Submission on *Exposure draft Insurance Contracts Bill*

Your name and organisation

Name	Dr Maria Hook (Faculty of Law, University of Otago) Jack Wass (Stout Street Chambers)
Organisation (if applicable)	See above
Contact details	Privacy of natural persons

[Double click on check boxes, then select 'checked' if you wish to select any of the following.]

☐ The Privacy Act 2020 applies to submissions. Please check the box if you do not wish your name or other personal information to be included in any information about submissions that MBIE may publish.

☐ MBIE intends to upload submissions received to MBIE's website at www.mbie.govt.nz. If you do not want your submission to be placed on our website, please check the box and type an explanation below.

I do not want my submission placed on MBIE's website because… [Insert text]

Please check if your submission contains confidential information:

☐ I would like my submission (or identified parts of my submission) to be kept confidential, and **have stated below** my reasons and grounds under the Official Information Act that I believe apply, for consideration by MBIE.

I would like my submission (or identified parts of my submission) to be kept confidential because… [Insert text]

We are a legal academic and practitioner specialising in private international law/the conflict of laws. We welcome the opportunity to comment on the cross-border aspects of the Exposure Draft. Please feel free to contact us on maria.hook@otago.ac.nz if you have any questions or would like to discuss our comments further.

1. Cross-border scope of part 3, subpart 4: third party claims against insurers

The draft Bill should clarify the cross-border scope of part 3, subpart 4 on third party claims against insurers. In particular, it should specify whether the rules are subject to common law conflict of laws rules, or whether they are intended to apply—and apply only—in the circumstances set out in cl 83(2). The main such circumstances are a policyholder's insolvency in New Zealand and administration of an insolvent policyholder's estate in New Zealand.

The conflict of laws rules on this question are not settled. Third party claims against insurers have been variously characterised as contractual, tortious and proprietary, with the result that the proper law of the contract, the law governing the tort or the law of the place of the insurance debt respectively was applicable.[1] In *Ludgater v Gerling*,[2] the Supreme Court applied the lex situs, on the basis that s 9 of the Law Reform Act 1936 had the effect of imposing a proprietary charge over the insurance monies. This reasoning would no longer apply in the context of the proposed rules, which do not create a property right. Another common approach is to apply the law of the forum, provided there is a relevant link between the forum and the claim.[3] In the United Kingdom, for example, the Third Parties (Rights Against Insurers) Act 2010 applies if the insolvency event underpinning the right of direct action is taking place in England.[4]

In our view, this latter approach is preferable. It would address concerns raised by the Supreme Court in *Ludgater* that New Zealand law should not be applied in a way that might interfere with foreign insolvency proceedings.[5] The proposed right of action is designed to modify the ordinary rules that would apply in insolvency or administration proceedings. Those are matters that are generally governed by the law of the forum. It would make sense, therefore, to characterise the right of direct action in a way that aligns with such proceedings for conflict of laws purposes.

We therefore recommend that the Bill be amended to clarify that the rules in part 3, subpart 4 are intended to apply unilaterally. In other words, the Bill should explicitly provide that subpart 4 applies in cross-border cases in the circumstances in cl 83, provided there is a

[1] Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, 2020) at [6.112]-[6.113].

[2] *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd* [2010] NZSC 49, [2010] 3 NZLR 713.

[3] See Louise Merrett "Direct action" in Jürgen Basedow and others (eds) *Encyclopedia of Private International Law* (Edward Elgar, 2017) 531 at 536-7.

[4] Cf Civil Liability (Third Party Claims against Insurers) Act (NSW): see Maria Hook "The 'statutist trap' and subject-matter jurisdiction" (2017) 13 J Priv Int L 435 at 459 for criticism.

[5] *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd* [2010] NZSC 49, [2010] 3 NZLR 713 at [23],]29].

sufficient connection to New Zealand.[6] The cross-border application of cl 83 would not depend on the proper law of the insurance contract being New Zealand law.

