

## WHOSE LAW IS IT ANYWAY?

Any business of significance has trans-national elements. Even if the business does not sell its product overseas, it will almost inevitably import goods or services which will go into the manufacturing process. One of the most common (and most transportable) assets traded is intellectual property. When dealing across borders it is important to know whose law you are dealing with, and if possible what the rules are.

While the general rules of commercial law are broadly similar in many countries, especially developed Western countries, there are important differences of detail. Those details may, however, be what a dispute turns on and mean winning or losing a case and large sums of money. More importantly, if both parties know at the outset what the applicable law is then disputes are less likely to arise, and when they do, they will be easier to resolve.

In some areas countries have agreed to harmonise regulation of the business environment. The most obvious example of this is the CER agreement between Australia and New Zealand. One result of this is that competition law and trade practices law (in New Zealand covered by the Commerce Act and the Fair Trading Act) is more or less identical in both countries.

Another much less well known example is the Vienna Convention on the International Sale of Goods. That Convention sets up a body of rules exclusively for commercial sales of goods across borders. The rules are significantly different from our domestic law. However, for those rules to govern it must be clear that the law of New Zealand (or another State which applies the Convention) applies. While many trading partners apply these rules (USA, Australia, China, Singapore) other significant trading countries do not (UK, Japan, Brazil). Anyone who wants to read the Convention can go on line at: <http://cisgw3.law.pace.edu/cisg/text/cisg-toc.html>.

The main point is that the law of different countries can conflict and it is important to know which law applies. The only thing worse than knowing that bad law applies to your contract, is not knowing what law applies to your contract! As such, every contract (including standard contracts and internet contracts) should set out which state's law will apply.

When considering whether such a "choice of law clause" will be enforced, most courts around the world take a fairly robust and practical approach. While it would not be open for two New Zealand companies to agree that the law of Saudi Arabia applies to a contract between them, there is nothing wrong with a German and New Zealand company agreeing that UK law applies. In fact in some areas (especially shipping contracts) it is common to specify the law of an agreed third nation to apply.

Having your choice of law in an international contract is however, only half of the battle. Having the best rules in the world is little help if the dispute is to be held in the Court of Cassation in Baghdad. As such it is also important to choose the courts which are to have jurisdiction to determine any dispute. While there is an enormous advantage if disputes are to be heard in home courts, this is not always possible. It should however be a starting position in any negotiation. In general, courts will recognise and enforce a contractual agreement that a dispute is to be heard in a particular forum, providing it is a reasonably convenient one.

It is also important to ensure that the court in question has exclusive jurisdiction. It is not unknown for parties with big international disputes to be fighting substantially the same battle, in several courts, in several countries at once. While in the end only one judgment can prevail, there is much to be said for ensuring that the matter is fought in one court, rather than many. Of course if you find yourself in a court over a contract dispute you have already lost, it is much better to avoid the dispute by good planning in the first place. Where the dispute is unavoidable it is generally better to solve it outside of the court framework, especially if those courts are overseas and applying foreign law.

Probably the best way to avoid the pitfall of overseas litigation is to ensure that any contract has a soundly drafted dispute resolution clause including provision for arbitration. While any such arbitration will still have to apply the law of the contract, and may be conducted overseas, the procedure is generally a lot more flexible (and cheaper) than litigation. There is also widespread agreement on the rules of arbitration by virtue of the Model Law on International Commercial Arbitration. Those rules apply in New Zealand under the Arbitration Act 1996.

# ARTICLES

## **WHOSE LAW IS IT ANYWAY?** (Con't)

The moral of the story is to be clear about whose law applies and whose courts will have jurisdiction to hear any contractual dispute. While such clauses in contracts are wholly procedural, the fact of the matter is that unless good law applies before good courts, you will have lost your dispute before it even begins.

**Duncan Webb**

**Lane Neave Lawyers**, Level 15, 119 Armagh St, Christchurch 8011

Tel: +64 3 379 3720, Fax: +64 3 379 8370, [www.laneneave.co.nz](http://www.laneneave.co.nz)