Considerations Regarding So-Called Boilerplate Clauses in Cross-Border Commercial Transactions[1]

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Litigators called to analyze contract disputes generally look first to the procedural clauses of the underlying agreement to analyze the issues in the proper framework: does the agreement have a forum selection clause, is there a choice of law selection, is there a dispute resolution mechanism? These provisions are central not only to litigation strategy but often to the determination of substantive rights. As a result, they usually fall within the initial matters that litigation counsel considers, but are often some of the last items considered by transactional lawyers - on the eve of closing and following much deliberation on the central "deal" or commercial terms.

Each of these factors is critical to evaluating a dispute and the subject of great and detailed analysis. An overview of some of the more timely and pertinent issues to consider when drafting cross-border commercial agreements is provided here in summary fashion. In short, the more that is decided up-front – that is, contained in the contract when the parties are working together - the more predictable resolution of a later dispute will be. While a party may always attempt to avoid the impact of such clauses – by filing suit in the face of a binding arbitration provision or filing a case in a jurisdiction other than one selected as the "exclusive" place of resolution for example – those challenges, if without merit, can result in consequences including increasing the time and expense of resolution which may result in facing a motion for fees and costs as a result of frivolous tactics.

One recent case highlights the importance and interplay of these so-called "boilerplate" provisions. In *Timothy Wright v. Lewis Silkin LLP,* [2015] EWHC 1897 (QB), the court resolved an action between a law firm and its client, Mr. Wright, former CEO of the Deccan Chargers Sports Venture Limited, an Indian cricket team. Wright, a UK party, was hired by the Deccan Chargers franchise and retained the Lewis Silkin firm to draft and negotiate his employment agreement. The 2008 agreement included a £10 million severance guarantee payable in the event Wright was constructively dismissed. Notably, while the Agreement contained an English choice of law provision, it did not contain a choice of forum clause.

In 2009, following his dismissal, Wright sued the franchise in England to recover his guaranteed severance. For the ensuing three years, the Chargers challenged service and the jurisdiction of the English court. Though the Chargers ultimately lost its jurisdictional challenge, Wright spent some £1 million defending it. In 2012, Wright obtained a judgment in excess of £10 million. However, by the time he attempted to collect on the judgment in India, the Chargers franchise was insolvent.

Dissatisfied with the outcome, Wright sued his former counsel for negligence arising, in part, from its failure to include an exclusive forum selection clause in his employment agreement. Following trial, the High Court held in Wright's favor and awarded him £2

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million in damages from the lost opportunity to satisfy the underlying judgment. The failure to include a forum selection clause resulted in tangible damage to Wright highlighting the importance of such provisions.

This article briefly summarizes some of the issues each of these critical determinations may play in connection with cross-border disputes. The factors should be considered comprehensively (rather than independently) in order to tailor them to the particular client's needs and to obtain the most favorable overall outcome.

A. Which Law Will Govern - Choice of Law

Absent designation or challenge by one of the parties, most jurisdictions apply their own substantive law or have well-established mechanisms through conflicts of laws principles to determine which law will apply to a given dispute. Where challenged, the party advocating the use of a foreign law typically bears the burden of proving its application. In jurisdictions applying the Restatements of Laws, a court generally will apply the analysis depending on the type of underlying claim at issue (e.g., contract or tort claims) and may apply different laws to different claims.

Generally, the procedural law of the place where the dispute is heard governs. Choice of law issues can be exceedingly complex depending in part on whether overriding public policy concerns are implicated or applicable statutory provisions conflict with the jurisdiction selected by the parties or otherwise prohibits application of a foreign jurisdiction. Choice of law principles should be considered not only with respect to substantive law but also in relation to the potential impact the law may have as to applicable privileges, immunities and procedural law.

The failure to select the underlying substantive (non-procedural) law applicable to a matter may result in some unforeseen issues. While transactional lawyers may find comfort in omitting a provision on choice of law in favor of a presumption that it is perhaps covered by the choice of forum clause or is better left open-ended, the failure to include such a provision may lead to uncertainty in a dispute with an aggressive counter-party.

For the most part under traditional analysis, the law selected should bear some relation to the underlying dispute or the parties involved. In addition, parties should consider any mandatory public policy or statutory provisions that may undermine their selection (i.e. consumer protection, employment law statutes, franchise laws, UCC application). In order to increase the likelihood of application of the selected law, the selected law should not run counter to the public policy of the forum as it will not be applied in such cases. Furthermore, certain laws - like U.S. securities regulations for covered transactions - cannot be avoided by contract. In short, the subject matter of the likely dispute, the law of the forum and the overall procedural framework should be analyzed to select the appropriate law.

