**Jurisdiction and governing law clauses**

This element introduces drafting principles and relevant law relating to jurisdiction and governing law clauses.

**Introduction**

Parties to a contract can choose which court(s) will have jurisdiction over any dispute, and which country's laws will govern their obligations and any dispute arising out of them.

Doing so increases certainty for the parties. In the absence of a choice, it may be uncertain which court(s) has jurisdiction and which country's laws govern the dispute. This uncertainty can give rise to disputes between the parties, which in turn lead to cost and inconvenience.

This element:

- gives examples of jurisdiction and governing law clauses;

- explains those examples and how the drafting can be modified to achieve a different result;

- explains the effect of those clauses by putting them in the context of the laws governing how the courts of England and Wales decide whether they have jurisdiction to determine a dispute and which country's laws apply to a dispute.

The reasons why your client might want the courts of England and Wales to have jurisdiction are addressed in a different element relating to forum shopping (and proof of foreign law).

**Jurisdiction**

The courts of England and Wales have prima facie jurisdiction over a defendant if the defendant is present in the jurisdiction when served with the proceedings or if the defendant submits to the jurisdiction.

Otherwise, it will be necessary to serve proceedings on the defendant out of the jurisdiction. This can be done without the permission of the court where (CPR 6.33(2B)):

(a) the court has power to determine that claim under the 2005 Hague Convention and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the 2005 Hague Convention; or

(b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim.

The advantage of a properly drafted jurisdiction clause is that it allows for service out of the jurisdiction without the permission of the court. It also makes it much harder for a party properly served to argue that the courts of England and Wales should stay the proceedings because they are not the appropriate forum to decide the dispute. An example of a jurisdiction clause is set out on the next page.

**Example**

"Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this agreement or its subject matter or formation."

Choice of jurisdiction clauses are commonly drafted to apply to both parties equally, as in this example ('Each party…'). The clause could, however, stipulate that Party X must be sued in (for example) England whilst Party X has the choice to sue Party Y in England or wherever it may choose. [As you will recall from SQE1 when we looked at the 2005 Hague Convention,] these types of clauses are known as asymmetric jurisdiction clauses. Some countries would not recognise that type of jurisdiction clause, so you should exercise caution before agreeing to that in practice.

'Exclusive' means **only** the courts of England and Wales have jurisdiction. You could replace 'exclusive' with 'non-exclusive', which would mean a party could commence proceedings in the courts of England and Wales **or** in the courts of any country which would have jurisdiction applying that country’s rules on jurisdiction

Note the breadth of this clause: it would capture non-contractual claims, such as claims in negligence, which are connected to the agreement, for example where a duty of care arises out of a relationship also established by contract…

…as well as claims such as those based on misrepresentation, which relate to the formation of a contract.

**Agent for service**

A clause such as the one you have just considered significantly increases the likelihood of the courts of England and Wales accepting jurisdiction over a dispute.

However, even where a claimant can serve proceedings out of the jurisdiction without the permission of the court, the process is still less convenient than service in the jurisdiction – it is still necessary to actually effect the service abroad. This cannot necessarily be done simply by posting proceedings to a foreign address. The acceptable methods of serving proceedings out of the jurisdiction depend on the jurisdiction in which proceedings are being served, but they can often be time consuming and costly.

The clause on the following page further helps a claimant seeking to pursue proceedings in England and Wales against a party outside of the jurisdiction. It requires that party (Party X in the draft clause) to appoint an agent in the jurisdiction to accept service of proceedings on the party’s behalf.

**Example**

"Party X irrevocably appoints [name of solicitors with address in England and Wales] as its agent to receive on its behalf in England or Wales service of any proceedings under the immediately preceding clause. If for any reason such agent ceases to be able to act as agent or no longer has an address in England or Wales, X shall forthwith appoint a substitute acceptable to Y and deliver to Y the new agent's name and address and fax number within England and Wales. "

This clause complements the clause set out earlier in this element – it is in addition to, not instead of, that clause. It provides for Party X to appoint solicitors as service agents in the jurisdiction. If there is a risk that Party Y would not be present in the jurisdiction either, the wording could be modified to require Party Y to appoint agents too.

By appointing an agent within the jurisdiction, Party X can be served with proceedings within the jurisdiction by the usual methods of service (eg first class post) (CPR 6.3).

The second sentence in the clause seeks to ensure that an agent always remains in place for the purpose of service.

**Governing law clause**

So far, this element has been concerned with jurisdiction. Remember, however, that governing law needs to be considered separately to jurisdiction.

The Retained Rome I Regulation and Rome II Regulation, which govern how a court determines the governing law for contractual and tortious obligations respectively, both permit the parties to a contract to choose which country's laws govern their obligations and disputes arising out of them, subject primarily to protections aimed at weaker parties (and to certain anti-avoidance and public policy exceptions). These Regulations effectively continue to apply post-Brexit, having been adopted into domestic law with minor amendments which are not relevant for the purposes of this element.

Whilst it is possible that a choice of law can be 'implied' by the circumstances of the case, this can be difficult to establish and the goal of certainty is much better served by an express governing law clause.

An example of a governing law clause which could be included in a contract is set out on the next page.

**Example**

"This agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of England and Wales."

This clause directs that the law of England and Wales will apply. Note that whereas several countries can have jurisdiction to determine a dispute, only one country's laws should apply – so there is no question of 'exclusive' or 'non-exclusive' in the case of governing law. It is possible to agree that different countries' laws apply to different parts of a contract, but this can easily cause very significant practical problems, and is generally best avoided.

Just as with the jurisdiction clause, note the breadth of this clause: it would capture non-contractual claims, such as claims in negligence, which are connected to the agreement, for example where a duty of care arises out of a relationship also established by contract…

…as well as claims such as those based on misrepresentation, which relate to the formation of a contract.

**Jurisdiction and governing law clauses**

- Parties can agree that the courts of England and Wales are to have exclusive or non-exclusive jurisdiction to determine a dispute.

- Such an agreement allows a claimant to serve proceedings on a defendant out of the jurisdiction without seeking the court's permission, as well as making it harder for the defendant to argue that the courts of England and Wales are not an appropriate forum to hear the dispute.

- A clause requiring a party to appoint solicitors (or another agent) in the jurisdiction for the service of proceedings means that the inconvenience of effecting service out of the jurisdiction can also be avoided.

- Generally speaking, parties to a contract can also agree which country's laws should govern a contractual or non-contractual dispute, and the courts of England and Wales will generally uphold such a choice.

- Whether drafting a jurisdiction or governing law clause, care should be taken to define the type of dispute which falls within the clause: should it cover non-contractual claims as well as contractual claims? Claims relating to the formation of a contract as well as matters after the contract has been formed?