To ensure there is a sufficient connection to New Zealand, cl 83 would have to be accompanied by a discretion to decline jurisdiction in circumstances where the availability of a third party claim would be better resolved in another country – for example, because there are already insolvency or administration proceedings taking place overseas. The court's exercise of cross-border jurisdiction under part 3, subpart 4 would not be mandatory.[7]

This discretion to decline jurisdiction would also be necessary because there is no express link to New Zealand in some of the circumstances set out in cl 83 (namely cl 83 (2)(c) and (f)).

2. Law applicable to insurance contracts: cl 7

Clause 7(1)(b) excludes the parties' ability to choose a foreign law to govern their insurance contract, in circumstances where the contract would otherwise be governed by New Zealand law. This limitation does not apply to contracts of reinsurance.

We assume that cl 7(1)(b) seeks to protect weaker parties to the contract, by ensuring that such parties continue to enjoy the protection of New Zealand law despite the inclusion of a foreign choice of law clause in the contract. We agree that this is important. However, we think that the provision as drafted could have unintended consequences.

First, the clause seems to be concerned only with express choices of law ("choice of law provision"). It should be immaterial for the purposes of cl 7(1)(b) whether the parties have entered into an express or implied choice of law agreement. For example, parties should not be able to circumvent the application of the Act by including a foreign jurisdiction clause, which is often treated as a factor indicating an implied choice of foreign law. The current wording recreates problems encountered in the Australian case *Akai Pty Ltd v People's Insurance Co Ltd*, albeit to a lesser extent.[8]

We recommend a minor redrafting of cl 7(1)(b) to clarify that the Act apples to a contract that "would be governed by the law of New Zealand but for *an express or implied choice of law in relation to that contract*".

Second, the clause applies to all insurance contracts except reinsurance contracts, even if they do not involve a vulnerable policyholder. For example, the clause could potentially apply to an insurance contract of high value between international companies. This would amount to

---

[6] Cf s 18 of the Third Parties (Rights Against Insurers) Act 2010 (UK).

[7] For example, the insolvency proceedings in New Zealand may be ancillary to the principal insolvency proceedings overseas (for example, where the insolvent company was based in the foreign country, but had some of its assets here that required insolvent administration). This would be consistent with the philosophy of the UNCITRAL Model Law on Cross-Border Insolvency, adopted by the Insolvency (Cross-Border) Act 2006, which distinguishes between "main" and "non-main" proceedings.

[8] *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 438.

a significant restriction of party autonomy.[9] By comparison, the European approach has been to allow a free choice of law in insurance contracts covering "large risks" (and a more limited choice in other insurance contracts).[10]

We understand that cl 7 is based on s 8 of the Australian Insurance Contracts Act 1984, but the Australian court's approach to s 8 has not been free from criticism,[11] and the breadth of cl 7(1)(b) is unusual in a New Zealand context, when compared to other overriding mandatory rules.[12]

We recommend, therefore, that the types of insurance contracts falling within cl 7(1) be limited further. Clause 7(1)(b) could be amended to specify that the Act apply to a contract of insurance if the contract "*is a consumer insurance contract or a small trade insurance contract and* would be governed by the law of New Zealand but for a choice of law provision in the contract". The term "small trade contract" could be defined by reference to the Fair Trading Act 1986. This amendment would make cl 7(2) superfluous.

Third, the current drafting could have the effect of depriving a weaker party who is meant to be protected by cl 7(1)(b) of the benefit of a favourable choice of law clause. In other words, a choice of law will be ineffective even if the chosen law happens to provide greater protection than the Act. This would obviously defeat the purpose of cl 7(1)(b).

We therefore recommend that a new paragraph (cl 7(1)(c)) be inserted that gives those parties the option of retaining the chosen law. For example, the provision could say that the Act will not apply to a contract falling within cl 7(1)(b) to the extent that application of the Act would disadvantage the policyholder (or beneficiary of the policy). Similar tools have been used overseas to combine the benefits of party autonomy with the aim of protecting weaker parties.[13]

Finally, we note that the Act will only be applicable if the proper law of the contract is New Zealand law. This means that the overall effectiveness of cl 7 depends on the common law

---

[9] See Hague Conference of Private International Law *Principles on Choice of Law in International Commercial Contracts* (2015) regarding the importance of the principle of party autonomy in choice of law. The Principles extend to insurance contracts.