The Restatement of Laws, Conflicts of Laws sets forth a traditional established framework to assess the law applicable to a dispute. For example, § 187 Restatement (Second) Of Conflict of Laws (1971) "Law Of The State Chosen By The Parties" generally provides that the law chosen by the parties will be applied unless it bears no relationship to the parties or transaction, has no reasonable basis for application or is contrary to the fundamental policy of a state.

Absent selection of applicable law, the law of the jurisdiction typically applies barring a timely challenge by one of the parties and ensuing analysis of conflict of laws principles.

Recent noteworthy developments include the March 2015 Hague Principles on Choice of Law in International Commercial Contracts ("the Hague Principles"). The Hague Principles are non-binding and meant to apply to international commercial transactions for use in courts or before arbitral tribunals but do not apply to employment or consumer related disputes. The Hague Principles recognize that parties are free to contract with respect to the applicable law and the chosen law is not required to relate to the parties or the underlying transaction. The Principles adopt a delocalized approach to commercial disputes permitting the parties to select a particular law developed or specialized to the nature of the transaction (e.g., well-developed maritime or international banking laws).

If the parties have opted to arbitrate their dispute, a choice of law clause likely will be upheld because the failure to comply with the agreement of the parties may result in a challenge to a subsequent award. Without such a selection, the arbitrators will likely determine the law that will be applied to the merits of the dispute. For example, the European Convention on International Commercial Arbitration of 1961 provides that the parties may select the applicable law but, barring any such selection, the arbitrators apply the law they deem applicable pursuant to conflict principles. Institutional rules should also be examined in assessing the applicable law (e.g. the International Centre for Dispute Resolution Rules provide that the tribunal shall apply the law it deems applicable barring a selection of law by the parties).

One notable caveat with respect to the selection of law in the context of arbitration is the *lex arbitri* – or law of the seat of the arbitration. While the parties have selected a seat, the law in that location typically governs procedural and public policy aspects of the arbitration that generally cannot be avoided. For example, issues regarding arbitrability, interim measures, ethical considerations, assistance of the judiciary and ability of the tribunal to determine its own jurisdiction are governed by the *lex arbitri*. Parties selecting arbitration need to be cognizant of the substantive law that applies to their suit, the procedural rules of the arbitration and the law of the seat.

B. Where will the Dispute be Resolved - Forum Selection Clauses

In the absence of a binding forum selection clause and subject to any challenge, a party may file suit in any court with proper personal and subject-matter jurisdiction. Challenges may include improper venue or forum *non conveniens* and may be lengthy and costly. In an attempt to streamline or resolve such issues, parties often include forum selection provisions in their agreements.

An agreement with a forum selection clause may still be subject to challenge. Presuming an otherwise valid clause (not unfair or unconscionable), courts often review a clause to determine whether it is exclusive or permissive. In order to uphold a clause in the face of a challenge, the clause must be exclusive – that is, *require* that the action be filed in the particular jurisdiction – not just *allow* a suit to be filed in the jurisdiction. The specific language is reviewed and use of the term "shall" is a strong indicator that the

forum is exclusive. A forum selection clause may also include consent to personal jurisdiction. The decision as to whether a forum selection clause will be upheld turns on careful drafting.

Generally, forum selection clauses are presumed to be valid unless the party opposing enforcement demonstrates that the clause is somehow unfair or unreasonable. Cross-border transactions between parties of member states may benefit from the recently enacted Hague Convention of June 30, 2005 on Choice of Court Agreements entered into force October 1, 2015 ("Choice of Court Convention"). To date, the Convention has been ratified by nearly 30 countries including Mexico and the EU countries (except Denmark). The United States and Singapore have signed the convention but have not yet ratified it.

The Choice of Court Convention applies to international commercial agreements but does not apply to employment, consumer, family law, estate, anti-trust, insolvency, intellectual property, torts, personal injury or other non-commercial matters. Essentially, the Convention provides that: (1) the designated court has jurisdiction over the matter (unless jurisdiction would be void under its law) and cannot decline jurisdiction in favor of an alternate court; (2) a non-designated court cannot exercise jurisdiction over the matter except for limited exceptions; and (3) the resulting judgment by a designated court is subject to mutual enforcement in any other Contracting State.

