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How to draft exclusive vs. non-exclusive jurisdiction clauses

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A recent decision from the Court of Appeal for Ontario reminds us that parties using their contracts to select a jurisdiction for hearing disputes must consider jurisdiction clauses carefully.

Exclusive jurisdiction clauses pick one jurisdiction, and only one jurisdiction, whose courts will decide any disputes under the contract. Canadian courts will generally uphold exclusive foreign jurisdiction clauses, unless the party challenging the clause shows "strong cause" why the clause should not be enforced and an action in Canada should be permitted to proceed.

By contrast, non-exclusive jurisdiction clauses identify a jurisdiction that the parties agree may hear their disputes but accept that, in the appropriate circumstances, courts in other jurisdictions may have jurisdiction over a dispute.

In *Forbes Energy Group Inc v Parsian Energy Red Gas*, 2019 ONCA 372 (*Forbes*), the Court of Appeal considered the following jurisdiction clause: "This term sheet shall be governed by and construed in accordance with the laws of England and the Parties agree to attorn to the courts of England" (the Clause).

The motion judge below decided to stay the action in Ontario based on this Clause. The Court of Appeal overturned the motion judge's decision and allowed the action to proceed in Ontario. It held that the Clause did not grant *exclusive* jurisdiction to the courts of England to settle disputes. Instead, it simply reflected the parties' agreement to "attorn to" (or submit to the jurisdiction of) the courts of England. In other words, if an action had been commenced in England, the Clause would require the parties to submit to the jurisdiction of the English court. However, in a situation where there was no action in England, the Court of Appeal held that the Clause did not exclude the jurisdiction of the Ontario courts.

Forbes and other recent cases teach us several practical drafting tips:

1. **Have clear goals:** Drafters often overlook these clauses as "boilerplate," but there is no one size fits all "jurisdiction clause." Before drafting, you consider carefully the interests of the parties should a dispute arise and tailor the clause accordingly. Some important questions include whether the grant of jurisdiction is exclusive, and whether if exclusive it covers all types of claims or only certain categories of claims (e.g., exceptions for IP misappropriation or non-contractual misrepresentation claims)?
2. **Avoid ambiguity:** Use language that clearly reflects your intent. The proposed effect of the clause should be clear to an outsider with no background other than the contract itself, and terms like "exclusive" and "attorn" have specific technical meanings and effect.

3. **Governing law clauses do not establish jurisdiction for disputes:** A governing law clause specifies the law that will govern the interpretation of the contract, but does not establish the jurisdiction in which disputes will be resolved. Governing law and jurisdiction are separate concepts, and the fact that a contract is governed by a foreign law does not prevent a Canadian court from having jurisdiction to hear disputes arising from that contract.
4. **Consider your negotiating partner:** If you are negotiating with a commercially unsophisticated party, be careful in your approach to jurisdiction. The court may consider the clause to be unconscionable or interpret an ambiguous clause unfavourably, if it requires unsophisticated claimants to incur significant costs to pursue an action far from their home. In such a case, consider selecting a jurisdiction which is logically connected to the parties' agreement (e.g., where the contract will be performed) and accessible for both parties. Courts in some jurisdictions will refuse to hear disputes not sufficiently connected to the jurisdiction even if the jurisdiction clause indicates otherwise.