the relevant jurisdictions to ensure that the implications of the proposed arrangement are properly understood.

Drafting a governing law clause

When drafting a governing law clause, parties should describe the chosen legal system precisely. A legal system is not necessarily the same as a country. For example, a reference to ‘Australian law’ will often be too general, and the clause should instead identify the law of a particular State or Territory (such as ‘the laws of Victoria’ or ‘the law in force in Victoria’, the latter to emphasise to foreign parties and courts that this encompasses both State and federal law). Similarly, a reference to ‘US law’ should be replaced with a reference to the law of a particular US jurisdiction (such as ‘the laws of the State of New York’).

Parties should also consider drafting the governing law clause broadly so that it applies not only to contractual claims, but also to related non-contractual claims. For example, the clause may apply to ‘this agreement, and any dispute, controversy or claim arising out of or in connection with this agreement or its formation (including any non-contractual disputes or claims)’.

It is also preferable to expressly state that the chosen law applies excluding its conflict of laws (or private international law) rules. This may minimise the risk of disputes about what the applicable governing law should be.

Annexure 1 | Model jurisdiction clause

Exclusive or non-exclusive jurisdiction clause

The parties irrevocably submit to the [non-exclusive/exclusive] jurisdiction of the courts of [jurisdiction] in respect of any dispute, controversy or claim arising out of, relating to or in connection with this agreement, including any question regarding its existence, validity or termination.

Asymmetric jurisdiction clause

Rothschild clause

This agreement, and any dispute, controversy or claim arising out of or in connection with this agreement or its formation (including any non-contractual disputes or claims), shall be governed by and construed in accordance with the laws of Victoria, Australia. This clause is for the benefit of [Party B] only and nothing shall prevent [Party B] from pursuing proceedings relating to a dispute in any other courts with jurisdiction. To the extent allowed by law, [Party B] may take concurrent proceedings in any number of jurisdictions.

Unilateral non-exclusive clauses

[Party A] agrees for the benefit of [Party B] that the courts of Australia will have non-exclusive jurisdiction to settle any dispute which may arise in connection with this engagement.

Unilateral indeterminate jurisdiction clauses

[Party A] accepts and agrees that this agreement, and any dispute, controversy or claim arising out of or in connection with this agreement or its formation (including any non-contractual disputes or claims), shall be governed by and construed in accordance with the laws of the jurisdiction nominated by [Party B] from time to time and agrees that the resolution of all disputes shall be decided in accordance with the laws of that nominated jurisdiction.



Annexure 2 | Model governing law clause



This agreement, and any dispute, controversy or claim arising out of, or in connection with this agreement, or its formation (including any non-contractual disputes or claims), shall be governed by and construed in accordance with the laws of [Victoria, Australia], excluding its conflict of laws rules.

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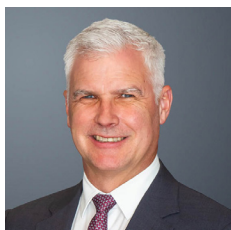
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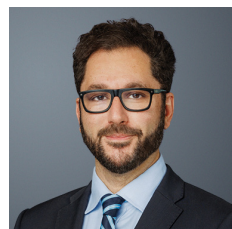
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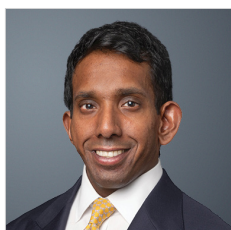
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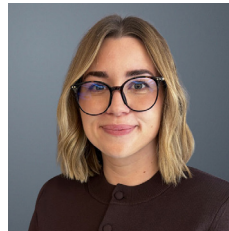
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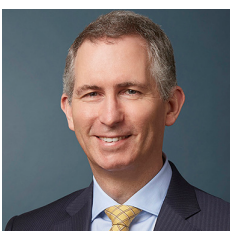
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