The Choice of Court Convention attempts to assist contracting states in the enforcement of judgments obtained in national courts similar to that provided for arbitration awards by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). While the New York Convention is well established and much broader in scope (currently ratified by 156 countries), the Choice of Court Convention aims to provide a notable and welcome enforcement mechanism for court judgments to cross-border transactions providing greater forum flexibility to litigants.

C. How will the Dispute be Resolved? Dispute Resolution Clauses

While traditionally, litigation and arbitration each offer distinct advantages, recently, some of those perceived advantages have attempted to be co-opted. So, for example, the expansive scope of discovery in litigation has been curtailed by recent procedural revisions seeking to impose proportionality. In arbitration, provisions may now increasingly call for mediation or provide an avenue for institutional appeal. In addition, the American Law Institute is drafting a Restatement of the Law for U.S. Law of International Commercial Arbitration addressing enforcement of arbitration agreements, judicial assistance in arbitration and post-award relief investor-state arbitration. While the viability and utility of recent trends in arbitration are yet to be fully understood, no doubt the single-most significant factor weighing in favor of international arbitration continues to reside with the New York Convention and the ease of enforcement of arbitral awards among member states.

A viable arbitration clause typically provides that any dispute or claim arising out of the underlying agreement shall be determined by arbitration and is signed by the parties. For example, the International Centre for Dispute Resolution of the American Arbitration Association suggests a variety of clauses but its short form clause

for international commercial contracts provides: "[a]ny controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules" and advises the parties to also consider including the number of arbitrators, place or seat of the arbitration and the language of the arbitration proceeding. *See,* www.icdr.org. Similarly, the ICC suggest a sample clause that provides "[a]ll disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules" and also suggests addressing the applicable law governing the agreement, the number or arbitrators, place and language of the arbitration. *See,* www.iccwbo.org. For non-institutional or ad-hoc arbitration clauses, generally the clause should address the scope of the issues presented to arbitration, the rules applicable to the dispute, an appointing authority, the number of arbitrations, and place and language of the proceeding.

Unless the parties have entered a binding arbitration agreement, a dispute will be determined by litigation. Arbitration has traditionally been heralded for its flexibility, confidentiality, limited discovery, speed of proceedings, avoidance of unfavorable legal systems, ability to select the decision-makers and broad enforceability of awards. Some historically praised factors have come under fire as speed is not always assured, the inability to obtain a summary disposition and rising costs along with a perception that awards are often compromised are common complaints. Many of these complaints can be addressed through artful drafting of the clause or by experienced arbitration counsel in fashioning the terms of reference or procedural terms of the arbitration.

Parties drafting dispute resolution clauses also have an opportunity to provide for various types of staged proceedings including pre-dispute mediation or post-award appeal. These are current hot topics in arbitration. Mediation in the context of international arbitration (prior to or after a panel has been seated) is a current hot topic and raises multiple issues including who should conduct the mediation (the arbitrator or a third party); enforceability of any resulting settlement (if resolved prior to empaneling arbitrators); and confidentiality requirements, to name a few.

Also, while traditionally unavailable, institutional appeals of arbitration awards may also be available in some instances provided that the parties have included an appellate provision in their arbitration clause. *See e.g.,* AAA Optional Appellate Arbitration Rules; JAMS Optional Arbitration Appeal Procedure; CPR Arbitration Appeal Procedure; The International Institute for Conflict Prevention & Resolution (CPR) Appellate Arbitration Rules. Both mediation in arbitration proceedings and institutional appeal of arbitration awards are the subject of much recent debate. These developments highlight the manner in which arbitration seeks to borrow mechanisms more-commonly associated with litigation.

Similarly, in litigation, the expansive discovery traditionally available has been criticized as expensive and unduly time-consuming. However, recent efforts to curtail perceived excesses have resulted in new procedural rules placing limitations on over-broad and unduly expensive document productions by requiring proportionality to the issues presented, amount in controversy,

access to information and resources of the parties, among other factors. *E.g.* Federal Rule of Civil Procedure 26, effective December 1, 2015. Clearly, the borrowing of practices between these competing forums will continue.

D. Conclusion

The so-called boilerplate clauses included in international commercial transactions are critical components of determining how a dispute that may arise down the road will be resolved. While they often take a back seat to the deal components, the choice of law, forum and mechanism of how any resulting dispute may be handled are crucial provisions necessary to protect a client's rights if or when a deal goes sour. Given the rising globalization and internationalization of commercial deals, it is no longer possible to avoid giving thoughtful analysis to these key dispute-related provisions as well as the main deal terms.

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