



International Distribution Institute

How to combine choice of forum or arbitration clauses with the right to claim in the franchisee's country

Jeffrey A. Brimer

Alexius, LLC

Denver, CO USA

Hikmet Koyuncuoglu

Koyuncuoglu & Koksal

Istanbul, Turkey

Silvia Bortolotti

Buffa Bortolotti & Mathis

Torino, Italy

Robert Juodka

PR1MUS

Vilnius, Lithuania



Introduction

- Speaker Introductions
- Overview of Topic and Program
- Discussion Hypotheticals



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HYPOTHETICAL #1

GENERAL CASE OF INTERIM MEASURES AND ARBITRATION

FACTS

- A Japanese franchisor enters into a franchise agreement with a direct franchisee who has units in Italy, Lithuania and Turkey.
- Dispute are subject to ICC arbitration in Tokyo.
- The franchisee falls into financial difficulties and stops paying royalties to the franchisor.



FACTS

- After giving a notice of default, the franchisor terminates the franchise agreement.
- The franchisee refuses to comply with the post-termination obligations, including returning the documents, manuals, stopping using the trademarks, etc.

ISSUES

- Can the franchisor ask for an interim measure in the franchisee's country (consisting in the issue of an order against the franchisee to stop using its trademark, insignia, know-how etc. and return all the franchisor's materials) notwithstanding the arbitration clause?
- Should a specific provision allowing interim measures be included in the franchise contract?



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HYPOTHETICAL #2

ARBITRATION AND
FRANCHISOR'S RIGHT TO
CLAIM AMOUNTS DUE BY
FRANCHISEE BEFORE THE
FRANCHISEE'S COMPETENT
COURT



FACTS #1

- A US franchisor enters into a franchise agreement with a master franchisee who has rights to open units in Italy, Lithuania and Turkey.
- All disputes related to the franchise agreement are subject to AAA Arbitration, but the franchisor has the right to start court proceedings against the master franchisee, for recovering amounts due by the franchisee in connection with the franchise agreement.

ISSUE #1

- Would a clause allowing court actions in certain cases be valid and effective against the master franchisee?
- How would such a clause be considered by a court of the master franchisor's country ?

FACTS #2

- The master franchisee stops paying royalties and the franchisor commences a court proceeding before the competent court of the master franchisee's country, claiming the payment of such royalties.
- The master franchisee challenges such claim, stating that it has not paid the royalties because the Franchisor was repeatedly and constantly breaching its obligations under the contract.



ISSUE #2

- Would such court be allowed to deal with these exceptions or should they be deemed as reserved to arbitration?



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HYPOTHETICAL #3

ARBITRATION AND
RECOVERING PRODUCTS
OWNED BY THE FRANCHISOR
AS PER A RETENTION OF
TITLE/CONSIGNMENT
CLAUSE

FACTS

- A Russian franchisor enters into a franchise agreement with an Italian/Turkish/Lithuanian franchisee, which provides for an arbitration clause (Russian Arbitration Association) in Moscow.
- The franchise agreement is subject to Russian law.

FACTS

- Under the franchise agreement, the franchisee sells products in the franchise outlet, manufactured by the franchisor; the franchise agreement provides that the franchisor retains the ownership of the goods (under either a retention of title clause or a consignment, or similar forms).



FACTS

- The franchisee falls into financial difficulties and stops paying the royalties and the purchase price for the products.
- The franchisor wants to take back the products, which are in the franchisee's outlet, but are owned by the franchisor as per the retention of title clause (or consignment).

ISSUES

- Would the contractual provision regulating the retention of title or the consignment be valid and effective against the franchisee?
- Which law would regulate the validity and effectiveness of such clause: Russian law, or the law of the franchisee's country?

ISSUES

- How would the franchisor enforce its right against the franchisee?
- Should the franchisor start the arbitral proceeding in Moscow?
- Would the franchisor be allowed to bring an action before a court of competent jurisdiction?



ISSUES

Would the franchisor be allowed to ask for an interim measure to that aim?

SUMMARY

- Factors that franchisors should take into account when determining the choice of forum in a franchise agreement:
 - Arbitration, litigation or both
 - Mandatory law in franchisee's jurisdiction
 - Parties' preference for arbitration or litigation
 - Choice of home jurisdiction of the franchisor or franchisee

SUMMARY

- Setting different jurisdictions for different types of disputes
 - Monetary disputes
 - Intellectual Property Disputes and Enforcement
 - Performance issues

SUMMARY

- International Arbitration
 - Pro's and Con's of Arbitration
 - Arbitration Forums
- Other possible strategic approaches



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QUESTIONS



THANK YOU

- **Jeffrey A. Brimer** – jbrimer@alexius.co
- **Silvia Bortolotti** –
s.bortolotti@bbmpartners.com
- **Hikmet Koyuncuoglu** –
h.koyuncuoglu@kkhukuk.com
- **Robert Juodka** –
robert.juodka@primus.legal