



International Distribution Institute

THE IMPORTANCE OF CHOICE OF LAW AND JURISDICTION

Combining jurisdiction and applicable law

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Panel discussion

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INTRODUCTION

- Short presentation of the speakers.
- The purpose of this panel is to discuss the various options/strategies regarding choice of law and choice of jurisdiction and their possible combinations.
- We will deal only with **agreements regarding distribution**, such as agency, distributorship, franchising, master franchising, mainly from the point of view of the principal/supplier/franchisor.

THE MAIN OPTIONS

CHOICE OF THE GOVERNING LAW

- Law of the party drafting the contract
- Law of the counterparty
- Law of a third country
- A-national rules/Unidroit Principles.

CHOICE OF JURISDICTION/ARBITRATION

- Courts of the party drafting the contract
- Courts of the country of the counterparty
- Courts of a third country
- International arbitration

LAW OF THE PRINCIPAL/SUPPLIER/FRANCHISOR

CRITICAL POINTS TO BE VERIFIED IN ADVANCE

- **Convenience** with respect to its substantial rules
- **Effectiveness** with respect to mandatory rules of the counterparty
- **Acceptability** by the counterparty
- **Consistency** with respect to the choice of jurisdiction/arbitration

LAW OF PRINCIPAL/SUPPLIER/FRANCHISOR

Example 1: Convenience

A German supplier negotiates a very detailed and binding exclusive distributorship agreement with an Italian company. He would like to choose German Law and the jurisdiction of German Courts.

According to German case law the distributor who agrees to inform the supplier about the names of his customers is entitled to goodwill indemnity under the the rules on commercial agents. According to Italian law, the distributor has no right to goodwill indemnity, but only to a reasonable period of notice.

What type of solution would you suggest?



LAW OF PRINCIPAL/SUPPLIER/FRANCHISOR

Example 2: Acceptability by counterparty

A US Principal is negotiating an agreement with a French agent. He proposes to apply New York law and to provide jurisdiction of the courts New York.

The French agent refuses absolutely New York law, because he he knows that under French law he would be entitled to a goodwill indemnity (up to 2 years of commission).

The New York principal insists in having the jurisdiction of his courts and his own law, but is willing to consider an acceptable compromise.

What type of alternative solutions would you suggest?

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Dealing with overriding mandatory rules

Simply mandatory rules	These rules can be lawfully derogated by choosing a different law
Overriding mandatory rules	<p>These rules cannot be derogated by choosing a different law. This principle is binding for the courts of the counterparty. Courts of the principal/supplier will in principle not be bound to respect the overriding mandatory rules of the counterparty.</p> <p>Judgment of foreign court or arbitration award may not be recognised in the country of the counterparty if disregard of the overriding provisions implies violation of public order.</p>
Overriding mandatory rules + case law disregarding choice of law and jurisdiction	When an exclusive jurisdiction of local courts is not provided by law, courts may decide that the choice of a foreign forum/arbitration is ineffective, when it may have the effect of circumventing the effectiveness of overriding mandatory rules.
Overriding mandatory rules + exclusive jurisdiction	When the law expressly reserves disputes on certain overriding rules exclusively to its own courts the counterparty is entitled to bring a claim before its own courts disregarding the jurisdiction or arbitration clause agreed between the parties.

LAW OF PRINCIPAL/SUPPLIER/FRANCHISOR

Example 3 : Effectiveness

A Turkish supplier is appointing a Belgian exclusive distributor for Belgium and France. He proposes his standard distribution contract which provides for the application of Turkish law and ICC arbitration in Geneva.

He has been informed about a Belgian law of 1961 protecting Belgian distributors, which cannot be derogated due to its overriding mandatory character. Thus, in case of termination the distributor will be able to bring a claim before his own courts and a possible award disapplying Belgian rules on concessionnaires would not be recognised in Belgium.

What type of solution would you suggest?

CHOICE BETWEEN NATIONAL COURTS AND ARBITRATION

IN FAVOUR OF ARBITRATION

- Neutral composition of arbitral tribunal
- Possibility to appoint arbitrators having actual experience in commercial matters
- Less formal procedure: easier to make understand reasons of dispute
- No appeal
- Effective defence against claims before courts of counterparty, e.g. in the US.

IN FAVOUR OF NATIONAL COURTS

- Small claims (e.g. general conditions of sale)
- Purely defensive position (e.g. principal fears possible claims of counterpart, but assumes that he will not have claims towards the latter)

INTERNATIONAL ARBITRATION

- **Institutional – ad hoc arbitration**
- **Choice of the arbitral institution**
 - **Criteria:** independence, language, choice of arbitrators, etc.
 - No institutions of the counterpart, if possible.
- **Drafting the arbitration clause** stick to recommended clauses; avoiding drafting without assistance of an expert.
- **Determining the seat of the arbitration**

RECOMMENDATIONS

- Try to identify in advance appropriate strategies with regard to the typical situations you are dealing with.
- Try (where possible) to select preferable solutions before negotiating and drafting the agreement.
- If you are to accept a foreign law, get ASAP a basic information on its contents (e.g. through our IDI website)
- And, at the end ... **GOOD LUCK**, since we cannot exclude any future unforeseeable risk.



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THANK YOU FOR YOUR ATTENTION

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