

Case Law Update

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Redraft Choice of Law Clauses to Avoid Unpleasant Surprises

By Angela Swan

A recent decision of the Ontario Superior Court of Justice, [Trillium Motor World Ltd. v. General Motors of Canada Limited, 2015 ONSC 3824](#), illustrates the danger that unusual and even common choice of law clauses can create. It may be advisable to consider re-drafting such clauses.

The traditional structure of the analysis of cases with geographically complex facts, *i.e.*, cases that fall into the category of Conflict of Laws or Private International Law, says that a contract is “governed” by its “proper law”. It is further said that the parties may choose the law to “govern” their arrangement, the transaction they are effecting or the relation they are creating. A choice of law clause will be the method used to identify the proper law.

Notwithstanding the almost universal acceptance of the structure of conflict of laws and the function of the proper law, it is much more useful to stand further back and consider what it is that a drafter wants when she or he “chooses” a governing law.

When a solicitor uses a choice of law clause, she or he is saying to any court that may consider the contract, “When you look at this contract to interpret it or give it effect, keep in mind that when it was drafted, the drafter was working in the context of or under the law we have chosen”.

A choice of law clause cannot prevent a court from applying any rule that is mandatory. A Canadian court will, for example, apply section 347 of the *Criminal Code*

(criminal interest rate), notwithstanding that the drafter may have chosen New York law. A New York court will do the same for its mandatory rules. In other words, a choice of law clause has no more effect than any other clause in an agreement. It cannot avoid the application of any rule that a court believes should be applied; it can deal only with those matters that the parties can deal with.

The very recent decision of McEwen J. in *Trillium Motor World Ltd. v. General Motors of Canada Limited* gives a far wider effect to a choice of law clause than most drafters of commercial agreements would expect. McEwen J. relied on the decision of the Ontario Court of Appeal in [405341 Ontario Ltd. v. Midas Canada Inc., 2010 ONCA 478](#), 322 D.L.R. (4th) 177, to impose on the defendant, General Motors of Canada Limited (“GMCL”), the obligations on a franchisor under the *Arthur Wishart Act (Franchise Disclosure), 2000*.

The choice of law clause in *Trillium Motor World* is fairly standard:

This Agreement is governed by the laws of the Province of Ontario. However, if performance under this Agreement is illegal under a valid law of any jurisdiction where such performance is to take place, performance will be modified to the minimum extent necessary to comply with such law.

The one in *Midas Canada* is very different:

10.11. **Controlling Law.** This Agreement, including all matters relating to the validity, construction, performance and enforcement thereof, shall be governed by the laws of the Province of Ontario.

It is well established that contracting parties can incorporate the terms of a statute into their agreement, as they can the terms of some other agreement or document. The Court of Appeal in *Midas Canada* held that Midas had done just that, the effect being that its franchisees who were outside Ontario were entitled to the benefits of the *Arthur Wishart Act*. McEwen J. held that the choice of law clause in *Trillium Motor World* had the same effect. He did not pay any attention to the very differently worded language in the two clauses. In the end, it did not matter what effect the choice of law clause had as GMCL was held to have behaved properly *vis-à-vis* its dealers, the franchisees.

The wholesale importation of Ontario law into an agreement by a choice of Ontario law may well catch clients by unpleasant surprise and gives such clauses a much larger significance than they are usually understood to have.

Given what a choice of law clause actually does, it is, in my opinion, necessary to use different, safer and more accurate language:

This agreement was drafted against the background of Ontario law and is to be interpreted in accordance with that law.

This language sets out what a choice of law clause actually does and should eliminate the risks that the unusual clause in *Midas Canada* and the ordinary clause in *Trillium Motor World* created for Midas and GMCL.



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