[10] Regulation 593/2008 on the law applicable to contractual obligations [2008] OJ L177/6, art 7 (and see also art 6 in relation to consumer contracts). This choice is subject to overriding mandatory rules of the forum (art 9), but courts and lawmakers are likely to take a cautious approach when identifying such rules.

[11] See Mary Keyes "Improving Australian Private International Law" in Andrew Dickinson, Mary Keyes and Thomas John (eds) *Australian Private International Law for the 21st Century: Facing Outwards* (Bloomsbury, 2017) 15 at 32-33. In *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90, the English High Court granted an anti-suit injunction restraining the Australian proceedings in order to give effect to the parties' choice of English law.

[12] For example, the Fair Trading Act 1986 and the Consumer Guarantees Act 1993 are more directly concerned with the protection of weaker parties; it has not been suggested that the Employment Relations Act 2000 as a whole has overriding force; and it is unlikely that a New Zealand court would have treated the common law duty of good faith as an overriding mandatory rule.

[13] See, eg, Regulation 593/2008 on the law applicable to contractual obligations [2008] OJ L177/6, art 6 in relation to consumer insurance contracts.

choice of law rules for contracts. In the absence of party choice, the proper law is the law with the closest and most real connection to the contract.[14] There is no specific choice of law rule for consumer contracts, so there is no guarantee that New Zealand law will apply to contracts with New Zealand consumers. However, we think that it is reasonable to expect that courts will have particular regard to the policyholder's place of residence in determining the law with the closest and most real connection to the contract.[15]

3. No contracting out: cl 164

Clause 164 states that the provisions of the proposed Act "have effect despite any provision to the contrary in any agreement or in any contract of insurance". We recommend that the scope of cl 164 be clarified with respect to choice of law agreements and jurisdiction agreements. In particular, it is not clear whether cl 164 is intended to invalidate jurisdiction agreements that would lead to the application of foreign law contrary to cl 7(1)(b).

In *Akai Pty Ltd v People's Insurance Co Ltd*, for example,[16] the High Court of Australia considered that an English jurisdiction clause was invalid under a 'no contracting out' provision in the Insurance Contracts Act 1984 because the English court would have given effect to the parties' choice of English law, in circumstances where the Act had overriding mandatory force in the Australian court. More generally, the effect of 'no contracting out' provisions on choice of law and jurisdiction agreements is rarely clearcut and can involve difficult questions of statutory interpretation.[17] It would be desirable to prevent similar litigation in New Zealand concerning the meaning of cl 164.

We therefore recommend that the scope of cl 164 be clarified to say that it does not extend to jurisdiction clauses. This could be achieved by amending cl 67 (on arbitration), which could be broadened to include submissions to another jurisdiction. Clause 67 is currently concerned only with consumer insurance contracts but, depending on the scope of cl 7(1)(b), could be extended to small trade insurance contracts. The benefits of jurisdiction agreements between parties of equal or similar bargaining power are well-established,[18] so we consider that jurisdiction agreements between such parties should continue to be enforceable, subject only to the ordinary rules of the conflict of laws.[19]

---

[14] *Bonython v Commonwealth of Australia* [1951] AC 201 (PC).

[15] But cf Mary Keyes "Improving Australian Private International Law" in Andrew Dickinson, Mary Keyes and Thomas John (eds) *Australian Private International Law for the 21st Century: Facing Outwards* (Bloomsbury, 2017) 15 at 33-34.

[16] *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418.

[17] Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, 2020) at [4.73], [2.397].

[18] See Hague Convention on Choice of Court Agreements (signed 30 June 2005, entered into force 1 October 2015). For this reason, the European approach has been to enforce jurisdiction clauses in insurance contracts covering large risks: Regulation 1215/2012 of the European Parliament and Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1, art 15(5). The decision in *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 has been criticised because of its wholesale interference with the principle of party autonomy: see Richard Garnett "Jurisdiction clauses since *Akai*" (2013) 87 Australian Law Journal 134.

[19] See Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, 2020) at part G.4.