Choice of Law and Venue in Cross-Border Contract Drafting

March 27 in Santa Clara
March 28 in San Francisco
# Speakers

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<th>Susan Eandi</th>
<th>Matthew Gemello</th>
<th>Colin Murray</th>
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Agenda

– Introduction
– Setting the Stage
  – Key Considerations in Determining Choice of Law & Venue
  – Litigation Implications
– Commercial Agreements
– IP Assignment Agreements
– Employment Agreements
– Deal Agreements
Who will win the NCAA tournament?

A. Florida Gulf State  
B. Wichita  
C. Ohio State  
D. Indiana
Setting the Stage
Choice of Law

- Choose Substantively Favorable Law
- Consider Nature of Potential Disputes
- Exclude Reference to Conflict of Law Rules
- Will the Foreign Law or Public Policy Override?
Forum Selection

- Home Court Advantage
- The Forum’s Interest in the Dispute
- Convenience to parties, witnesses
- Consenting to Exclusive v. Non-Exclusive Jurisdiction (Mandatory v. Permissive)
- Forum Non Conveniens Factors
Choosing Litigation v. Arbitration

– Service of Process
– Preliminary/Injunctive Relief
– Discovery
– Motion to Dismiss/Summary Judgment
– Jury
– Equitable Relief
– Damages
– Appeal Process
Why Arbitration?

- Contracting parties from multiple jurisdictions
- Lack of confidence or experience in counterparty’s home jurisdiction
- Desire for confidentiality, avoiding copycat disputes
- Limiting Discovery
- Enforcement advantages (NY Convention)
- Curbs race to the courthouse, first-to-file problems
- Enlarges negotiation options at time of contracting
- Speed/Efficiency
- No appeal
Why Not Arbitration?

- Cost Considerations (Panel of Arbitrators/Institutional Fees)
- Compelling Participation of Defendant
- Need Discovery
- Need Emergency Relief
- Harder to Win Summary Judgment
- Loose Rules of Evidence
- Baby-splitting: Harder to Get a Clean Win
Administered v. Non-Administered
Basic Arbitration Clauses (Key Ingredients)

- Adoption of Arbitration as Method of Resolving Disputes
- Award Will be Final and Binding
- Scope of Clause
- Institutional Rules or ad hoc
- Number of Arbitrators
- Method of Selecting Arbitrators
Basic Arbitration Clauses (cont’d)

– Place of Arbitration
– Language of Arbitration
– Authorization for Court to Enter Judgment on Award
– Notice Provision
– Governing Law
General Clauses
(Optional Language that Can Be Useful)

– ADR Provisions Requiring Negotiation or Mediation as Prerequisite
– Preclusion of resort to interim measures
– Qualifications of Arbitrator(s)
– Costs & Attorneys’ Fees for Prevailing Party
– Interest
– Currency of Award
– Exclusion of Punitive and Consequential Damages
– Waiver of Appeals
Complex Clauses (Carefully Tailored)

– Confidentiality
– Discovery
– Multi-Party Arbitration – identify procedures
– Consolidation
– Split clauses
– Summary Judgment
– Arbitrability
– Consent to appeal?
– Submission of draft award before final
Commercial Agreements
Commercial Hypo

- Big East US (incorporated in Delaware and based in California) is the ultimate parent company of Big East Singapore and Big East Nederland.
- Big East group of companies are engaged in the business of manufacturing and selling athletic equipment (including basketballs).
- Big East US enters into (i) a distribution agreement with BigTen Brazil for the sale and distribution of athletic equipment in Latin America, and (ii) a sales agency agreement with Big East Nederland for the marketing and promotion of its athletic equipment in Europe.
- Big East Singapore enters into a manufacturing and supply agreement with PAC 10 China to manufacture and supply the athletic equipment.
Pac Ten China fails to supply the athletic equipment in accordance with the terms of its agreement with Big East Singapore. Which governing law and dispute resolution mechanism would likely favor Big East Singapore?

A. Chinese courts and law
B. Chinese courts/Singapore law
C. Singapore courts and law
D. Arbitration in Singapore/Singapore law
E. Arbitration in Hawaii/California law
F. Arbitration in San Francisco/California law
Explanation

- Arbitration is the preferred dispute resolution mechanism for cross-border contracts where one of the contracting parties is located in a country that will not enforce a foreign judgment or is not a party to the 1958 New York Convention.
- Since China will not enforce a US judgment arbitration is the best option.
- If Big East Singapore has the bargaining power, arbitration in Singapore with Singapore law would be convenient and relatively cost effective.
- If Pac Ten China insists on neutral turf, consider arbitration in New York or Hong Kong or some other neutral territory (equally inconvenient for both parties), but note that choice of governing law other than the laws of the neutral territory could potentially raise evidentiary issues regarding proof of the substantive law.
Big East US wants to terminate Big Ten Brazil for material breach of their distribution agreement (i.e., selling knock off basketballs). If the agreement is governed by California law and provides for arbitration in San Francisco, will Big East US be able to get injunctive relief to stop the illegal sale of the knock off basketballs?

A. Yes - provided that a skilled lawyer drafted the arbitration provision

B. No – you are not allowed to seek relief in the courts once you have opted for arbitration

C. Depends – hedging is part of our profession
Explanation

– Local laws and arbitration rules vary on whether arbitrators can grant judicially enforceable preliminary relief
– Therefore, parties should always consider expressly carving out injunctive and equitable relief from the arbitration process
– Even if the local laws and rules permit injunctive and equitable relief, you may not want to have to rely on the arbitration process to obtain it
Is it preferable to select California law to govern Big East US’s sales agency agreement with Big East Nederlands?

A. Yes – California law rules
B. No – Anything but California law - please
C. Maybe So
Explanation

– General principle: parties are free to choose the governing law of their agreements

– Since related parties will not enter into a formal dispute, the choice of law is not as impactful as it is for third party agreements

– Dispute resolution and venue: again, related parties don’t sue each other so consider remaining silent in the relevant agreements

– Mandatory/public policy laws: apply regardless of choice of governing law (e.g., dealer protection legislation)
Practical Tips for Commercial Agreements

- Vastly different considerations at play in determining choice of law and venue for related party transactions vs third party transactions
- Mandatory/public policy laws (i.e., dealer termination, consumer protection, antitrust) will trump the parties’ choice of governing law
- Don’t automatically default to home court law and venue – consider likely nature of dispute, potential enforceability of judgment, sophistication of the courts
- Strongly consider using arbitration for agreements with a party located in a country that doesn’t enforce foreign court judgments (i.e., non-signatories to the NY Convention)
IP Agreements
IP Hypo

- U.S.-based company, Big Idea, Inc., is a licensor of SaaS (Software as a Service) technologies to international customers and manufacturing partners.
- Quarter-end is coming up, and Big Idea really needs to close on a big sale to a new Chinese-based customer.
- Big Idea has a sales office in China, but its operating software and data centers are in California.
- While the customer is based in China, it has employees throughout the world, including in California.
- Remaining terms for the license boil down to the license fee (of course), the choice of law, forum, and arbitration provisions.
Does the choice-of-law matter?
Let’s get the deal done, does anything other than the license fee matter?

A. Of course not, it’s quarter-end
B. No, it’s a service agreement so it just boils down to where services will be provided
C. Yes, there are significant risks in accepting the customer’s demands on choice of law, forum, and arbitration (or lack thereof)
Explanation

– Where services are provided in this context are far from clear. In the world of SaaS services, the technology and workers providing service can be provided from anywhere, and are often distributed in several locations.
– Oftentimes the customers also have distributed use of the services.
– So there is no clear “situs” of the services.
– Choice of law clauses will fill the gap of uncertainty.
– How the COL clauses are construed will be determined by the venue – geographic and judicial vs. arbitration.
What if you get California Law?
What if you get California Law but remain silent on venue? Will the foreign court apply it?

A. No, because it’s China.
B. Yes, because it’s a commercial agreement between two commercial entities.
C. Probably, but that doesn’t mean you are out of the woods.
Explanation

– Even if a Chinese court accepts the choice of US law, it will likely more readily lean toward local principles (and there are plenty of shades of grey in computer services)

– The Chinese court will also likely consider “public policy”
  – Consider including an arbitration clause in the agreement, setting venue in a neutral location
  – An arbitration panel is typically less likely to give as great a deference weight to public policy considerations as a local court would
What other factors to consider?

– Suppose you have to take the terms on the choice of law (hey, did we mention that it’s quarter-end?) can you mitigate through other terms?

– Yes, particularly if you can get a binding arbitration clause in for a neutral jurisdiction. As mentioned, the licensee is far less likely to get “home cooking” there.

  – It would be good to carefully scrutinize the procedures for instituting arbitration

  – These terms might be less carefully reviewed and less likely to impose a road-block to the important deal

  – Make sure that the forum is one where the licensee has assets – China does not enforce US judgments
Ok, you got California law, California venue; if this deal goes south, what happens? (Hidden fact – the licensee has very few US assets.)

A. You’re a hero because you got your own law and venue applied and the Chinese company accepted.

B. Yes, because your boss told you that all that mattered was the money, and you didn’t blow up the deal.

C. No, you are about to have a very uncomfortable meeting on an issue your boss will have to discuss with the Board.
Explanation

– Major trap for the unwary here.
– Make sure that the forum chosen is one where the licensee has assets or that will otherwise enforce US judgments.
– China does not enforce US judgments; there is a major reciprocity issue.
Practical Tips for IP Agreements

- Consider the relationship of choice-of-law and venue – how will different venues interpret the choice of law?
- Most venues will be relatively likely in the commercial IP context to apply the agreed choice of law
- Watch out for situations where the other party is in another country (like China) where a US judgment will not be enforced
- Consider including an arbitration clause to avoid overwhelming application of “policy considerations”
Employment Agreements
Employment Hypo

– U.S. company headquartered in California, Winners.com, Inc., develops software for predicting the outcome of sporting events and is looking to expand globally (so “everyone wins”).

– The VP of Sales has leads on statisticians, engineers and sales super stars in France, China, Brazil and the UAE (and they all need to be hired ASAP).

– Winners.com has no corporate entities outside of the U.S., and the CEO wants to keep things simple by hiring all employees through the U.S. company, using at-will offer letters, with U.S. choice of law, venue and arbitration.
Which Law Applies to the Employment Relationships?

Here is the “gimmie” (sort of). As a rule of thumb, will local courts apply a foreign choice of law in the employment context?

A. Of course
B. Never
C. It depends
Explanation

– Employment law is almost always going to favor the local employee and apply local employment law regardless of the choice of law
– Exceptions are in some jurisdictions (e.g., Shanghai and the Netherlands) where courts may recognize a foreign choice of law for a non-local expat
– Worst case, employees will be protected by the foreign law as well as local law and get the “best of both worlds”
What if instead of engaging local nationals as employees of Winners.com, they are engaged as independent contractors, using U.S. paper and choice of law. Would local courts enforce a U.S. choice of law?

A. Yes, because it is not an employment relationship
B. No, because “if it quacks like a duck, it’s a duck”
C. It depends (because Susan likes that answer)
Explanation

- Ability to engage ICs globally
  - Commercial contracts for ICs
  - Sales agents
- Misclassification of ICs as employees
  - Factors
  - Registrations
  - Penalties
- Protecting confidential information / IP & structural options
  - U.S. Agreement
  - U.S. Agreement with modification
  - Local Agreement
The Finish Line – Arbitration in Employment?
Arbitration is recognized in every jurisdiction outside of the U.S. for local employment claims.

A. True
B. False
Explanation

– France: Arbitration is not permitted, but conciliation hearings (like mediation) are required prior to a hearing on the merits before the Labor Court.

– China: Arbitration is required for most labor disputes and are head by labor arbitration committees or tribunals, with appeal process to the People’s Court.

– Brazil: Arbitration is recognized and clauses are recommended in employment contracts, but the employee cannot be bound to arbitrate.

– UAE: Arbitration is not recognized for employment matters.
Practical Tips for Employment Agreements

– Step 1: Understand the specific facts of the situation, i.e., local hires, employees vs. contractors, expats
– Step 2: Determine best approach, weighing likelihood of applicable law and opportunities to protect the company, i.e., ICs and expats
– Step 3: Use compliant documentation, i.e., local law compliant employment contracts, appropriate IC agreements, secondment / assignment agreements
Deal Agreements
Hypothetical

– Buyer is a NYSE-listed, US-headquartered multinational company with significant operations throughout the EU Europe and Southeast Asia.
– Target is a privately-held German company, with operations in Poland, Israel and Singapore.
– Parties will be entering into a customary letter for intent relating to Buyer’s proposed acquisition of:
  – Scenario 1 – …Target’s outstanding equity interests (i.e., stock deal)
  – Scenario 2 – …Target’s Advanced Technology business (i.e., asset deal/carve-out)
How does the ultimate choice of “Governing Law” impact an M&A deal?

A. Identifies the site of in-person negotiations
B. Drives the style of clothing that principals and advisors wear to in-person negotiations
C. Dictates the language to be used for definitive transaction documents
D. Colors/informs the parties’ perspective on “nature and style” of deal
In weighing the choice of law/venue decision, which factors would/should be relevant:

A. When/where the LOI will be signed?
B. Whose letterhead is on the LOI?
C. What the LOI covers?
D. All of the above
What’s in the letter of intent?

– Binding vs. nonbinding provisions
– Confidentiality
– Exclusivity/No-Shop
– Fees/Expenses
Should the governing law and venue provisions of the definitive acquisition agreement follow the LOI?

A. Always  
B. Maybe  
C. Never  
D. I am tired of these questions
Key Considerations for Definitive Agreement

– Pre-closing issues:
  – Deal termination
  – Compelled closing

– Post-closing issues:
  – Indemnity claims
  – Contract interpretation/enforcement
Practical Tips for M&A Practitioners

– Use choice of law to your strategic advantage
– Don’t be lulled into a “one approach fits all”
– Consider de-coupling choice of law and venue as a method to bridge negotiating gaps on the topic
– Remember that US legal expertise resides in most international arbitral forums located outside the US
Wrap Up
THANK YOU